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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 84-333]

Witchweed Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: This document affirms the interim rule which amended the list of suppressive areas under the Witchweed Quarantine and Regulations by adding areas in 7 counties in North Carolina and 1 county in South Carolina to the list of suppressive areas; by deleting 2 entire counties and areas in 13 counties in North Carolina, and areas in 3 counties in South Carolina from the list of suppressive areas; and by making certain nonsubstantive, editorial changes. This action is necessary to prevent the artificial spread of witchweed and to delete unnecessary restrictions of the interstate movement of regulated articles.

EFFECTIVE DATE: August 15, 1984.

FOR FURTHER INFORMATION CONTACT: Paul F. Sand, Staff Officer, Field Operations Support Staff, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 663 Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8295.

SUPPLEMENTARY INFORMATION:

Background

A document published in the Federal Register on April 25, 1984, (49 FR 17723-17733), set forth in an interim rule amending § 301.80-2a of the Witchweed Quarantine and Regulations (7 CFR 301.80 et seq.; hereinafter known as Regulations). The document amended the quarantine and regulations by adding areas in 7 counties in North Carolina and 1 county in South Carolina to the list of suppressive areas, and by deleting 2 entire counties in North Carolina, areas in 13 counties in North Carolina, and areas in 3 counties in South Carolina from the list of suppressive areas. In addition, this document made certain other nonsubstantive, editorial changes.

The amendment became effective on the date of publication. The document provided that the amendment was necessary as an emergency measure in order to prevent the artificial spread of the witchweed and to delete unnecessary restrictions on the interstate movement of regulated articles.

Comments were solicited for 60 days after publication of the amendment. No comments were received in reponse to the amendment. The factual situations which were set forth in the document of April 25, 1984, still provide a basis for the amendment.

Executive Order 12291 and Regulatory Flexibility Act

The amendment has been issued in conformance with Executive Order 12291, and has been determined to be not a "major rule." Based on information compiled by the Department, it has been determined that the amendment will have an annual effect on the economy of approximately $400; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; and will not cause significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Mr. Bert W. Hawkins, Administrator of the Animal and Plant Health Inspection Service, has determined that this action will not have a significant economic impact on a substantial number of small entities. This action affects the interstate movement of regulated articles from specified areas in North Carolina and South Carolina. Based on information compiled by the Department, it has been determined that there are approximately 290,000 small entities that move regulated articles interstate from North Carolina and South Carolina, and many hundreds of thousands of small entities that move such articles interstate from other States. However, it has been determined that only 15 entities in North Carolina and South Carolina move regulated articles interstate from the areas affected by this action. Further, the overall economic impact from this action is estimated to be only about $400.

For this rulemaking action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant pests, Quarantine, Transportation, Witchweed.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, the interim rule published at 49 FR 17723-17733 on April 25, 1984, is adopted as a final rule.

(Secs. 8, 9, 37 Stat. 318, as amended, sec. 106, 71 Stat. 33 (7 U.S.C. 161,) 162, 150ee); 7 CFR 2.17, 2.51, 371.2(c))

Done at Washington, D.C., this 8th day of August 1984.

Harvey L. Ford,

Deputy Administrator, Plant Protection and Quarantine, Animal and Plant Health Inspection Service.

[FR Doc. 84-21406 Filed 8-14-84; 8:45 am]
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Food and Nutrition Service

7 CFR Parts 278 and 279

[Amdt. No. 257]

Food Stamp Program; Insured Financial Institutions, Retail Food Stores and Wholesale Food Concerns; Miscellaneous Amendments

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule and correction.

SUMMARY: This Food Stamp Program rulemaking amends various provisions of the regulations governing insured financial institutions, retail food stores and wholesale food concerns participating in the program. These amendments are being published in response to violations and abuses

observed by the Food and Nutrition Service. They clarify distinctions between retail food stores and wholesale food concerns; specify additional conditions under which the authorizations of firms may be withdrawn; increase the accountability of insured financial institutions in the coupon redemption process; and expand the authority of the Food and Nutrition Service (FNS) to establish claims against violators. There are also some technical revisions intended to ensure greater consistency between statutory and regulatory provisions. A proposed rule including these issues was published on August 5, 1983. Comments were solicited from interested parties through November 3, 1983. This final action addresses significant issues raised by commenters. We are also correcting an erroneous amendatory instruction which appeared in a final rule entitled *Bonding of Authorized Firms*, published July 12, 1984.

DATE: This rule is effective September 14, 1984.

FOR FURTHER INFORMATION CONTACT: Thomas O'Connor, Supervisor, Issuance and Benefit Delivery Section, Program Design and Rulemaking Branch, Program Planning, Development and Support Division, Food and Nutrition Service, USDA, Alexandria, Virginia, 22302, (703) 756–3425.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291. The Department has reviewed this rule under Exectuve Order 12291 and Secretary's Memorandum No. 1512–1. The rule will not significantly raise costs or prices for consumers, industries, government agencies or geographic regions. There will not be significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, the Department has classified the rule as "not major".

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act, Pub. L. 96–354. Robert E. Leard, Administrator of the Food and Nutrition Service, has certified that this action will not have a significant economic impact on a substantial number of small entities. Although a large number of small entities (retail food stores and insured financial institutions) will be affected, the economic impact on such entities will be negligible.

Recordkeeping Requirements

The reporting requirements contained in this rule (in s278.5(a)(2)) have been approved by the Office of Management and Budget (OMB). (OMB approval No. 0584–0085.)

Background

The Department published a proposed rule on August 5, 1983 (at 48 FR 35868) containing several amendments intended to curb violations and abuses of the program. Comments on the proposed rule were solicited from interested parties through November 3, 1983. A total of 21 comment letters were received regarding the proposed rule from State welfare agencies, retailer and wholesaler trade associations, commercial banks, commercial bankers' associations, and FNS Offices. This final action addresses significant issues raised by these commenters.

General Comments

Several commenters supported the proposed amendments, and one commenter stated that the regulations bring about such needed changes to reduce program abuse and improve food stamp accountability.

Authorization of Retail Food Stores

The proposed rule included a provision that a wholesale firm may be authorized as a retail food store only if it has significant retail food business. Two commenters objected to this provision on the grounds that certain retail firms could no longer be authorized to accept food stamps. Apparently these commenters were concerned about the two following types of firms which have both wholesale and retail outlets: (1) Retail firms owned by a firm which also owns warehousing (wholesale) facilities and (2) retail firms which join together as a cooperative association which owns warehousing facilities. While these commenters were concerned that these types of retailers might not be authorized, another commenter recognized that it is not the Department's intention to disqualify wholesalers having legitimate retail business. This commenter also supported judging wholesaler firms on a case-by-case basis in determining whether such firms should be authorized as retail food stores.

Other commenters objected to considering the ratio of a wholesale firm's retail food sales to its total sales as one factor in determining whether to authorize a wholesaler as a retailer.

Those commenters who expressed concern that retail outlets owned by wholesale firms would no longer be authorized appear to have misunderstood the intent of the proposed rule. It is not the intent of the Department to prevent the authorization of any firm which is clearly a retail food outlet, but, as stated in the August 5 preamble, to ensure that wholesale firms which sell little, if any, food at the retail level are not authorized as retailers. Authorizations of wholesale firms as retail food stores could create a potential for fraudulent redemptions by wholesalers. The Department acted to curtail or eliminate this and other sources of wholesaler fraud and abuse in its final rule published on December 29, 1981. The authorization of such firms without the added criteria of comparative retail/wholesale sales would circumvent the Department's policy that only those wholesalers needed for the effective and efficient operation of the program may be authorized.

The commenters' concerns that wholesaler owned retail firms could no longer be authorized also result partially from a misunderstanding of the Department's current authorization policy. Firms having multiple units or locations do not apply for and receive authorizations as one entity. Each separate unit of a firm must apply for authorization individually and separate authorizations are issued to individual outlets. Thus, in considering a firm's relative retail and wholesale sales, only the sales of the applicant unit would be considered. To eliminate confusion about the intent of this provision, the Department has in the final rule added language to clarify that authorization determinations are made for each individual unit of a firm. Under this provision, any firm which operates as a distinct retail food outlet and which meets the other criteria for the authorization of retail firms set forth in § 278.1 of the regulations will qualify and continue to qualify for authorization.

It should also be noted, as stated in the August 5, 1983, proposed rule, that the proportion of a firm's total retail food sales to its total sales is only one of the factors in determining whether a wholesale firm qualifies for authorization as a retailer. Other factors which FNS will consider include whether the firm holds itself out to the public as a retail food store and whether it actively seeks retail food trade. In considering a wholesaler for authorization as a retail firm, FNS will weigh all factors. For example, an

applicant wholesale firm might have a significant retail food business but not in comparison with its wholesale sales. If such a firm holds itself out to the public as a retail food store through advertising or other means, the firm would normally be considered a retail food store for food stamp authorization purposes. To further clarify that determinations as to whether wholesale firms qualify as retail food stores will be based on a consideration of all criteria specified, the Department has added language to this effect to the final rule.

One commenter requested further explanation of how to determine whether a firm is a retail food store. This same commenter believed that a wholesale firm should have what can clearly be recognized as a retail outlet in order to be an authorized retailer. The Department agrees that wholesale firms authorized as retailers should clearly be retail outlets. However, as illustrated by the example above, and as stated in the preamble to the August 5 publication, determinations on individual firms will be made on a case-by-case basis by weighing all pertinent factors. Therefore, the Department does not believe it is practical or feasible to provide more specific criteria, such as specific retail sales volumes or percentages of sales for determining whether a wholesaler may be an authorized retail outlet. The Department believes that local FNS Field Offices are in the best position to make these determinations by evaluating the factors in this rule and has not included further specific criteria in this final rule (§ 278.1(b)(1)(iv)).

Withdrawal of Authorized Firms

The August 5, 1983, publication would permit FNS to withdraw the authorization of firms under the following additional conditions: (1) The firm refuses to accept correspondence from FNS or refuses to respond to inquiries from FNS, or (2) the firm cannot readily be located. All comments received on this proposal were favorable. Two of the commenters, however, recommended expanding the provision for withdrawing the authorization of firms.

One commenter suggested that the proposal be expanded to cover seasonal operations (e.g., produce stands). This commenter explained that some operations such as produce stands become authorized to accept food stamps and do business at one location for a season. However, in some cases they cannot be located when the next season begins and the local FNS Field Office cannot determine whether the operation is still in business. The Department believes that such firms may be withdrawn when they cannot be located. Therefore, the Department does not believe it necessary to specify in the final rule that seasonal operations are covered by the readily located provision.

Another commenter suggested that a provision be added to withdraw the authorization of a firm which fails to respond to the required update of its application for authorization (Form FNS-350). Section 278.1 specifically states that failure to update information on the application form, upon request, may result in withdrawal of a firm's authorization and no additional provision is needed in the regulations (§ 278.1(1)).

Acceptance and Redemption of Food Coupons by Authorized Firms

The August 5 publication proposed to amend § 278.2(d) to prohibit an authorized retail firm from engaging in any series of coupon transactions to provide the same customer an amount of cash change greater than the maximum 99 cents allowed in one transaction. Current regulations prohibit engaging in a series of transactions of less than one dollar. However, as stated in the preamble to the proposed rule, it has come to the Department's attention that larger transactions have been used to circumvent the limitation. One commenter suggested that the period of time (e.g., a day, a week) over which a series of small transactions is prohibited should be defined. The Department does not believe that is practical or desirable to specifically define a maximum period of time within which a customer may be attempting to accumulate excess cash change. The Department believes that allowing the retailer latitude to decide whether a customer is attempting to accumulate excess cash rather than would setting an arbitrary time period, affords a better opportunity for preventing such schemes. Therefore, the Department has decided not to specify in the final rule a period of time over which a series of transactions is prohibited (§ 278.2(d)).

Redemption of Coupons by Financial Institutions

The August 5, 1983, publication proposed to amend procedures used by insured financial institutions to redeem food stamps which they accepted from authorized firms. Current food stamp program regulations (§ 278.4(c)) require that retail food stores and wholesale food concerns execute and surrender a redemption certificate each time they redeem food coupons at insured financial institutions. Presently the Food and Nutrition Service does not require a redeeming financial institution to verify the amount of coupons being redeemed by recording its count on the redemption certificate. Currently, financial institutions forward the food coupons to the Federal Reserve Bank through normal banking channels. The Federal Reserve Bank credits the financial institution for coupons received, destroys the food coupons and charges FNS for the face value of food coupons received and destroyed. The Federal Reserve Banks send the redemption certificates directly to the FNS Computer Center in Minneapolis, Minnesota. The center tabulates the value of coupons shown on the redemption certificates and generates various reports.

The present system properly monitors the activities of authorized retail food stores. It does not, however, reconcile individual redemption certificates with the value of coupons reflected, nor does it provide data to verify Federal Reserve Bank charges for food coupons received and destroyed. In the past, the total dollar value of coupons redeemed has greatly exceeded the total amount shown on all redemption certificates for given periods of time.

The August 5 publication proposed to implement, program-wide, a new redemption procedure recently tested as a cooperative effort by FNS and the Federal Reserve Bank of Atlanta. The new procedure, as described in the proposed rule, includes several provisions for enhancing the quality of accountability of the redemption of coupons by financial institutions, including: (1) Verification of the amount of coupons being redeemed by requiring redeeming financial institutions to record their count of coupons on the food coupon redemption certificate; (2) use of the Food Coupon Deposit Document (cash letter) to identify the depositing financial institution, the value of the coupons being deposited, and the value of the redemption certificates sent with the transmittal; (3) forwarding food coupons, redemption certificates, and Food Coupon Deposit Documents together to Federal Reserve Banks.

Results of the test established that the new procedure clearly tightened the entire redemption process by providing a complete audit trail from the authorized firm, to the financial institution, to the Federal Reserve Bank. Additional results of the test show that the difference between the dollar value of coupons redeemed and the amount shown on the redemption certificate was greatly reduce. The proposed rule contained a provision that FNS monitor

coupons presented for redemption at the Federal Reserve and provided that FNS could, at its discretion, return deposits not meeting specified cancellation requirements to the depositing institution for reprocessing. One commenter suggested that the Federal Reserve, not FNS, should decide whether deposits not meeting cancellation requirements should be returned to the depositing institution. The Department has looked again at this function in terms of whether FNS or the Federal Reserve should have responsibility for deciding whether to return such deposits. Inasmuch as this aspect of monitoring coupon deposits is a new effort, the Department believes that a period of time is needed for evaluation of several aspects of this function. During this time, the Department can determine how extensive the problem of deposits with improper cancellations is and the manpower involved in returning such deposits. The Department believes that it can best make these determinations if it initially retains the authority for returning deposits. Based on these considerations, as well at other pertinent factors, the Department may decide that it is appropriate for the Federal Reserve, rather than FNS, to perform this function. However, since this activity is an internal administrative procedure, the Department determined it is not necessary to specify in the rule who will be authorized to conduct this function.

Another commenter suggested that the Federal Reserve should return to depositing institutions, without credit, food coupon deposits not accompanied by properly completed Food Coupon Deposit Documents. The agreement between the Department and the Federal Reserve for handling coupon redemptions includes a procedure for the handling of such deposits. Under that procedure, the Federal Reserve will write on a blank Food Coupon Deposit Document the coupon total and the name and address and the check routing code of the originating financial institution. The Department believes that it would be impractical and more complicated to return such deposits than to follow the agreed procedure as long as all requirements other than those related to the Food Coupon Deposit Document are met. For these reasons and the risk of coupon deposits being lost if returned, the Department has decided not to require returning deposits not accompanied by properly completed Food Coupon Deposit Documents (§ 278.5(a)).

Liability for Losses of Redeemed Coupons in Transit

The August 5, 1983 publication would rescind FNS' liability for losses of coupons in transit to Federal Reserve Banks and for losses of coupons from financial institutions as a result of burglary or robbery. Several commenters objected to this proposal stating: (1) FNS should assume liability for losses which do not result from bank negligence; (2) financial institutions will have to self-insure food coupon deposits and will pass these increased costs on to depositing retail food stores in the form of increased service charges if FNS' liability is rescinded; and (3) financial institutions may refuse to accept food coupon deposits.

The Department does not believe that the absence of a financial institution's negligence alters the fact that the Department should not be liable for losses in transit. Even without bank negligence, lost coupon deposits could be found and redeemed subsequent to FNS reimbursement, resulting in double payment for the coupons.

Redeeming financial institutions may find that they wish to purchase insurance for food coupon shipments. However, as pointed out by one commenter, the value of such losses over the years has not been high and, thus, the degree of risk financial institutions will have to absorb or obtain insurance for should not be great. Accordingly, the Department does not expect that rescission of FNS liability should result in significant increases in charges levied against depositing retail food stores by financial institutions.

The Department believes that the benefits which accrue to financial institutions in accepting food coupon deposits far outweigh the risk of losses of coupons in transit. The Department does not believe that significant numbers of financial institutions will refuse to accept coupon deposits. Existing regulations should provide retailers with more than adequate numbers of redemption outlets.

