negative findings) to the Manager, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2689; fax (206) 227–1181. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) and have been assigned OMB Control Number 2120–0056.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on August 7, 1996.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–20671 Filed 8–13–96; 12:33 pm]

BILLING CODE 4910–13–U

Office of the Secretary

14 CFR Part 255

[Docket No. OST–96–1145 [49812]; Notice No. 96–22]

RIN 2105–AC35

Computer Reservations System (CRS) Regulations

AGENCY: Office of the Secretary, Transportation.

ACTION: Notice of proposed rulemaking

SUMMARY: The Department is proposing to adopt a rule that would prohibit each computer reservations system (CRS) from adopting or enforcing contract clauses that bar a non-vendor carrier from choosing a level of participation in that system that would be lower than the carrier's level of participation in any other system. The Department believes that this rule is necessary to promote competition in the CRS and airline industries, since the contract clauses at issue appear to unreasonably limit an airline's ability to choose how to distribute its services through travel agencies. The Department will consider creating an exception from this prohibition so that a CRS could enforce such a clause against an airline that owns or markets a competing CRS. The Department is acting on a rulemaking petition filed by Alaska Airlines.

DATES: Comments must be submitted on or before September 13, 1996. Reply comments must be submitted on or before October 3, 1996. We are shortening the comment period because our decision on Alaska's rulemaking petition will resolve an existing controversy between Sabre and many of its participating airlines, including Alaska, and because our request for comments on Alaska's petition has already given the public an opportunity to comment on Alaska's proposal.

ADDRESSES: Comments must be filed in Room PL–401, Docket OST–96–1145 (49812), U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590. Late filed comments will be considered to the extent possible. To facilitate consideration of comments, each commenter should file six copies of its comments.

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

SUPPLEMENTARY INFORMATION: Travel agents in the United States largely rely upon CRSs to determine what airline services and fares are available in a market, to book seats, and to issue tickets for their customers, because CRSs can perform these functions much more efficiently than any other means currently available for gathering information on airline services, making bookings, and issuing tickets. Each of the CRSs operating in the United States is owned by or affiliated with one or more airlines, each of which has the incentive to use its control of a system to prejudice the competitive position of other airlines. We found it necessary to adopt regulations governing CRS operations, 14 CFR Part 255, in order to protect competition in the airline industry (and to help ensure that consumers obtain accurate and complete information on airline services). 14 CFR Part 255, adopted by 57 FR 43780 (September 22, 1992), after publication of a notice of proposed rulemaking, 56 FR 12586 (March 26, 1991). In adopting those rules, we followed the similar findings made by the Civil Aeronautics Board (''the Board''), the agency that formerly administered the economic regulatory provisions of the Federal Aviation Act (''the Act''), now Subtitle VII of Title 49 of the U.S. Code. 49 FR 11644 (March 27, 1984).

Like the Board, we based our adoption of CRS regulations primarily on our authority to prevent unfair methods of competition and unfair and deceptive practices in the marketing of airline transportation under 49 U.S.C. 41712, formerly section 411 of the Federal Aviation Act, codified then as 49 U.S.C. 1381. 57 FR at 43789–43791.

Alaska Airlines has petitioned us to adopt a rule barring each CRS vendor (the owner of a system) from imposing contract terms on participating carriers that limit a carrier's ability to choose the level at which it will participate in a system. Alaska wished to consider lowering its level of participation in Sabre, the largest CRS, but Sabre claimed that its contract with Alaska barred that airline from reducing its level of participation in Sabre as long as it planned to continue participating in any other system at a higher level. Alaska contends that Sabre's contract clause—and similar clauses imposed by Worldspan and System One—are contrary to our policies on CRS and airline competition and should be proscribed (we will refer to these contract clauses as parity clauses). Alaska's proposed rule would protect non-vendor airlines (airlines holding no significant CRS ownership interest) but would not affect the participation obligations of vendor airlines under section 255.7(a) of our rules.

We issued a notice inviting comments on Alaska's petition. 59 FR 63736 (December 9, 1994). We received comments opposing the petition from American Airlines; two other CRS vendors, Worldspan and System One Information Management; the two major travel agency trade associations, the American Society of Travel Agents (ASTA) and the Association of Retail Travel Agents (ARTA); and three travel agencies. Alaska and Galileo International Partnership each submitted reply comments accompanied by a motion for leave to file the reply comments late. We will grant the motions.

As described below, our staff has met with two system owners—American Airlines and Galileo—and with Alaska and another carrier affected by Sabre's parity clause, Midwest Express Airlines.

In considering the issues raised by Alaska's petition, we are relying on the comments filed in response to the petition, as well as Alaska's own arguments in support of its rule proposal. However, we have also relied on our findings in our 1991–1992 rulemaking and in our last study of the CRS business, Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer

Reservation Systems, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry (February 1990) (Airline Marketing Practices).

We are proposing to adopt the rule requested by Alaska, since the vendor contract clauses at issue appear to us to be fundamentally inconsistent with our goals of eliminating unreasonably restrictive practices in the CRS business that limit competition. By denying each non-vendor airline an opportunity to change its level of participation in a system in response to the quality and price of the services offered by each vendor and the airline's own marketing and operating needs, the contract clauses unreasonably restrict competition in the CRS and airline businesses. However, an airline owning or marketing a system may choose to limit its participation in a competing system in order to make its own system more attractive to travel agencies.

We are asking for comments on whether the proposed rule should allow systems to use the contract clauses to deter such conduct by airlines that own or market a CRS.

Background

Four CRSs operate in the United States. The largest system, Sabre, is owned by the parent corporation of American Airlines. Apollo, the second largest system, is operated by Galileo International Partnership, which is owned by United Air Lines, USAir, Air Canada, and several European airlines. Worldspan is owned by Delta Air Lines, Northwest Airlines, Trans World Airlines, and Abacus, a group of Asian airlines. System One was formerly controlled by an affiliate of Continental Air Lines, but recently Amadeus, a major European system, acquired control of the system.

With the exception of Southwest Airlines and several low-fare carriers, virtually all U.S. airlines have found it essential to distribute their services through each of the four CRSs operating in the United States due to two factors: the importance of travel agencies in the distribution of airline services and each travel agency's predominant use of a single system.

As we explained in our last CRS rulemaking, at least seventy percent of all airline bookings are made by travel agencies, and travel agencies rely almost entirely on CRSs to determine what airline services are available and to make bookings for their customers. Travel agencies rely so much on CRSs because of their efficiency. If travel agency offices commonly used several CRSs, travel agents would be able to obtain information and make bookings on a carrier even if the carrier participated in only some of the four systems. Each travel agency office, however, generally uses only one system for the great majority of its bookings.

An airline's ability to sell its services will be significantly impaired if its services are not readily available through a CRS used by a significant number of travel agents. If the airline does not participate in one system, the travel agents using that system can obtain information and make bookings on that carrier only by calling the carrier, which is substantially less efficient than using a CRS. The carrier's sales accordingly will be lower than they would otherwise be. Because of the importance of marginal revenues in the airline industry, a loss of a few bookings on each flight is likely to substantially reduce the airline's profitability. Finally, the airline could not practicably enter the CRS business on its own, for entry would be extremely costly and the airline would have difficulty obtaining a significant market share. 57 FR at 43782–43784.

Each carrier's need to participate in each system is reflected in the vendors' conduct and the terms imposed by each for participation in its system. Since a vendor has little need to compete with other systems for airline participants, the terms for airline participation are not significantly affected by market forces. Among other things, market forces do not discipline the booking fees charged by each system. 57 FR 43784–43785.

Since each system is entirely or largely owned by one or more airlines, each system's owners also have an incentive to use the system to prejudice the competitive position of competing airlines. Otherwise, CRS business practices would present little competitive concern. For example, the treatment of rental car companies and hotel companies by the CRSs had not led to any claims that the vendors' conduct was contrary to antitrust law principles. 57 FR 43784.

