BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of

COMPUTER RESERVATIONS SYSTEM (CRS) REGULATIONS

Notice of Proposed Rulemaking

Docket Nos. OST-97-2881
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INTRODUCTION

The Department's decisions in these proceedings will have a profound effect on airline ticket distribution for years. Misguided regulations could entrench existing market failures and create new distortions in the market that will undermine competition. To avoid such errors, the Department must rely to the maximum extent possible upon competition rather than prescriptive regulation to correct market failures affecting the airline industry. Delta reasserts its view that the time has come to begin a transition to complete deregulation.

The threshold question the Department should be asking as it brings these proceedings to a close is whether any regulations at all are still necessary. If normal
competition and the discrete enforcement of Section 411 and the antitrust laws will protect consumers, then the answer to that question is "No," and the Department should refrain from extending any regulations at all.

   But if the Department concludes that some rules are still required to protect competition, then it should identify the specific market failure that a rule is needed to correct, and craft the narrowest possible regulation that is sufficient to correct it. The mere fact that a regulation was deemed appropriate one or two decades ago should not justify its retention if a more narrow rule would adequately address any perceived market failures today. The Department should rely upon competition, not regulation, wherever possible.

   Finally, and most importantly, whatever the Department does, it should avoid enacting or maintaining any regulations that distort or suppress competition. The Department has correctly applied this principle in its proposed repeal of the mandatory participation rule. That rule, adopted long ago in an entirely different market context, operates today to distort and suppress competition among carriers by severely hampering the ability of some carriers to negotiate with the GDSs. Eliminating this rule will improve competition among carriers. Improved competition will benefit consumers.

   In contrast, the Department would move in precisely the opposite direction if it enacted the proposed new restrictions on MIDT. These new restrictions would gut the usefulness of this important competitive tool. The Department has not conducted an adequate investigation of this issue, and its proposed rules are based upon the speculation of
commentators, false assumptions about how carriers use the data, and the false assumption that adequate alternatives are available. The Department should not deny carriers access to such an important and pro-competitive tool based upon speculation and false assumptions.

**COMMENTS**

I. **THERE IS NO VALID BASIS FOR EXTENDING CRS REGULATIONS TO INTERNET TICKET SITES**

At the outset, Delta reaffirms its support of the Department's preliminary decision not to stifle innovation in airline ticket distribution with new, burdensome regulations of Internet ticket sales. While some commentators have urged the Department to reverse course, none have provided any new arguments or evidence for why it should do so. To the contrary, parties recommending Internet regulation simply rehash the same arguments that the Department, the Office of Inspector General, and the Department of Justice have all considered and rejected in the past. No one makes a serious attempt to present any new evidence to suggest that the Department's tentative decision not to enact new Internet ticket regulations was incorrect. Instead, the comments hostile to the Department's proposal on this issue reflect an attempt not to protect airline competition or consumers, but to protect competitors from the competition that alternative ticketing distribution channels are creating. The Department has wisely chosen to encourage rather than suppress this competition.

The most effective long term solution to the market distortions caused by GDS power is competition. Alternatives to the traditional GDS channel -- including the Internet
-- are the most promising means for creating this competition. As the past president of the American Society of Travel Agents recently acknowledged, the Internet has ended the traditional monopoly on travel information previously enjoyed by the GDS distribution channel:

"When the Internet first came out, most agents were concerned that they would lose their monopoly on selling airfares," Galloway says. "That hasn't happened. But what kind of sneaked up on us is that we lost our monopoly on travel information."

Efforts to suppress competition from online travel agencies, including Orbitz, will not benefit consumers. No carrier has produced any evidence to suggest that online travel agencies have harmed any carrier or the public through the introduction of bias in their display screens or otherwise. And, as the OIG report makes clear, there is no evidence to suggest that Orbitz has deviated from its commitment to every carrier that chooses to participate to provide an "unbiased display of airfares and services." To the contrary, the evidence is that online travel agencies, including Orbitz, are providing a valuable new alternative for airline ticket distribution and a new source of travel information that in many

1 "Many Travel Agents Making the Internet their Friend," Houston Chronicle, April 25, 2003.
2 See OIG Comments, at 7-8 ("The Department concluded, and we concur, that Orbitz has not deviated from its commitment to an unbiased display of airfares and services....To date, we have seen no evidence to suggest that Orbitz has deviated from this commitment.") (emphasis in original).
cases is much more cost effective for both consumers and carriers than traditional channels.  

Nor has any commentator produced any evidence to contradict the Department's factual finding that consumers can and do jump quickly from web site to web site comparing prices. No one would suggest that every lawn and garden retailer should be required to sell every brand of lawnmower "without bias" -- to the contrary, retailers are free to market preferred brands because consumers can compare lawnmower prices at several different stores before they buy. The same is true for air transportation. In fact, the Internet makes comparison shopping for airfares much easier than for most consumer purchases, since comparing airfares on the Internet can now be accomplished in minutes with a few clicks of the mouse in the privacy of a consumer's home or office. The Department's conclusion that consumers can and do check multiple Internet websites before they buy airline tickets is correct and renders any regulation of Internet ticket sites unnecessary.

Most carriers and Orbitz strongly support the decision not to regulate online ticket sites. At least two of the four GDSs also support this decision, as do the other major

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3 A recently published study by Global Aviation Associates at the request of Orbitz reports that the average cost to all airlines for booking a ticket through Orbitz is $16.43, or 37% less than the Sabre travel agency cost. The cost is even lower for Orbitz Charter Associates ($16.22) and supplier link customers ($9.58), which reflect savings of 38.1% and 63.4% respectively over Sabre travel agencies. See "Report Claims Orbitz Cheapest Distribution Channel," Aviation Daily, May 6, 2003.

4 Sabre and Worldspan support the decision. Amadeus tentatively supports it, but says that Footnote continued on next page
online travel agencies who compete directly with Orbitz, although they pepper their support with anti-Orbitz rhetoric and arguments for special anti-Orbitz rules. Public interest commentary from the Regulatory Studies Program at the Mercatus Center of George Mason University also provides strong support for the Department's decision to avoid suppressing innovation in Internet ticket distribution with unnecessary and burdensome regulation.

In contrast, the parties who urge the Department to reverse its decision and extend the CRS regulations to Internet ticket distribution fall into a few identifiable categories:

First, there is group of carriers who want protection from a market reality facing every company: that sellers must compete for distributor shelf space when they sell their product. Some carriers, including for example US Airways, America West, and Midwest Airlines, argue in effect that all Internet travel sites should be treated like a public utility for the airlines, i.e., that each online travel site should be required to give equal shelf space to all carriers on their system. No similar standard, however, applies to other retailers, nor does this standard apply to traditional travel agents. Car dealers, for example, are free to specialize in selling particular brands of cars. Grocery stores are free to put Coke and not

Footnote continued from previous page

GDSs and Internet sites should be treated the same, i.e., deregulated, but that if regulation continues, it should be extended to Internet travel sites. Galileo is the exception, arguing that Orbitz at least should be regulated.
Pepsi on their shelves if they choose to do so. No one suggests this "bias" harms consumers, because consumers are free to go to other car dealerships or other grocery stores to compare the quality and pricing of different brands if they are not satisfied with any given retailer's offerings. These commentators fail to recognize that preferences for a particular airline brand are no less legitimate than preferences for particular brands of any other consumer product.

Travel agencies, like any other retailers, are free to support a particular brand if they choose to do so. Competing for a travel agency's loyalty is an essential part of competition in the sale of air transportation. That is why carriers offer sales incentives to those agencies whom the airlines believe can most effectively sell their products. These incentives ultimately benefit consumers, because they make it possible for the travel agencies who receive them to offer better rates or better services or both to their customers. They are, in effect, price discounts. Price discounts benefit consumers.

If a given agency's support for a particular airline means that it fails to offer its retail customers the price and service selection that best matches the customers' needs, that travel agent will not stay in business long. As the Department correctly notes, consumers can and do check the Internet. They can also call other travel agents. They will not keep buying for long from a travel agent that fails to deliver the price and service which best fits their needs. Thus, this competition for brand loyalty benefits consumers because it encourages airlines to provide the most attractive service offering at the best prices they can, and encourages
agencies to favor those airline brands they believe will be most attractive to their customers.

Carriers who demand that online travel agencies be treated like a public utility that cannot bargain for sales incentives like this are simply asking the Department to protect them from competition. They do not want to compete for agency shelf space, they want it handed to them by regulatory fiat. That, in turn, would force online agencies to earn revenue or cut costs in other ways, including raising the fees they charge or reducing the services they provide to consumers. That kind of regulation is not consistent with "antitrust principles." As the Supreme Court has held, "[t]he antitrust laws ... were enacted for 'the protection of competition, not competitors.'" Nor would such regulation be consistent with the Department's mandate to place "maximum reliance on competitive market force and on actual and potential competition."  

The second category of comments urging regulation of Internet travel sales are from traditional travel agencies and some GDSs (notably, Amadeus and Galileo). In this case, the parties limit their proposals to calls for regulation of airline-owned websites such as Orbitz or Hotwire. Without producing any evidence to contradict the findings of the Department and the OIG that Orbitz has not engaged in any anticompetitive activity, they assert that the

unrelated conduct by some single-carrier owned GDSs in a different product market twenty years ago should justify suppressing competition from airline-owned travel websites today. Some also argue that travel agents should be entitled to "equal access" to all fares, and they claim that the existence of carrier-owned travel websites like Orbitz give carriers a motive to offer better fares to airline-owned sites than to other travel agencies.

The Department has already considered and correctly rejected the notion that it should or even could use Section 411 jurisdiction to force airlines to distribute all fares through all distribution channels:

> [G]iven 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 preceding, we are primarily relying on our authority under section 411 to prohibit unfair methods of competition. Unfair methods of competition...are practices that violate the antitrust laws or antitrust principles....[A]n 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.