Finally, in developing this rule, the Department considered Federal government policy in regard to liability for other Federal instruments lost in transit. We found that the United States Department of the Treasury generally accepts liability for items such as Social Security checks, Federal payroll checks and United States Savings bonds if the losses do not result from bank negligence and/or the lost item is not subsequently redeemed. Banks maintain records of transacted bonds and checks and, therefore, it can be determined whether lost instruments are later negotiated. Therefore, liability is tied to this ability to track these items. The Department believes that requiring banks to identify and record transacted food stamps in order to determine if they are redeemed later would be extremely burdensome and expensive. As stated in the August 5 proposal, financial institutions were reimbursed a total of $2.5 million for losses in transit during fiscal years 1975–81. Given this relatively small amount, the Department believes that banks would bear greater costs through maintaining records of transacted food stamps than through being liable for losses of coupons in transit.

On a related issue, one commenter suggested that FNS should permit insured financial institutions to cancel food coupons by perforation to assure that coupons are permanently cancelled and, thus, could not be redeemed more than once. The commenter believed this would eliminate the lost in transit problem. The Department has previously considered requiring that food coupons be cancelled by perforation. However, the banking industry has advised the Department that the equipment used to process food coupons would not accept perforated coupons. Therefore, it is not feasible to require cancellation of food coupons by perforation.

For the reasons outlined, the Department has decided to retain in the final rule the provision that FNS shall not be liable for losses of coupons in transit or by burglary or robbery. However, for purposes of clarity, the language in this amendment has been slightly revised in the final rule (§ 278.5(c)).

Establishment of Claims by FNS for Funds Lost Through Violations

There were few comments on the proposed amendment requiring FNS to establish and pursue claims against any person or firm which has accepted coupons in violation of the Act or regulations. While one commenter supported the proposal, another commenter believed that FNS would not be successful in collecting claims against firms or individuals not authorized to participate in the program. This commenter also believed that establishing claims against such parties would cause a loss to the government through bookkeeping and billing expenses. In developing the proposal included in the August 5 rule, the Department weighed the costs of asserting claims and billing costs against the amounts which might likely be collected and concluded that pursuing such claims would be cost-

effective. The Department has, therefore, retained in this final rule the provision requiring FNS to establish and pursue claims against any person or firm which has accepted coupons in violation of the Act or regulations (§ 278.7(a)).

Administrative Review of Claims by Authorized Firms Against FNS

The August 5 publication included an amendment to clarify that claims by firms against FNS are subject to administrative review, but that claims asserted against firms by FNS for violations of the Food Stamp Act or regulations are not. Although it has been the Department's policy that claims asserted against firms are not subject to administrative review, this policy had not been specified in the regulations.

In response to this proposal, the Department received a comment including several arguments in favor of allowing administrative review of claims asserted against firms. No comments were received in favor of the proposal. A commenter objecting to the proposal acknowledged, as was stated in the preamble to the August 5 publication, that the Food Stamp Act does not specifically require that such claims be subject to administrative review. This commenter argued, however, that in the interest of fairness, these claims should be subjected to administrative review. It was also pointed out that in some cases, claim determinations have been made inconsistently and that since claims involve mathematical calculations, they are subject to error. Finally, it was stated that failure to provide administrative reviews of claims could lead firms to seek unnecessary and lengthy judicial reviews.

The Department has considered the comments expressed in favor of allowing administrative review of claims asserted by FNS against firms and believes the points raised are well taken. In addition, the Department looked again at other factors involved in allowing such reviews, including the workload which the reviews might entail. The Department had originally believed that allowing reviews of these claims would significantly increase the workload for FNS by creating a whole new class of actions which would be reviewable. However, upon reconsideration, the Department has found that, through a minor modification of the review process, it can allow such reviews without doing so. In most cases, such claims will also involve an action disqualifying a firm from program participation for a specified period of time for violations. Instead of having two reviews of the same case, one on the claims action and one on the disqualification action, the Department has determined that both reviews in these cases can be conducted simultaneously. Also, since it is not likely there will be many claims that do not involve associated disqualification actions, review of these claims will not significantly increase the workload. Therefore, the final rule specifies that claims asserted by FNS against firms as well as those brought by firms against FNS shall be subject to administrative review.

As discussed above, this final rule provides that FNS shall establish and pursue claims against any person or firm which has accepted or redeemed coupons in violation of the Food Stamp Act or regulations. Previously the regulations provided that FNS may establish a claim only against an authorized firm. The Department has decided that in the interest of fairness, these claims as well as those against authorized firms should be subject to administrative review. Therefore, the regulations specify that all claims asserted against violators under § 278.7(a) shall be subject to administrative review. (§§ 278.7(e), and 279.3 (a)(3), and (a)(4)).

Implementation

Except as noted below, the provisions of this amendment shall be effective 30 days following the publication of this amendment as a final rule in the **Federal Register.** Implementation of § 278.5(a) requiring redeeming financial institutions to verify that coupon deposits are supported by redemption certificates will be phased in by Federal Reserve Bank districts in accordance with a schedule determined by the Federal Reserve Board. Redeeming financial institutions shall be required to adhere to current requirements for handling redemption certificates (at 7 CFR 278.5(a)) until their Federal Reserve District implements the procedures contained in this final rule.

In regard to the amendment rescinding FNS liability for losses of cancelled coupons in transit or by burglary or robbery, FNS shall not be liable for any loss occurring after the effective date of this rule.

Correction—At 49 FR 28391 Published July 12, 1984.

In § 279.7, amendatory instruction number 2 (appearing in column 3, page 28393) is incorrect. The reference to revise the "fourth" sentence in paragraph (a) should refer to the "second" sentence of paragraph (a). There is no fourth sentence. The amendatory instruction is being corrected.

List of Subjects

7 CFR Part 278

Administrative practice and procedure, Banks, banking, Claims, Food stamps, Groceries—retail, Groceries, General line—Wholesaler, Penalties.

7 CFR Part 279

Administrative practice and procedure, Food stamps, Groceries—retail, Groceries, General line—Wholesaler.

Accordingly, 7 CFR Parts 278 and 279 are amended as follows:

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

1. In § 278.1, a new paragraph (b)(1)(iv) is added, Paragraphs (l), (m), (n)(o) and (p) are redesignated as paragraphs (m), (n), (o), (p) and (q) respectively, and a new paragraph (l) is added. The additions read as follows:

§ 278.1 Approval or retail food stores and wholesale food concerns.

* * * * *

(b) Determination of authorization. * * *

(1) * * *

(iv) A firm whose primary business is the sale of food at the wholesale level may not be authorized as a retail firm unless it has a significant volume of retail food sales. In addition to criteria applicable to all retail firms, the FNS officer in charge shall consider all of the following factors in determining whether a wholesaler qualifies to be authorized as a retailer: the volume of the firm's retail food business in relation to the volume of its wholesale food business, whether the firm holds itself out to the public as a food retailer, and whether the firm actively seeks retail food trade. The absence or presence of any one of the factors listed in this paragraph will not necessarily determine whether a wholesale firm qualifies for authorization as a retail food store. In determining whether a wholesale firm qualifies for authorization as a retailer, FNS shall consider each unit of a multi-unit firm separately. A firm authorized under this paragraph may not accept coupons as a wholesale food concern.

* * * * *

(l) *Refusal to accept correspondence or to respond to inquiries.* FNS may withdraw the authorization of any firm which:

(1) Refuses to accept correspondence from FNS;

(2) Fails to respond to inquiries from FNS within a reasonable time; or

(3) Cannot be located by FNS with reasonable effort.

* * * * *

2. In § 278.2, paragraph (a) is revised, and paragraph (d) is amended by removing the phrase "of less than 1 dollar" appearing in the last sentence. The revision reads as follows:

§ 278.2 Participation of retail food stores.

(a) *Use of coupons.* Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food under pargraph (d) of this section. Coupons may not be accepted in payment of interest on loans or for any other nonfood use. An authorized retail food store may not accept coupons from another retail food store.

* * * * *

3. In § 278.5, paragraphs (a) and (c) are revised, paragraph (d) is removed, and paragraphs (e), (f) and (g) are redesignated as paragraphs (d), (e) and (f) respectively. The revisions read as follows:

§ 278.5 Participation of insured financial institutions.

(a) *Accepting coupons.* (1) Financial institutions that are insured by the Federal Deposit Insurance Corporation (FDIC) or the Federal Savings and Loan Insurance Corporation (FSLIC) may redeem coupons only from authorized retail food stores, meal services, and wholesale food concerns in accordance with the rules contained in this Part and instructions of the Federal Reserve Banks. Coupons submitted to insured financial institutions for credit or cash must be properly endorsed in accordance with § 278.4 of this part and shall be accompanied by a properly completed and signed redemption certificate.

(2) An insured financial institution shall verify the amount of the coupons being redeemed by recording its count on the redemption certificate. The count may either be encoded to permit Magnetic Ink Character Recognition (MICR) or handwritten. However, financial institutions are encouraged to MICR encode the count. Redemption certificates accepted by insured financial institutions shall be forwarded, with the corresponding coupon deposits, to the Federal Reserve Bank along with the transmitting Food Coupon Deposit Document (Form FNS–521).

(3) Redeemed coupons must be indelibly cancelled on the face of the coupon by the first insured financial institution receiving them. If the cancellation on the coupon face does not show the depositing institution's name or its routing symbol transit number, this identifying information must appear on the straps affixed to each bundle of coupons of like denomination. Deposits not meeting these cancellation requirements may be returned to the depositing institution for reprocessing. A portion of a coupon consisting of less than three-fifths of a whole coupon may not be redeemed.

(4) Insured financial institutions which are members of the Federal Reserve System, insured nonmember clearing institutions, and insured nonmember institutions which have arranged with a Federal Reserve Bank to deposit coupons for credit to the account of a member institution on the books of a Federal Reserve Bank may forward coupons directly to the Federal Reserve Bank. Other insured financial institutions may forward cancelled coupons through ordinary collection channels.

* * * * *

(c) *FNS liability for losses.* FNS shall not be liable for the value of any coupons lost, stolen, or destroyed while in the custody of an insured financial institution or for the value of coupons lost, stolen, or destroyed while in transit from an insured financial institution to a Federal Reserve Bank.

* * * * *

4. In § 278.7, paragraphs (a) and (e) are revised to read as follows:

§ 278.7 Determination and disposition of claims—retail food stores and wholesale food concerns.

(a) *Claims against violators.* FNS may establish and pursue claims against firms or other entities which have accepted or redeemed coupons in violation of the Food Stamp Act or this Part regardless of whether the firms or entities are authorized to accept food stamps. If a firm fails to pay a claim, FNS may collect the claim by offsetting against amounts due the firm on redemption of other coupons or by deducting the amounts due from bonds posted by firms in compliance with the provisions of § 278.1(b)(4). FNS shall deny an application for authorization or reauthorization by a firm which has failed to pay a claim.

* * * * *

(e) *Denials of claims brought by authorized firms against FNS.* If a claim brought by a firm against FNS under this section is denied in whole or in part, notification of this action shall be sent to the firm by certified mail or personal service. If the firm is aggrieved by this action, it may seek administrative review as provided in § 278.8.

* * * * *

6. In § 278.9, the undesignated paragraph is designated as paragraph (a). A new paragraph (b) is added to read as follows:

§ 278.9 Implementation of amendments relating to the participation of retail food stores, wholesale food concerns, and insured financial institutions.

* * * * *

(b) *Amendment No. 257.* With the exception of the provisions in § 278.5 requiring redeeming financial institutions to verify that coupons are supported by redemption certificates, the revisions to Part 278 shall be effective September 14, 1984. Redeeming financial institutions shall begin verifying coupon deposits as required by § 278.5 in accordance with the schedule determined by the Federal Reserve Board. Insured financial institutions shall adhere to preexisting requirements for handling redemption certificates (at 7 CFR 278.5(a)) until their Federal Reserve District implements the procedures contained in this final rule. FNS shall not be liable for any losses of coupons in transit to Federal Reserve Banks or as a result of a burglary or robbery of an insured financial institution which occur after September 14, 1984.

PART 279—ADMINISTRATIVE AND JUDICIAL REVIEW—FOOD RETAILERS AND FOOD WHOLESALERS

7. In § 279.3, paragraph (a)(3) is revised, paragraph (a)(4) is redesignated as paragraph (a)(5) and a new paragraph (a)(4) is added. The new and revised paragraphs read as follows:

§ 279.3 Authority and jurisdiction.

(a) *Jurisdiction.* * * *

(3) Denial of all or part of any claim asserted by a firm against FNS under § 278.7 (b), (c), or (d);

(4) Assertion of a claim under § 278.7(a); or

* * * * *

§ 279.7 [Corrected]

8. At 49 FR 28393 (column 3) published July 12, 1984, amendatory instruction number 2 is corrected to read "In § 279.7, the second sentence in paragraph (a) is revised to read as follows:".

9. In § 279.11, the undesignated paragraph is designated as paragraph (a). A new paragraph (b) is added to read as follows:

§ 279.11 Implementation of amendments relating to administrative and judicial review.

* * * * *

(b) *Amendment No. 257.* The program change to § 279.3(a)(4) shall be effective September 14, 1984.

(91 Stat., 958 (7 U.S.C. 2011–2029))

(Catalog of Federal Domestic Assistance Programs No. 10.551, Food Stamps)

Dated: August 8, 1984.

Robert E. Leard,

Administrator.

[FR Doc. 84-21593 Filed 8-14-84; 8:45 am]

BILLING CODE 3410-30-M

Agricultural Marketing Service

7 CFR Part 946

Irish Potatoes Grown in Washington; Amendment No. 4 to Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This amendment to the handling regulation, § 946.336 sets more uniform tolerances for certain potatoes. The regulation requires fresh market shipments of potatoes grown in Washington to be inspected and meet minimum grade, size, maturity and pack requirements. The regulation promotes orderly marketing of such potatoes and keeps less desirable quality and sizes from being shipped to consumers.

EFFECTIVE DATE: August 15, 1984.

FOR FURTHER INFORMATION CONTACT: Kurt Kimmel, Vegetable Branch, F&V, AMS, U.S. Department of Agriculture, Washington, D.C. 20250 (202) 447–2036.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512–1 and Executive Order 12291 and has been designated a "nonmajor" rule. Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities.

Marketing Agreement No. 113 and Order No. 946, both as amended, regulate the handling of Irish potatoes grown in the State of Washington. This program is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The State of Washington Potato Committee, established under the order, is responsible for its local administration.

At its public meeting in Pasco, Washington, on June 6, 1984, the committee recommended that the handling regulation be amended to set more uniform size tolerances on certain potatoes. Long variety potatoes grown in the production area are required to be at least 2⅛ inches in diameter or 5 ounces in weight from July 15 through August 31 each season. Currently undersize tolerances for these size designations are as specified in the "U.S. Standards for Grades of Potatoes" (7 CFR 51.1540–51.1566). These standards state that at least 95 percent of the potatoes must be at least 5 ounces to be certified to be of that weight, and that at least 97 percent of the potatoes must be at least 2⅛ inches in diameter to be certified to be of that size. The committee recommended that a 3 percent undersize tolerance be set on both size designations. This will eliminate some confusion within the industry on the proper sizing and certification of such potatoes.

The committee further recommended that tolerances on 50-pound carton packs be left unchanged. This is because these packs are currently marketed within the foodservice sector of the industry and this pack is established and accepted within this market.

Findings: After considering all relevant matters, including the proposal in the notice, it is found that the following amendment will tend to effectuate the declared policy of the act.

It is further found that good cause exists for not postponing the effective date of this regulation until 30 days after its publication in the **Federal Register** (5 U.S.C. 553) in that (1) shipments of potatoes grown in the production area have begun, (2) to maximize benefits to producers this regulation should apply to as many shipments as possible during the marketing season, (3) notice was given in the July 10, 1984, **Federal Register** (49 FR 28070) allowing interested persons until July 25, 1984, in which to file comments and none was filed, and (4) compliance with this regulation, which is similar to regulations issued during previous seasons, requires no special preparation by handlers subject to it which cannot be completed by the effective date.

List of Subjects in 7 CFR Part 946

Marketing agreements and orders, Potatoes, Washington State.

Section 946.336 *Handling regulation* (46 FR 39116, 47 FR 33245, 47 FR 38493, and 48 FR 31851) is hereby amended by adding a new (a)(2)(iii) as follows:

§ 946.336 Handling regulation.

* * * * *

(a) *Minimum quality requirements.*

* * *

(2) *Size.* * * *

(iii) *Tolerances*—The tolerances for size contained in the U.S. Standards for Grades of Potatoes shall apply except that for long varieties of potatoes packaged in other than 50-pound cartons and which are packed to meet a minimum size of 5 ounces, a 3 percent tolerance for undersize shall apply.

* * * * *

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: August 10, 1984 to become effective August 15, 1984.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 84-21683 Filed 8-14-84; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

9 CFR Part 72

[Docket No. 84–064]

Texas (Splenetic) Fever in Cattle

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: This document affirms the interim rule which amended the Texas (splenetic) fever in cattle regulations by deleting all proprietary brands of toxaphene emulsion from the list of dips allowed by the Department for dipping cattle to rid them of ticks prior to their interstate movement. This rule is necessary because such brands of toxaphene emulsion are no longer approved by the Environmental Protection Agency for such use.