We recognize, however, that some recently-established low-fare airlines compete successfully while participating in none of the systems and that Southwest Airlines has succeeded without participating in any system except Sabre. Nonetheless we believe that the systems still have market power with regard to the major portion of the airline industry. Despite the growing number of low-fare airlines, the more established airlines provide the great majority of domestic airline service and virtually all of the international service operated by U.S. airlines. And even Southwest has found it necessary to participate in Sabre, albeit at a low level (formerly ''call direct'' and now Basic Booking Request).

Moreover, for a number of years, Southwest's refusal to participate in any system but Sabre did not entirely prevent travel agents using those systems from obtaining some information on Southwest's services and using the systems to write tickets on Southwest. In 1994, however, the other three systems—Apollo, Worldspan, and System One—changed their policies on the treatment of non-participating carriers in ways which made the sale of tickets on Southwest much harder for travel agents using one of those systems. While section 255.11 of our rules states that a system must treat all non-paying airlines the same, an airline that refuses to participate in a system has no right under our rules to obtain CRS services. Apollo, Worldspan, and System One each changed its policies on non-paying carriers so that travel agents using the system no longer had ready access to the schedules offered by any non-paying carrier and, as to two of the systems, could no longer use the system to write tickets on such carriers. As a result, agents using these systems could no longer efficiently serve customers who wanted to fly on Southwest. ASTA Answer at 2–3. This experience is relevant to several issues raised by Alaska's petition, as explained below.

Regulatory Background

Because each vendor has the power and the incentive to deny competing carriers access to its system except on terms which will prejudice the competitive position of those carriers, we and the Board determined that regulations restricting the discretion of CRS owners were necessary to protect airline competition and to ensure that consumers obtain accurate, complete, and unbiased information on airline services. 14 CFR Part 255, originally adopted by the Board, Regulation ER–1385, 49 FR 32540 (August 15, 1984), and readopted by us, 57 FR 43780 (September 22, 1992), after the publication of a notice of proposed rulemaking, 56 FR 12586 (March 26, 1991). Those rules regulate several aspects of CRS operations, including CRS contracts between vendors and participating carriers and between vendors and subscribers (subscribers are the travel agencies using a system by contract with the system), although they do not address the issue raised by Alaska's petition. When we readopted and modified those rules in 1992, one of our goals was to give carriers (and

travel agencies) a greater ability to choose alternative means of electronically transmitting information and making airline bookings. We reasoned that this would promote competition in the airline and CRS businesses. 57 FR at 43781, 43797.

To advance this goal, we adopted a rule (section 255.9) giving travel agency subscribers the right to use CRS terminals not owned by a vendor to access other systems and databases with airline service information. We expected that this rule would make it practicable for carriers to create direct links between the carriers' internal reservations systems and CRS terminals at travel agencies, which would enable carriers to bypass CRSs for some transactions. 57 FR at 43796–43798. We also prohibited certain types of contract clauses imposed by vendors on subscribers—rollover clauses, minimum use clauses, and parity clauses—that unreasonably restricted the agency's ability to use more than one system or to replace one system with another as its primary system. 57 FR at 43823–43824.

We are proposing to grant Alaska's rulemaking petition, because we believe that the airline parity clauses challenged by Alaska resemble the types of restrictive practices currently prohibited by our rules: the airline parity clauses seemingly lack a legitimate business justification, and they unduly restrict the business options of the firms on which they are imposed. While section 255.7 of our rules requires each airline with a significant ownership share in a CRS to participate in other systems at the level in which it participates in its own system, the rationale for that rule does not apply to non-vendor airlines.

The Vendor Contract Clauses

Sabre, System One and Worldspan, but not Apollo, each requires every carrier participating in the system to agree that it will participate at as least as high a level of service as it participates in any other system. These parity clauses do not excuse the airline from this requirement if the service offered by the system imposing the clause is inferior or more expensive than the similar level of service being purchased by the participating airline from another system (the Appendix to Alaska's Petition sets forth each system's contract terms on this issue).

Each CRS offers carriers several levels of participation in its system. The vendors obtain payments from participating carriers for CRS services by charging them a fee for each booking made through the system. The booking fee increases as the carrier's level of participation increases. For example, when Alaska filed its petition a carrier could participate in Sabre at the ''call direct'' level, where the system displayed the carrier's schedules but neither showed whether seats are available nor enabled the agent to make a booking on the carrier. When a carrier participates at the ''full availability'' level, travel agents can use the system to learn whether seats are available on the carrier and make a booking. When Alaska filed its complaint, Sabre's charge for the full availability level of service was $2.43 per segment booked and $1.25 per segment for the call direct level of service. Alaska Petition at 7.

After Alaska filed its petition, Sabre changed its participation levels by eliminating the call direct level and creating a new level of service, Basic Booking Request, which allows travel agents to make a reservation with the participating airline through Sabre; in contrast to the call direct level, the agent does not need to call the airline by telephone to make a booking. Sabre does not display availability information for carriers participating at the Basic Booking Request level, and any booking request made by a travel agent will take longer to process than it would for carriers participating at the full availability level. The fee charged the airline is $1.60 per segment booked. Alaska Reply Comments at 15.

In addition to the different levels of participation, systems separately offer different enhancements, such as the ability to display a seat map of the aircraft used for the flight being booked by a travel agent or to issue a boarding pass.

Almost all major carriers have participated in each system at the full availability level or at a higher level involving some form of direct access. However, in the past some U.S. carriers have limited their participation in a system in order to save money by avoiding the higher booking fees charged for higher levels of participation. Airline Marketing Practices at 68. Galileo represents that more than one hundred airlines participate in Apollo at a higher level than they do in Sabre. Galileo Comments at 3. Thus, while participation at some level in each system appears to be essential for almost all U.S. airlines, airlines may be able to compete without using all of the service features offered by a system.

If a system did not impose a parity clause, an airline that had no significant ownership affiliation with a CRS could participate at a lower level in that system and at a higher level in other systems. If an airline and its affiliates own five percent or more of the equity of one system, that airline, deemed a ''system owner'' under 14 CFR 255.3, must participate in each other system and its enhancements if the airline participates in such enhancements in its own system, if the other systems offer commercially reasonable terms for such participation. 14 CFR 255.7 (for the rationale for this rule see 57 FR 43800–43801). Nothing in our rules requires other airlines to participate in any system, although in some circumstances an airline's refusal to participate could be an unfair method of competition or a form of discrimination prohibited by the United States' bilateral air services agreements.

Alaska's Rulemaking Petition

Alaska's rulemaking petition stems from American's efforts to keep Alaska from lowering its level of participation in Sabre, the system affiliated with American, while maintaining a higher level of participation in other systems. American contends that the parity clause included in Alaska's participation contract with Sabre bars Alaska from reducing its level of participation in Sabre unless Alaska similarly reduces its level of participation in all other systems.

Alaska was considering reducing its participation in Sabre from the full availability level to the call direct level in order to reduce its costs. Alaska has generally become increasingly dissatisfied with CRS services, in part due to increased booking fees and in part due to the ways in which the airlines owning the systems allegedly discriminate against other airlines. Alaska Petition at 6–7. One of Alaska's major competitors, Southwest, participates in Sabre at a low level and thus incurs lower CRS costs than Alaska for Sabre bookings. As explained above, Sabre charges higher booking fees when a carrier participates in the system at a higher level. Alaska Petition at 7, 17.

Although Sabre has eliminated the call direct level and replaced it with the Basic Booking Request level, Alaska was still considering reducing its participation in Sabre. If Alaska participated in Sabre at the Basic Booking Request level, travel agents could not obtain availability information on Alaska through the CRS, but they could make bookings electronically. Alaska Reply Comments at 5, 7.

American told Alaska that reducing its participation level would violate the parity clause in Alaska's Sabre contract if Alaska continued to participate at a higher level in any other system, as Alaska had planned. American filed suit against Alaska to enforce the parity

clause. *American Airlines* v. *Alaska Airlines,* N.D. Texas Civ. Action No. 4–94CV–595–Y.

In addition to defending itself in that suit, Alaska has asked us to adopt a rule invalidating the parity clauses. Alaska's proposed rule reads as follows:

> No system may claim discrimination or require participating carriers which are not system owners to maintain any particular level of participation in its system on the basis of participation levels selected by participating carriers in any other system.