NPRM, at 96413. The Department's conclusion is absolutely correct. Moreover, the ability of airlines to negotiate with GDSs and travel agencies concerning the availability of their inventory is critical to insuring competition in airline distribution channels, as
discussed in more detail below.

It is ironic that the largest and most powerful travel agencies -- such as AAA, Carlson Wagonlit, and even American Express (a company whose total revenues in 2002 were roughly double that of Delta's) -- would complain that airlines may provide different terms to different participants in the airline ticket distribution channel. These mega-agencies are precisely the ones who have benefited the most from competition among airlines for airline ticket distribution services. American Express has successfully negotiated deals to give its corporate clients direct access to web fares of some carriers. Clearly, competition is working, but these agencies seek regulatory intervention because they would prefer not to have to compete with Orbitz. That is not a valid basis for regulation. As the Department has correctly noted, the competition that Orbitz has injected into the airline distribution market is good for consumers. Without question, the Department should continue to monitor Orbitz for any actual anticompetitive activity (as it has said it will do), but the Department has correctly concluded that it should not suppress competition based upon the speculative assertions of Orbitz competitors.

The comments by Southwest Airlines urging DOT to extend its CRS regulations to Orbitz are also a transparent effort to undermine competition, not protect it. Southwest does not participate in Orbitz, just as it has decided not to participate in any GDS but Sabre.

7 "Amex to Offer CO Web fares to Biz Clients," Travel Weekly, May 5, 2003 (reporting that Footnote continued on next page
It does not even allow its fares to be displayed in the Orbitz screen displays. It has made the business decision to severely restrict the ability of travel agencies, including Orbitz, to sell its fares, preferring to deal directly with the public in most transactions. Thus, Southwest is not and will never be dependent upon Orbitz to sell any ticket.

Nor does Southwest produce any evidence of any actual anticompetitive effect of Orbitz on any other airline or competition in general. It simply rehashes the same rhetoric that Orbitz competitors have used to try to avoid competing with Orbitz. Southwest also misstates the terms of the Orbitz charter associate agreement. As the Department is well aware from its investigation, the Orbitz charter associate agreement does not prevent participating carriers from offering any discounts through any channels -- including other agencies. It does not even prevent carriers from undercutting the web fares they provide to Orbitz, so long as the special discounts are targeted rather than publicly available published fares. After completing exhaustive investigations of Orbitz, neither this Department, nor the OIG, nor the Antitrust Division of the Justice Department have concluded that the MFN or any other provision in the Orbitz agreement warrants any further government action at this time.

American Express has such web fares arrangements with Continental and American).
Given the fact that Southwest does not even allow its fares to be displayed on Orbitz, its misleading comments about the site appear to be motivated by a desire to undermine the efforts of other carriers to improve the efficiency of their distribution channels, rather than any real concern for consumers. Undermining the ability of carriers to lower their distribution costs through Orbitz sales would, of course, make it more difficult for those carriers to compete effectively with Southwest.8

The desire of Southwest to undermine the distribution efforts of its competitors is not a legitimate basis for regulation. As the Department notes, improving carrier distribution efficiency benefits consumers. The Department should adopt regulations, if any, solely because they promote such efficiency. The Department has correctly concluded it should reject new regulations of Internet ticket distribution that would undermine that efficiency.

II. THE DEPARTMENT SHOULD COMMENCE AN ORDERLY TRANSITION TO COMPETE CRS DeregULATION

Perhaps the most fundamental question raised by the huge volume of comments on the NPRM is whether there should be any CRS regulations at all, and if not, what the most appropriate path to a deregulated world should be. A surprising number and variety of

8 Orbitz is more cost effective than the traditional channel. See n. 3, supra. This is critical to carriers competing with Southwest, because Southwest bypasses the GDS channel in most sales. See, e.g., "Southwest Boosts Online Ticket Sales," Aviation Daily, Jan. 24, 2003 (54% of Southwest's tickets sold through its own website during 4Q03).
commentators from virtually every affected interest group has argued in favor of
deregulation within the next three to five years. United argues for complete and immediate
deregulation. Worldspan similarly argues for immediate deregulation. Expedia supports
immediate deregulation. Most major carriers have argued for complete deregulation within
a three to five year time frame, with the majority arguing for immediate elimination of most
rules and only minimal interim regulations designed to prevent abuse of CRS market power
during the transition. The Large Agency Coalition expresses a preference for complete
immediate deregulation rather than the new restrictions on productivity pricing in
subscriber contracts. And perhaps most remarkably of all, despite having fought bitterly for
years to retain the entrenched advantages the regulations have given to it, Sabre and
Travelocity now support "complete" and immediate deregulation, with the notable exception
that they say the mandatory participation rule should continue under a special "Worldspan"
exception whose primary effect would be to allow Sabre to continue to dictate terms to
three of its largest airline customers.

This broad support for a movement towards complete deregulation in some form or
fashion within the next three to five years is remarkable. It should lead the Department to
seriously reconsider rule-by-rule whether any rules at all are truly necessary. No rule
should be retained out of sheer inertia. Delta strongly urges the Department to commence
an orderly transition to complete deregulation. As discussed at length in Delta's original
comments and below, compete deregulation within three years is in the public interest. It is
critical, however, that certain narrowly tailored transitional regulations be retained to ensure an orderly transition to a deregulated marketplace after twenty years of government regulation. Delta's reply comments on those transitional regulations and on the lack of any need for the other specific rules proposals in the NPRM, are set forth in the sections that follow.

III. THERE IS NO VALID BASIS FOR THE PROPOSED RESTRICTIONS ON MIDT DATA

The single most harmful rule proposal in the NPRM is the proposed new restriction on MIDT usage. This surprising proposal would gut the usefulness of MIDT as a market share analysis tool and as a tool for measuring the effectiveness of sales initiatives by allowing carriers to block the release of tapes reflecting their sales data. It would also undermine the use of MIDT to develop and verify performance under travel agency incentive programs by prohibiting carriers from obtaining, directly or indirectly, the specific market share figures for individual travel agencies.

As Delta demonstrated in its original comments, MIDT is a valuable competitive tool, and the proposed restrictions would force carriers to make critical business decisions about forecasting, route planning and capacity allocation with far less accurate or timely information. In reliance upon the Department's regulations which have mandated the availability of MIDT to all carriers for almost twenty years, Delta and many other carriers have invested valuable resources in developing the analytical tools to use this data, and those investments will be wasted if the Department proceeds with its proposals. As
demonstrated in Delta's original comments, the restrictions would also harm the public interest by forcing these carriers to make less efficient decisions when they allocate capacity -- meaning some routes will get less service than they deserve, and carriers will waste capacity on others. The proposals will also suppress airline competition and competition for the distribution services of travel agencies -- not just on the hub routes that the Department discusses in the NPRM, but on many other routes throughout the country. Some or all of these concerns have been echoed by more than a dozen carriers, of various sizes, both domestic and international, as well as various associations of international air carriers.

The proposed new restrictions are not narrowly tailored to address any actual anticompetitive behavior in the real world. Instead, the proposed restrictions will simply distort competition by favoring some competitors over others, depending upon whether the carrier has invested its resources in exploiting MIDT as a competitive tool. Those carriers who have invested their economic resources in the development of MIDT as a market share analysis tool or for structuring travel agency incentive programs will be harmed by the proposal. Those who have chosen a different competitive strategy will be helped.

Not surprisingly, the air carriers who support the proposal are those who have decided not to invest in using MIDT, and who are therefore advantaged by any regulation that renders this valuable competitive tool useless to their competitors who have. They applaud the proposal, because it will harm their competitors by rendering expensive
investments in this data moot and because it will make it more difficult for the carriers who have invested in the data to compete with them in the future. Yet despite empty rhetoric about unspecified "predatory" conduct, not a single one of these carriers provides any evidence to support their claims. This is illustrated by the responses of the Air Carrier Association ("ACA") to the Department's inquiries during the May 22 hearing. Forced to admit that it had no evidence of any actual anticompetitive conduct, ACA nevertheless took the extreme position that any use of MIDT would ipso facto be improper because there is no use of the data could ever be legitimate! The allegedly "improper" conduct ACA is complaining about appears to be simply that "when a new entrant tries to come into a market that is already dominated by incumbent carriers, ...the incumbent carriers quickly respond to travel agencies the minute some ticketing tends to go against them."

This assertion makes clear that the complaints about use of MIDT are complaints about competition, not legitimate complaints about any arguably anticompetitive conduct. These commentators are simply complaining that incumbent carriers use MIDT to identify

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9 Although ACA claimed there were numerous "witnesses" to some unidentifiable "misconduct" by carriers using MIDT, ACA admitted that it could not produce any evidence to support the claim. See May 22 Hearing Transcript, at 216 ("[A]re those corporation and travel agencies prepared to submit affidavits and statements to the Department? No." )

10 Id. ("Well, I would suggest to you that it can't be properly used in any way, so I would suggest that any use of the data concerning who a corporation is selling to or buying from, or who a travel agency is selling through is misused information.").

11 Id.
customers and agents that are shifting business to their competitors, and then use that knowledge to try to win the business back. *If so, what would be wrong with that?* It is not anticompetitive to try to persuade customers to buy your products, nor to ask your distributors to sell them. To the contrary, that is the essence of competition. Evidence that incumbent carriers use MIDT as a tool in their efforts to engage in *legitimate competition* cannot form the basis of any valid regulation banning use of the data. Regulation designed to prevent that legitimate competition would fly in the face of "antitrust principles."