DATE: The effective date of this document is August 15, 1984.

FOR FURTHER INFORMATION CONTACT: Dr. G.O. Schubert, VS, APHIS, USDA, Special Diseases Staff, Federal Building, Room 820, 6505 Belcrest Road, Hyattsville, Maryland 20782, 301–436–8438.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR Part 72 regulate the interstate movement of certain cattle because of ticks which are vectors of splenetic or tick fever. Section 72.13(b) of the regulations sets forth

certain permitted dips and procedures for the dipping of certain cattle before they are moved interstate in order to ensure that they are not infected with ticks. The "permitted dips" are proprietary brands of specific pesticides at prescribed concentrations. On May 10, 1984, an interim rule was published in the **Federal Register** (49 FR 19798–19799) which amended § 72.13(b) by removing toxaphene emulsions from the list of "permitted dips." The interim rule was made effective upon publication.

Comments were solicited for 60 days following publication of the interim rule. No comments were received. The factual situation which was set forth in the document of May 10, 1984, still provides a basis for the amendment.

Executive Order 12291 and Regulatory Flexibility Act

This action has been reviewed in conformance with Executive Order 12291 and has been determined to be not a "major rule." The Department has determined that this action will not have a significant effect on the economy; will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. The amendment merely reflects that toxaphene may no longer be used as a permitted dip for the treatment of cattle for fever ticks because of action taken by the EPA under FIFRA. No analysis of this action has been made under the Regulatory Flexibility Act because this action is required by law.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

List of Subjects in 9 CFR Part 72

Animal diseases, Animal pests, Cattle, Quarantine, Transportation, Texas fever, Splenetic fever, Ticks.

PART 72—TEXAS (SPLENETIC) FEVER IN CATTLE

Accordingly, the interim rule published at 49 FR 19798–19799 on May 10, 1984, is adopted as a final rule.

Authority: Secs. 1, 2, 32 Stat. 791–792, as amended; secs. 4–7, 23 Stat. 32; secs. 1–4, 33 Stat. 1264, 1265; 21 U.S.C. 111–113, 115, 117, 120, 121, 123–126; 7 CFR 2.17, 2.51, and 371.2(d)

Done at Washington, D.C., this 9th day of August 1984.

D.F. Schwindaman,

Acting Deputy Administrator, Veterinary Services.

[FR Doc. 84–21680 Filed 8–14–84; 8:45 am]

BILLING CODE 3410–34–M

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Loans to Members and Lines of Credit to Members; Correction

AGENCY: National Credit Union Administration ("NCUA").

ACTION: Correction to Preamble of Final Rule.

SUMMARY: On Wednesday, August 1, 1984, the final rule entitled "Loans to Members and Lines of Credit to Members" was published in the **Federal Register** (49 FR 30683). A statement regarding Office of Management and Budget approval of information collection requirements in the regulation was inadvertantly left out of the preamble to the final rule. This correction is necessary so that the statement may be added. The effective date is also corrected to reflect this change.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, D.C., 20456.

FOR FURTHER INFORMATION CONTACT: Hattie M. Ulan, Staff Attorney, Department of Legal Services, at the above address. Telephone: (202) 357–1030.

The following paragraph should be added after the paragraph entitled *Regulatory Flexibility Act* in the third column on page 30685 of the **Federal Register** dated August 1, 1984.

Paperwork Reduction Act

The final rule will be submitted to the Office of Management and Budget for approval of any information collection requirements that appear therein. Any information collection requirements in the final rule will not take effect until they have been cleared by the Office of Management and Budget. Comments regarding information collection requirements contained in the final rule should be forwarded directly to the OMB Desk Officer indicated below: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, D.C. 20503. Attn: Judith McIntosh.

On page 49 FR 30683, the **"EFFECTIVE DATE"** is corrected to read as follows:

EFFECTIVE DATE: September 1, 1984, except for the information collection requirements contained in § 701.21(c)(2) and the last sentence of § 701.21(g)(4).

Dated: August 9, 1984.

Rosemary Brady

Secretary of the Board.

[FR Doc. 84–21825 Filed 8–14–84; 8:45 am]

BILLING CODE 7535–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 84–ASW–23]

Alteration of Control Zone; Little Rock AFB, AR

Correction

In FR Doc. 84–20524, appearing on page 31060, in the issue of Friday, August 3, 1984, in the second column, in the first paragraph under **"Little Rock AFB, AR"**, in the eighth line "of 8" should read "to 8".

BILLING CODE 1505–01–M

CIVIL AERONAUTICS BOARD

14 CFR Part 255

[Regulation ER–1385; Economic Regulations Docket 41686]

Carrier-Owned Computer Reservations Systems

AGENCY: Civil Aeronautics Board.

ACTION: Final Rule.

SUMMARY: The CAB is adopting rules that deal with competitive abuses and consumer injury resulting from practices of those airlines that provide computer reservations services to other air carriers and travel agents. The rules prohibit specific practices, including discrimination in price and other terms of access for information distribution services; tying access to information distribution services to the purchase of other services or goods; ordering the display of information in computer reservations systems on the basis of carrier identity; and including provisions in agreements with travel agents that impede agent access to objective service information. The rules also require the dissemination of certain computer-generated information. The rule is at the Board's own initiative in response to a study requested by Congress.

DATES: Adopted: July 27, 1984. Effective: November 14, 1984.

In accordance with the Paperwork Reduction Act (44 U.S.C. 3507), the reporting provisions (§§ 255.4(b)(2); 255.4(c)(3); 255.5(c); and 255.8) that are included in this final rule have been or will be submitted for approval to the Office of Management and Budget (OMB). They are not effective until an OMB control number has been obtained.

FOR FURTHER INFORMATION CONTACT: Robert D. Young (202) 673–6060, Samuel E. Whitehorn (202) 673–5450, Paul Samuel Smith (202) 673–5450, Barry L. Molar (202) 673–5205 or George S. Baranko (202) 673–6011, Civil Aeronautics Board, 1825 Connecticut Avenue NW., Washington, D.C. 20428.

SUPPLEMENTARY INFORMATION: EDR–466C, 49 FR 11644, March 27, 1984, proposed general rules that would forbid air carriers owning computer reservation systems (CRS's) from using these systems to injure consumers and air transportation competition. We tentatively found that rules dealing with unjust discrimination in the terms of contract with other carriers are necessary. We also proposed rules that would prohibit the ordering of information in integrated displays on the basis of carrier identity. Under these rules, CRS vendors would be required to inform participating airlines of the criteria used in selecting connecting cities and ranking flights. In addition, we proposed rules that would forbid subscriber contract terms that impede travel agent access to other information services. Finally, we proposed rules requiring CRS carriers to disseminate to participating airlines information generated by CRS's.

Comments and reply comments have been filed by numerous parties. Consistent with our statement in EDR–466C that we would consider comments received after the comment dates, we will grant all motions for late filing. While the great majority of comments support some regulation of CRS vendor practices, many request that we modify the rules we have proposed. The comments of American Airlines, Inc.; Air Cal/Muse Air Crop./Jet America (the Muse Group); the American Society of Travel Agents, Inc. (ASTA); the Association of Retail Travel Agents, Ltd. (ARTA); Continental Air Lines, Inc.; Delta Air Lines, Inc.; the Department of Justice (DOJ); Eastern Air Lines, Inc.; Frontier Airlines, Inc.; Jet Express, Inc.; Air Atlanta, Inc., Air Florida, Inc., Midway Airlines, Inc., Northeastern International Airways, Inc., Ozark Air Lines, Inc., Pacific Southwest Airlines, and Southwest Airlines Company (the Joint Carriers); KLM Royal Dutch Airlines; Newair Flight Inc.; Northwest Airlines, Inc.; Omega World Travel, Inc.; Pan American World Airways, Inc.; People Express Airlines, Inc.; Republic Airlines, Inc.; Southwest Airlines Co.; Trans World Airlines, Inc.; Tymshare, Inc.; USAir, Inc.; and Western Air Lines, Inc. fall into this category. In addition, the Aviation Consumer Action Project (ACAP); the Association of Data Processing Service Organizations, Inc. (ADAPSO); and the Regional Airline Association (RAA) have filed generally supportive comments. In their comments Heritage Travel, Inc.; Horizon Air; the Travel Agent's Computer Society (TACOS); and United Air Lines, Inc. indicate their opposition to CRS rules.

Most of the parties that submitted initial comments also submitted reply comments. In addition, reply comments were filed by Japan Air Lines Company, Ltd.; Lufthansa German Airlines and Swissair/Swiss Air Transport Company, Ltd.

We have also received more than 110 letters from travel agents indicating their views. Almost without exception, the agents indicate that they cannot afford increases in their costs, which may occur as a result of our rules. Slightly less than a third of the agents go on to argue that because they can work around the bias in their CRS's, no rules should be adopted. Almost an identical number support our rule, but ask us to ensure that participating carriers pay their fair share of CRS costs. The remainder take no position on our rules, but ask us to ensure that agents do not unfairly bear their burden.

The several challenges to our basis and purposes for promulgating these rules, and our disposition of numerous requests for modification of those rules, are discussed below.

The changes from the rules proposed in EDR–466C we have decided to make are, for the most part, technical. They are designed to clarify our intention with respect to certain proposals. One major exception is our decision to propose that CRS vendors use a minimum of nine hubs in constructing connecting flight displays. We have recently adopted a Notice of Proposed Rulemaking in order that we may receive further comments on this issue. A second exception is our proposal to require the release of criteria for selection and display of information to any interested party, rather than just participating carriers and subscribers. Finally, with respect to our proposal to require the release of marketing data generated through CRS's, we are concerned that the release of such data to foreign carriers may give them an unfair advantage over U.S. flag carriers in international markets. We will shortly issue a second Notice of Proposed Rulemaking seeking comments on those two subjects.

With regard to other matters, we have decided to delete our proposal requiring CRS vendors to arbitrate fee disputes with participating carriers. The comments have convinced us that such a rule would probably not facilitate dispute resolution. We have also decided to adopt, essentially as proposed, a rule prohibiting CRS vendors from unjustly discriminating in the prices they charge for CRS access. However, in order to foreclose easy circumvention of that rule, and the bias rule as well, we are making clear our earlier intention that CRS vendors treat all carriers with which they have not signed contracts in a nondiscriminatory fashion. This will preclude CRS vendors from continuing discriminatory treatment and retaining bias in their systems by merely raising access charges to a level no carrier is willing to pay, and then adjusting their bias to suit the competitor.

We are also emphasizing our expectation that basic access charges will not vary from carrier to carrier except in unusual circumstances. While our rule permits cost-based price differences, the rule creates a rebuttable presumption that access charges will be equal.

With respect to the effect of our rule on existing participation contracts, we are clarifying our intent and understanding that they become void as of the effective date of our rule. Absent such a result the objectives of our regulations would not be obtained for several years. In any event, our rules constitute a significant change in circumstances that may make the contracts unenforceable by either of the parties under contract law.

General Challenges to Our Authority

Of the parties opposing any regulation of the CRS industry, only United offered significant legal or factual arguments for not adopting the proposed rules. We will first address its arguments that we lack the power to promulate these rules, before turning to its specific challenges to our legal and factual analysis.

I. Statutory Authority

Our powers to redress "unfair methods of competition" were designed to provide a means to protect competitive processes in the marketplace. Unfair competition may be any practice that destroys competition and establishes monopoly. *Pan American World Airways* v. *U.S.*, 371

U.S. 296, 307 (1963). There is no list of practices that violate its terms. Generally, practices that would violate provisions of other antitrust statutes may be found unlawful under this section. However, we may also prohibit practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate those laws. *See FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321 (1966). Section 411, like section 5, was meant to supplement other antitrust statutes by stopping in their incipiency those methods of competition which fall within the meaning of the word "unfair". Whatever the unfair practice or method employed, the sections were designed to bolster and strengthen antitrust enforcement. What is unfair is determined on the facts of each case and the impact of the practice on competition and monopoly. *Pan American, supra.* 371 U.S. at 307–08.

Our judgment of what is unfair must be informed not only by general antitrust principles, but also by the policy considerations underlying the Federal Aviation Act. *Pan American, supra.* 371 U.S. at 308. Section 102 of the Act, which sets out the policy factors to be considered in Board decisions, strongly supports our intervention in this case. It directs us to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation, and [to avoid] (A) unreasonable industry concentration, excessive market domination, and monopoly power; and (B) other conditions; that would tend to allow one or more air carriers or foreign air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation." Section 102(a)(7), 49 U.S.C. 1302(a)(7).

United asserts that our objective in this proceeding is to eliminate the competitive advantage carriers operating CRS's have obtained over their air carrier competitors. Citing *E.I. DuPont de Nemours & Co.* v. *FTC*, 729 F.2d 128 (2nd Cir. 1984), it argues that such action is beyond the authority granted us in section 411 of the Federal Aviation Act, as amended. 49 U.S.C. 1381. In its view, we only have the authority to prohibit conduct that is "unfair." We cannot prohibit legitimate conduct simply because it has an impact on competition we do not like or with which we disagree.

United's characterization of our action is incorrect. Our rules do, in fact, focus on eliminating conduct antithetical to the antitrust laws. Among the several types of conduct we found to be unfair methods of competition were the following:

1. Discriminatory treatment of downline competitors by a competitor with upstream market power. *See LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966);

2. The use of market power in one market to induce the purchase of services in another, *Hirsh* v. *Martindale-Hubbell, Inc.*, 674 F.2d 1343 (9th Cir. 1982);

3. The use of market power in one market to gain an unwarranted competitive advantage in another, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 360 F.2d 263 (2nd Cir. 1979);

4. The exclusive use of information gained by virtue of a competitor's upstream market position from the monopoly to disadvantage downstream competitors, *Second Computer Inquiry*, 77 FCC 2nd 384, 480–81 (1980); and

5. Inducing purchasers to accept exclusive contracts that are restrictive in character. *See FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

The *Dupont* case, where the court struck down FTC prohibitions on a group of independent practices by oligopolists which the FTC conceded were not collusive, predatory or individually objectionable under the antitrust laws, is clearly inapposite here.

Morever, our rules clearly do not eliminate the legitimate competitive advantages the CRS vendors have gained because of their innovations. For example, we are not regulating the amount that CRS vendors charge either carriers or travel agents. Similarly, they retain the right to decide how to treat non-paying carriers under our rules and are free to retain the benefits of enhancements for themselves. Further, we have adopted a very narrow information disclosure rule designed to deal with the particular problems created by CRS vendors' exclusive access to marketing information of other carriers. Nor have we attempted to dictate the manner in which information is displayed. In these, as well as other areas, we have taken the minimum action we believe is necessary to eliminate unfair conduct.

II. Adequacy of the Record

United also raises a second broad challenge to our proposed rules. It asserts that the record is inadequate to support the proposed rules. In its view our proposals are based upon untested factual assumptions, particularly regarding the shifting of revenues, load factors, and the setting of booking fees. It asserts that crucial facts are highly controversial and that the disputes about them can only be resolved by holding an oral evidentiary hearing. It also points out that the FTC would have to conduct such a hearing if it were to engage in a rulemaking of this kind.

It is well established that we have the discretion to proceed by general rule or by adjudication. *See SEC* v. *Chenery Corp.*, 332 U.S. 202–03 (1974); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966) cert. denied, 385 U.S. 843, *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973). Having chosen to proceed by rulemaking, nothing in our governing statute or the Administrative Procedure Act requires that formal hearings be held. There is no provision in our statute comparable to the Magnuson-Moss Act, 14 USC 45, even though Congress must be aware that our standard practice has been to adopt rules through informal procedures.

United cannot be claiming that we have not gathered enough information on CRS practices, for, as it has made clear elsewhere, it believes the document production obligations we placed upon it were unduly burdensome. *See* Order 83–10–74, October 18, 1983, at 12–14. Rather, it objects to our rejection of its economic analysis and disputes the inferences we draw from the underlying facts. As will be detailed below, there is substantial evidence of record in support of our findings and conclusions, as well as ample reason to reject United's proposed economic analyses.

Challenges to Our Basis and Purpose

I. The Existence of Market Power

In the NPRM, we found, based on our review of the extensive record before us and on our familiarity with the air transport and travel agency systems, that CRS owners have a substantial degree of power over price and output in the CRS industry. Moreover, because they are competitors in the downstream air transportation industry, they have the ability and incentive to exercise that power in ways that may interfere with air transport competition. Upon careful analysis of the various challenges to those conclusions, we remain convinced that our findings in the NPRM accurately described the competitive dynamics of the CRS and air transportation industries.