To support its petition, Alaska first notes that we adopted a rule, section 255.9, in our last CRS rulemaking which gives travel agencies the right to use their CRS terminals, if not owned by the vendor, to access other systems and databases. We thereby intended to give non-vendor airlines some ability to avoid CRS fees by creating direct links between travel agencies and their internal reservations systems. Alaska argues that the vendors' parity clauses will discourage carriers from creating direct links, by keeping them from reducing their level of participation in one system unless they do so in all systems, which would be too risky for most carriers. According to Alaska, if a carrier cannot reduce its booking fee costs by reducing its participation level, it will have little incentive to incur the costs of creating direct links between the agencies using that system and the carrier's own internal reservations system. Alaska Petition at 10–11.

Secondly, Alaska contends that the parity clauses limit a non-vendor carrier's ability to respond to unacceptable CRS service or pricing. If a carrier wished to reduce its level of participation in one system because the system's service was poor or too expensive, the carrier could not do so unless it simultaneously reduced its level of participation in other systems, even if the other systems' service and pricing were superior. Alaska Petition at 13. Alaska, however, has not alleged that Sabre's service and pricing are in fact inferior to the service and pricing offered by other systems.

In response to the argument of the parties opposing the petition that Alaska could avoid the effects of the Sabre clause by suspending entirely its participation in Sabre, Alaska claims it could never afford to do that. Alaska relies on travel agencies for 85 percent of its bookings, so it could not afford to take any action that would alienate the travel agency community. Alaska Reply Comments at 19–20; Alaska Reply Comments at 3.

Comments on Alaska's Petition

In response to our request for comments on Alaska's petition, we received comments opposing Alaska's petition from the three vendors that use parity clauses, the two major travel agency trade associations, and three travel agencies. Galileo filed a late comment supporting Alaska's petition. Our staff has met with American, Galileo, Alaska, and Midwest Express on the petition and American's enforcement of the parity clause earlier this year, as discussed below. Midwest Express supported Alaska's opposition to Sabre's parity clause.

American argues that its contract clause is necessary to prevent a carrier like Alaska from discriminating in favor of one system by reducing its level of participation in other systems, that Alaska unfairly intends to get the benefits of Sabre participation without paying for them, that travel agencies would be hurt if they could not make bookings on Alaska through their CRS, and that the contract clause prevents foreign airlines from discriminating against a U.S. system in favor of a system with which they have ownership or marketing ties. American also argues that the clause does not unfairly restrict Alaska's distribution options, since Alaska is always free to quit participating in Sabre. Furthermore, some of Alaska's major competitors participate in Sabre at the full availability level. And, according to American, the Sabre contract clause is similar to other contract clauses which the courts have found permissible under the antitrust laws.

Worldspan argues that we should not attempt to regulate the kind of contract issue raised by Alaska and that in any event no rule should be proposed until after the completion of our current investigation into the CRS business and airline marketing practices. Worldspan also asserts that the rule proposed by Alaska would harm the smaller systems, because carriers would be more likely to withdraw from those systems than from the largest two systems. In opposing Alaska's petition, System One Information Management focuses on the harm Alaska's business proposal would cause travel agencies and the competitive position of the smaller CRSs. System One Information Management further asserts that the parity clauses are consistent with antitrust principles and do not unduly restrict Alaska's response to unsatisfactory CRS service and fees.

While ASTA has supported rules giving travel agencies and airlines more flexibility in receiving and sending airline information, ASTA opposes Alaska's petition because travel agencies still must depend on the systems for airline information and booking capabilities. If an airline does not fully participate in the system used by an agency, the agency's alternatives for obtaining information and making bookings on that airline are quite burdensome, as shown by the recent experience of many agencies when the policy changes by Apollo, Worldspan, and System One made it more difficult for agents to book customers on Southwest. ASTA accordingly cannot support a rule which would make it easier for other airlines to reduce their level of participation in the CRSs.

Furthermore, ASTA points out that travel agencies would have a limited ability to switch to another system if a major airline in their region stopped fully participating in the agencies' CRS. Most travel agency contracts for CRS services have five-year terms, so an agency probably would be forced to continue using a system even if the airline's reduced level of participation substantially reduced the value of the system used by an agency. As a result, ASTA contends that we should allow travel agencies to cancel their CRS contracts on short notice if we grant Alaska's rulemaking petition.

ARTA similarly argues that Alaska's proposal would injure travel agencies. According to ARTA, over one-third of the agencies in the Pacific Northwest and Alaska—the regions where Alaska principally operates—use Sabre, and those agencies will be at a considerable competitive disadvantage if Alaska reduces its participation in Sabre.

Three travel agencies—Carlson Wagonlit Travel of Minneapolis, Austin Travel of Melville, New York, and Tyee Travel of Wrangell, Alaska—wrote to oppose Alaska's petition. Tyee Travel, a Sabre subscriber, states that Alaska's reduction in the level of participation in Sabre would seriously damage the agency's ability to operate and survive. Carlson Wagonlit Travel and Austin Travel contend that a rule allowing airlines to reduce their participation in one system would injure travel agencies.

Apollo Travel Services (ATS), which distributes Apollo in the United States, Mexico, and the Caribbean and manages the system's distribution in Japan, filed a comment opposing ASTA's requested rule giving travel agencies the right to terminate a CRS contract before it expires. ATS claims that its ability to offer travel agencies contracts with terms as long as five years gives it the ability to recover its costs over a longer period and thus enables it to offer lower prices to travel agencies. ATS would

have to increase its charges to travel agencies if subscribers had the freedom to cancel contracts before the end of their term.

No one else submitted comments to us on Alaska's petition until Sabre recently enforced the parity clause against many of the airlines participating in its system, as described next.

Sabre's Recent Enforcement of Its Parity Clause

While we were considering Alaska's petition, Sabre notified its participating airlines that Sabre was revising its contractual terms and that each participating airline had to sign the contract amendment. Sabre's letter to many of these airlines additionally stated that Sabre would eliminate the airline's services from Sabre's display on February 1, 1996, unless the airline upgraded its participation level in Sabre, since the airline allegedly was participating at a higher level in another system than it was participating in Sabre.

Two of the airlines receiving this letter were Alaska and Midwest Express, each of which uses Sabre as its internal reservations system. Since they are ''hosted'' in Sabre, they thought that Sabre provided its subscribers at least as much functionality for information requests and booking transactions on themselves as was provided by any other system. In their view, accordingly, they were already in compliance with Sabre's parity clause. They asked us to stop Sabre from compelling them to purchase additional services from Sabre, a demand that they estimated would raise their booking fee expenses by over ten percent. After meeting with these two airlines, Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, wrote Sabre and obtained its agreement that Sabre temporarily would not compel either airline (or any other airline hosted in Sabre) to upgrade its participation level. Although Alaska and Midwest focused at the meeting on Sabre's demands that each airline upgrade its participation in Sabre, Alaska also noted that it was no longer considering reducing its level of participation in Sabre. Alaska still asked us to prohibit parity clauses, since it did not wish to be compelled by contract to buy CRS services that it preferred not to use.

Soon after Alaska and Midwest Express had presented their complaint, Galileo complained in writing to Mr. Murphy that Sabre's threats to participating airlines were causing some airlines to comply with Sabre's demands by reducing their level of participation in Galileo rather than increasing their level of participation in Sabre. Galileo thereafter filed a comment supporting Alaska's petition. Galileo complains that Sabre's parity clause restricts CRS competition, since the clause prevents airlines from choosing their participation level and other features in each system on the basis of price and quality. Since an airline's Sabre fee expenses will increase if the airline increases its participation level in Sabre, an airline will be reluctant to maintain a higher level of participation in Apollo (or another system) if the airline must then increase its participation level in Sabre and thereby incur higher CRS costs. As a result, Sabre's threats have forced some airlines to reduce the amount of services they are purchasing from Galileo, which reduces Galileo's revenues, even though those airlines would prefer to buy a higher level of CRS services from Galileo.