The only alleged "evidence" that any proponents of the new MIDT ban cite to support their claims of misuse of the data are the unfounded speculation by American Express, America West, and others in earlier filings in this docket, or the Department's preliminary conclusions in the NPRM, which were themselves based solely upon that same speculation. No one identifies even a single tangible instance of actual anticompetitive conduct, and certainly no pervasive pattern of such conduct that would suggest any rule-making was justified. Unfounded speculation about what some carrier might hypothetically do with MIDT is not a rational basis for regulations consciously designed to suppress competition. That is particularly so when the regulations will inflict the collateral damage of undermining significant carrier investments and forcing carriers to make less efficient capacity allocation decisions.

Similarly, the large agencies that urge the Department to ban the sale of MIDT applaud the NPRM proposal because it will give them an information advantage at the
bargaining table with carriers. They have access to their sales data, of course, and would prefer that carriers be denied it so they can force the carriers to negotiate at a disadvantage. Without this sales data, carriers who negotiate incentive commission arrangements with agencies cannot verify whether the agencies are actually meeting their contractual commitments. If these large travel agencies were successful in persuading DOT to intervene and deny this data to carriers, then the agencies would have greater leverage in negotiating those contracts in the future. Like the carriers who have chosen not to invest in the data, these travel agents offer no evidence for their claims that any carrier has actually used any of this data in any anticompetitive way, because there is no such evidence. 12

The economic analysis provided by the Regulatory Studies Program at the Mercatus Center of George Mason University is insightful on this point. As the GMU comments demonstrate, the supposed "coercion" of travel agents with incentive programs or corporations with discounted fares necessarily benefits consumers. As noted above, both incentive programs and special corporate fares amount to price discounts, and price discounts benefit consumers.

Nor is there any evidence that any use of MIDT by hub carriers has excluded

12 The claims by American Express are misleading in other ways as well. For example, MIDT does not provide personally identifiable passenger information, so the data privacy arguments American Express makes are a red herring. So are the "poaching" claims. As ACA admits, "Well, I won't deny the fact that there is probably a limited amount of poaching going on...[I]t's not the poaching that's the issue." Jd., at 217.
competition from any relevant market. To the contrary, as Delta demonstrated in its original comments, the new entrant carriers that would supposedly be the "victims" of this hypothetical anticompetitive use of MIDT are the only carriers that are growing and expanding profitably in the industry today. As the statistics Delta cited in its original comments show, this trend has continued steadily from 1990 to the present, during which time MIDT was always available, and was in fact actively in use by major carriers to support travel agency incentive programs. Yet during that time, AirTran has built major operations in Atlanta; Frontier in Denver; Spirit in Detroit; and Southwest and JetBlue have expanded dramatically throughout the country.¹³

In other words, there is simply no rational basis for leaping to the conclusion that there is a "problem" that needs fixing here. It is absolutely certain, however, that the proposed "solution" will cause serious harm to the carriers who have invested in MIDT, to the GDSs who generate significant revenue from selling it, to the companies like Shepherd

¹³ The financial pattern documented in Delta's original comments continued during the first quarter of this year. Compare "Southwest Reports Quarterly Profit; War Costs Climb to $25 million, Aviation Daily, April 22, 2003 (1Q03 profit of $24 million); "AirTran Reports Slim Profit, Nearing Order for 100 Planes," Aviation Daily April 23, 2003 (1Q03 profit of $2 million; announced plans to order up to 100 additional aircraft); "JetBlue Posts 15.9% Operating Margin, Orders 65 More A320s," April 25, 2003 (1Q03 profit of $17.4 million; announced firm order for 65 additional aircraft with options on 50 more); with "AMR Loss Soars Over $1 Billion", Aviation Daily April 24, 2003 (1Q03 loss of $1.04 billion); "Delta's Deep Q1 Loss Tempered by Positive Financial Developments," Aviation Daily, April 18, 2003 (1Q03 loss of $466 million); Northwest Reports Steep Loss, But Sales May Have Hit Bottom," Aviation Daily April 17, 2003 (1Q03 loss of $396 million).
Systems whose livelihood depends upon the ability to process MIDT for carriers who use it, and -- ultimately -- to the public, who will suffer from higher prices and less efficient matching of capacity to demand as a result of the economic inefficiencies these misguided proposals will inflict.

For all of these reasons, Delta urges the Department to reconsider and reject the proposed restrictions on MIDT distribution. If any interested party ever discovers actual evidence of conduct by any carrier that involves the use of MIDT in a way that violates the antitrust laws, that conduct can and should be dealt with through enforcement of the antitrust laws or an individual enforcement action under Section 411, not through shotgun blast regulations that would undermine such a wide array of procompetitive conduct.

IV. DELTA'S SPECIFIC REPLY COMMENTS TO THE REMAINING PROPOSALS ON A RULE-BY-RULE BASIS

Delta respectfully submits the following additional reply comments relating to the specific rules the DOT has proposed to promulgate in the NPRM:

A. Proposed Changes to the Purpose and Scope of the Rules

The Department proposes in general to renew most of the existing rules, and therefore to retain current §§ 255.1 & 255.2, with changes to reflect the Department's intended expansion of the rules from a traditional focus on carrier-owned CRSs to a new focus on the abuse of market power by CRSs regardless of ownership. Predictably, Sabre and Galileo oppose this expansion. Most of the commentary supported the proposal to apply the regulations even-handedly to all CRSs, regardless of their ownership structure.
As set forth in Delta's original comments, Delta believes that most of the rules can and should be eliminated immediately, and that only a very limited set of rules to contain abuse of market power by CRSs during a short transition to deregulation is appropriate or necessary. However, the problem of CRS market power is no longer related to the ownership structure of the CRS, and those transitional regulations must be applied equally to all systems regardless of their ownership structure if they are to succeed in addressing the abuse of this market power. Thus, assuming the Department concludes that it has jurisdiction to extend its regulations to non-airline owned CRSs, Delta supports the proposal to apply regulations even-handedly.14

B. Proposed Changes to Definitions

If the Department begins the transition to deregulation Delta has proposed, most of the definitions contained in the regulations will be unnecessary. Indeed, the only remaining relevant definitions would be the definitions of Carrier, Participating Carrier, Subscriber, and System. With respect to these definitions, Delta supports the definitions as proposed in the NPRM for the first three, i.e., Carrier, Participating Carrier, and Subscriber.

With respect to the proposed definition of a "System," however, Delta concurs with the comments filed by several parties that the Department's proposed "formal contract" language will create unnecessary ambiguity as to the exclusion it is intended to accomplish.

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14 Many commentators have raised difficult legal questions concerning the Department's
To eliminate this ambiguity, Delta supports the following proposed definition of "System" during the transition to complete deregulation:

“System” means a computerized reservations system offered to subscribers for use in the United States that contains information about schedules, fares, rules or availability of carriers and provides subscribers with the ability to make reservations if it charges any carrier a fee for system services, and if it is used by a subscriber under a contract other than on a booking-by-booking basis.

As noted above, Delta's view is that none of the other proposed definitions need be retained as they would be rendered moot by the deregulatory approach Delta proposes. However, if the other proposed rules were to be adopted, Delta has additional concerns over the proposed revised definition of "system owner," which eliminates the 5% threshold stock ownership, and would define as a system owner any carrier which owns any equity interest in any GDS. Under this definition, as Sabre points out, the ownership of even a single share of stock in a GDS would convert a carrier into a "System Owner." While the definition as a whole is unnecessary and should be deleted, if any definition of system owner is retained it should not permit this result. If any restrictions or distinctions are to be retained based upon system ownership, then Delta agrees with the comments of Air Canada that the regulation should require a sufficient percentage of ownership to permit a reasonable

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jurisdiction to regulate non airline-owned CRSs. Delta expresses no view on this issue.
inference that the carrier actually controls the GDS. In Delta's view, a greater than 50% share would be an appropriate threshold.

C. Proposed Retention and Extension of Display Bias Rules

1. Need for Continuation of the Bias Rules

Most comments have expressed support in various degrees for the Department's proposal to retain the current screen bias rules codified in §255.4, at least for a transition period to full deregulation in three to five years. Yet the comments provide no compelling reason to believe that the huge volume of information available for free on the Internet -- which the Department has acknowledged makes it easy for anyone to check airfares from multiple sources -- has not rendered these twenty year old bias rules unnecessary.

Delta reiterates the view expressed in its original comments that the advent of the Internet travel phenomenon has rendered GDS bias rules unnecessary. The Internet has ended the monopoly on information that CRSs previously enjoyed, and the alternative sources of information now permit the market to provide adequate checks on any actual CRS bias. Orbitz contractually guarantees unbiased displays to any carrier that chooses to participate in the site, and both this Department and the OIG's investigation have confirmed

\[\text{\\footnotesize\textsuperscript{15}}\] Delta and United have urged immediate elimination of the bias rules. Worldspan and Sabre also support this position. Expedia and Travelocity also support immediate elimination of the bias rules. The economic analysis from the Mercatus Center of George Mason University also supported this position. With those exceptions, most commentary favored retaining at least some form of the bias rules, at least during a transition period to complete deregulation.
that Orbitz as met this commitment. Travel agents are as capable as consumers of spot-checking the Internet to verify the quality of GDS data.

The mere fact that most travel agents prefer to book in a GDS rather than on the Internet because of the other services or productivity payments the GDS provides does not mean they cannot and should not take the few minutes required from time to time to check the same Internet resources that are available to do-it-yourself consumers. As the immediate past president of the ASTA has said:

"The Internet is our tool," Galloway says. "Just as a chef knows what to do in the kitchen, a good travel agent knows how to use the Internet."