A. Conduct

The essence of market power is the ability of individual competitors to raise prices or decrease output without fear of competitive response. The presence or absence of such power can be ascertained through a number of analytical methods, including examination of concentration in the

industry and assessment of its performance. Market power can also be detected much more directly—through evidence showing the actual use of such power. United's theoretical challenges to the NPRM's findings largely ignore the abundant, compelling evidence of the major vendors' pricing and output behavior. The documents in Docket 41663 and the evidence gathered and catalogued in DOJ's comments show example after example in which the major vendors have: dictated fees that were discriminatory, not based on cost, not affected by the prices charged by other vendors and unchanged by pleas that they were excessive, see DOJ 11/17/83 Comments at 108–144; forced other carriers to pay substantial net ticketing fees as a condition of CRS access *id.;* steadily increased the degree of bias in their system, with no adverse effect on their CRS market penetration, DOJ 11/17/83 Comments at 73–108; and reduced or withheld service on a selective basis to discipline air transportation competitors, DOJ 11/17/83 Comments at 112–113 and 144–158. Both the CRS vendors and their air carrier customers are acutely aware of the vendors' market power, and they act accordingly. *See* DOJ 11/17/83 Comments at 166–168.

United and American do not deny the conduct. Instead, they challenge our definition of the market, and proffer theoretical explanations of how their conduct may be consistent with a competitive market, and why it should not be found to be unfair. We will discuss the controversy over CRS behavior first.

United and American interpret our statement that the disparate prices charged other airlines can only be the result of market power to mean that differential pricing can never occur in a competitive market. Of course, that was not our point. Rather, our conclusion was that the pricing behavior we see in the CRS industry is clearly the result of market power. Our conclusions, therefore, are not meant as a rejection of the value of service pricing theory espoused by Professor Baumol. United 11/17/83 Comments. He is correct in noting that differential pricing does occur in apparently competitive industries like air transportation. However, in such industries, competition forces suppliers to take account of their own costs, the value of the service being offered and, most importantly, the prices charged by their competitors. Thus, when an air carrier offers discounts based on advance purchase and length of stay restrictions, its competitors are inevitably forced to offer a competitive response.

In the CRS industry, vendors take no account of the price charged by their competitors. Moreover, they virtually ignore their own costs in setting their prices. *See* evidence cited in DOJ 11/17/83 Comments at 108–144. Thus, it is not merely the fact of price differentials, but the additional facts that they are based on competitive considerations and that they are not disciplined by CRS competition, that demonstrate market power. The value of service pricing theory simply does not explain the behavior we see in the CRS industry.

One example that United cites of a competitive market in which differential pricing occurs is theater seats. That analogy is inapposite. Theaters are better categorized as operating in a monopolistic competitive environment rather than a purely competitive environment. At any given time, in any given city, there is generally only one theater that is offering a production of a particular play. Although the theater owner is clearly competing with other goods and services (and the overall price level is thereby somewhat constrained), the owner does have a degree of monopoly power—*i.e.,* some discretion over price. In addition, all theater patrons have the option to select the price and service level that best suits their needs.

United has suggested a number of "legitimate business reasons" that purportedly account for price differentials in its contracts with other airlines. Half of the factors listed, however, are inconsistent with either a competitive price or a value of service price, specifically the importance of the other airline to United's "overall business," the extent of the bias reduction purchased in the contract, and the negotiating power of the other airline vis-a-vis United. The suggestion that the bias reduction explains the disparity in prices could not be farther from the mark. As a general rule, co-hosts have the least bias against them *and* they pay the lowest prices. Similarly, the further suggestion that the date of contracts is a primary basis for price disparity is belied by the wide disparity in recent contract prices. *See* DOJ 11/17/83 Comments at 139–140. Furthermore, most of these contracts do not provide for non-monetary compensation that might justify different contract prices. Quite simply, there is little evidence to support United's assertion that it and other vendors have engaged in value of service pricing. The evidence we have unambiguously demonstrates that vendor pricing decisions are in actuality based upon the goal of manipulating downstream air transportation competition.

American asserts that because the production of CRS services clearly entails joint costs—*i.e.,* the benefits of CRS's to travel agents, participating carriers and ancillary service vendors are produced simultaneously, and costs and benefits cannot be explicitly assigned to one or the other class of purchasers—there is no linkage between price discrimination and market power. The weakness in this argument is that it does not justify discrimination within a class of purchasers—*i.e.,* participating carriers. While we share American's concern that it would be difficult to allocate cost between the various classes of purchasers, nothing in its argument undermines our conclusion that it is only able to discriminate among participating carriers because it has substantial market power in the CRS industry.

United and American also challenge our conclusion that CRS vendors' ability to bias indicates the existence of market power. In this regard, we reasoned that the increases in bias that have been occurring in the last two years are inconsistent with the preferences of the purchasers of CRS services—travel agents and other airlines—who would prefer unbiased systems and who would presumably be able to demand a product responsive to those preferences in a competitive market. United contends that its system does, in fact, give agents what they want, citing the fact that three travel agent associations have opposed our proposed rules. Their reliance on the comments of the American Automobile Association, Travel Trust International and TACOS is misplaced. The major travel agent trade associations (ARTA and ASTA) representing more than half of the approximately 24,000 travel agents in this country wish to see bias eliminated and their comments support our proposed rules. All of the travel agent pleadings, including the numerous letters we have received, have one theme in common—a concern that agents not be made to bear the cost of our rules. Virtually all that oppose our rules do so on the grounds that any benefits from our rule may be outweighed by this feared result. We are confident that travel agent costs will not rise significantly as a result of our rules.

With regard to the preferences of the airline purchasers of CRS services, United simply says that they are irrelevant. Such an attitude could not prevail in a competitive market, where competition would force vendors to

meet customer desires in order to stay in business.

American argues that bias does not constitute a restriction of output becuase unlike normal output restrictions, bias does not reduce the vendor's overall costs, and does not drive prices up by making the product more scarce. The fact that bias constitutes a restriction on the quality of the product rather than its quantity does not change its effect or significance. Bias still raises the price to air carriers by increasing the amount of air transport revenues lost to the host. Moreover, as one would expect in a non-competitive market the restrictions on information quality have not generated a meaningful competitive response. On the contrary, it appears that bias has been increasing rather than decreasing over the past few years.

B. Market Definition and Market Shares

Another basis for our conclusion that CRS vendors have monopoly power was our analysis of market share statistics that show a high level of concentration on both the regional and, given the unusual importance of incremental passengers for profitable air transport operations, the national level. United, and to some degree American as well, argue that our reliance on those statistics is misplaced because they are based on product and geographic markets that are defined too narrowly. They assert that the relevant product is "airline ticket distribution services," rather that CRS services and that the only relevant geographic market is national, rather than particular regions of the country.

The service CRS vendors sell is not the direct distribution of airline tickets to consumers. Rather, it is the distribution of information between travel agents and airlines. Travel agents must have access to a source of information on what services are available, at what fares, whether seats remain to be sold and whether reservations can be confirmed and tickets issued. Air carriers, at the same time, must communicate to their distribution outlets what services they are offering, at what fares, and whether seats are available. These are the relevant purchase transactions.

With this in mind, the suggestion that the relevant product is air transportation distribution services is easily dealt with. As we explained in the NPRM (pp. 22–23), air carriers currently have no realistic substitute for the travel agency distribution system, because of its efficiencies, coverage, and the fact that passengers perceive it as providing a different type of service than they can receive by contracting airlines directly. It is noteworthy that since we issued the NPRM, the Air Traffic Conference of America has published new data showing that travel agents now account for 80 percent of the sales of major and national carriers. There are no real substitutes for CRS's from the travel agent's perspective because the systems are so much more efficient than other methods of exchanging information. Finally, because the vast majority of travel agents use CRS's to the exclusion of other information sources, for a carrier to have meaningful access to travel agents, it has no alternative other than to have access to their CRS's (See NPRM at 8–11).

With respect to geographic markets, United insists that a national market is the only one relevant to our analysis. We agree that viewing the CRS market from a national perspective provides some insight. As explained below, however, we also believe that in many respects the market for CRS services is regional in nature.

DOJ's national market statistics show that SABRE agents account for 43 percent of all domestic travel agent revenues, while APOLLO agents account for another 27 percent. These shares are lower than those courts generally recognize as indicating monopoly power. Nevertheless, given the nature of competition in CRS and air transportation markets, the national shares suggests that the leading vendors have significant market power. Because of economics of aircraft size, the time sensitivity of a substantial portion of passengers, and the geographic dispersion of potential passengers for a given flight, ignoring a substantial fraction of travel agents can have a severe negative impact on the economic viability of a carriers' service. Thus, from the carrier's perspective, CRS's are in many respects not substitutes for one another. Access to SABRE agents does not render access to APOLLO agents unnecessary, and vice-versa. This fact, noted in the DOJ study as well as in the comments of a number of carriers, is most dramatically demonstrated by the vendor's pricing behavior. In setting carrier fees, vendors take little or no account of the fee levels charged by other vendors, and individual carriers frequently pay varying fees to different vendors. The willingness of purchasers to switch among competing suppliers on the basis of changes in price or service quality is the hallmark of competition.

However, there is abundant evidence that, from the perspective of travel agent and air carrier purchasers, as well as CRS suppliers, the area of effective CRS competition is far narrower than nationwide. The essence of the geographic market definition task is to determine whether an area confines relevant commercial activities. If CRS vendors are making pricing and output decisions protected from the need to take the practices of other CRS vendors into account, there is a distinct market. If the CRS vendors act to discipline one another, however, because they can readily enter each others' areas to sell, the market is defined too narrowly. Sullivan, Antitrust at 68 (1977). Nothing in *White & White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983), on which United relies, is inconsistent with these principles.

The evidence in this proceeding strongly supports the conclusion that a CRS provider can effectively sell its system only in areas where it is a substantial provider of air transportation services, particularly the metropolitan areas surrounding its major hubs.

There is a strong correlation between CRS dominance and air transporation presence. In the Dallas/Ft. Worth area, where American has developed a significant hub, it had 280 travel agent subscribers, accounting for 88 percent of travel agent sales revenue. United, on the other hand, which provides no service to DFW, had only four agencies subscribing to APOLLO, accounting for only one percent of the sales revenue. Appendix A, Table 1, DOJ 11/17/83 Comments at 3. In Denver, where United has a major hub and American entered only recently, the figures were essentially reversed.

This correlation is explained by a number of factors, all of which confirm the relevance of regional markets to our analysis. Travel agents' need for the most accurate, reliable and up-to-date information on the carriers they book most, and their desire for a strong working relationship with those carriers, give CRS vendors substantial regional marketing advantages. NPRM at 18. Thus, for a Denver travel agent, Eastern's SODA system is a poor substitute for APOLLO because it offers inferior information on the carrier that agents book most.

From the supply side, the heavy reliance by vendors on incremental revenues dictates that their competition for agents is regional. To ensure that a prospective subscribe would benefit American, for example, that carrier has, until recently, set criteria for automation agents that include minimum yearly sales on American. Agents that did not meet the threshold, either because they were located in regions outside those where American flew or because they

were too small, could only obtain SABRE if another carrier covered the cost of automating the agency. *See* AA080999. Thus, even if Denver travel agents were willing to forego the superior information provided by APOLLO, American would have little incentive to compete for their business.

In areas where two CRS vendors provide substantial air transportation services, there is a greater degree of competition for travel agency subscribers, although, as is explained below, this competition does not redound to the benefit of air carrier consumers of CRS services. Large agents in these areas can benefit from the so-called conversion war. They may receive substantial cash inducements, in the form of free systems or incentive payments, to switch systems. In the year ending June 30, 1983, Chicago, New York and Los Angeles were major conversion battlegrounds. In the Dallas/Ft. Worth area, however, American lost no agents to other systems. Docket 41663, AA22–102.

American and United explain the correlation between air transport presence and CRS dominance as purely historical—that vendors simply focused their initial sales efforts in their own back yards. This explanation may have some validity in that it explains why cities like Boston are CRS strongholds for SABRE or APOLLO despite the fact that late CRS entrants, like Eastern and Delta, are the major carriers there, but it does not undercut a regional market definition. First, the historical incentives for vendors to focus on specific regions remain in place today. Second, because of long-term subscriber contracts, liqudated damage provisions, restrictions on multiple systems within individual agencies and the substantial disinclination of agents to switch systems (NPRM at 25–26), current regional dominance can be expected to erode only slowly, if at all. This is of concern because air carrier demand for CRS services is regional in nature as well.

While all air carriers draw some traffic from all over the country, some regions are more vital traffic sources to them than others. For example, for Frontier, whose hub and spoke route structure is focused at the Denver hub, Denver passengers constitue its most important traffic pool, passengers from the end-points of its spokes are next in importance, and passengers from points not in its route system are of lesser, but still significant, importance. Since access to travel agents is necessary to reach the majority of each traffic source, Frontier's need for CRS access varies regionally as well. For it, access to APOLLO is vital, not just because APOLLO agents nationally account for 31 percent of all domestic travel agent revenues, but more importantly because they account for a much higher proportion of traffic in many of the cities Frontier serves. The importance to Frontier of access to APOLLO agents is clearly shown by the results it achieved by attaining co-host status in APOLLO. It estimated that its improved display position in APOLLO resulted in a four percent increase in its system-wide revenues. FAS 569.

Because carrier demand for CRS services is essentially regional in nature, and because individual CRS's are in many ways complements, rather than substitutes for one another, CRS competition in some areas has not worked to the benefit of air carrier purchasers or CRS services. A carrier with a substantial number of flights serving an area has little choice but to purchase access to each CRS to which a major share of the travel agents in the region subscribe. If it is not listed on a major CRS in that area, a sizeable block of agents will be substantially less likely to book flights on that carrier. Not being listed on the CRS will force it to forego the chance to sell tickets to the customers of the agents booking a large portion of the revenues in a region it serves. Even in Chicago, where CRS competition may be the most intense, APOLLO is not an acceptable substitute for SABRE. While a listing on APOLLO gives a carrier access to agents who account for 42 percent of automated agency bookings, failure to be in SABRE denies the carrier access to agents who account for another 41 percent of such bookings. DOJ 11/17/83 comments at 44–45.

Recognizing this, CRS providers do not consider the practices of other CRS providers in their dealing with other air carriers. *See* sources cited in DOJ 11/17/83 Comments at 130–31. For the same reason, carriers have recognized that there is little benefit in being on a system whose subscribers are located in areas far removed from where they provide service. Docket 41663 EA–CON ER1–10–193–94.

In sum, all the factors normally employed in defining the geographic market suggest that a regional market definition is in many respects much more relevant to a competitive analysis than a national market. The CRS vendors perceive their sales area to be less than national and customarily have made little effort to sell or promote their services in areas where they are not substantial air transportation providers. Few sales are made outside a vendor's home region. Prices within a region are not responsive to changes in supply and demand elsewhere. Finally, other traders are significantly disadvantaged in trying to sell in other regions. *See* Sullivan, Antitrust at 68 (1977). While our markets may not exactly define the parameters of competition, as the *White & White* court recognized, that is not necessary. 793 F.2d, *supra*, at 503. What is required is that the geographic market be defined in a realistic way so that the economic power of the seller may be evaluated. We are confident, particularly because of the substantial evidence of record that CRS vendors themselves and their air carrier customers believe they hold market power, that our market definitions are appropriate.

C. Performance

United also challenges our conclusion that CRS vendors have earned excessive rates of return. It rejects our reliance on statements in the record and demands that we engage in a "thorough and competent analysis of profits." At the heart of its argument is the belief that our rulemaking is an attempt to find it in violation of the antitrust laws. It thus characterizes our action as essentially an adjudication for which a full evidentiary hearing is required. In this regard the case it relies upon for the proposition that a full economic analysis is required, *In re Kellog Company*, 99 F.T.C. 8 (1982), was an adjudication not a rulemaking proceeding. United continues to ignore the fact that this proceeding is designed to determine whether prospective action is necessary. It is not an effort to punish United or any other carrier for past actions or to assess whether violations of the antitrust laws have occurred. We have not addressed those questions and we need not resolve them in order to go forward with our proposed rules. *See National Petropoleum Refiner's Ass'n* v. *FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951.

The evidence of record is overwhelming to the effect that taking incremental revenues into account, the profits from CRS's are far in excess of costs. *See* NPRM at 27 and DOJ 11/17/83 Comments at 51–56 and 107–8. To counter this evidence, United asserts that we cannot rely upon the internal statements of corporate officials used in making their corporate decisions. Instead, United would have us rely upon the economic analysis of Professor Wecker.

Analysis of that study, however, indicates that it is of little probative

value. Professor Wecker's conclusion that APOLLO operates at a loss, on a stand alone basis, is based upon fee assumptions that do not take into account non-cash payments. For example, he sets Eastern's fee at 50 cents per booking without considering the value of gates transferred to United as a part of the contract. Docket 41663 EA–CON ER1–10–610. Negotiating documents, however, clearly indicate that the fee to Eastern would have been $1.00 without the gate transfers. The yearly difference in revenues from Eastern alone translate into an operating profit. Similar arrangements with Frontier and Republic were also excluded.