In response to Mr. Murphy's letter, American and Sabre met with him and Department staff members to discuss American's rationale for the parity clause. Sabre stated that it had begun requiring parity and non-discrimination clauses in its participation agreements with several European airlines, since the refusal of some European carriers to participate in Sabre at the full availability level had injured Sabre's marketing efforts with European travel agencies. Sabre also feared that some foreign airlines might otherwise deny commissions to travel agencies in the airlines' homelands if they used Sabre to make bookings on the foreign flag carrier. Within the past year Sabre has successfully invoked the parity clause against several foreign airlines that participated at a high level in a competing system marketed by those carriers while participating in Sabre at a relatively low level.

Although Sabre developed the parity and non-discrimination clauses to protect its ability to market its services in foreign countries, Sabre believes that a U.S. airline like Alaska with a large market share in some regions could distort CRS competition by reducing its level of participation in some systems but not others. If a carrier did that, travel agencies in regions where that airline was a major airline would be compelled to choose a system where the airline participated at a higher level. American claimed, for example, that Sabre would have to abandon the Seattle market if Alaska did not participate fully in the system.

In a later meeting with our staff on the issue, Galileo stated that four carriers had lowered their level of participation in its Apollo system due to Sabre's threats to enforce the parity clause and that Galileo believed more carriers would do so since Sabre had given a number of carriers more time to decide how to respond to Sabre's demands to either upgrade their participation in Sabre or downgrade their participation in Apollo. Galileo believes that it is a leader in developing higher-level functionality and that many airlines therefore will choose to participate in Apollo at a higher level than in other systems if they are free to do so.

The Need for a Rule Barring Airline Parity Clauses

After considering the comments, we have determined to propose the rule requested by Alaska. As shown in our last rulemaking (and in the Board's rulemaking), the CRSs have a substantial ability to impose onerous contract terms on participating airlines, for the systems have little need to compete for airline participants. Almost all major airlines are compelled to participate in each system, even if the CRS imposes unreasonable terms for participation. Thus a participating carrier has little, if any, bargaining power on contract issues like the airline parity clause demanded by Sabre.

We believe that the use of parity clauses should be resolved through a rulemaking proceeding, rather than through enforcement. Since three of the four CRSs in the United States use parity clauses, the question of the legality of their use raises an industry-wide issue more appropriately considered in a rulemaking proceeding. In a rulemaking all potentially interested persons can submit factual information and legal and policy arguments.

While we have been reluctant to regulate CRS contracts in detail, the parity clauses substantially—and unfairly—restrict a non-vendor airline's ability to choose the level at which it is willing to participate in a system. Under those clauses, each vendor in effect is stating that it refuses to do business with a customer unless that customer buys the same level of services from it that the customer buys from any competing system. Furthermore, the clauses used by some systems bar an airline like Alaska from reducing its level of participation even if the system imposing that requirement offers lower quality service or charges higher prices. If Worldspan's charges for participation at the full availability level, for example, were much higher than Apollo's charges for the same level of service, the Worldspan contract would still compel Alaska to maintain its Worldspan

participation at the full availability level, as long as Alaska participated at that level in Apollo.

The contract clauses, moreover, unreasonably restrict Alaska's ability to choose its participation level in different systems. Sabre's contract with Alaska, for example, gives Alaska only three choices: it can maintain its participation at the full availability level, since it participates in other systems at that level; it can maintain its participation at the full availability level in one or more of the other systems and withdraw entirely from Sabre; or it can reduce its level of participation in every system below the full availability level. Alaska thus cannot respond to its changing distribution needs by lowering its participation level in Sabre (and hence its costs) while maintaining its participation at the full availability level in one or more other systems.

Although the commenters claim that Alaska could easily resolve its alleged dissatisfaction with Sabre's full availability level service by withdrawing entirely from Sabre, see, *e.g.*, American Response at 16, Alaska explains that this is not a realistic option. Alaska depends on travel agency bookings for the great majority of its total revenues, and, if it withdrew entirely from Sabre, the many travel agencies using Sabre as their primary system would find it so difficult to obtain information on Alaska's services that its bookings from those agencies would fall sharply. Alaska Reply Comments at 7–8. We found in our last rulemaking that few carriers could afford to stop participating entirely in a system, since a carrier taking that action would lose a substantial portion of its bookings from that system's subscribers. 57 Fed. Reg. at 43783. None of the parties opposing Alaska's petition has shown that complete withdrawal from Sabre would be an acceptable business option for an airline like Alaska.

While complete withdrawal from a system is not a practicable option for a non-vendor airline, a reduction in its level of participation might be a reasonable business strategy. While no major airline except Southwest has chosen not to participate at all in one or more systems, some major airlines have limited their participation in CRSs. Airline Marketing Practices at 68. The parity clauses, as shown, unreasonably restrict an airline's ability to choose this option.

American's claim that complete withdrawal from a system is an acceptable alternative for a dissatisfied participating airline is inconsistent with American's other claim that parity clauses are needed to protect travel agencies from the loss of functionality in booking airlines important to an agency's business. Obviously travel agencies will become much more inefficient if such an airline withdraws completely from a system than if it lowers its level of participation in the system. Non-vendor airlines should be free to make their own decisions on their level of participation in each system. In making such decisions, those airlines will consider the impact of their choices about CRS participation on the travel agencies' ability to market their services.

Furthermore, the parity clauses discourage airlines from creating direct electronic links between their own reservations systems and travel agencies. As Alaska explains, if an airline otherwise willing to bear the costs of establishing such links still had to pay the costs of CRS participation at a high level, the airline would have less economic incentive to create direct links. Alaska Petition at 10–11. By discouraging airlines from creating direct links between travel agencies and their internal reservations systems, the parity clauses frustrate one of the major goals of our last rulemaking, making it possible for airlines and travel agencies to develop alternative means of transmitting airline information and making bookings. 57 FR at 43781, 43797. The parity clauses, moreover, reduce airline competition, since the carriers owning the systems are restricting other airlines from reducing their distribution costs by creating alternatives to full CRS participation. If other airlines could reduce their participation in one or more systems, they would reduce their booking fee costs. The parity clauses prevent airlines like Alaska from lowering their costs and improving their distribution methods by restricting their ability to choose the level of CRS services best suited to their needs.

In addition to injuring non-vendor participating airlines like Alaska, the parity clauses also injure CRS competition. As shown by Galileo's comments, a system offering more attractive prices and services may obtain less business than it otherwise would, because some airlines will be unwilling to purchase a higher level of that system's services when doing so will force them to increase their purchases from other systems, even if the latter offer lower quality services or charge higher fees.

Indeed, the parity clauses imposed on participating airlines are quite similar in effect to the parity clauses formerly imposed on travel agency subscribers. Those clauses required an agency to use a number of terminals for one system comparable to the number of terminals used to access other systems. In our rulemaking we found that the clauses discouraged agencies from using more than one system. We therefore prohibited such clauses. 56 FR at 12624–12625; 57 FR at 43826.

Finally, we doubt that firms in any competitive industry could unilaterally impose any similar requirement on their customers. While purchasers often agree with suppliers in competitive industries to requirements contracts or contracts requiring purchases in large quantities or over long periods of time, in those situations the purchaser typically obtains offsetting benefits, such as a guaranteed supply or a lower price. *Cf. Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 237 (1st Cir. 1983) (Breyer, J.). Here the commenters claim neither that participating airlines obtain any benefit from the clauses nor that such airlines have obtained other benefits in exchange for accepting the clauses.

Legal Authority for Adopting the Proposed Rule

Under 49 U.S.C. 41712, formerly section 411 of the Federal Aviation Act (and codified then as 49 U.S.C. 1381), we may investigate and determine whether any air carrier or ticket agent has been or is engaged in unfair methods of competition in the sale of air transportation. That section, modelled on section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, does not confine unfair methods of competition to those practices constituting a violation of the antitrust laws. For example, we have the authority to ban practices well before they become serious enough to violate the antitrust laws, as the Seventh Circuit held when it affirmed the Board's adoption of CRS rules, *United Air Lines*, 766 F.2d 1107, 1114 (7th Cir. 1985):

> Although none of the airline owners of computerized reservation systems has a conventional monopoly position in the market for that service, and they are not accused of colluding, the Board found that some of them, anyway, had substantial market power. This finding * * * would bring their competitive practices within the broad reach of section 411. We know from many decisions under both that section and its progenitor, section 5 of the Federal Trade Commission Act, that the Board can forbid anticompetitive practices before they become serious enough to violate the Sherman Act.