As ASTA points out in its comments in this docket, the vast majority of travel agents in the country -- 98% -- have online services available to them in their office. They are fully capable of spot-checking those Internet resources to verify that their GDS is providing

\[\text{\textsuperscript{16} See OIG Comments on DOT Study of Air Travel Services, CC-2002-061 (December 13, 2002), at 7-8 ("The Department concluded, and we concur, that Orbitz has not deviated from its commitment to an unbiased display of airfares and services....To date, we have seen no evidence to suggest that Orbitz has deviated from this commitment.") (emphasis in original).}\]

\[\text{\textsuperscript{17} "Many Travel Agents Making the Internet their Friend," Houston Chronicle, April 25, 2003.}\]

\[\text{\textsuperscript{18} Comments of ASTA, OST-97-2881-392, at pp. 10-11 & n. 12, citing ASTA Agency Automation 2002 survey ("Contrary to popular misconceptions, travel agencies are now well connected to the Internet and the electronic way of doing business. The most current data indicates that 98 percent of agencies have online services in their offices. Sixty-two percent of the Industry firms have a Web site.").}\]
accurate and complete data. If they do not check, and if they subscribe to a GDS that is providing them inferior data, they will be disciplined by competitive forces in the market. Enough of their customers are checking, and they will complain or take their business elsewhere if their travel agents are not doing their job.

In contrast to the market structure as it existed in 1984 and 1992, the availability of this information on the Internet empowers travel agencies in 2003 to identify and then discipline bias in the GDSs by expressing and if necessary acting upon their preferences for unbiased displays. As Sabre and others have pointed out in this docket, the GDSs systems compete aggressively with each other for the business of their subscribers, in many cases paying the agencies to use their services. If subscribers demand unbiased data, then GDSs will have an incentive to provide it. Travel agencies who are dissatisfied with bias in their GDS data displays can threaten to switch to other GDSs at contract renewal or use alternative distribution channels that guarantee unbiased data. For all of these reasons, the bias rules are unnecessary regulatory intrusion into the market. They should be eliminated.

2. **New Restrictions on "Screen-Padding"**

The rationale described above for elimination of the bias rules generally applies with equal force to the so-called "screen-padding" rules proposed by the Department. Delta agrees with the suggestions of other commentators that competition among GDSs to satisfy the preferences of their agency subscribers will be more than adequate to address any screen clutter problems that may arise as a result of expanded codeshare operations.
Indeed, as Sabre points out, at least one GDS has already proactively limited its displays in a way that is even more restrictive than the Department's proposed rule would require. If agencies demand limitations on the multiple display of codeshare flights on GDS screens, GDSs will provide this service, because they compete aggressively for agency business. There is no need for the Department to dictate the content of screen displays in this way.

If, however, the Department concludes that it is appropriate to add a new rule regulating the number of times code share flights may be displayed, Delta supports the rule as proposed by the Department -- *i.e.*, Delta supports a rule which limits the number of times a flight could be displayed to "only once under the code of each carrier." Delta urges the Department to reject the more restrictive alternatives proposed by some commentators, which would limit screen displays to *less* than one display per carrier.

Many carriers float various versions of such proposals. Some suggest adoption of the European rule, which limits displays to two per codeshare flight. That, of course, would diminish the competitive value of codeshare relationships involving more than two carriers, since by definition, at least one competitive option for a flight would become invisible in GDS displays whenever all three carriers were competing to sell tickets on the same flight. But some carriers -- including Southwest, America West, and Air Canada -- propose an even more radical rule apparently designed to eliminate the benefits of codesharing entirely by prohibiting the display of any flight more than once, with the lucky codeshare partner whose flight will actually be displayed for sale on any given flight apparently to be selected at
random. All of these proposals are another transparent attempt to suppress competition, by reducing the number of competitive alternatives for air transportation that could be displayed in a GDS.

The fundamental point which all of this commentary ignores is that in a codeshare relationship which is not protected by antitrust immunity, the codeshare partners remain competitors on every route that they serve, whether as an operating or marketing carrier. They may not coordinate fares on any flight, nor do they sell their services as a single economic unit. The codeshare agreement expands the size and scope of their networks, allowing each party to sell a greater variety of air transportation services than either could offer alone, but the carriers remain competitors in the sale of seats on each flight. Vigorous price competition -- in the form of traditional sale fares, corporate discounts, web fares, agency incentive payments, loyalty program benefits, and otherwise -- are all just as pro-consumer when the competitors are competing to sell seats on the same flight as when they are competing to sell seats on two different aircraft. Any rule that would block one or more would-be competitors from selling air transportation on a given city pair is anticompetitive and will harm consumers. That is exactly what a rule prohibiting the display for sale of one or more codeshare flights would do.

Thus, if the Department concludes that the bias rules should be maintained and that a rule to restrict so-called "screen-padding" is necessary, Delta urges the Department to adopt the rule it has proposed and reject the more radical alternatives described by others in this
D. Proposed Retention of the Equal Functionality Rules

Very few commentators expressed views on the proposal to retain the existing §255.5 governing defaults and service enhancements. Most commentary that was filed suggested that the rule is unnecessary, and the handful of parties voicing support for it provide no evidence to the contrary. Delta agrees with the economic analysis submitted by the Mercatus Center on this point, which suggests that retention of this rule is unnecessary. It is unlikely that CRSs would engage in the kind of architectural bias this rule contemplated, simply because it would be expensive to do so.

Rules should not be retained out of pure inertia. As set forth in Delta's original comments, changed circumstances have rendered this rule unnecessary. Unless there is some compelling reason for retention, all rules should be allowed to sunset as originally contemplated. Delta therefore reiterates its view that this rule should be eliminated.

E. Proposed Restrictions on Participating Carrier Agreements

1. Certain Narrow Restrictions on the Exercise of CRS Market Are Necessary During a Transition to Deregulation

The only long term solution to the market failures identified in the NPRM is healthy competition for the GDS channel of air transportation distribution. If the twenty year history of the CRS regulations demonstrates anything, it shows how difficult it is restrain the abuse of GDS market power through detailed prescriptive regulations. On the other hand, the creation of viable competitive alternatives to GDS distribution will permit
natural market forces to work.

Many of the proposed changes in the NPRM reflect the Department's attempt to nurture this nascent competition. The Department has sought to accomplish this laudable goal through several positive deregulatory steps, but with an overall philosophy that still relies upon detailed prescriptive regulation of the manner in which CRSs do business. Delta, like many other commentators, believes that the Department's goal can be accomplished more effectively through more complete deregulation.

If the Department chooses to move towards deregulation, the most critical issue the Department must resolve is precisely what regulations will be necessary during the transition. Delta believes those regulations should be as narrowly tailored as possible, while still sufficient to avoid the disruption that would occur if a regulatory structure which has shaped this market for twenty years were suddenly removed. Delta strongly supports a rapid move towards complete deregulation, and recommends a three year transition to elimination of the existing CRS regulations.

The GDS denials that they have "market" power are based on straw man arguments and misleading market definitions that obscure a basic and obvious market fact which the Department has correctly articulated in the NPRM. The source of the GDS market power in this industry is not that any single GDS has a monopoly over airline ticket distribution or even over GDS services generally, or that GDSs do not compete vigorously for the business of travel agents when it comes time to sign up for a new contract. The source of
GDS market power is the essentially undisputed fact that they have *de facto* exclusive dealings arrangements with their subscribers, and most carriers cannot survive without access to those subscribers.

Thus, the supposedly "relevant" markets discussed at length in the GDS comments are in fact *irrelevant* to the true competition issues raised in the NPRM. For example, Sabre's discussion of its "vigorous" competition for the business of travel agencies at contract renewal time is a red herring. No one disputes that GDSs compete vigorously for travel agency subscribers when their contract renewal is up for grabs. Indeed, GDSs typically are willing to give their services away for free to travel agents or even pay the travel agencies to use their services, if they can lock them into long term *de facto* exclusive dealing agreements. According to ASTA survey results, more than half of all U.S. agencies paid no monthly fee for GDS service, and about 60% receive a signing bonus for agreeing to use a GDS.\(^\text{19}\) All the GDSs have productivity pricing arrangements which effectively pay travel agents based upon the volume of services they consume. It goes without saying that when a seller is paying its customers to take its services, the seller is competing vigorously for the business.

But the fact that a GDS competes vigorously in this downstream market when an agency's contract is up for renewal does not change the fact that once a deal is struck the

\(^{19}\) Comments of ASTA, OST-97-2881-392, at 17.
GDS has a *de facto* exclusive dealing arrangement with the agency. It is this commercial reality that creates the relevant antitrust concern in the *upstream* market -- the market for access to the distribution services of those travel agents by carriers. In this market, the GDS is a seller, and carriers are buyers. The *de facto* exclusive dealings arrangements between a GDS and its subscribers effectively gives the GDS monopoly control over access to its travel agencies, and that access is what the GDS sells to carriers. Because of this peculiar market structure, the services of any given GDS are *not* reasonably interchangeable with the services of other GDSs for carriers who depend upon distribution through traditional travel agencies. As the Department has observed, these carriers must have access to all travel agencies to survive, and therefore must purchase access from *each* GDS.

In short, the source of GDS market power is that they have entered into, and will continue to enter into, *de facto* exclusive dealings arrangements through which they effectively control each air carrier's access to the vast majority of their subscribers; and in today's environment, many carriers cannot survive without that access. This gives the GDS power to raise price and dictate terms to those carriers -- *i.e.*, market power.

The proper GDS market definition turns upon the commercial realities facing air carriers negotiating for access to GDS subscribers. For many carriers, there is no realistic commercial alternative to executing a participating carrier agreement with each GDS, and therefore each GDS is its own relevant market for the purposes of antitrust analysis.

Thus, so long as most carriers remain dependent upon traditional travel agency
distribution, and so long as each GDS controls access to a significant percentage of U.S.
travel agents, each GDS has market power in the relevant market. The narrow regulations
Delta has proposed during a transition to deregulation are designed to prevent GDSs from
abusing this market power by using it to stifle the development of alternatives to the GDS
distribution channel through the denial of access to their exclusive agents in the short term.
Efforts by a GDS to preserve its current market power by threatening a refusal to deal with
carriers who attempt to develop alternative distribution channels is an improper attempt to
exclude competition. Delta's proposals are narrowly tailored to protect competition by
preventing such refusals to deal during the transition to a fully deregulated marketplace.