In addition, Professor Wecker based his conclusion that the increased passenger revenue accruing from bias was 13 percent on a comparison of agency revenues immediately before and within the first two months after conversion from one system to another. Internal documents of American indicate that the benefit of bias is much greater, AA22–104, and internal documents of both American and United conclude that it takes some time after conversion for the full effects of bias to be felt. AA22–104 and UA012208. Another obvious weakness in his study is his conclusion that 90 percent of the fares gained from incremental passengers must be apportioned to the cost of providing service, even though we have repeatedly found that the marginal cost of transporting additional passenger is extremely small. *See Domestic Passenger Fare Investigation, Phase 6B* at 43. In subsequent comments, he sought to bolster his assumption by presenting evidence that United's load factors have remained constant, despite the fact that it is carrying more passengers. Putting aside the fact that he used load factor data covering only a one year period, his supplemental analysis still does not save his 90 percent figure. Given the fact that airlines obtain additional flight segments primarily through improved asset utilization, the cost of adding additional flights is still far less than ninety percent of the passenger's fare.

United would argue that the value of Professor Wecker's profit analysis can only be determined in a hearing, with the opportunity for interested parties to engage in cross-examination. It is well-established that this is not necessary. *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 435 U.S. 519 (1978); *Florida East Coast Railway* v. *U.S.*, 410 U.S. 224 (1973).

Nor do we believe that our findings concerning entry barriers are flawed by our failure to measure sunk costs in the CRS industry. United's contrary assertion appears to be based on Professor Baumol's theory of market contestability. However, despite his illuminating description of a "perfectly contestable" market, we do not believe that he has demonstrated the computer reservation system industry is contestable, let alone perfectly so. For example, the record demonstrates that carriers have invested substantial sums in developing software systems. Clearly these represent a sunk cost and therefore limit the contestability of the market. More fundamentally, the evidence in the record demonstrates that computer reservation systems depend on the system operator offering substantial air transportation services. Professor Baumol ignores this critical relationship. Small air carriers, as well as independent vendors, are not able to exploit the incremental revenues from bias and, absent our rule, would be deprived of an important revenue source from potential CRS operations. The lack of this revenue precludes the viability of hit-and-run entry.

II. Essential Facilities/Monopoly Leveraging

United objects to our use of the essential facility doctrine in this proceeding. In its view, the elements of that doctrine have not been established and cannot, therefore, be used to support our conclusions that CRS vendor conduct is unfair. Specifically, citing *Official Airlines Guide Co., Inc.* v. *FTC*, 630 F.2d 920, 926 (2nd Cir. 1980) and *Fulton* v. *Hecht*, 580 F.2d 1243, 1248 (5th Cir. 1978), United asserts that the doctrine only applies to concerted activity where the facility is owned jointly by a group of competitors. The doctrine does not apply where the facility is owned separately.

United misunderstands the findings of those cases. Neither court found that the doctrine cannot be applied to a facility owned by a single person. Neither forecloses application of the essential facility doctrine to an individually owned facility. In fact, the Supreme Court has applied the doctrine in such circumstances. In *Otter Tail Power Company* v. *U.S.*, 410 U.S. 366 (1973) the only firm with electric power lines was forced to transfer power over its lines for any retailer that wanted service, even one bent on replacing the company.

The proposition for which the *OAG* and *Hecht* cases may be properly cited is that the essential facility doctrine may not be applied where the facility is owned by a person or persons that do not compete with others wishing to gain access. If the monopolist does not compete in the enterprise of those seeking access, it has no inherent incentives to prefer one potential purchaser over another and is therefore apt to attempt to accommodate as many as possible. Even if it does not, under the *Colgate* doctrine, *U.S.* v. *Colgate & Co.*, 250 U.S. 300 (1919), absent any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right of a trader to exercise his own independent discretion as to the parties with whom it will deal. Of course, that is not the situation presented here.

While we cited the essential facility cases as alternate bases for our proposed rules, we also find them instructive because they suggest that courts have been cognizant of similar types of harm and have moved to foreclose it under the Sherman Act. For example, the central concern of the Court in *U.S.* v. *Terminal Railroad Association*, 224 U.S. 383 (1927), was the ability of the members of the Terminal Railroad Association to use their monopoly to foreclose competition and to gain competitive advantages downstream. The court found that the terminal association had economic power. It then reasoned that while there would be no illegal restraint of trade if the trade association had "act[ed] as the impartial agent of every line which is under compulsion to use its instrumentalities," it had not acted impartially. In fact, it had denied entrance into the association for apparently competitive reasons, imposed arbitrary handling charges, and maintained a discriminatory billing system. However, if these "administrative conditions" were eliminated and "the obvious advantages" of the association were preserved, the association would be consistent with the statute and would benefit the public. 224 U.S. at 410–11. Consequently, to foreclose unfair uses of the facility, the Court imposed an obligation on the association to afford access to the facility on reasonable, non-discriminatory terms. Other essential facility cases are to the same effect. *See e.g., Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1952) and *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

Parallels may also be drawn with the line of cases establishing the concept of monopoly leveraging. Derived from the more traditional section 2 Sherman Act offense of monopolization, the theory provides that a firm violates section 2 by using its monopoly power in one market

to gain an unwarranted competitive advantage in another. *Berkey Photo, Inc.*, v. *Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979) and *M.A.P. Oil Co., Inc.* v. *Texaco, Inc.*, 691 F.2d 1303, 1305–06 (9th Cir. 1982). In short, a firm can be found to have abused its monopoly even though it has not sought to maintain or expand its monopoly in the monopoly market, or to acquire monopoly power in the disputed markets. We are surely empowered to reach comparable conduct in the CRS industry, given our broad powers and responsibility under section 411.

III. Consumer Protection

In determining whether practices are "unfair and deceptive" under section 411, we may consider public values beyond those enshrined in the letter or encompassed in the spirit of the antitrust laws. We may be guided, as well, by pronouncements of public policy embodied in other statutes, the common law as well as common perceptions of what constitutes moral and ethical business conduct. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

A. Consumer Injury

In EDR–466C, we found that CRS bias injures consumers. Under section 411, conduct may be found unlawful because of its effects on consumers if (1) it causes substantial consumer injury, (2) that is not outweighed by any consumer or competitive benefits from the conduct, and (3) the injury cannot reasonably be avoided by consumers. We found that bias causes substantial consumer injury in that it deprives consumers of the opportunity to take advantage of lower fares and causes them to take less convenient flights. United disputes these conclusions. It asserts that as of November 1983, its fares are as low or lower than those of any of its competitors in 84 percent of the routes it served and that consumers are really very flexible in their travel options such that a wide variety of flights may be equally suitable to them.

United's arguments are not persuasive. Using its figures, bias creates a clear danger that consumers will not become aware of the lowest-fare service in one sixth of the markets it serves. Moreover, although virtually all carriers offer some discount fares in the markets they serve, those fares may have differing capacity controls and restrictions, and the flights on which they are offered may be at varying times of the day. Consumers seek the service/fare options most suitable to their needs. Even in the 84 percent of United's markets where United matches the lowest fare, there is no guarantee and little likelihood that its fare/service offerings will always match consumer needs and desires better than the offerings of other carriers, or indeed that its offerings will match those needs at all. As Frontier has shown (Frontier 11/17/83 Comments at 3–5 and Appendices B and C), schedule and availability displays can often act to limit a consumer's fare choices. If a flight is hidden in later displays, or perhaps not displayed at all, the CRS can create the impression that the low fare is not available on a convenient flight. As for the suggestion that consumers' travel plans are generally flexible so that being put on a later flight, or perhaps a less desirable connecting flight or less desirable equipment, is not a significant inconvenience, little needs to be said. The crucial point is that consumers are being denied the opportunity to select flights with full knowledge of fare and service offerings. Incremental revenue figures indicate the extent to which consumer choices are being distorted. While there is not a perfect one-to-one correlation between incremental revenues and the harm caused consumers, if only a small portion of the hundreds of millions of dollars of passenger revenue shifts caused by bias represented consumer injury in the form of lost time or higher fares, the injury would be substantial.

With respect to our conclusion that the consumer injury is not outweighed by any consumer or competitive benefits that bias produces, United asserts that we did not really consider the benefits that result from bias. Specifically, United claims that bias has the beneficial effects of lowering CRS prices to travel agents and encouraging investment and innovation in the CRS industry.

Our difficulty with United's asserted benefit is that it does not enure to consumers. We have no evidence to suggest that lower travel agent prices are passed on to consumers. Even if some benefits are passed on, bias results in substantial hidden charges to other airlines that consumers ultimately pay for in the form of higher fares and reduced air transportation competition. In addition, below-cost pricing to agents works to undermine, not enhance, CRS competition. Non-carrier vendors and CRS vendor carriers that cannot earn similar incremental revenues because of their smaller route systems are deterred from CRS entry because they cannot make up for the incremental revenue shortfall by charging realistic fees to subscribers.

With regard to encouraging investment and innovation, United's claim is that because it earns greater profits with bias than it would be able to earn without bias, it has greater incentive to invest and innovate when bias is present. One would expect the same to be true with any unfair practice. However, under our rules, United and other efficient CRS vendors should have no trouble earning respectable profits from their CRS operations, and it is the profit motive, not just the source of profits, that encourages investment and innovation. Moreover, as we have demonstrated, bias acts to inhibit CRS entry. Insofar as it does, investment and innovation in the CRS industry is less than we would expect to see without bias.

To demonstrate that any consumer injury can be avoided, United makes three arguments. First, it asserts that consumers can obtain information on preferencing from sources other than CRS vendors. While this may be true in a general sense, nothing in this record suggests that anyone has made, or has any incentive to make, any effort to explain bias to consumers, or to travel agents for that matter. Indeed, vendors change the degree and type of bias frequently, and are working to make it more subtle and more difficult to detect. Thus, even if consumers and agents are aware of bias in a general way, they cannot work around it if they do not know its details.

Second, United argues that consumers have the option of using unautomated agents or those automated with "unbiased" systems. It asserts that this is a real alternative because about 20–25 percent of all agents are unautomated. In reality, however, unautomated agents are not a feasible alternative. Such agents account for only 12 percent of yearly agent sales and appear to be concentrated in rural and suburban areas. Thus, to realize this option, consumers would have to seek out the smallest, least sophisticated agents, incurring further cost and time loss in order to avoid the possible inconvenience caused by bias. As for United's suggestion that Delta may offer an unbiased CRS alternative we need only note that in its comments to EDR–471 United recognizes that Delta does in fact bias its selection of connecting flights and it asks that we eliminate that bias. UA 4/26/84 comments on EDR–471, at 2.

Finally, United asserts that consumers will begin to demand impartial information from agents if it is important to them. If they do not, then bias is not a problem. Stripped to its simplest form,

United's argument is that the marketplace will correct any problems. For a number of reasons, including the complexity and quantity of information involved, the ability of CRS vendors to change bias without notice and modify its effects market-by-market, and the substantial cost of obtaining superior information, we conclude that the problem will not be overcome by consumer demand.

B. Consumer Deception

In response to our conclusion that bias constitutes a deceptive practice, United argues that it has made no direct or indirect representation on CRS quality to consumers. While United and other CRS vendors have made no direct representations to consumers, it is sufficient that the CRS providers are making representations to travel agents that will be relied upon in their dealings with consumers. In *Great Lakes Airlines* v. *United States Overseas Airlines*, 34 CAB 61 n.7, for example, we concluded that false statements in a trade publication used primarily by agents were sufficient to violate section 411 even though there was no representation made to the public. *See* also *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3rd Cir. 1963) and *Hunt Pen Co.* v. *FTC*, 197 F.2d 273, 281 (3rd Cir. 1952). Delta, of course, claims that its system is unbiased and other vendors have made indirect representations by failing to disclose substantial increases in the level of their bias. *See* DOJ 11/17/83 Comments at 83 and 104.

In addition, consumers expect travel agents to offer impartial information. United and the other CRS vendors are parties to agreements establishing travel agents as a common, essentially neutral distribution system. United cannot now ignore the impression of neutrality it and the other members of the Air Traffic Conference of America endeavored to create over the last forty years. United's response is that consumers are not aware of the accreditation system and that the degree to which the public expects agents to offer impartial information is a matter of speculation. In fact, it is well established that the consuming public views travel agents as providing objective advice. *See* Initial Decision, Docket 36595, at 42–44. The fact that we allow carriers to pay incentives commissions to agents is in no way inconsistent with our findings here. Unlike bias, commissions do not restrict the information available to consumers, and all air carriers have the same ability to compete in that way.

Finally, United claims that if our deception theory has merit, the remedy is not to eliminate bias, but to require that it be disclosed. While disclosure may be the traditional remedy in deception cases, it is not feasible in this case. As we have elsewhere explained, consumers would not be able to readily obtain better information if the mere existence of bias were disclosed. Rather, its full nature and extent would have to be revealed. Given its complexity and the quantity of information involved, the only practical alternative is to require its elimination.

Requests for Modification of Our Rules

We now turn to the numerous requests that we modify our rules. As more fully explained below, we conclude that most proposed modifications are not warranted, many because they constitute greater intervention in CRS vendor prerogatives than we believe is necessary. We will make several technical changes, however, that clarify how our rules are to operate and eliminate unforeseen ways to circumvent them.

I. The Scope of Our Rules (§§ 255.2 and 255.3)

A. Non-airline CRS's

American, ASTA, DOJ, Northwest, RAA and TWA all argue that our bias rules should apply to non-airline systems. They assert that bias harms consumers and competition regardless of ownership of a CRS. They also fear that, if such systems were not covered, airline CRS owners could easily avoid our rules by selling their systems under arrangements giving them preferential display.

Tymshare counters that it is the prospect of incremental revenues from competitors in the air transport market that creates the current problems. Non-airline vendors cannot obtain incremental revenues and do not compete in downstream markets, hence their incentives are to produce the most complete and efficient information systems available. Their agent and airline customers will want the same. Finally, extending the proposed rule to apply to CRS's owned directly or indirectly by airlines would reduce the incentive to engage in sham spin-offs.

For essentially the reasons Tymshare has set forth, we will not apply our rules to non-airline CRS's. Our fundamental concern in this proceeding is the potential to use CRS power to destroy air transportation competition and to injure consumers. Non-airline CRS's do not have the same incentive or ability to engage in similar conduct. Nor has there been any evidence that such enterprises have or are likely to do so.

We will, however, adopt Tymshare's suggestion, which was also proposed by several other commenters, that we apply our rules to CRS's indirectly owned or controlled by airlines and their affiliates. We will accomplish that modification by adopting a definition of affiliate and including references to affiliates in the definitions of "system" and "system vendor." Absent such action CRS vendors could readily circumvent our rules through a relatively simple corporate reorganization.

B. "System" Definition

Our proposed rule would apply to CRS's that offer information on "schedules, fares, rules or availability" and provide "the ability to issue tickets." This definition restricts the application of our rule to the package of services CRS vendors generally offer. DOJ, American, Continental and JAL support the proposed definition because otherwise the rules would apply to systems which should not be regulated because they perform different roles in air transportation distribution. Delta, however, thinks that we should apply the definition to systems that either provide the listed types of information or provide the capability to make reservations or issue tickets. TWA suggests that we should focus on the ability to make reservations instead of the ability to issue tickets, because otherwise some small systems that lack only ticket issuing capabilities would not be covered.

We have decided to modify our definition by including within it the ability "to make reservations" as well as the ability to issue tickets. The key to CRS efficiency, and the factor that makes them indispensable to travel agents, is the capability they provide to agents and carriers to exchange information without the use of the telephone. The information essential for this purpose is fares, schedules, availability and the request for and confirmation of reservations. The end product of this process is the issuance of tickets, and the fact of that issuance must also be communicated. Our definition is consistent with our estimation of the features which make the CRS product unique. Lesser products—such as the electronic Official Airline Guide—or limited purpose systems that provide information only on the vendor are not effective substitutes. Moreover, air carriers have concluded that their service, fare and availability information must be displayed and agents must be able to write their tickets on the CRS if the they are to have effective access to the travel

agent distribution system. Only a few carriers, most notably Southwest and People Express, which have tailored their operations to reduce their reliance on agents, have been able to survive without the basic services we have described. For these reasons, it does not appear that vendors of such lesser products have the same abilities and incentives to engage in unfair practices as do vendors of the CRS product.

C. "Participating Carrier" Definition

Our proposed definition of "participating carrier" covers any carrier with an agreement "for display of its flight schedules, fares, and seat availability." Southwest currently has an agreement with system vendors for display of its schedules, but not its availability. It fears that the use of the word "and" in the definition would permit vendors to discriminate against it. USAir suggests substitution of "and/or" for that word. Continental has suggested that we expand the definition to include contracts for reservations and ticketing services. On a related point, several commenters have suggested that we require vendors to "unbundle" their services by allowing carriers to decide on the degree to which they will participate in the system.

We will modify the definition of "participating carrier" to include a carrier with an agreement for ". . . display of its flight schedules, fares, or seat availability, or for the making of reservations or issuance of tickets, through a system." The purpose of this change is twofold. First, the specification on reservations and ticketing is added to make the definition more consistent with our definition of system. Second, we have replaced the word "and" with "or" to cover the unbundling problem. With the changed definition we read our rule as permitting, but not requiring, vendors to offer any combination of services to carriers that they wish. However, any combination that is offered to one carrier must be offered to all on nondiscriminatory terms. This result is consistent with our treatment of enhancements.