We may therefore define a practice as an unfair method of competition and prohibit it without finding that it is in fact a violation of the antitrust laws. Nonetheless, we doubt that we could

prohibit a business practice on competitive grounds unless the practice is comparable to practices that would violate the spirit or the letter of the antitrust laws.

See, *e.g., E.I. Du Pont de Nemours & Co.* v. *FTC,* 729 F.2d 128 (2d Cir. 1984). Here we find that we may proscribe the parity clauses, because these clauses appear comparable to impermissible tying arrangements, violations of the essential facility doctrine, and attempts to monopolize the electronic distribution of information on airline services to travel agencies.

CRS Market Power. As the predicate for the findings that the contract clauses are similar to conduct prohibited by the antitrust laws, we find that each of the systems has market power, which the Supreme Court has defined as the power ''to force a purchaser to do something that he would not do in a competitive market,'' *Jefferson Parish Hospital* v. *Hyde,* 466 U.S. 2, 14 (1984); *Eastman Kodak Co.* v. *Image Technical Services,* 504 U.S. 451, 464 (1992).

Each vendor has market power over other carriers, because most carriers have no adequate alternative to the travel agency system for efficiently distributing their services, because travel agents have no alternative to CRSs for quickly and efficiently obtaining information and bookings on airline services, because the great majority of agencies use only one system (or predominantly only one system) at each location, and because entry into the CRS business under current conditions would be extremely difficult. As the Department of Justice explained in our earlier rulemaking, each system as a practical matter holds a monopoly over the carriers' access to its subscribers. See 57 FR at 43783–43784, quoting the Justice Department's comments on the advanced notice of proposed rulemaking at 10–11. Since the economics of the airline business make it difficult for a carrier to operate successfully if its services cannot be readily marketed by a significant group of distributors, each major airline must participate in each system. 57 FR 43783–43784.

And, as discussed above, we believe the systems' ability to impose the type of contract clause challenged by Alaska is itself evidence of their market power. We recognize, however, that each vendor has made major improvements to its system in recent years and that those improvements have benefited participating airlines by giving travel agents a greater ability to obtain current information and to complete bookings and other transactions without errors or delays. Nonetheless, the systems' development of improvements that benefit participating airlines along with travel agents does not disprove our finding that each system has market power. *Cf.* 57 FR at 43781.

As noted earlier, some recently-established low-fare carriers compete while participating in none of the systems. The systems nonetheless still have market power with regard to more established airlines. And even Southwest apparently has found it necessary to participate in one system, Sabre, albeit at a low level.

Tying Arrangements. Parity clauses are analogous to the kind of tying contracts prohibited by the antitrust laws, since they result from a system's use of its market power to force each participating airline to purchase services that it may not want as a condition to obtaining any services. The Supreme Court held in *Eastman Kodak Co., supra,* 504 U.S. at 461–462 (1992), that a tying arrangement—a seller's agreement to sell one product only on condition that the buyer purchase a second product from the seller (or promise not to buy the product from another seller)—is a *per se* violation of the Sherman Act if the seller has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. Tying arrangements are objectionable because they force buyers to accept conditions that they would not accept in a competitive market. See, *e.g., Jefferson Parish Hospital,* 466 U.S. at 12–15.

As a result of the parity clause, a system like Sabre will provide no CRS services to a participating airline unless the airline purchases at least as high a level of services from Sabre as it purchases from other systems. Sabre, for example, would not allow Alaska to buy any CRS services unless Alaska buys services at the full availability level, as long as Alaska participates at the full availability level of service in any other system. Sabre has taken that position even though Sabre marketed the call direct level—and now Basic Booking Request—as a separate product and sold it to other airlines, most notably Southwest.

Monopolization. A vendor like Sabre essentially holds a monopoly over the electronic provision of information and booking capabilities on airline services to its subscribers, as explained above. 57 FR 43783; ASTA Answer at 2–3. By requiring an airline to participate in Sabre at a higher level than it prefers, Sabre simultaneously discourages the airline from creating alternative electronic channels for information and bookings for Sabre subscribers and reduces its subscribers' incentives to use alternative channels. Sabre achieves this goal by requiring the airline to purchase a specified level of services from Sabre without regard to price or quality. As a result, the parity clause helps to maintain Sabre's existing monopoly over electronic access to its subscribers. The clause accordingly is comparable to conduct designed to maintain or create a monopoly, which would be unlawful under section 2 of the Sherman Act.

The Essential Facility Doctrine. Under the essential facility doctrine, a firm that controls a facility essential for competition must give its competitors access to the facility on reasonable terms. The firm's denial of access will violate section 2 of the Sherman Act. A facility is essential if it cannot be feasibly duplicated by a competitor and if the competitor's inability to use it will severely handicap its ability to compete. See, *e.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985); *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.,* 902 F.2d 174 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2041.

We concluded in our rulemaking that each of the systems is comparable to an essential facility. Each system must therefore offer airlines access to its services on reasonable terms. 57 FR at 43790. While the Ninth Circuit ruled in a private antitrust suit, *Alaska Airlines* v. *United Air Lines,* 948 F.2d 536 (9th Cir. 1991), that CRSs were not essential facilities, its decision appeared to be inconsistent with decisions by other circuits and in any event did not limit our authority to determine that CRS practices constitute unfair methods of competition which we may prohibit, as we explained in our last rulemaking. 57 FR 43791.

We believe that a system is denying access on reasonable terms if it makes a non-owner airline's participation contingent on the airline's agreement to purchase at least as high a level of services from that system as it does from any other system, without regard for the price or quality of the system's services.

The Commenters' Defenses for the Airline Parity Clauses

The commenters opposing Alaska's rulemaking petition argue that we should not prohibit parity clauses, since they allegedly promote CRS competition and benefit travel agencies. American, supported by Worldspan and System One Information Management, also contends that the clauses are consistent with the antitrust laws. We have carefully considered these parties' arguments, particularly those relating to the proposed rule's impact on travel

agencies, but we believe that these arguments do not outweigh the reasons for granting Alaska's petition. We will discuss first American's antitrust arguments and then the arguments that the rule would be harmful.

Before addressing these arguments, we will address the claims made by American and other commenters that the clauses prevent ''discrimination'' and ''free-riding'' by participating airlines. In making these claims, these commenters are effectively arguing that any firm choosing one supplier over another is ''discriminating'' against other suppliers and that a firm engages in ''free-riding'' by choosing to buy one level of service offered by a supplier rather than a more expensive level of service.

The discrimination claim is based on the theory that an airline like Alaska would choose to distort CRS competition by participating in a favored system at a higher level than it participates in one or more other systems. See, *e.g.*, American Response at 27. This could be of concern, of course, if the airline were trying to promote the market position of a system which it owned or marketed. That type of discrimination caused us to adopt the mandatory participation rule for carriers that directly or through an affiliate hold a significant ownership position in a CRS.

Alaska, however, neither owns any share of a CRS nor promotes the marketing of any CRS. Thus Alaska's so-called ''discrimination'' is only its wish to exercise the normal freedom of a purchaser in a competitive market to choose its suppliers and the quantity of goods or services that it will buy from each. This does not constitute discrimination.

In an effort to cast doubt on the legitimacy of Alaska's approach on reducing its distribution costs, American and System One Information Management accused Alaska of ''free-riding''. According to them, when Alaska planned to participate in Sabre only at the call direct level and to provide direct electronic links between Sabre subscribers and its internal reservations system, Alaska sought to use Sabre to provide schedule and fare information to travel agencies while avoiding any booking fee obligation, since the bookings would be made through the direct link. American Response at 13–14, 18; System One Reply at 3–4. This argument has an obvious flaw—Alaska must pay fees set by American for its participation in Sabre at the call direct level. According to Alaska, Sabre would then receive a booking fee whenever a travel agent used Sabre to issue a ticket on Alaska, even if the booking was initially made through a direct link. Alaska Reply at 16. Alaska therefore will not be getting a free ride. Indeed Alaska would only be doing what other airlines using the lower level of participation are already doing.