The arguments by Sabre and others that the Department should refrain from such
regulation because carriers have compensating bargaining leverage by virtue of the fact that
each GDSs needs each carrier's participation to satisfy their subscriber base ignores the
practical fact that no U.S. carrier that has built a distribution system based on twenty years
of GDS regulation and reliance upon traditional travel agency distribution could survive a
showdown with a GDS. The GDSs know this, and that is why they can dictate terms. A
GDS's refusal to deal could quickly bankrupt such carriers in the current environment.

Thus, complete immediate deregulation without any transitional checks on GDS
market power would threaten the growth of the competitive alternatives that are necessary
for a long term solution. It is critical that GDSs not be permitted to blackmail carriers with
a refusal to deal if the carrier chooses to develop alternative distribution channels. As
American Airlines demonstrated in its comments, this is not a merely hypothetical risk.

Sabre has already taken the public position in lawsuits against American and Air Canada that language in the existing Sabre participating carrier agreements prohibits carriers from offering web fares without placing those fares in the GDS. Sabre does not dispute this -- to the contrary, it seems to admit that this is exactly what it is doing, at least with respect to web fares that American has chosen to offer to Orbitz.20

The potential consequences for the future health of airline competition and competition in airline ticket distribution cannot be understated. The Department has correctly concluded that the existence of viable alternative channels is necessary for a permanent solution to the market failures in airline distribution, and that new technologies like the Internet and direct connection offer the best hope for that competition. Delta believes that within three years, alternative channels should be sufficiently viable to give carriers the ability to bargain fairly with GDSs. By then, all carriers, travel agents, and GDSs will have had a three year warning that deregulation was coming, and three years to prepare for the change. Free market forces should be allowed to work at that time. After twenty years of government regulations, a three year period is appropriate for a transition to

20 Comments of Sabre, Inc., OST-97-2881-422, at 134. Sabre offers the not-so-reassuring consolation that it has not yet attempted to use this twelve year old contract provision to demand fares that a carrier offers only on a carrier's own website, though Sabre is careful to avoid any suggestion that it would not or could not do so. To the contrary, Sabre seems to contend in its comments that could do so, but has simply chosen not to out of a sense of
full deregulation and will provide an adequate opportunity for the development of GDS alternatives that are necessary for the market to work.

Delta reiterates the call in its original comments for two narrowly tailored restraints on the exercise of GDS market power during the three year transition to complete deregulation. Those restraints, set forth on pp. 35 and 39 of Delta's original comments, are (1) a prohibition on parity clauses, patterned after existing § 255.6(e), but applied equally to all carriers regardless of system ownership; and (2) a new provision, similar to but broader than the Department's proposed new § 255.6(e), which would prohibit systems from requiring, as a condition of participation, that a carrier provide it with any fares, schedules, or seat availability that the carrier has chosen not to sell through the system.

Both of these proposed transition rules are an attempt to accomplish the same result -- to help ensure that, during a three year transition period, GDSs are not able to prevent the development of alternative distribution channels through the threat of a refusal to deal. For example, if a major carrier were to attempt to mimic the distribution strategy of JetBlue with a low fare subsidiary that sold its tickets exclusively through a website and other direct channels, the proposed transition rules would prevent GDSs from blocking the strategy by refusing to allow the parent to participate in the GDS (at any level) unless the low cost generality to carriers. *Id.*
subsidiary also participated in the GDS (at the highest level). Similarly, during this three year transition to deregulation, GDSs could not block distribution via direct connect technology by insisting that as a condition of participation a carrier give the GDS and its subscribers all fares that carrier might otherwise choose to offer as an incentive to agency or corporate customers willing to experiment with alternatives.

It is important to note that Delta's proposed transitional measures would only be temporary. All participants in this market would be given fair warning that the ground rules were changing, and that there was a strictly defined time period during which everyone must prepare for full deregulation. Given the rapid pace of technological developments, Delta believes that a three year transition should be sufficient to prepare for the change. If these two rules are adopted during the transition to full deregulation, Delta believes that all remaining restrictions on participating carrier agreements could be eliminated immediately.  

2. Specific Comments on Remaining Proposed Changes to Participating Carrier Agreements

If the Department does not commence the move towards complete deregulation, then Delta has the following additional reply comments on the specific proposals in the

21 Northwest, Alaska Airlines, and Continental all have proposed an approach similar to that proposed by Delta, with an orderly move towards deregulation with relatively narrow restraints on GDS market power during the transition. Delta generally supports their proposals, but believes that the two transitional rules Delta has proposed will most
NPRM relating to participating carrier agreements.

a) **Elimination of the "Discriminatory Pricing" Rule**

The Department's proposal to eliminate the so-called "discriminatory pricing" rule at § 255.6(a) has elicited deeply divided commentary. Delta reiterates its support for this proposal, on the basis that so long as carriers remain free to limit their participation levels in a GDS and to limit the fares and schedules that they provide to the GDS, the elimination of this pricing rule may drive some systems to offer better terms to some carriers than they would otherwise be willing to offer. That competition would be good for consumers.

Most of the opposition to the proposal is premised on objections that the elimination of the rule would benefit larger carriers which the commentators assume have greater bargaining power in negotiations with each GDS. America West, US Airways, Midwest, Alaska, and many foreign carriers all make such arguments. Southwest does so as well, despite the fact that it does not even participate in most GDSs. Allowing GDSs and carriers to freely negotiate price terms, the argument goes, would "harm" smaller carriers because they would not be able to negotiate as good a deal. Southwest goes so far as to describe repeal of the rule as a "wealth transfer" from smaller to larger airlines.

These arguments all assume that carrier size is the only factor that matters at the

Footnote continued from previous page
effectively address concerns about GDS market power during the transition.
negotiating table with a CRS. It is true that size matters, since the more flights a carrier has to offer, the more value a carrier's participation will add to a GDS's subscriber base, and the more important it will be to the GDS to have that carrier's flights in its system. But equally and perhaps more relevant is the level to which the carrier is dependent upon the CRS for its ticket distribution. Indeed, the carriers who arguably have the most bargaining power when dealing with GDSs are not the larger network carriers who depend upon travel agents to sell a large percentage of their tickets, but rather those carriers (large or small) who have adopted business models that bypass the GDS distribution channel for a significant percentage of their ticket sales. Carriers like Southwest and JetBlue have demonstrated that they can and do refuse to deal with most GDSs -- they are not dependent upon GDS sales, and therefore are in a much stronger bargaining position at the table with each GDS. Because they can say "no" to a GDS, they would be in a position to negotiate more favorable terms of participation if they chose (and were permitted by regulation) to do so. The CRSs that have so far been unable to persuade a Southwest or JetBlue to participate in their systems might well be motivated to offer those carriers much more favorable terms than they currently offer other carriers, if they were free to do so without offering the same terms to everyone else. There is simply no way to predict how those competitive chips might fall, and certainly no reason to assume that being big will necessarily mean getting the best deal.

But in any case, the fact that some competitors -- no matter what their size -- may be
able to negotiate a better deal than others is hardly "unfair competition" that could be proscribed under § 411. There is nothing unfair about it. It is the natural result of competition in a free market. Some carriers can negotiate better deals for aircraft, or fuel, or debt, or ground handling services, or labor contracts, or any number of a thousand other cost items that go into the operation of an airline. No one would serious contend that § 411 might justify a rule requiring aircraft manufacturers to sell planes to all carriers at the same price, nor all pilots to work for the same salary, nor all oil companies to sell fuel at the same price. The fact that some carriers would prefer a "level playing field" cannot justify the elimination of price competition for inputs to air transportation.

Nor can speculation about hypothetical misconduct that might occur absent the rule. Galileo, for example, speculates that elimination of this pricing rule, coupled with elimination of the mandatory discrimination rule discussed below, "could have a devastating impact on competition in air transportation markets." Galileo theorizes that in a deregulatory world, Delta might refuse to participate in any CRS but Worldspan, and that this refusal would "force" all travel agencies in the Atlanta area to be Worldspan subscribers so they could sell tickets on Delta flights. This, Galileo theorizes, would mean that AirTran could only sell tickets in Atlanta through Worldspan, but Worldspan might undermine its efforts to do so by charging AirTran prohibitively high CRS fees. Through this attenuated chain of events, Galileo foretells, "small and low cost carriers would lose the ability to offer low prices to consumers and cancel their plans for expansion, as they lost access to
Galileo's speculation ignores a number of obvious market facts:

First, it assumes that Delta could realistically refuse to participate in any CRS but Worldspan. This is certainly not the case, since Delta relies on traditional travel agencies for more than 40% of its ticket sales, and more than 55% of Delta's ticket revenue. Worldspan's traditional agency U.S. market share is only approximately 18%. Thus, even if it wanted to, there is simply no realistic prospect that Delta could afford to refuse to participate at any level in every CRS but Worldspan any time soon.

Second, even assuming that Delta could afford to withdraw from every GDS but Worldspan, that would not "force" any travel agent to use Worldspan in the way that it would have when the GDS regulations were originally adopted because travel agents have alternative booking options today that were not available in 1992 or 1984. Delta allows any agent to book any Delta flight from the "Online Agency Service Center" on its web site at delta.com. If Delta chose to participate only in Worldspan, travel agents who preferred to use an alternative GDS could simply book their Delta tickets on Delta's website.