D. CRS Subscribers

Our rules only apply to systems offered to subscribers., The proposed definition of "subscriber" is limited to ticket agents with a CRS "agreement" holding themselves out "as a neutral source of information about or ticketing for" the airline industry 'in general." Several changes have been suggested. Several commenters objected to the reference to an agreement, arguing that freedom from bias should not depend on the existence of a CRS contract. We agree. The requirement that an agreement exist adds nothing to our rules and may create a loophole. We will delete references to an "agreement."

Most of the same commenters also assert that bias affects all who sell air transportation, and not just conference travel agents. ASTA, for example, claims that effectively limiting the rule to ATC/IATA travel agents gives vendors the incentive to use other retailers and so places conference agencies at a competitive disadvantage. Delta believes "in general" should be deleted because it would be confusing in the case of ticket outlets that (at some point) might represent some but not all airlines.

We will not apply our rules to new distribution channels that represent just one or a few carriers. Our order in the *Competitive Marketing Investigation*, Order 82–12–85, December 16, 1983, allows air carriers to appoint distributors, outside the travel agency system. Potentially, such outlets could serve the important function of disciplining travel agent practices. Where such outlets restrict themselves to the sale of one or a few carriers' services, the imposition of our CRS rules would be inappropriate. They would have been created for the very purpose of preferring certain carriers' services. So long as this fact is made known to the public, and other carriers are free to establish similar outlets, the use of biased CRS's in such outlets could not be found to harm competition or injured the public. Of course, if such outlets hold themselves out to be neutral distributors of air transportation services, our rules would apply to any systems they use.

We will, however, adopt Delta's suggestion that we delete the words "in general" from the definition. We agree that the words add nothing to the definition and may create confusion.

Several commenters also argue that the definition should be broadened to cover systems used in Scheduled Airline Ticket Offices (SATO's), Combined Airline Ticket Offices (CATO's) and Business Travel Departments (BTD's). It is asserted that customers of these outlets need protection just as much as travel agent customers do.

American and United, on the other hand, argue that SATO operations are already governed by contracts requiring neutral service to all participating carriers. As for corporate accounts, they are not "neutral." The BTD customers have arranged with specific carriers to obtain CRS equipment and are aware that the information displayed favors the host. This choice should remain available to businesses, who must be considered competent to decide their own transportation needs.

We will not expand the scope of our rules to include the systems used by SATOs, CATO's or BTDs. CRS's play a different role in such outlets than they do in travel agencies. SATO's and CATO's are under the direct control of local committees consisting of interested airlines serving the area in which the individual offices are located. Airlines injured by automation practices—including the use of highly biased internal displays—can use their power in those committees, and as participants in SATO and CATO agreements, to force the use of less biased systems. Carriers that do not offer reservations systems to travel agents sometimes place their own internal systems, *i.e.*, the systems used by their own reservations personnel, in SATO's. Including SATO's in our definition of subscriber would have the perverse effect of either forcing these carriers to incur the cost of developing unbiased systems for this limited purpose, or replacing their system with one offered by a CRS vendor. Finally, from a consumer perspective, the United States Government is, for all practical purposes, the sole customer of such offices and has the leverage to require impartial CRS's in them. In addition, the General Accounting Office has ruled that travel agencies may now compete with SATO's for government business, thus offering an unbiased alternative.

Similarly, corporations establishing BTD's negotiate at arm's length in their dealings with air carriers and all carriers are able to compete for their business. The CRS system to be used is one factor to be weighed in selecting the carrier to provide ticket stock and other services. The amount of bias in the CRS system could be another matter to be dealt with in the contract, along with settlement terms, security considerations, etc. In addition, corporations can always place their business through travel agents using unbiased systems. Consequently, we believe that corporations are generally capable of protecting their own interests.

II. The Bias Rules (§ 255.4)

A. Multi- and Direct-Access Systems

American, Eastern, JAL and TACOS urge clarification that the bias rules apply only to "primary" displays in multi- and direct-access systems. They argue that otherwise each participating

carrier would have to unbias its own "internal" display, rendering this type of CRS extremely unattractive. DOJ, on the other hand, considers this a "loophole" through which CRS hosts will make their own "secondary" display more attractive to agents than the primary. The Joint Carriers think this prospect would be less likely if we either required that users of primary screens have available all services or options open to secondary display users, or, as TWA suggests, allowed vendors to display only their own services on secondary screens. American and United simply deny that offering a biased display in addition to an unbiased one constitutes an unfair method of competition or consumer injury, so long as agents have access to objective information.

We will amend the rule to make clear our original intent that its requirements apply only to the primary displays in each airline CRS offered to a travel agent. Additional displays of airlines participating in multi- or direct-access systems, including those produced by the host, need not be unbiased. Our concern in this proceeding is to ensure that agents have access to impartial information through their CRS's. So long as each CRS includes a neutral display of all carrier offerings that is as useful to the agent as any other displays, this objective should be fulfilled. The additional ability of system users to refer to biased screens to improve their knowledge of one carrier's services does not undercut competition or the public interest. To close the loophole That DOJ fears, we will include a specific requirement that the primary display be as useful to the subscriber in terms of functions or enhancements offered, and the ease with which such functions or enhancements can be performed or implemented, as any secondary display maintained by the system vendor. We intend to apply this requirement with reference to our entention that Vendors not make primary displays so difficult or time-consuming to use that subscribers automatically turn to biased secondary displays to serve their clients. We do not intend by this requirement to force multi-or direct-access systems to offer so-called "last seat availability" for third-party carriers in their primary displays, but we do interpret it as requireing that their own availability information be at least as current in the primary display as it is in any secondary displays.

B. Elimination of Carrier Identity Factors

Almost all parties endorsed elimination of carrier identity factors in ordering displays. A good many urged that a rule also require the service factors employed by each vendor be applied consistently to all markets as well as to all carriers. Otherwise, they argue that ostensibly neutral criteria (e.g., multi-class service, wide-body aircraft, etc.) could be selected for each market that would favor the CRS vendor.

We agree. Our intent is that display criteria be applied uniformly to all markets and to all carriers, and the rule will be amended to make that clear. Absent such a requirement, CRS vendors could vary their display criteria market-by-market to maximize the sales on their flights and continue the very harm this rulemaking was meant to address.

We will not permit CRS owners to use different factors for display of international services at this time. While a different set of criteria may be appropriate for international air transportation, as KLM suggests, there is not enough evidence yet to justify a departure from our general rules that might afford an opportunity for reintroducing carrier preference. We will remain flexible on this point, however, and will consider different treatment for foreign air transportation if circumstances warrant.

Many parties believe it would be desirable for us to adopt a general proscription against even indirect use of carrier identity factors. They urge the inclusion of the words "directly or indirectly" in § 255.4(b), arguing that without at least a broad "backstop" against CRS bias, the general rules proposed in the NPRM will fail and specific, detailed regulation will be necessary.

We will include this suggestion in our rule. It makes it clear that we will intervene to eliminate display criteria which appear to be neutral but in fact are contrary to the spirit and purpose of our rules.

We requested comments in the NPRM on the need for prohibiting vendors from using certain criteria, such as hub size, in selecting connect points. Although a number of commenters supported that idea, we will not adopt it at this time. As we have noted in EDR–471A, we are extremely reluctant to become involved in substituting our judgment for that of the vendors, especially where there is no clear need to do so. We believe that several of the modifications we are making or proposing substantially reduce vendors' abilities to evade our rule. We have made it clear that vendors may not achieve bias by indirection and that they must apply their criteria even-handedly to all markets. In addition, we have proposed a requirement that they be capable of building connections over at least nine hubs. With those changes, we believe it unnecessary to develop a catalogue of prohibited hub selection criteria.

A number of parties ask us to prohibit discrimination as to airports serving the same city, to prevent favoring those used by vendors at the expense of others. American, however, submits that all major CRS's now allow agents to inquire about service to and from cities as well as airports. So long as the information is readily available to users, forced integration of city/airport displays would be inappropriate and inconsistent with the policies generally underlying the proposed rules, according to American.

We see no need to add a specific requirement in this area. We read the requirement that vendors "order" their displays in an unbiased fashion as including a requirement that they select flights for display in such a fashion. Thus, our rule would require vendors to use objective criteria in deciding which airports will be searched when the subscriber uses any given city or airport code in his or her request.

We will also deny Frontier's request that we require the display of combined air-ground services on CRS's. Its request is beyond the scope of this proceeding, and would amount to affirmative regulation of display criteria, which would be inconsistent with our approach to display bias. Moreover, we have no evidence that the failure to list air-ground services is a significant competitive problem.

Finally, we will deny American's request that we require other CRS vendors to integrate the displays of their direct and connecting flights. Our reasons for not taking this action were carefully articulated in EDR–466C (NPRM at 32–33) and American has offered no evidence persuading us to change those views.

C. Disclosure of Display Criteria

Sections 255.4(b)(2) and 255.4(c)(3) provide that display selection criteria be disclosed to participating airlines and subscribers. Several parties ask for clarification of these rules. Continental and KLM note that the rules apply only to current criteria. They do not create an affirmative obligation to disclose changes in the criteria used. Continental asks that we require CRS vendors to notify participating carriers and subscribers prior to any changes in criteria or in weighing factors. Absent such a requirement, the burden would fall on other carriers and subscribers to detect any changes in criteria.

Our use of the phrase "disclose upon request . . . current criteria" was intended to relieve vendors from the possible burden of disseminating information to parties with no desire or need for such information while at the same time facilitating the enforcement of the bias rules by insuring that interested parties have accurate and current information on the vendor's display criteria. As we read that language, the question of whether the disclosure obligation is continuing will depend on the terms of the request. If a participating carrier wishes to be informed of changes without the need to make separate requests, all it need do is phrase its original request to include subsequent changes. We therefore see no need to change our original formulation, although we will amend § 255.4(c)(3) to parallel the language contained in § 255.(b)(2). With respect to timing, we will not specify when criteria or format changes must be disclosed, other than that they must be known in advance of or simultaneously with implementation. This obligation only extends to participating carriers and subscribers who ask that the criteria, formats or procedures be made known to them.

Since issuing the NPRM, we have come to a tentative conclusion that the effectiveness of the disclosure requirement would be greatly enhanced if interested members of the general public had access to information on display criteria. Because that issue has not been raised to date, we will issue a separate Notice of Proposed Rulemaking to obtain comments on that proposal before including it in the rule.

D. Information Loading

The proposed rule requires vendors to "apply the same standards of care and timeliness" to loading the information of participants as they do with their own information. Furthermore, any "special loading capability" is treated like a service enhancement; it must be made available to all participants if offered to any. DOJ, Continental and the Joint Carriers believe this allows host airlines to evade the anti-bias rules by simply not offering direct updating or comparably quick procedures to others. However, American thinks the rule may require that direct updating be available to all participants and asks for clarification that it does not. ASTA favors the rule as written. United considers that it would have to delay loading its own information until it could offer the same loading frequency to all participants. Delta, DOJ, and the Joint Carriers deem it sufficient if hosts offer the same frequency to others, rather than require that all be updated on the exact same basis.

Our reason for proposing and adopting a rule on information loading is to ensure that vendors do not allow competitive considerations to affect the care or timeliness with which they load other carriers' information. Our objective was not to require absolute equality between non-vendors and vendors in loading procedures or frequency. Indeed, we recognize that integration of vendors' internal and external systems, and the cost of direct links and the development of direct loading procedures may make it difficult to load other carriers' information in the same way or at the same time as the vendor's own information is loaded. We believe that our rule as proposed accommodates these opposing concerns. As we interpret it, it would allow vendors to decide when and how they would accept information for loading. However, once the vendor's CRS department has received information on other carriers, it must be loaded as quickly and as carefully as the vendor's own information is loaded. We believe this standard will be adequate to protect competition and consumers.

For the same reasons, we will not force CRS owners to offer other carriers direct computer-to-computer links. If offered to one participating carrier, however, it must be offered to all on non-discriminatory terms. To clear up an ambiguity in this area, we will delete the parenthetical in § 255.4(d). The language "direct updating" contained in that parenthetical suggests that direct updating is a basic feature of CRS's. This was clearly not our intention.

E. Miscellaneous Matters

Frontier asks us to adopt rules that would prohibit CRS vendors from programming their systems to automatically name themselves as ticketing carriers whenever they appear on the flight itinerary. Because the ticketing carrier holds the passenger's money until the ticket is actually used, it gains the benefit of the use of the money—the credit float.

We are unwilling to adopt rules in this area at this time. So long as the carrier receiving the credit float is one of the several providing transportation, the practice is in compliance with our prior decisions on the subject. *See* Orders 83–4–135 and 83–7–55. Moreover, the several carriers providing transportation would seem to have initially equal claims to the credit float. The agent's decision to steer it to one or the other carrier is a complex one involving many factors, such as the amount of transportation provided by the respective carriers, consumer preferences and so forth. These factors apparently have induced agents to override such autovalidation programs. American has reported that SABRE agents negate its autovalidation program on half of the tickets they issue.

Finally, we will make a technical change suggested by USAir that will clarify our rules. In § 255.4(b)(1) we will subsitute the words "display of information" for "flight information".

III. Carrier Access Fees (§ 255.5(a))

In EDR–466C we proposed to prohibit unjust discrimination in fees charged to participating carriers. The rule would allow vendors to charge different fees to carriers based on differences in the cost of serving them. § 255.5(a). However, we also requested comments on whether we should adopt an equal fee rule in lieu of a prohibition on unjust discrimination.

The positions of the various parties run the entire spectrum of possible action on CRS pricing. United and DOJ urge us to adopt no pricing rules whatsoever. User carriers generally support some action on reasonableness of fees while vendors generally support a non-discrimination approach. At the other extreme, some parties suggest that participating carriers be afforded access to CRS's free of charge.

A. No Pricing Rule

United and DOJ urge us not to adopt a pricing rule. United's position derives primarily from its arguments that Board intervention is unnecessary and unlawful. These arguments have already been addressed.

DOJ, in contrast, agrees with us that the current CRS pricing structure is the result of market power and is adversely affecting airline competition. It argues, however, that our intervention in CRS pricing may produce inefficiencies that outweigh the benefits of such a rule. DOJ suggests that we focus, for the time being, on eliminating bias and requiring vendor participation in other systems.

DOJ believes that a pricing rule should meet four criteria: it should not allow reintroduction of bias; it should not inhibit CRS competition; it should inhibit the vendors' ability to exercise market power against downstream rivals; and it should inhibit vendors from charging excessive fees. DOJ fears that our rule, particularly because of its treatment of carriers that refuse to pay non-discriminatory fees, would allow the re-introduction of bias. DOJ foresees vendors asking prohibitive but non-discriminatory fees. When carriers refuse to pay these fees, the CRS

vendors then are free to bias against them in their displays.

DOJ's preferred option of no pricing rule has engendered substantial opposition. It is generally described as emphasizing theoretical market distortions of a pricing rule over distortions that exist and will continue as a result of vendor market power. (Muse Group, Western, USAir, and Frontier)

The Muse Group argues that the lack of a price rule will lead to the same evils that DOJ claims result from bias. Vendors could use their market power to set excessive fees to carriers, continue to charge below cost fees to agents and thus protect themselves from competitive entry in the CRS market. In addition, excess fees would raise air carrier costs, as does bias. Competition in air transportation would continue to be distorted. The Muse group also claims that elimination of price regulation would allow vendors to reintroduce bias by charging excessive fees. Carriers that could not afford the fees might be subjected to the most extreme form of bias, elimination from CRS's entirely.

There is some merit to DOJ's arguments. We are sensitive to the risks of distortion inherent in government regulation of prices. Those risks were among the reasons that we declined to propose a reasonableness requirement in EDR–466C. DOJ's position, however, does not give sufficient weight to the market distortions that will persist if we take no action. The record demonstrates that some vendors currently charge differential prices based on considerations of air transportation competition. If we were simply to eliminate bias, and vendor market power did not dissipate in the short run, they could continue to do so. Indeed, with the loss of incremental revenues, their incentives and ability to discriminate based on competition might increase. Thus, carrier ownership of CRS's would continue to affect air transportation competition adversely. However, given the detriments of government regulation noted above, we will refrain from intervening too greatly into market pricing decisions in the first instance. Rather, the unjust discrimination rule, as discussed more fully below is the minimal intervention which should cure the problems of existing pricing practices, *i.e.*, vendor prices to individual carriers that are based on air transportation competition. Of course, should our approach prove ineffective, it may be necessary to reconsider our role in regulating prices at a later date.

B. Reasonable Fees

Continental, Frontier, the Joint Carriers, the Muse Group, Newair, Northwest, Pan American, RAA, Republic and USAir argue that a rule against discriminatory fees alone will not be sufficient to control abuse of market power in setting fees. Most urge us to adopt a reasonable fee requirement.

All these commenters argue that market power can be exercised by charging excessive prices as well as by price discrimination. If our rule does not preclude excessive CRS fees, then vendors will have the incentive and the ability to recover lost incremental revenues by charging additional booking fees. Excess fees will have the same deleterious effect on air transportation competition as does bias. It will raise the cost of doing business for vendors' competitors, and thus insulate vendors from competition.