American's ''free riding'' argument is thus refuted by its own conduct. If American really thought carriers using the call direct level of participation were free riders—carriers obtaining valuable CRS services without paying their share of the system's costs—then American presumably would never have offered that level of service or would have charged carriers higher fees for using it.

Furthermore, while Sabre will not obtain the higher fee payable for participation at the full availability level if Alaska lowers its level of participation, Sabre also will not incur the cost of transmitting booking messages. The systems must believe there is a significant cost created by such message transmissions, since most U.S. systems now charge participating carriers fees based on separate transactions rather than a single fee per booking. Sabre in fact recently imposed a cancellation charge for all levels of participation except Basic Booking Request. As a result, the ''free riding'' claim is unpersuasive.

American's Antitrust Defense. In arguing that the parity clauses are consistent with the antitrust laws, American claims that the clauses are not unusual, that they prevent discrimination, and that they are pro-competitive. American Response at 24. American contends that the clauses are legitimate even if analyzed under our past findings on the CRS business and each vendor's market power, findings with which American disagrees. American Response at 24.

In defending the parity clauses, American primarily relies upon a decision holding that a monopolist health insurance company did not violate the antitrust laws when it required physicians to give its customers prices as low as those given customers of a rival insurance firm. *Ocean State Physicians Health Plan* v. *Blue Cross,* 883 F.2d 1101 (1st Cir. 1989), *cert. denied,* 494 U.S. 1027. On the theory that the Blue Cross conduct at issue represented a firm's efforts to prevent discrimination against it, American alleges that its parity clause is equally valid, since the clause is designed only to prevent discrimination against Sabre. American Response at 25–26. See also *Blue Cross & Blue Shield* v. *Marshfield Clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995), *cert. denied,* 64 U.S.L.W. 3624 (March 19, 1996).

American's reliance on *Ocean State Physicians* appears to be misplaced. First, as Alaska has pointed out, the court's decision is inconsistent with the Justice Department's position in two recent cases that ''most favored nation'' clauses of the type at issue in *Ocean State Physicians* are anticompetitive because they reduce price competition. Alaska Reply Comments at 27, citing the proposed consent decrees in *United States* v. *Vision Service Plan* and *United States* v. *Delta Dental Plan of Arizona,* published respectively at 60 F.R. 5210 (January 26, 1995) and 60 F.R. 47349 (September 15, 1994).

Furthermore, the parity clauses are not like the ''most favored nation'' clause upheld in *Ocean State Physicians.* The court held that the conduct challenged in *Ocean State Physicians* was not exclusionary because it represented a buyer's insistence on obtaining the lowest price, a practice which tended to further competition on the merits. 883 F.2d at 1110. The court additionally noted that Blue Cross' conduct benefited consumers by giving them lower prices. 883 F.2d at 1111. *Cf. Blue Cross & Blue Shield, supra,* 65 F.3d at 1415. Here, in contrast, the parity clauses are imposed by sellers, not by buyers, and the clauses do not act as a means of providing low prices to the affected consumers, which here are the participating airlines. Instead, as shown, the clauses require airlines to participate at a high level in a vendor's system, merely because they participate in other systems at that level.

American's other antitrust arguments are also unpersuasive. American correctly notes that a firm with market power may legitimately seek to increase its market share; a firm will not violate the antitrust laws, for example, by developing new products. See, *e.g., Foremost Pro Color* v. *Eastman Kodak Co.,* 703 F.2d 534, 544–546 (9th Cir. 1983), *cert. denied,* 465 U.S. 1038. But a firm with market power may not strengthen its market position by engaging in coercive conduct. The parity clauses appear comparable to the kind of coercive conduct prohibited by the antitrust laws. In contrast, of course, American is free to continue improving Sabre without running the risk of antitrust liability.

Furthermore, while American claims the clauses are not unusual, it has cited no examples of similar contract restrictions in other industries.

The Commenters' Other Justifications for Airline Parity Clauses: CRS Industry Effects. In defending the parity clauses,

the commenters opposing Alaska's petition argue that the clauses promote competition, at least in the CRS and travel agency businesses, and benefit the public. We find these arguments unpersuasive.

Worldspan and System One Information Management claim the airline parity clauses promote CRS competition by keeping airlines from reducing their level of participation in the smaller systems, Worldspan and System One. According to their comments, if a smaller system could not impose contract terms preventing a participating airline from reducing its participation in that system, some airlines would reduce their level of participation in the smaller systems while maintaining a higher level of participation in the larger systems, Sabre and Apollo. The smaller systems would then be unable to offer subscribers as complete a coverage of the airline industry as the larger systems and would therefore lose subscribers to one of the larger systems.

However, the airline participants in a smaller system will continue purchasing a high level of service from that system if it offered attractive service and prices. Furthermore, even if an airline reduces its participation in a system, the system presumably would still provide information on the airline's schedules and other capabilities, such as the ability to write tickets through the CRS.

The smaller vendors' own conduct indicates that the loss of subscriber access to booking and ticketing capabilities on some airlines may not damage CRS competition. As discussed earlier, in 1994 System One, Worldspan, and Apollo each changed its policies on the treatment of carriers that chose not to participate in the system. As a result, their subscribers found it much more difficult to obtain information and make bookings on non-participating airlines. Southwest, a major airline in many markets, does not participate in these systems (but does participate in Sabre). Southwest accounts for more than ten percent of domestic enplanements, although its share of travel agency bookings for domestic travel is lower. The policy change by Apollo, Worldspan, and System One should have made those systems much less attractive than Sabre for many travel agencies. Even though Southwest, the major non-participating airline, continued to refuse to participate in these systems, the smaller systems—and Apollo—nonetheless went ahead with the change in policy. If the smaller systems were willing to take that action, we do not see how allowing airlines to reduce their level of participation in a system could cause them significant competitive harm.

The Commenters' Other Justifications for Parity Clauses: Travel Agency Effects. The parties opposing Alaska's petition generally argue that Alaska's proposed rule would harm many travel agencies. If a major airline decided to reduce its level of participation in a system, travel agencies using that system will have more difficulty obtaining information and making bookings on that airline through their system. If, for example, Alaska participated in Sabre at the Basic Booking Request level, a travel agency in Alaska or the Pacific Northwest using Sabre will have higher costs booking Alaska, an airline used by many of its customers, since Alaska bookings would take longer and since the CRS would no longer display availability information for Alaska. If Alaska reduced its participation in another system to the equivalent of the call direct level formerly offered by Sabre, an agency using that system could not book Alaska through the CRS at all and therefore would operate less efficiently than competing agencies using other systems.

The increased difficulty of obtaining information and conducting transactions would not matter much if travel agencies commonly used more than one system or if the vendors offered them short-term contracts. Short-term contracts would enable agencies to switch systems relatively soon after deciding that other vendors offered better service. However, the vendors have traditionally insisted on long-term contracts (usually five-year contracts) and on other contractual restrictions which discourage the use of multiple systems. In particular, most travel agencies obtain their CRS terminals from a vendor, and each vendor commonly bars its subscribers from using the terminals to access any other system or database. 57 F.R. at 43796, 43822–43824; *Airline Marketing Practices* at 85–91. While travel agencies would be reluctant in any event to switch systems or to use multiple systems due to the cost of doing so, *Airline Marketing Practices* at 26, 87, the vendor contract clauses additionally discourage travel agencies from switching systems or using several systems.

ASTA and ARTA specifically complain that a rule barring airline parity clauses will impair competition in the travel agency industry and injure the business position of many agencies. They base this contention on their expectation that the rule will cause some airlines to reduce their participation in some systems below the full availability level and thereby injure travel agencies by making their operations less efficient, as explained above. An agency using a system which no longer provides the ability to conveniently make bookings on a significant airline in the agency's business area will be less able to compete with agencies using other systems.

Tyee Travel, a travel agency in Wrangell, Alaska, complains that Alaska's proposed reduction in Sabre participation to the call direct level would be devastating for it. Tyee Travel has three years left on its Sabre contract and cannot switch to another system. It also makes many more bookings on Alaska Airlines than it does on all other airlines combined. If the agency were forced to make its bookings on Alaska by telephone, the agency's expenses would be much higher.