Third, the assumption that Worldspan could drive AirTran out of business by raising

22 Comments of Galileo, OST-97-2881-381, at 27.
23 As noted in Delta's letter of June 2, 2003, sales through all GDS channels (including both traditional and online travel agents) is higher, accounting for more than 65% of Delta ticket revenue.
booking fees if it chose to do so ignores the fact that AirTran's business model is similar to that of JetBlue and Southwest -- it relies much less on traditional agency sales, and much more on direct sales through its web site. If Worldspan tried to charge AirTran "egregiously high fees" for participation as Galileo envisions, then AirTran would very likely simply follow the example of Southwest and JetBlue and walk away, leaving Worldspan with a less attractive service to sell to its subscribers, and fewer booking fees. Like Delta, AirTran allows any agent to book directly from its website. If a Worldspan agent wanted to book an AirTran flight, it could always do so there.

In other words, Galileo's speculation has no basis in current market reality, and cannot justify the rule regulating GDS pricing. Individual enforcement actions will be more than adequate to address the situation in the extremely unlikely event that such a scheme was actually attempted in a deregulated world.

b) Proposed Restriction on "Non-Discrimination" Provisions

The NPRM also proposes to add a new restriction on participating carrier agreements, to be codified in the first sentence of a new § 255.6(e), to provide that

\[
\text{No system may bar a carrier from treating its subscribers differently from subscribers to other systems, if the difference in treatment is based on the system charging higher booking fees or offering poorer service to participating airlines than}
\]

\[24\] E.g., NPRM, at 69373 ("AirTran was obtaining over half of its bookings through the Internet by the end of 2001.").
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.

There was relatively little comment on this proposal. The GDSs oppose it, as they oppose all of the proposed new restrictions on their ability to negotiate terms in participating carrier agreements. But few carriers offered any substantial comments in support of the proposal. Of the carriers proposing a transition to deregulation, only Continental suggested that this rule be implemented during the transition period.

While the rule is clearly directed towards the important goal of stimulating GDS competition, Delta's view is that the rule is not necessary to restrain GDS market power during the transition to deregulation. Whether a carrier's decision to treat subscribers of one GDS differently from those of another is "based on the system charging higher booking fees or offering poorer service to participating airlines than other systems" will most likely be unclear and disputed if the issue arises. The reasoning behind the exception excluding system owners and marketers from the protections of the proposed rule is unclear, and will further diminish any impact the rule might have on actual GDS behavior. Ultimately, Delta believes that only the minimum essential regulations should be adopted during the transition to complete deregulation. In Delta's view, this provision is not essential to protect competition.

c) Proposed Restriction on Requirement That Carriers Provide All Fares as a Condition of Participation
In contrast, the concept which the Department attempted to implement through the second sentence of proposed new § 255.6(e) is an important one. This provision would provide that:

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.

Several carriers proposing a transition to deregulation suggested that some variation of this rule should be included to protect competition in the interim. Once again, the GDSs oppose such a rule.

This rule was intended to address the Department's justified concerns that Sabre and other GDSs "may be imposing contract terms on airlines that unreasonably restrict airline choices on how to distribute their services."\textsuperscript{25} As the Department correctly observed, "[s]uch contract clauses could keep an airline from pursuing the most efficient and least costly distribution channels."\textsuperscript{26} The comments of Sabre and American make clear that the Department's concerns were well-founded. As noted above, Sabre has taken the unabashed position in litigation with American and Air Canada and in its comments in this docket that its participating carrier agreement does in fact prohibit carriers from offering special web discounts without making those same fares available through Sabre's high cost GDS. In the

\textsuperscript{25} NPRM, at 69393.

\textsuperscript{26} Id.
absence of regulatory restraint, the Department can certainly expect Sabre to attempt to use these legal arguments to undermine carrier efforts to develop competitive alternatives to the GDS channel.

The rule proposed in the NPRM focuses on Internet fares, but this problem is not limited to Internet fares. Direct distribution on a carrier's web site is not the only new distribution channel that presents a potentially viable competitive alternative to a GDS. Direct connect relationships with travel agencies or corporate clients are no less important. Indeed, the same logic applies to the possibility of stimulating competition among the four traditional GDSs themselves by permitting GDSs and carriers to negotiate differing participation levels or the availability of special fares or discounts in one or more systems. The same logic that led to the Department to propose the rule as set forth in the NPRM applies equally to GDS efforts to suppress carrier's efforts to innovate in these alternative distribution channels. But, as discussed above, the market power of the GDS may well make it possible for GDSs to put a stop to these efforts simply by refusing to deal with any carrier that engages in them. That is what Delta's proposed rule is designed to prevent, at least during a transitional period leading to complete deregulation. Delta therefore urges the Department to adopt a slightly broader version of this rule, as set forth in Delta's original comments:

No system may require any carrier, as a condition to participation, to provide it with any fares, schedules, or seat availability that the carrier has chosen not to sell through that system.
Thus, carriers and GDSs would remain free to negotiate the terms and conditions of participation, and GDSs would be free to offer more favorable terms to carriers who chose to provide web fares or special discounts. The GDS could not, however, threaten to exclude a carrier from participation altogether (or to charge such prohibitively high fees as to be the effective equivalent of a refusal to deal) based on the fact that the carrier chose to distribute some fares, schedules, or inventory through alternative channels.

F. Proposed Elimination of Mandatory Participation Rule

One of the most important proposals in the NPRM is the Department's proposal to eliminate the mandatory participation rule. This proposal has generated significant commentary. Most air carriers (no matter what their size) that submitted comments on this proposal supported it. The existing rule clearly suppresses competition among GDSs by eliminating any possibility that any carrier with any ownership interest in a system can experiment with the business strategies successfully exploited by Southwest, JetBlue, and others, in which the carrier attempts to lower its distribution costs by limiting or eliminating its participation in one or more GDS systems. In other words, the mandatory participation rule entrenches the precise GDS market power over carriers that the Department has correctly concluded is harming competition. Thus, the Department's proposal to eliminate the rule is clearly in the public interest and should be adopted.

The commentary in opposition to the Department's proposal falls into three distinct categories:
The first category of opponents to this proposal are the GDS systems who have benefited so much from the command market this regulation creates. All of the GDSs except Worldspan have opposed the proposal. This is not surprising, since the mandatory participation rule forces affected carriers to purchase the services of these GDSs whether the carriers want them or not. In fact, Galileo and Amadeus argue that this restriction be applied to all carriers who have a marketing agreement with any GDS, expanding even further the pool of carriers forced to buy their services. Even Sabre, which spends hundreds of pages in its commentary extolling the virtues of complete and immediate deregulation when it comes to any regulation that restrains Sabre's own behavior, has argued for a Worldspan-only mandatory participation rule that would force the Worldspan owners to purchase the highest level of participating carrier services from Sabre.

For many of the same reasons discussed above in the context of the discriminatory pricing rule, the parade of horribles conjured by this GDS commentary has no basis at all in the reality of the current market structure. First, as the Department has correctly observed, it is highly unlikely that any major network carrier could realistically choose to eliminate its participation entirely in any GDS any time soon. The carriers are dependent upon travel agency distribution for too large a percentage of their ticket sales, and each GDS controls too large a percentage of travel agency ticket sales through *de facto* exclusive dealing arrangements. Thus, most carriers are compelled to participate in each GDS at least at some level. Some system owners may well decide to participate in one or more other
systems at a lower level of service if they cannot negotiate acceptable business terms from those GDSs, but the possibility that any system owner would refuse to participate at all in any GDS for the foreseeable future is remote to say the least.

Moreover, as discussed above in the context of the proposal to eliminate the discriminatory pricing rule, there is simply no truth to the claim that system owners could use their participation level in other systems as a means to suppress competition in air transportation, given the current structure of this industry. Many of the most successful carriers -- including, for example, both Southwest and JetBlue -- pursue business models that are impervious to such a strategy, because they are not dependent upon GDS distribution and already refuse to participate in one or more GDS systems. In addition, as discussed above, the advent of carrier-provided Internet booking portals for travel agents create alternatives that make the decision of the carrier not to participate in a GDS much less significant for travel agencies than it was even five years ago. As discussed above, for example, a decision by Delta to refuse to participate in any GDS but Worldspan -- however unlikely as a practical matter -- would not force any travel agent to switch to Worldspan, because Delta lets any travel agent book Delta inventory through its web site.

The case of Southwest Airlines illustrates why the potential for continuing ties between carriers and CRSs cannot justify a mandatory participation rule. As the Department is aware, Southwest Airlines has a marketing arrangement with Sabre and therefore presumably has a financial incentive to encourage travel agents to use the Sabre
system. Since Southwest is not bound by the mandatory participation rule, Southwest is free to exploit a competitive strategy of refusing to participate in any other CRS. Thus, it forces non-Sabre agents to book from the Southwest web site or switch to Sabre if they want to sell Southwest tickets.

All of this occurs in the context of several undisputed market facts. Southwest is a major domestic air carrier. It is one of the largest carriers in the country with significant operations in many cities, including Dallas, Phoenix, Salt Lake City, Las Vegas, Baltimore, and others. Obviously, travel agents in these cities have a strong desire to be able to issue tickets on Southwest, and therefore a powerful incentive to switch to Sabre so they can do so. Despite all of this, Southwest's competitive strategy to participate in only one GDS -- and the resulting market advantage this gives Sabre over its GDS competitors -- has not caused the sky to fall as Galileo predicts. Many travel agents may well have switched to Sabre to get access to Southwest, particularly in those cities where Southwest has a major presence. Others may have decided to book on the Southwest website or just not sell Southwest tickets. But the Department has never concluded that Southwest's business strategy warrants bringing an enforcement action under § 411 to force Southwest to participate in every GDS.

There is no reason that carriers who happen to own a minority ownership interest in a GDS should arbitrarily be held to a different standard than Southwest. All carriers should be free to attempt to lower their distribution costs by exploiting the same competitive
strategies. Unless the Department is prepared to order Southwest and every other carrier to participate at the same level in every GDS, it should not force any carrier to do so. In the extremely unlikely event that any truly anticompetitive conduct did occur when carriers were all equally free to compete in the marketplace, an individual enforcement action should be more than adequate to address the situation. Speculation about hypothetical misconduct that might occur if the Department gave the free market a chance to work is not a rational basis for regulation, particularly not a regulation such as the mandatory participation rule, which harms consumers by distorting competition among air carriers.