While the carriers in this group share a concern that a discrimination rule will not preclude excessive fees, there is some divergence on proposed solutions. Pan American, the Joint Carriers, the Muse Group, Northwest, Republic, and USAir support a reasonableness requirement. None would have us attempt to set fees at this stage. Continental suggest that it would be sufficient for us to state our concern over fee levels and institute a separate rulemaking to consider more effective solutions to pricing problems.

United, American and Delta oppose a reasonableness rule, arguing that enforcement would lead to complex administrative problems. In their view, the Board would inevitably have to determine exactly what level is reasonable. American states that the failure of supporters to suggest an appropriate cost allocation in the first instance shows how difficult this task would be.

In proposing and adopting only a price discrimination rule, we are not finding that vendors should have unfettered freedom to charge their air transportation competitors excessive fees. We need not determine the limits of that freedom here. Rather, we anticipate that the bargaining power of some participating carriers, combined with a non-discrimination requirement, will generally hold fees close to reasonable levels. The evidence and comments submitted by proponents of a reasonableness rule have not convinced us otherwise. Many carriers rely on United's plans to charge regional and commuter carriers $2 or $3 for booking or cohost status as evidence of vendors' plans to charge excessive fees. Assuming that such fees would be excessive, United's ability to charge regional carriers these fees does not demonstrate its ability to charge major carriers the same fees. If it does not, the discrimination rule should protect the regional carriers. United has indicated that some carriers are important enough to agents to give those carriers substantial bargaining power, and DOJ has also noted its view that a properly constructed rule would permit us to rely on bargaining power of larger CRS customers to hold all fees to reasonable levels. Morever, although we noted in EDR–466C that some evidence suggests that fees in the $1 to $1.50 range would adequately compensate vendors, this evidence is by no means conclusive. The cost study submitted by Republic is too cursory to qualify as conclusive evidence that fees of $2 are excessive.

A reasonableness requirement also has serious drawbacks that should be considered only after less intrusive alternatives are explored. Such a requirement would not be self executing, so any complaint brought under the rule would require a ratemaking proceeding before a violation could be established. Any such proceeding would likely be time-consuming and expensive for the parties. The delay involved would simply perpetuate any injury while the proceeding was being completed. In contrast, with the clarifications that we are making, the discrimination rule should permit prompt resolution of disputes. Moreover, as we noted in the NPRM, to the extent that competition exists in the CRS market, regulation of fee levels could produce distortions in the market. NPRM at 49.

C. Zero Fee Proposals

Another proposal which has prompted substantial comment is an alternative proposed by DOJ. DOJ suggests that, if we adopt a pricing rule, we require CRS vendors to offer basic services to air carriers for nothing, *i.e.*, a "zero fee." Basic services would include unbiased display of schedules, fares and availability, and reservations and ticketing capability. Vendors would recover the expenses of their systems from charges to travel agents and non-air carrier participants, and by charging carriers for services offered in addition to the basic services.

RAA and the Joint Carriers support the proposal and New Air independently requested a similar rule. Supporters claim it would guarantee that carriers do not pay excessive fees without the need for government oversight, including the difficulties of rate regulation. While vendors would

increase agent charges to cover their costs, in their view charges to agents would not become excessive. CRS vendors would receive only a reasonable return on their investment rather than monopoly profits because competition for agent subscribers is greater than for carrier participants.

American and United object to the zero fee proposal. They claim that the rule would necessitate a dramatic increase in fees to agents. They predict that smaller agents would no longer be able to afford automation. Consumers would then turn to the larger automated agents. This is turn would lead to increased concentration in the travel agent industry. American also predicts that carriers would have to pay higher agent commissions. Because larger carriers would be better able to pay them, concentration in the air transportation industry would also increase.

The zero fee proposal has some attractive features. The travel agent side of the CRS market appears to function somewhat more competitively than the air carrier side. Although, as we have noted, agents in particular regions have strong preferences for systems provided by carriers serving their area, they do have a greater ability to substitute one system for another than do air carriers. If travel agent fees became the primary source of revenues for vendors, one might expect that overall fees would be held closer to a competitive level, and that non-carrier vendors could compete on a much more even basis. While such a rule would likely result in a substantial increase in agent fees, agents may be able to recoup those cost increases through increased carrier commissions.

Nevertheless, the zero fee proposal also has serious drawbacks. User carriers derive substantial benefits from CRS's. Thus, the zero fee proposal would foreclose vendors from receiving any payment from a major group that derives a benefit from their product would appear to be somewhat unfair and illogical. Such action could also produce inefficiencies by encouraging excessive use of the systems by those receiving the "free ride." While a zero fee rule would reduce the procedural burdens and administrative entanglements that might result from other types of pricing rules, such a rule would nonetheless constitute a substantial intrusion into the operations of the CRS market. In addition, the precise effects of a zero fee rule are difficult to predict, but it is reasonable to assume that it would have a fundamental impact on both the air transportation and CRS industries. It could also have precisely the kind of distorting effects that DOJ seeks to avoid with its preferred alternative of no pricing rule.

Weighing these considerations, we conclude that it is preferable to adopt the kind of pricing rule that is consistent with our general approach to the CRS problem. Our rules are designed to produce the minimum intervention necessary to prevent the abuses we detect, and to give vendors maximum flexibility to operate their systems so long as they do not exercise market power to harm competition or consumers. Therefore, we will not adopt a zero fee rule, but opt instead for an unjust discrimination rule as discussed below.

Although we have decided against the various proposals for additional pricing rules, we recognize that pricing issues are perhaps the most difficult issues confronting us. We are aware of the possibility that market power may allow vendors to charge excessive fees and of the potential adverse consequences for air transportation competition of such fees. Our failure to take further action now should not be viewed as an irreversible conclusion that further price regulation is not in fact necessary. We expect to monitor the situation and to adopt additional pricing rules should the need arise. We would expect our successor to do the same.

D. Unjust Discrimination vs. Equal Fees

On the choice between the unjust discrimination standard and the strict equality alternative proposed in EDR-466C, KLM, Continental, Western, the Joint Carriers, and TWA more or less support an unjust discrimination rule. They generally argue that vendors should be allowed to recognize cost differences and to avoid cross subsidization. At the same time, many recognize the potential for abuse, and suggest a variety of measures to strengthen the rule. Continental and Western would have the rule specifically impose the burden of demonstrating cost differences on the vendor; *i.e.*, there would be a rebuttable presumption in favor of equal fees. Delta, Frontier and the Muse Group prefer equal fees, but believe a presumption is necessary if we adopt an unjust discrimination standard. Western and the Joint Carriers suggest that the rule require vendors to disclose their fees, in order to facilitate monitoring and self-help remedies by carriers. TWA would require vendors to establish and publish participation criteria for various levels of service, with a uniform fee set for each level.

Delta, Frontier, the Muse Group, and American all support the proposed alternative of requiring equal fees for equal services. Although DOJ prefers no pricing rules, it argues that an equal fee rule would be more effective than an unjust discrimination rule. Proponents of equal fees argue that an unjust discrimination rule allows too much opportunity for abuse. Cost differences will be fabricated, and deciding when cost differences are justified will be time-consuming if possible at all. Even if vendors do not attempt to abuse an unjust discrimination rule, the equal fee rule would be much easier to enforce because it would avoid the need to undertake ratemaking-type determinations.

In addition, these commenters claim that our desire to preserve the vendors' ability to base prices on costs is largely based on speculation. They claim that for any level of service, the cost of providing the CRS will not vary substantially from carrier to carrier. So long as fees can be set for different levels of service, there will be little risk of cross subsidization or loss of incentive to reduce vendors' cost under an equal fee rule.

We have decided to adopt the unjust discrimination standard, subject to certain clarifications to improve its effectiveness. We have repeatedly stressed our desire to limit our intervention to deal effectively with the evils we see without creating more problems or inefficiencies. Permitting producers to consider cost differences in their fee structures promotes efficiency. On the other hand, precluding vendors from taking cost differences into account could introduce economic inefficiencies into the CRS industry. Incentives to lower costs might be reduced and cross subsidization might occur. Moreover, a rule of strict equality would be to impose a greater requirement than is normally imposed under the strictest standards of utility ratemaking.

If we were to adopt an equal fee rule, we would be ignoring these considerations, and we would be departing from policies that we have consistently applied since deregulation. We are aware of the risks entailed in the unjust discrimination rule, and we are making some modifications to strengthen the rule. However, we do not believe that these risks justify departing from traditional notions of discrimination at this time. Of course, should the rule prove ineffective, we are prepared to consider further regulation.

A number of commenters have suggested refinements to the discrimination rule which would make

enforcement easier, and would reduce risks of evasion. We are incorporating some of these suggestions into the final rule.

At the outset, we wish to clarify that the unjust discrimination rule does not permit fee differences based on value of service. To permit fee differences on that basis would perpetuate the existing discriminatory fee structure. The rule does not, however, preclude a vendor from establishing different prices for different levels of CRS services. Rather vendors simply cannot charge different prices to two carriers for the same services based on alleged differences in the value of services to those carriers.

In our discussion of the discrimination rule in EDR–466C, we stated that there would be a presumption of equality. We have decided to incorporate the presumption into the text of the rule itself and to explicitly impose the burden of justifying cost differences on vendors. Courts have on occasion imposed similar requirements, *See U.S.* v. *American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1360 (D.D.C. 1981) and it should reduce the risk of manipulation. Vendors will be required to demonstrate that cost differences actually exist before creating price differentials. In addition, the presumption alleviates the problem of costing data being in the hands of vendors and inaccessible to participating carriers. Vendors will be required to produce the data in order to make their case.

Our rule does not specifically prohibit CRS vendors from affording non-paying and paying carriers essentially the same treatment. Thus, for example, a vendor may change its policy on treatment of non-paying carriers after having signed a number of carriers to participation contracts. The early participants might find, then, that they could have obtained substantially the same services by opting for non-paying carrier status. This results in de facto price discrimination. Carriers should be cognizant of this fact during their negotiations with CRS vendors. They may want to preserve their right to switch to non-participating carrier status in the event CRS vendors afford those carriers similar services on more favorable terms. For example, carriers could negotiate provisions permitting unilateral termination on 60 days notice in such circumstances.

We will also adopt the disclosure requirement suggested by some of the commentors. Upon request, vendors will have to disclose the fees paid by any carrier for the CRS services. Where an agreement includes a barter element, vendors would also have to disclose the goods or services traded and their estimated cash value. This rule will greatly facilitate enforcement of the discrimination rule because it will allow participating carriers in the first instance to determine if they are paying fees which differ from those paid by other carriers. The schedules themselves will not, of course, establish conclusively that a violation has taken place. Vendors will still have the opportunity to demonstrate cost differences which justify the fee differentials.

E. Indirect Discrimination

DOJ and Tymshare have pointed out an apparent loophole in our rule against discriminatory fees. They foresee the possibility that vendors may be able to discriminate among air carriers by charging discriminatory prices to agents. For example, a vendor could impose per-booking charges on agents and vary them according to the identity of the carrier booked. We obviously do not intend to allow vendors to achieve by indirect practices that we prohibit directly. We will therefore include a provision in section 255.6 prohibiting vendors from conditioning prices to subscribers on the identity of carriers whose flights are sold by subscriber.

F. Reciprocal Fees for Vendors

American urges that an exception be made from the non-discrimination requirement for CRS vendors' charges to each other. It claims that the failure to provide such an exception could have perverse results. It maintains that, as a general proposition, no system vendor will pay more to another vendor than that vendor pays to it. American proposes that reciprocal fee agreements between vendors be exempt from the fee rule so long as the fee is set at least as high as the level that one vendor charges to other carriers.

The Joint Carriers, Delta, Western, TWA and DOJ oppose American's reciprocity proposal. Generally, they claim that it would undermine whatever power a price discrimination rule would have in controlling fee levels.

We will not adopt American's reciprocity proposal. We note that, although American casts its proposal as an effort to preserve pricing freedom for smaller vendors, two of the three smaller CRS carriers oppose reciprocal fees. Such a provision could be manipulated by CRS vendors to punish or reward other vendors based on the extent of their air transportation competition because it would allow a vendor to discriminate in prices between other vendors. As such, some of the evils that our rule was intended to correct would continue. Reciprocal fees could undermine some of the checks and balances contained in our rule by eliminating CRS vendor bargaining power as a constraint on fees charged by other vendors. CRS vendors tend to be the largest carriers, and their inclusion in a system is likely to be important to agents. They may therefore have greater leverage than most non-vendor carriers in their dealings with other CRS vendors. With a reciprocity provision, fees that they pay would not be considered in determining whether the fees to other carriers are discriminatory.

Finally, we reject American's premise—that one vendor will not pay more for a second vendor's service than the second vendor pays for its service. When one vendor buys CRS services from another, it is buying information distribution services to agents who are on the other carrier's system. These services are distinct from the services offered by the first vendor because its system covers a different set of agents. Since the services are not identical, it does not follow that vendors would insist on reciprocal prices.

IV. Contracts With Carriers (§ 255.5 (b) and (c))

A. Tying Arrangements

In EDR–466C, we proposed to prohibit the tying of the purchase or sale of any goods or services to participation in a CRS. We found that CRS carriers had used their substantial power in the CRS industry to force other carriers to pay for tickets they were writing for other carriers.

United argues that by requiring a CRS participant to enter into a net ticketing arrangement as a precondition of CRS access it has neither engaged in an "unfair competitive practice" nor has it violated the letter or spirit of the antitrust laws. In this regard, it reiterates its earlier arguments (1) that it does not possess sufficient economic power to coerce other carriers to accept burdensome contract terms; (2) that interline ticketing is not a separate product; and (3) that there is no anticompetitive effect in the tied product because there is no competition for United's ticketing services.

United's arguments are not persuasive. The record clearly established that the major CRS vendors have used or threatened to use their power in the CRS industry to coerce other airlines to pay net ticketing fees. Moreover, as we explained in the NPRM, CRS services are distinguishable from interline ticketing services. NPRM at 50. Finally, it is sufficient that the

arrangement appreciably restrains competition. "Such appreciable restraint exists whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them" *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503–04 (1969).

United also suggests that its contracts do not cause significant economic harm. It characterizes the NPRM as finding that carriers are being forced to purchase services they do not want. In its view, if this were true, overall carrier fees would be the same as they are now. Participating carriers would be willing to pay the price they are currently paying for CRS services and ticketing services for CRS services alone, with the second product being a throw-in. In such circumstances there is no harm to the marketplace.

While United has misstated our conclusion—we found that interline fees charged participating carriers exceeded the amount carriers would be willing to pay absent the tying of interline ticketing services to CRS access—that fact does not dispose of United's argument. Rather, the weakness in United's argument is that it ignores other types of harm with which courts are concerned. Tying arrangements are not of concern only where there is a loss of economic efficiency. Other adverse effects of tying arrangements include their use as a device to effect price discrimination and as a means to force other products on a customer so as to extract more easily from him a monopoly return on one unique product in the line. *Moore* v. *James H. Matthews & Co.*, 550 F.2d 1207, 1213 (9th Cir., 1977). *See also*, 394 U.S. *supra*, at 512–14 (dissenting opinion, White, J.).

Moreover, regardless of whether requiring carriers to sign net ticketing agreements as a precondition to CRS access constitutes a tying arrangement, a rule is necessary to make our pricing rule effective. As we explained in EDR–466C, without the tying rule, vendors could use their market power to perpetuate a discriminatory pricing structure by requiring carriers to pay for other goods or services and by establishing discriminatory fees for those services.

Some supporters of our rule have suggested that the tying rule must be modified in order to ensure that barter transactions are not used to circumvent our discrimination rule.

The Joint Carriers suggest that CRS vendors will offer favored carriers goods or services at attractive prices as a part of their CRS contracts in order to achieve the same effect as price discrimination would have on competitors. ASTA shares this concern for "sweetheart deals." While the Joint Carriers acknowledge that voluntary bartering should be permitted, they urge us to require that any barter proposal include a voluntary cash option and that the cash equivalent value should be stated for the bartered goods or services. They also suggest that we prohibit discrimination in the exchange of goods and services outside the CRS contract.

American opposes this latter suggestion. It claims that there are simply too many services that one carrier can offer to another to regulate effectively. More importantly, the rule would unfairly penalize vendors in negotiating for separate services.

We will not adopt the Joint Carriers' last suggestion. "Sweetheart deals" could be made without any explicit reference to CRS services. To preclude such evasion effectively, a rule on contracts for other goods or services would, in effect, have to regulate all exchanges of non-CRS services by vendors with other carriers. Given the extent to which all carriers exchange services with each other, such regulation would put vendors at a severe competitive disadvantage to other carriers. Of course, our tying rule would prohibit a vendor from forcing a barter transaction on a participant. The participant must be able to choose between the cash fee and the barter transaction. In addition, our fee disclosure rule will require vendors to disclose the estimated cash value of any goods or services exchanged for CRS services.