We are sympathetic to these concerns. However, we believe that travel agencies will ultimately benefit if airlines—and travel agencies—have a variety of options for electronic communications between airline reservations systems and airline and travel databases, on the one hand, and travel agencies, on the other hand. The rule proposed by Alaska will promote that goal in the long run, since it will make it easier for airlines to set up alternative methods of providing information and transactional capabilities to travel agencies. Although ASTA opposes Alaska's proposal, it agrees with the principle that travel agencies will benefit if they have more alternatives for obtaining travel information and making airline transactions electronically. ASTA Answer at 2. Alaska, moreover, states that its dependence on travel agencies for bookings will ensure that it takes steps to offset the impact of its reduced level of participation. Alaska Reply Comments at 2, 3. Alaska notes that 85 percent of its bookings came from travel agencies in 1994. *Id.* at 22, n. 9.

Insofar as travel agencies using Sabre are concerned, Sabre's replacement of the call direct level of service with Basic Booking Request will substantially alleviate the loss of efficiency when a major airline lowers its participation from the full availability level. If the airline participates at the Basic Booking Request level, an agent using Sabre can still obtain a display of the airline's schedules and can book the airline electronically. This is more efficient for travel agents than direct call would have been. Moreover, although not critical to our analysis, Alaska has advised us that it is not planning to reduce the level of its participation in Sabre, although it does wish to avoid purchasing some

features from Sabre that it apparently purchases from other systems.

In addition, travel agencies using Apollo, Worldspan, or System One recently had similar difficulties when each of those systems changed its policies on non-participating carriers and thereby made it harder for those agencies to obtain information and make bookings on Southwest. Southwest created direct electronic links with some of the affected travel agencies and has changed its procedures in other ways (for example, by creating ticketless travel) to offset the impact of its non-participation in the systems besides Sabre. Even so, Southwest's non-participation reduces the efficiency of travel agencies using Apollo, Worldspan, or System One. Nonetheless, we have never required non-vendor airlines to participate in CRSs, even though an airline's non-participation will decrease the efficiency of travel agency operations. We do not believe that we should allow a CRS to dictate a non-vendor airline's level of participation, even though that could benefit travel agencies using that system.

In any event, we currently believe that we should not protect the short-term interests of travel agencies by allowing vendors to restrict the distribution options of non-vendor airlines. We are also unwilling at this point to propose ASTA's solution for this problem, a rule giving travel agencies the right to terminate their CRS contract on short notice so they can switch to a system offering better service. We recognize that longterm subscriber contracts keep travel agencies from switching systems even if their existing system becomes less desirable for any reason. However, we considered this issue at length in our last rulemaking and determined that longer term contracts could be economically efficient and enable travel agency subscribers to obtain lower CRS prices. 57 FR at 43825. We prefer not to reopen that issue, at least not until after we complete our current study of the CRS business and related airline marketing issues.

Potential Unfair Conduct by Foreign Airlines. American has raised a legitimate concern over one possible effect of Alaska's rule proposal. American contends that the parity clauses increase CRS competition in international markets by keeping foreign airlines from reducing their participation in a U.S. system in order to promote the marketing of systems affiliated with those foreign airlines. As an example, American cites Avensa, a major Venezuelan airline, which is reducing its participation in Sabre to the call direct level while participating in a competing system at the full availability level, allegedly in order to promote the other system that Avensa is marketing in Venezuela. This will cause Venezuelan agencies to prefer the latter system over Sabre. American Response at 9–10.

When American met with our staff, it stated that Sabre has recently invoked the parity clause to resolve problems with some other Latin American airlines that were marketing competing CRSs. As in the Avensa example, the airlines participated in Sabre at a low level while participating at a substantially higher level in the systems they sponsored in their home countries. After Sabre invoked the parity clause, these airlines upgraded their participation level in Sabre.

We sympathize with this effect of the parity clause, for several foreign airlines in the past have limited their participation in a U.S. system in an apparent effort to deny the U.S. system a fair opportunity to compete in their homelands against systems they owned. The foreign airlines' conduct injured the competitive position of the U.S. airline marketing its system. See, e.g., Complaint of American Airlines against British Airways, Order 88–7–11 (July 8, 1988). While the past cases each involved a foreign airline with an ownership interest in the CRS, a foreign airline responsible for marketing a system in its homeland would have the same incentive to reduce its participation in the U.S. system. Although we may impose countermeasures under the International Air Transportation Fair Competitive Practices Act against a foreign airline whose discrimination denies a U.S. airline a fair and equal opportunity to compete, a vendor's use of contract terms preventing that kind of discrimination can be more effective and more likely to prevent disputes between the United States and foreign governments. 57 FR at 43819. Our mandatory participation rule, moreover, only covers airlines owning five percent or more of the equity of a system operating in the United States.

We are unwilling to deny Alaska's petition to preserve Sabre's ability to prevent unfair practices by foreign airlines, since the parity clauses injure CRS and airline competition within the United States. Nonetheless, allowing a system to enforce a parity clause against airlines that own or market a competing CRS may be reasonable. We ask for comments on whether the proposed rule should be modified to prevent the potential harm cited by American, perhaps by barring airline parity clauses except insofar as they apply to a carrier affiliated with another system as an owner or marketer. In addition, commenters should address whether the rule should exclude any airline with a CRS ownership interest rather than only system owners, carriers defined by our rules as owning directly or indirectly five percent or more of the equity of a CRS that operates in the United States.

Allowing a CRS to enforce a parity clause against an airline that owns or markets a competing CRS would be consistent with one of our rules, section 255.7(a). That rule requires carriers with a significant ownership interest in a U.S. CRS to participate in each other system and each of its enhancements (to the extent that such carrier participates in those features in its own system). Our adoption of a rule barring a system from contractually requiring airlines that neither own nor market a system to participate in the system at a higher level would not conflict with our existing mandatory participation rule, which covers only airlines with significant CRS ownership interests. American accordingly is completely wrong in suggesting that we excluded airlines with a small ownership share from the mandatory participation rule since the vendors through contractual means could prevent such airlines from discriminating against a system. American Response at 8. We instead stated that an airline with a small ownership share in one system should have little incentive or ability to limit its participation in a competing system in order to promote the marketing of the former system. 57 FR at 43795.

Evidentiary Basis for Our Proposed Rule

As noted above, we are relying in part on our last study of airline marketing issues, *Airline Marketing Practices*, and our findings in our last CRS rulemaking. We believe that the CRS and airline businesses have not changed in ways that would undermine the findings made in the study and the rulemaking that are relevant to this rulemaking. We note, moreover, that none of the comments in this proceeding contends that changes in these industries have affected our earlier conclusions. If any parties believe that developments over the last three years have affected those findings, they may, of course, say so in their comments.

We have also decided to act on Alaska's petition without waiting for the completion of our current study of airline marketing practices, the CRS business, and the rules adopted in 1992, which was begun by Order 94–9–35 (September 26, 1994). Since the parity

clauses seem to frustrate competition without a legitimate reason, we doubt that our ultimate decision on Alaska's petition would be affected by the findings of our study. Any party, of course, may present any relevant information to us in its comments.

Regulatory Process Matters

Regulatory Assessment

This rule is a significant regulatory action under section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget under that order. Executive Order 12866 requires each executive agency to prepare an assessment of costs and benefits under section 6(a)(3) of that order. The proposal is also significant under the regulatory policies and procedures of the Department of Transportation, 44 FR 11034.

The proposed rule should benefit competition and innovation. It would give non-owner participating airlines a greater ability to choose the distribution methods that best meet their needs. The proposed rule also would not require any CRS to change its business methods in a way which impose a significant cost burden on the system. The rule would merely give participating carriers more flexibility in choosing among the participation levels offered by a vendor, although the exercise of that flexibility could reduce the revenues of a system. We doubt that our rule will significantly affect the vendors' revenues, since an airline lowering its level of participation in a system will still be paying fees to that system, and the system will incur lower costs serving that airline. It also seems unlikely that many airlines will choose to radically lower their participation level in some but not all systems.