The second category of comments opposing the proposed elimination of the mandatory participation rule is from travel agents and travel agency associations who complain that eliminating this rule might lead some carriers to withdraw from participating in one or more GDSs, thus making it more difficult for travel agents to book tickets through their preferred GDS. These arguments provide no basis for keeping the rule, and in fact, they illustrate why elimination of this rule would help spur competition among the various GDSs.

The fact that many travel agents would prefer that they be able to book every carrier's tickets through whatever GDS they decide to subscribe to without regard to the carrier's own judgment as to the most efficient means of distributing its product is not a justifiable basis for retaining the mandatory participation rule. As the Department has correctly observed, Section 411 does not create jurisdiction for regulations dictating that airlines
distribute all fares through all distribution channels. This travel agency logic would require the Department to apply the mandatory participation rule to all carriers, not just system owners. It would requiring forcing Southwest, JetBlue, and any other carrier who chose to experiment with alternative distribution models to cease doing so, and place all fares and all services in all GDSs, at whatever price the GDS chose to dictate. While that might be a favorable outcome for the travel agencies who often receive the services of a GDS without paying anything for it -- or who may even be paid to use it -- it would hardly be pro-competitive or in the public interest.

More importantly, however, the fact that travel agents value the ability to book tickets on as many different airlines as possible in their GDS illustrates why elimination of the mandatory participation rule will improve competition among GDSs. As discussed above, the GDSs compete vigorously for the business of travel agents. If carriers can credibly threaten to reduce or eliminate their participation in a GDS, that GDS will have an incentive to negotiate seriously with the carrier to avoid reducing the value of services it can provide to its travel agency customer base. On the other hand, if system owners continue to be bound by a regulation that forces them to participate equally in all GDSs,

27 NPRM, at 96413. ([G]iven 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.)

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then the GDS has no such incentive and can comfortably continue to dictate participation terms to those carriers. In other words, it is precisely because the travel agents want each carrier to participate in each GDS that the elimination of the mandatory participation rule may succeed in improving GDS competition.

Finally, a few air carriers have also argued for retention of the rule, notably Southwest Airlines, US Airways, British Airways, and Virgin Atlantic. What these carriers have in common is that they are not system owners and they compete with carriers who are currently handicapped by the mandatory participation rule. Indeed, both US Airways and Virgin Atlantic ask the Department to expand this competitive handicap even further by applying the rule (in US Airways' case) to any carrier which markets a system, or (in Virgin Atlantic's case) to "all major U.S. carriers." None of their comments provide any justification for retaining the rule.

Southwest's comments are most ironic, since Southwest illustrates perhaps better than any other the manner in which a carrier that is free to do so may successfully exploit the competitive freedom of refusing to participate in any GDS which it decides is not offering sufficiently attractive terms. Southwest participates only in Sabre. This is a legitimate business decision by Southwest and has not created any "distortions" in

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competition. It does, however, mean that non-Sabre agents who want to book Southwest tickets for their clients must do so directly from Southwest, which costs Southwest less. Southwest benefits from the fact that the mandatory participation rule prevents some of its competitors from exploiting the same options, since those restrictions increase the distribution costs of Southwest's competitors. The application of one regulatory standard to system owners and another to carriers like Southwest therefore distorts airline competition, and harms consumers. The Department should eliminate this distortion and finalize its proposal to eliminate the mandatory participation rule.

G. Proposed Restrictions on Subscriber Contracts and the Use of Third Party Software, etc.

The Department's proposed expansion of restrictions on the terms of subscriber contracts and on the use of third party hardware, software and databases has also generated significant and deeply divided commentary. While they differ in the details, carriers have overwhelmingly supported the proposals to restrict contract terms that make it more difficult for travel agencies to switch between GDS providers, because they virtually all agree with the Department's assessment that the market failures affecting this industry -- the problem of GDS market power described above -- is caused at least in part by the restrictive terms of GDS subscriber agreements that make it difficult for agencies to switch between GDS providers or book through alternative channels. On the other hand, GDSs have made compelling arguments in opposition to the proposals, focusing on the often unintended economic inefficiencies that result when regulators attempt to dictate
permissible contractual terms and conditions in such detail. Travel agencies have understandably opposed restrictions on their ability to generate an important source of revenue through productivity pricing agreements, but have generally supported many of the other proposals that would provide regulatory protections to them affecting the terms of their bargain with the GDSs, such as the limitation on liquidated damages provisions in provider agreements or limitations on the length of contract terms.

1. **The Restrictions on Subscriber Agreements and Third Party Hardware, Software and Databases Could Be Eliminated During the Transition to Deregulation**

Delta expressed support in its original comments for the proposed subscriber agreement restrictions during a three year transition to complete deregulation. However, Delta shares the concerns expressed by several commenters that these subscriber agreement rules are ultimately unlikely to have any real impact on the fundamental problem because it is simply too easy for a GDS to circumvent any specific restriction through innovative new contractual and pricing arrangements. If ASTA's observation that the great majority of travel agents simply do not want to use more than one GDS is correct, this only makes it more likely that any regulatory efforts to make it possible for them to do so will be wasted. Thus, while reducing the barriers to agency switching between GDSs would be a step in the right direction, it is probably not going to make that much difference to the market failures the Department is attempting to address. In the long term, only competition and viable competitive alternatives to the GDS distribution will correct those market
The Department's mandate to "rely[] on actual and potential competition" to the maximum extent possible. Delta believes that an orderly transition to deregulation is the best means to accomplish the Department's goals of restraining GDS market power in both the short and long term, and that the two narrowly-tailored rules Delta has proposed will be sufficient to protect competition during the transition, with or without any restrictions on subscriber agreements.

2. There Is No Need For A Regulation Prohibiting Carriers from Tying Commissions, Benefits, or Fares to The Usage of a Preferred GDS

There is no merit to the arguments by Sabre and others that the current prohibition on tying commission payments to participation in a system owner's GDS should be retained. There is certainly no merit to the arguments by the GDSs and many travel agencies that this restriction should be expanded beyond its proposed scope to cover other items such as marketing incentives, ability to book corporate discounts, access to web fares, or other benefits that carriers may provide to travel agencies. To the contrary, such restrictions on

28 49 U.S.C. Section 40101(a)(12)
the ability of carriers to decide how they will distribute their products would be
diametrically opposed to the goals the Department has sought to achieve in the NPRM.

The current restriction is contained in current § 255.8(d), which the NPRM
proposes to recodify as §255.7(e), with the following modifications:

(ed) 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.

As the Department has explained, the original purpose of the rule when it was adopted in
1984 was to ensure that "smaller or newer systems had an adequate opportunity to compete
for subscribers."

When renewing the rule in 1992, the Department echoed these concerns.
Yet the Department specifically considered and rejected the calls for extending this rule to
prohibit the tying of "marketing benefits" to system usage. While expressing some concern
that the tying of marketing benefits to CRS usage might have anticompetitive effects, the
Department rejected the calls for regulatory restrictions on the practice, concluding that
any such restriction would be too ambiguous and too difficult to enforce.

The Department also rejected calls in 1992 for a rule that would require the publication of all

30 57 Fed. Reg. at 43780, at 67 (concluding that "the arrangements tying airline marketing
benefits and CRS subscription are likely to be so informal and open-ended that it could be
difficult to say whether a particular situation violated the rules").
special corporate discount fares in every GDS. Individually negotiated corporate discounts customized for specific corporate agreements are not "widely available" published fares that a carrier would be required to distribute in every GDS.31

When the Department reached these conclusions in 1992, most systems were owned by a single carrier, and commission payments were a much more significant source of travel agency revenue. Today, most U.S. carriers have eliminated base commission payments altogether, and no GDS is owned by a single carrier. Thus, all the reasons not to prohibit the tying of "marketing benefits" or corporate discounts to GDS selection remain, and the grounds for the original rule have become largely moot as a result of the changing market circumstances in this industry.

In fact, there is good reason to believe that a carrier's decision to tie the payment of any kind of travel agency incentives to the use of a GDS could improve rather than harm competition among GDS systems in today's market context. As the Department has observed, carriers have a legitimate business reason to encourage ticket sales through lower cost distribution channels, such as a carrier's own Internet web site, direct connection, or online travel agencies that offer carrier rebates of the high booking fees that normally apply to sales through the GDS channel. These special incentives benefit consumers who choose to take advantage of lower cost distribution channels and promote competition by helping to

31 Id., at 30.
develop long term competitive alternatives for the GDSs. The Department has therefore wisely rejected calls for regulations that would force carriers to place special web fares in every GDS, and has correctly noted that Section 411 does not create jurisdiction for regulations dictating that airlines distribute all fares through all distribution channels.  

The same sound logic should compel the Department to reject calls for rules that would prohibit a carrier from providing other incentives to encourage sales through any lower cost distribution channel. This is true whether that channel is a carrier's own web site, an online travel agency that rebates booking fees, a low-cost direct connection to a major agency or corporate client, or even a traditional GDS that chooses to offer the carrier a better deal than its competitors.

This is true even if the "better deal" a GDS offers is simply a function of the fact that the carrier is a part owner or marketer of the GDS, and therefore shares in its profits or has some other financial incentive to encourage its use. A carrier that is a system owner or system marketer has a legitimate pro-competitive business reason to encourage sales of its tickets through the GDS in which it has an ownership or other financial interest, if that ownership or financial interest makes it cheaper for the carrier to distribute through that 

32 NPRM, at 96413. ("[G]iven 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.")

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GDS than through other GDSs. If all GDS fees are at essentially the same level, a carrier is better off selling tickets through the system that it owns or markets simply because the carrier shares in the profits or receives other compensation for sales through the owned or marketed system. All things equal, these sales are a net lower cost distribution option than sales through competitive systems. Exploiting this efficiency is no less rational and no less legitimate than exploiting the efficiencies of web distribution, direct connect technologies, or any other lower cost distribution channel.