If some airlines used the rule to reduce their level of participation in one or more systems, the travel agencies using those systems would be affected, since their operations would be somewhat less efficient. However, we expect that an airline reducing its level of participation will take steps to offset much of the impact on travel agencies. If a system offers a level of service like Sabre's Basic Booking Request, moreover, the agencies using that CRS could still make bookings through the CRS on the airline. The only agencies that would be seriously affected would be agencies in regions where the airline accounts for a substantial portion of the area's airline service. And again, we doubt that many airlines will choose to exercise this option to drastically reduce their level of participation. Alaska itself has decided not to reduce its level of participation in Sabre, although it prefers not to purchase some enhancements from Sabre that it may wish to purchase from other systems.

The Department does not believe that there are any alternatives to this proposed rule which would accomplish the goal of giving each participating carrier (other than carriers with a significant ownership interest in a CRS, which remain bound by section 255.7(a)) the ability to choose its level of participation in each system.

The costs and benefits of the proposed rule appear to be unquantifiable. The Department asks interested persons to provide information on the costs and benefits.

This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller U.S. and foreign airlines and smaller travel agencies. Our notice of proposed rulemaking sets forth the reasons for our consideration of Alaska's rule proposal and the objectives and legal basis for our proposed rule.

The proposed rule will, as explained above, give more flexibility to smaller non-owner airlines by barring the use of airline parity clauses. When a system imposes a parity clause, the clause prevents an airline participating in the system from participating in that system at a lower level than its participation level in any other system. If we make the clauses unlawful, airlines could choose different levels of participation in different systems. Smaller non-owner airlines would then have a better opportunity to choose how they will distribute their services and thus a greater ability to control their costs.

Although the proposed rule would not directly affect travel agencies, it could affect the operations of smaller travel agencies. If an airline reduces its level of participation in one or more systems without reducing its level of participation in all of the systems, agencies using a system in which the airline reduced its level of participation would not be able to operate as efficiently as before, since they will be unable to obtain as much information and conduct transactions as efficiently as before. That loss in efficiency would be significant for an agency only if the airline provided a substantial amount of the airline service in the area where the agency conducts its business. Since the system almost certainly would still be able to provide some information and enable the agency to conduct some transactions through the system, the agency would still obtain some of the efficiency advantages of using a CRS as to that carrier. Furthermore, we do not expect many airlines to substantially reduce their participation level, so the likelihood that many travel agencies would be significantly affected appears small.

In addition, the proposed rule should encourage airlines and other firms to develop alternative means of transmitting information on airline services and enabling travel agencies to carry out booking transactions. In the long term these developments would benefit travel agencies.

Our proposed rule contains no direct reporting, record-keeping, or other compliance requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with our proposed rules.

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

The Department certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. *et seq.*) that this regulation will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposal contains no collection-of-information requirements subject to the Paperwork Reduction Act, Public Law No. 96–511, 44 U.S.C. Chapter 35.

Federalism Implications

The rule proposed by this notice will have no substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, we have determined that the proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 14 CFR Part 255

Air carriers, Antitrust, Reporting and recordkeeping requirements.

Accordingly, the Department of Transportation proposes to amend 14

CFR part 255, Carrier-owned Computer Reservations Systems as follows:

PART 255—[AMENDED]

1.The authority citation for part 255 continues to read as follows: Authority: 49 U.S.C. 1301, 1302, 1324, 1381, 1502.

2. Section 255.6 is amended by adding paragraph (e) to read as follows:

§ 255.6 Contracts with participating carriers.

* * * * *

(e) No system may require a carrier to maintain any particular level of participation in its system on the basis of participation levels selected by that carrier in any other system.

Issued in Washington, DC, on August 8, 1996.

Federico F. Peña,

Secretary of Transportation.

[FR Doc. 96–20737 Filed 8–13–96; 8:45 am]

BILLING CODE 4910–62–P

14 CFR Part 255

[Docket No. OST–96–1145 [49812]; Notice No. 96–21]

RIN 2105–AC56

Fair Displays of Airline Services in Computer Reservations Systems (CRSs)

AGENCY: Office of the Secretary, Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department is proposing to adopt two rules to further ensure that travel agents using computer reservations systems (CRSs) can better obtain a fair and complete display of airline services. One proposed rule would require each CRS to offer a display that lists flights without giving on-line connections any preference over interline connections. The second proposed rule would require that any display offered by a system be based on criteria rationally related to consumer preferences. As an alternative to the latter proposal (or as an additional rule), the Department is also proposing to bar systems from creating displays that neither use elapsed time as a significant factor in selecting flights from the data base nor give single-plane flights a preference over connecting services in ranking flights. The Department believes that these rules are necessary to promote airline competition and ensure that travel agents and consumers can obtain a reasonable display of airline services. The Department is acting on the basis of informal complaints made by Frontier Airlines, Alaska Airlines, and Midwest Express Airlines.

DATES: Comments must be submitted on or before October 15, 1996. Reply comments must be submitted on or before November 12, 1996.

ADDRESSES: Comments must be filed in Room PL–401, Docket OST–96–1145 (49812), U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590. Late filed comments will be considered to the extent possible. To facilitate consideration of comments, each commenter should file twelve copies of its comments.

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

SUPPLEMENTARY INFORMATION: Airline travelers in the United States usually rely upon travel agents to advise them on airline service options and to book airline seats. Travel agents in turn largely depend on CRSs to determine what airline services and fares are available in a market, to book seats, and to issue tickets for their customers. Travel agents rely so much on CRSs because they can perform these functions much more efficiently than any other means currently available. Each of the CRSs operating in the United States is owned by, or is affiliated with, one or more airlines, each of which has the incentive to use its control of a system to prejudice the competitive position of other airlines. We therefore found it necessary to adopt regulations governing CRS operations, 14 CFR Part 255, in order to protect competition in the airline industry and to help ensure that consumers obtain accurate and complete information on airline services. 14 CFR Part 255, adopted by 57 FR 43780 (September 22, 1992), after publication of a notice of proposed rulemaking, 56 FR 12586 (March 26, 1991). Our rules readopted and strengthened the rules originally adopted by the Civil Aeronautics Board (''the Board'') and published at 49 FR 11644 (March 27, 1984) (the Board was the agency that formerly administered the economic regulatory provisions of the Federal Aviation Act, now Subtitle VII of Title 49 of the U.S. Code).

One of our major goals in adopting the rules was to assure that CRS displays would provide an accurate and complete display of airline services when a travel agency customer requested airline information. When the CRSs were unregulated, each system biased its display of airline services in favor of its airline owner's flights in order to generate more bookings for its owner. Our rules, like the Board's rules, accordingly prohibit each CRS from using factors related to carrier identity in editing and ranking airline services in its displays. Section 255.4.

While our display rules also impose some other restrictions on CRS displays in order to reduce the likelihood of bias, our rules generally do not regulate the criteria used by each system to edit and rank the airline services shown in its displays. In particular, we have not prescribed the display algorithm that each system must use (the algorithm is the set of rules for editing and ranking airline services in a particular display). In our last CRS rulemaking we declined to adopt stronger rules on CRS displays, in part because we believed that the systems' competition for subscribers (the travel agencies using a CRS) would keep each system from offering irrational displays designed to gain additional bookings for its owner airlines.

Recent experience suggests that the systems' competition for subscribers may not adequately check the desire of the airline owners of each system to create displays that will increase their airline bookings, even if those displays list airline services in a way that is contrary to consumer preferences. We are therefore proposing to revise our rules on CRS displays. One rule would require each CRS to offer a display that does not give on-line connections a preference over interline connections. The other rule would require that any display offered by a system be based on criteria rationally related to consumer preferences. As an alternative to the latter proposal (or as an additional rule), we are also asking for comments on a possible rule prohibiting displays that neither use elapsed time as a significant factor in selecting flights from the data base nor give single-plane flights a preference over connecting services in ranking flights.

In considering these issues, we are relying in large part on the findings made in our 1991–1992 rulemaking, in the Board's rulemaking, and in our last study of the CRS business, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems,* prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry (February 1990) (*Airline Marketing Practices*). That study and our rulemaking notices present a detailed analysis of CRS operations and their impact on airline competition and consumers. We are proposing to impose additional requirements on CRS displays because our reexamination of CRS issues and further experience with