For the same reason that a carrier should be permitted to encourage consumers or travel agents to book tickets on its web site, therefore, it should be permitted to encourage travel agents to use those GDSs which offer it the best deal, whether or not the GDS is owned or marketed by the carrier. If the GDS offers a carrier lower cost distribution, consumers benefit when the airline sells its tickets through that channel. Prohibiting a carrier from encouraging sales through lower cost channels, as the Department observes in the context of web fares, harms consumers. The Department should therefore reject calls for any expansion of the current rule prohibiting the tying of airline commissions to use of a system owner's GDS, and even the existing rule should be eliminated as part of the

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transition to deregulation.\textsuperscript{33}

H. Proposed Retention of Reciprocity/Exceptions Rule

Almost no commentary has been filed on the proposal to retain the reciprocity rule currently codified as §255.11. With respect to subsection (a), the rule simply articulates exceptions that are primarily applicable to the bias regulations promulgated in Part 255, and there would be no need to retain this rule if the bias regulations are eliminated as Delta has proposed. With respect to subsection (b), the provision is designed to provide self-help mechanisms for domestic systems faced with discriminatory treatment at the hands of a foreign system. While the rule therefore serves a valid purpose so long as the regulations remain in place, it is unnecessary in a deregulated world and not essential to protecting competition during the transition to deregulation. As the Department observes in the NPRM, the Department’s broad authority to take countermeasures against an unjustifiably discriminatory practices pursuant to 49 U.S.C. § 41310 is adequate for addressing such concerns if they should arise. Delta therefore urges that this provision also be eliminated immediately.

I. Proposed Restrictions on Carrier Biasing Software

Delta agrees with the comments filed by several other parties, ranging from ASTA

\textsuperscript{33} While Delta believes that the current restrictions on tying commissions to participation in a particular GDS are unnecessary and create inefficiencies in airline ticket distribution, Delta’s strict policy is to fully comply with the regulations currently in force.
and AAA to American and Northwest Airlines, which oppose the Department's proposal to prohibit both systems and carriers from providing hardware or software that would enable travel agencies to reorder their own screen displays based upon brand preference (proposed § 255.11). For all the reasons described above in the context of general bias rules, Delta believes this proposed rule is also unnecessary to protect competition during the transition to complete deregulation.

Moreover, Delta agrees with the views expressed by both ASTA and AAA, that there is no reason why a travel agent should not be permitted to reorder its screen displays however it chooses. If the travel agent prefers to sell the services of a particular airline, or if it serves corporate customers who want their employees to travel on a particular airline, they certainly should have a right to sell those preferred services. Like any retailer, travel agents should be free to specialize in the sale of particular carrier's services if they choose to do so. Competition is protected because consumers can easily check multiple sources of fare information on the Internet, and they can comparison shop with multiple travel agents just like they can compare prices at different grocery stores or hardware stores to make sure the brand and price selection offered by any given retailer is competitive. And like any consumer, corporate customers are free to prefer a particular brand of airline services, if they decide to do so. Travel agents should be free to assist them in executing those decisions.

There is no reason, therefore, why travel agents should not be able to make their
operations more efficient by using software tools to reorder screen displays in a way that makes it easier and more efficient to find the services of the supplier they or their customers prefer. Indeed, the proposed rule would not prevent this, so long as the software tools were provided by someone other than a system or carrier. The Department acknowledges in the NPRM that it is not prohibiting "travel agencies from creating biased displays on their own initiative." See NPRM, at 69397. Third party software providers would presumably be free, therefore, to create reordering software programs for travel agencies to use. Thus, it is highly unlikely that any public benefit will be obtained by a rule banning "carriers" or "systems" from providing this software to help travel agencies more efficiently sell the airline's services. If agencies desire such products, software providers will deliver them. The only effect of the rule will be to prohibit systems or carriers from participating in this market, and, even then, it would appear that the proposed rule could easily be circumvented by these entities working with third parties on a contractual basis.

The NPRM states that the Department has "not yet heard a persuasive reason why any airline should be able to distribute software that enables the agency to bias the displays," but the comments of American, AAA, ASTA, and others have answered this concern. Carriers have a legitimate interest in helping travel agents sell their tickets as efficiently as possible. Some travel agents may want to bias their own displays to make it more efficient for them to sell the services of a preferred supplier. If carrier-provided software helps accomplish this goal, then a carrier's business decision to provide that software to travel
agents benefits the carrier, the agency, and the customer.

The question the Department ought to be asking is not why this method of competition should be permitted, but why there should be a government regulation that prohibits it. The only answer to that question offered in the NPRM or in any of the comments that have been filed in support of this rule proposal is the vague and speculative concern that a carrier might coerce a travel agent into using the software, i.e., the Department's concern that it is "doubtful that the agency's choice [to use the carrier-provided software] will be entirely voluntary." Id. Yet there is no evidence of any improper coercion in the record. Both ASTA and AAA have voiced strong opposition to the proposed rule, suggesting that neither large nor small agencies are particularly concerned about the risk of such coercion. The public interest comments filed by the Mercatus Center of George Mason University also persuasively calls into question the premise that any carrier could "force" a travel agent to use biasing software it did not want. In other words, carrier efforts to distribute software like this will either be helpful -- in which case, agencies will use it, and it will promote efficiency in the marketing of an airlines' brand -- or it will simply be a waste of time.

The speculative concern that agency coercion could theoretically occur is not a rational basis for adopting a regulation that would prevent efficient and pro-competitive activity. In the event that any carrier's isolated behavior in distributing such software actually did rise to the level of anticompetitive conduct in violation of § 411, it should be
addressed through a DOT enforcement action. Delta urges the Department to reject this proposal as unnecessary during the transition to deregulation.

J. Proposed Elimination of Sunset Date

Almost all of the commentary filed in response to the Department's proposal not to include a Sunset Date in the proposed regulations has been negative. Some, like Worldspan, Expedia, and United, argue for an immediate end to all regulations. Others, including Delta and a number of other carriers, argue for an orderly transition to complete deregulation within a clearly defined period of from three to five years. The promulgation of new rules without any sunset period creates a serious risk that those rules will become increasingly anachronistic with each passing year, especially given the rapid pace of change in the structure of this market that is certain to occur in the next three to five years.

Delta's proposed three year transition period is designed to give the affected parties time to prepare for complete deregulation while helping to ensure the development of competitive alternatives that are essential to long term competition in the distribution of air transportation. Whether that transition period is three or five years in length, however, is less important than that a transition to deregulation begin immediately and that it be completed in a defined time period. It is essential that the Department not enact open-

34 Sabre and Travelocity purport to do so as well, although as noted above, they qualify their commitment to complete and immediate deregulation with a request for continuing regulations of Worldspan and its owners.
ended regulations with no sunset date that will distort the operations of a free market indefinitely.

V. DELTA'S SPECIFIC REPLY COMMENTS TO OTHER ISSUES AND PROPOSALS RAISED BY COMMENTERS

A. Zero Booking Fee Proposal

American, America West, and Air Canada have all expressed support for some form of a "zero booking fee" rule, which would require that travel agencies rather than airlines pay the cost of GDS services. As the Department observes in the NPRM, this proposal would directly address one aspect of the fundamental market failure afflicting the market for GDS services, which is that the entities which control the quantity of the services consumed -- travel agents -- typically do not pay the cost of their usage, and therefore have no economic incentive to consume an efficient amount. Similarly, as the NPRM notes, the GDSs do compete vigorously for travel agency business, and would likely compete on price if the travel agents were paying the costs.

Notwithstanding the merits of this proposal, however, Delta believes the Department should rely upon the free market to the maximum extent possible rather than regulations. In Delta's view, the best long term solution to the problem of GDS market power over carriers is competition for the GDS channel, not price regulations suppressing booking fees. Any regulations that the Department retains should be as narrowly tailored as possible and designed to promote competition by encouraging the development of GDS alternatives.
B. Proposal to Require Complete Divestiture of All Airline-Owned Distribution Ventures

The Department should reject out of hand the proposal by US Airways, echoed by Travelers First and the American Antitrust Institute, that the Department adopt an unprecedented new rule prohibiting any airline ownership whatsoever of any online travel website or GDS. None of these parties has made any showing that such a rule could possibly be justified under the Department's § 411 jurisdiction or otherwise.

Any carrier's attempt to improve the efficiency of its ticket distribution is pro-competitive and pro-consumer. If vertical integration through the creation or acquisition of online travel agencies or GDSs can lower a carrier's ticket distribution costs, that vertical integration is an efficient and pro-competitive means for the carrier to compete in the sale of its products. There is no conceivable basis for a blanket rule preventing such efficiencies. In the unlikely event that such vertical integration presented an unfair competitive practice or a threat to competition, it should be dealt with through a DOT enforcement proceeding under § 411 or through enforcement of the antitrust laws, not through regulation designed to stifle competitive innovation.

CONCLUSION

Delta urges the Department to rely upon competition, not prescriptive regulation, to address the CRS market failures. While the CRS rules were needed to address market failures in 1984, they have become hopelessly antiquated in today's marketplace. The only long term solution to the problem of CRS market power will be the development of
healthy competitive alternatives. The most important regulatory goal the Department can accomplish in these proceedings is an orderly transition to complete deregulation. Delta has proposed a three year transition period with narrowly-tailored rules designed to prevent the abuse of GDS market power and protect competition during that transition period. This approach will give GDSs, airlines, and travel agencies time to prepare for a fully deregulated marketplace, while ensuring the development of competitive alternatives for the distribution of air transportation services.
Respectfully submitted,

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