B. Arbitration

Response to our proposal to require arbitration of fee disputes was mixed. Continental, USAir, Western, Northwest, and Republic support the concept. They generally agree that it would improve enforcement of any pricing rule, and be more efficient than Board resolution of disputes. Republic argues that an arbitration rule would be fully analogous to the imposition of arbitration under merger and acquisition Labor Protective Provisions (LPP's). In both cases, according to Republic, the delegation is based on the Board's recognition that it cannot effectively handle all disputes which might arise.

DOJ, American, United and Delta oppose arbitration. Their objections are based, for the most part, on their opposition to the unjust discrimination rule. In addition, DOJ fears that arbitration may add to the costs of participation in CRS's and cause vendors to adopt strategies which themselves distort the market. Delta and American believe that arbitrators may get sidetracked by improper inquiries into the reasonableness of rates, and fear that arbitrators deciding individual cases may produce inconsistent decisions or decisions that require a vendor to alter the price of all contracts without the benefit of any coordination. American also suggests that the Board is capable of moving quickly on a charge of discriminatory pricing. It asserts that its experience with arbitration under merger LPP's proves that arbitration does not guarantee to provide prompt resolution of disputes.

These carriers also challenge our legal authority to impose an arbitration provision. Unlike labor relations, where we have no inherent expertise, we do have expertise in commercial ratemaking. United notes that LPP arbitration is imposed under section 408 of the Act, which authorizes us to impose reasonable conditions on our approval. United argues that section 411 contains no such authority.

We have decided not to adopt the arbitration provision at this time. This decision is not based on doubts about our legal authority to do so. On the contrary, we believe that we do have the legal authority and that our LPP experience provides a relevant analogy. Our decision to impose arbitration requirements when LPP disputes arise was based on our likely inability to resolve disputes quickly.

We proposed to require arbitration because we believed that it would provide a faster and less expensive means of resolving fee disputes. Based on the comments and our modification to the pricing rule, we are no longer certain of that conclusion.

As the commenters have pointed out, arbitration can be complex, time consuming, and expensive. We proposed arbitration as a possible alternative to protracted hearings in order to vindicate claims about discriminatory fees. The modifications to our fee discrimination rule outlined above should greatly reduce the need for hearings in this area. The vast majority of fare and rate complaints that we received when we regulated carrier pricing were resolved based on written submissions. We anticipate that this may also be true under our pricing rule, where disputes will be more narrowly drawn. In addition, even with arbitration, carriers would have had the right to appeal arbitrators' decisions to us. Such appeals are regularly filed with us in the LPP area. The appeal process would have undermined the time savings associated with arbitration.

Therefore, we will not include the arbitration requirement in the final rule. Of course, carriers are free to include arbitration provisions in their CRS agreements as a voluntary matter.

C. Validity of Contracts

Since our proposed rules require the removal of bias and the elimination of discriminatory fees, they will obviously have a major effect on existing contracts between vendors and carriers. A substantial number of comments address the question of precisely what that effect will or should be. Some carriers claim that we should declare all such contracts null and void (American, the Muse Group, Continental and United). American interprets the rule as abrogating existing contracts but requests that we declare all contracts void to avoid confusion. United notes that our silence on this issue could spur lawsuits and prove to be quite expensive. United also states that if contracts are not void it assumes it could offer a price equal to an existing contract to a few carriers and offer higher prices to others without violating the rule, but yet avoiding its intent. The Muse Group argues that we can not permit existing contracts to continue as even those contracts with lower fees disadvantage other carriers.

Frontier and Republic ask that we not interfere with their contracts. They claim that their contracts include non-monetary payments to CRS vendors, such as equipment or the settlement of a lawsuit that kept their fees low. They would lose the benefit of these payments if their contracts are voided. American and United respond that carriers will receive credit for any prepaid "funds" either in negotiations or the courts.

All current contracts must be abrogated, not just those that participating carriers dislike. Carriers can not have the protection of the rules and also retain the special benefits in their particular contracts. Our rules declare that the central provisions of existing CRS vendor-participant contracts are contrary to public policy. As a result of our rules, the product offered, and the bargain between the parties, will be substantially changed. In addition to the price provisions, other basic elements affected include cohost bias provisions, and the net ticketing provisions.

Our conclusion that the rule renders contracts between vendors and participating carriers unenforceable is consistent with numerous decisions recognizing that actions by the government can affect existing contracts. *See e.g. Louisville & Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467, 484–5 (1911); *Nebbia* v. *New York*, 291 U.S. 502, 523 (1934). Contracts in violation of a valid federal regulation are unenforceable. *See e.g., Quinn* v. *Gulf & Western Corp.*, 644 F.2d 89 (2nd Cir. 1981); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 420 F.Supp. 162 (S.D. Ala. 1976). If this were not so, parties could by contract circumvent any regulation or statute. *Cf.*, 219 U.S., *supra*, at 485–6. The courts have also rejected arguments, like Republic's, that government action denied a party to a contract due process by setting aside a contract because it violated a statute. 291 U.S., *supra*, at 537–38. Finally we clearly have the authority to take action that results in the voiding of contracts in order to carry out our responsibilities under the Act. *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1954).

The cases Republic cites, where courts have given one party the option to void contracts, are not controlling. Where, as here, we are not dealing with an individual contract but many, affecting a whole industry, different considerations apply. As American has pointed out, permitting some contracts to continue would make our rules ineffective and impossible to implement within a reasonable period.

Concerning the ability of carriers to recover prepaid "non-cash payments", we agree with American and United that in those instances where the problem exists, carriers should be able to recoup unearned fees either through negotiation or the courts.

V. Contracts With Subscribers (§ 255.6)

The major disputes concerning this section involve the length of contracts between vendors and travel agents, the scope of liquidated damage clauses, and the validity of contracts.

ASTA, ARTA, Newair and the Joint Carriers assert that the five year provision (§ 255.6(a)) is too long. American responds that it originally suggested that its contracts were for five years not for competitive reasons but to take maximum advantage of the tax code regulations. It notes that contracts for lesser periods obviously could be, and are, entered into.

We will adopt the proposal to limit the term of subscriber contracts to a maximum of five years. While we are sympathetic to the views of ASTA, ARTA and the other parties seeking shorter contracts, we believe we should as much as possible limit our intervention in the CRS industry and constrain our role to protecting air transportation competition. We will intervene to eliminate only those contract terms clearly designed to prevent travel agents from switching systems. We have found no other business justification for the lengthy contracts. American has, however, raised a significant business purpose in maintaining subscriber contracts with five-year terms. Consequently, although restricting subscriber contracts to very short terms may make the CRS industry somewhat more competitive, we will not take action to restrict subscriber contracts to less than five years. Subscribers and CRS vendors are, of course, free to negotiate contracts of shorter duration and we hope that a shorter term does become the industry standard.

We will not grandfather all subscriber contracts entered into before March 1, 1984, as Delta has proposed. Our rule would not affect the great majority of subscriber contracts, regardless of when entered into, as most, according to the information we have, are of less than five years' duration and do not contain the restrictive clauses we have found objectionable. While we believe our rule renders those specific provisions unenforceable, they are generally ancillary provisions, not crucial to the bargain between the parties. As such, vendors and subscribers may well decide to abide by their contracts' remaining terms.

The Joint Carriers and Tymshare both suggest that burdensome liquidated damages clauses should be struck down. Tymshare claims that such clauses, even if unenforceable under applicable state law, have a chilling effect. It proposes that such clauses be limited to a maximum of six months' rental payments or 80 percent of remaining payments, whichever is lesser.

In the NPRM we indicated that we were concerned that liquidated damage clauses requiring substantial payments could inhibit entry into the CRS industry, especially when combined with lengthy contract terms. While the issue remains troubling, we believe our reasons for not taking action remain sound. First, it would be very difficult to devise a liquidated damages formula suitable for all subscriber contracts, given the variety of contracts currently used. As a result, courts are better equipped to address liquidated damages provisions because they can tailor a decree to the particular circumstances. Second, we have moved to adopt rules keeping travel agent contracts to reasonable terms. Finally, our prohibition on exclusivity clauses should open up the market and permit agents to have more than one system. We are concerned, however, about the potential for abuse of liquidated

damages clauses, and will monitor practices in this area. If abuses occur, we will consider the need to take further action.

Tymshare asks that we prohibit discrimination among subscribers. This change would preclude vendors from offering volume discounts to agents to induce use of a particular CRS. It therefore asks that we foreclose both direct and indirect actions that could impair a subscriber's choice of systems.

We will not adopt Tymshare's proposal. We do not intend by this rule to limit CRS competition for agent subscribers. Our rules are not designed to eliminate marketing advantages or to benefit particular vendors. So long as vendors do not tie air transport commissions to the use of a particular system, they remain free to try to induce agents to use their systems. We see no need to interject rules in this area at this time.

VI. Service Enhancements (§ 255.7)

The controversy surrounding service enhancements concerns the extent to which vendors must share them with other carriers. The proposed rule allows vendors to retain exclusive use of enhancements but once an enhancement is made available to one carrier, it must be made available to all.

United attacks our legal and factual basis for imposing any enchancement rule. It argues that selective use and distribution of enhancements is not an unfair competitive practice as the antitrust laws do not require a vendor to assist competitors. In addition, enhancements do not affect the information supplied to travel agents and thus do not harm them or consumers. Further, competition among CRS vendors will force them to offer enhancements to meet the demands of the marketplace and thus regulation is not necessary. United also asserts that the rule will be difficult and time consuming to enforce as the Board will become mired in a multitude of complex disputes such as who gets enhancements first and at what price.

United's arguments are not persuasive. As we explained above, the discriminatory use of market power to affect down-line competition is clearly inconsistent with the antitrust laws. It is not a defense to say that enhancement practices do not have as great an effect on down-line competition as pricing practices. The conduct is nevertheless inconsistent with statutory standards of permissible business conduct and has a substantial adverse effect on competition.

United, however, makes a valid point in arguing that it offers enhancements for a variety of legitimate factors such as increasing the saleability of its system. As long as the order in which enhancements are offered to participants is not a function of the extent to which an airline competes with the vendor, we see no problem in staggered distribution. We will not, therefore, establish enhancement availability procedures as the Joint Carriers suggest.

Northwest, Pan American, Frontier and Continental claim that vendors should not be allowed to retain exclusive use of enhancements. Northwest argues that exclusivity will reward advantages gained prior to deregulation and they should not be continued. Continental asserts that we cannot allow vendors to keep enhancements, especially if the systems are neutral, as it would retain discrimination in favor of vendors.

These arguments fail to recognize the limited objective of our enhancement rule. It is not designed to give all airlines the benefits CRS vendors enjoy because of their ownership of CRS's. Rather, this rulemaking is designed to eliminate conduct that we consider to be unfair.

VII. Marketing Data (§ 255.8)

A. Distribution Requirements

We have received a number of suggestions for clarifying our proposed rule on the distribution of marketing data generated by CRS vendors. A number of commenters believe that we should dictate to the CRS vendors the information they must generate, rather than leaving it to their discretion. Some continue to argue that the information is proprietary to each agent and participating carrier, and so should not be available to anyone else (including the host) without consent. Others assert that data on the host should not be covered, while still others counter that it must be included lest the vendor's advantage continue. Timing of the release of reports has also been raised—reports distributed too late, some claim, are worthless. One carrier argues that the information would be available to the host in a non-print form which would fall outside the scope of the rule but would still be valuable. It wants access to all marketing programs of CRS owners/operators.

Our rule, as adopted and originally proposed, requires system vendors to supply any marketing sales and booking data they elect to generate, in printed or non-printed form, on non-discriminatory terms to participating carriers. This does not mean that vendors must share their analysis of data, so long as all the data underlying the analysis is available to others in a usable form. Our information rule does contemplate that CRS vendors will generate the same information on all carriers, including themselves. Otherwise CRS carriers could generate and use information on all carriers, while the information distributed to other carriers would be incomplete and of little value especially when the vendor carrier has all of the data and can act on it. We expect vendors to produce the reports and mail them to carriers desiring them at the same time that the reports are generated and distributed internally. Our involvement beyond that is not necessary and could prove counter-productive.

With respect to foreign carriers, § 255.9(b) as proposed would permit vendors to refuse to share data with those carriers operating a biased system abroad. U.S. flag airlines ask that we go further and provide that the data not go to foreign participants in U.S. CRS's unless comparable information on those carriers is made available. Their concern is that, absent reciprocity, our rule will have the perverse effect of giving foreign carriers a significant marketing advantage. We cannot conclude that their fears are unwarranted. Consequently, in a notice of proposed rulemaking to be issued shortly, we will seek further comments on this issue. We plan to resolve it before the rule goes into effect.

B. Fees for Enhancements and Marketing Data

Frontier, the Joint Carriers, Western and Republic urge us to require that fees for service enhancements or marketing data be reasonable or cost based. They argue that without such a requirement, vendors could continue to deny access to these aspects of CRS's by charging a prohibitively high price. As in the case of basic participation fees, they argue that competition in the CRS industry is insufficient to prevent vendors from evading the rule in this fashion.

KLM and American argue that we should merely adopt the non-discrimination requirement we have proposed. American asserts that vendors should be allowed to set fees for enhancements and marketing data on a value of service basis. A cost based fee would in essence amount to subsidization of participating carriers because it would be giving them the services at a price below the value of the information to them.

We have declined to specify that access fees be reasonable, and by the same token we decline to take a similar step here. As stated elsewhere, we are not attempting to prohibit vendors from

making a profit from their innovation or to limit their behavior any more than is necessary. However, the purpose of the rule is to ensure that carriers are not denied access to enhancements and marketing data for competitive reasons. If vendors have established fees for these services which are so high as to effectively preclude their purchase by participating carriers, we would consider that a violation of the rule.

VIII. Exemptions (§ 255.9)

A. Treatment of Non-participating carriers

EDR-466C contained a provision designed to prevent what has been described as the free rider problem, *i.e.* a participating carrier that refuses to pay a non-discriminatory fee, but nonetheless expects to get full access to systems. In § 255.9(a), we proposed that vendors' obligations under the rule would not apply to carriers that refused to enter into agreements conforming to the rule. In discussing this provision, we indicated that vendors would be free to drop such carriers from their systems completely, to bias displays against such carriers, or to give them equal treatment with paying carriers. We observed that in choosing the latter option, vendors would not be exempt from the non-discrimination rule.

A number of parties have commented on this provision. Continental merely requests clarification on what happens if a vendor continues to give full service to a free rider. It argues that all carriers should get full service on the same terms as the non-paying carrier. Frontier and Republic praise the rule as a deterrent to free riders, but they request that the rule not be construed as applying to carriers who insist on price terms negotiated in existing contracts.

Delta, DOJ, and Frontier have raised more fundamental concerns. They fear that giving vendors the option of biasing displays against non-paying carriers could seriously undermine the antibias rules. The danger is that vendors would request exorbitant, but non-discriminatory fees with the expectation that other carriers would not pay. Vendors would then be able to continue to bias their systems.

The Muse Group and Western foresee a related problem. They fear that the rule would perpetuate price discrimination against disfavored carriers. As the Muse Group explains it, favored carriers would be able to negotiate for minimal bias and pay zero fees. Western is simply concerned that the rule would permit vendors to offer full service to favored carriers at a zero price.

DOJ discussed three possible solutions. In addition to the zero fee option discussed above, it proposed as one alternative that vendors be given the choice of either removing all non-paying carriers from their systems or offering services to all carriers for no charge. Under DOJ's second alternative, the vendors would have the choice of dropping a carrier or keeping it on the system for free. If it did the latter, it would not be held to have violated the non-discrimination rule. DOJ acknowledges that either alternative has advantages and disadvantages. The first rule would ensure that smaller carriers benefited from the bargaining power of larger carriers. On the other hand, it could give vendors the ability to stifle entry if they refuse to pay smaller CRS operators. Those operators would be forced to sell their systems without the vendors' flights, or to collect no fees from any carrier. While the second alternative solves this problem, it may deprive smaller carriers of the protection of larger carriers' bargaining power.

Delta has also proposed a modification. Delta would have us require vendors to limit services to non-paying carriers to the display of schedule and fare information without reservations and ticketing capability. This approach would avoid the risk of reintroducing bias into displays, because the information would have to be displayed in an unbiased manner. In addition, it would guarantee that non-paying carriers received a lesser level of service, while assuring that at least the basic information about their services was available to travel agents and their customers through CRS's. The mandatory nature would also prevent vendors from using the discretion inherent in our original proposal to evade the new rules.

Western and the Muse Group similarly argue we must require vendors to penalize non-paying carriers in some fashion other than bias. The Muse Group suggests that we combine DOJ's mandatory deletion option with its suggested requirement that vendors make their availability data available to other CRS operators. This combination would preclude "sweetheart deals" but also assure that vendors do not use refusal to negotiate a non-discriminatory price to inhibit CRS competition.

United specifically opposed forced termination as an option. It argues that such an option would provide too much power to larger participating carriers, who United cannot afford to remove. Elimination of the bias option would have similar results according to United.

We have decided to adopt the non-participating carrier rule that we proposed, subject to certain clarifications. A CRS vendor will have the option of totally excluding non-paying carriers, limiting the information of those carriers it displays (perhaps schedules but not availability) or including all their information but with a measure of bias. Of course, CRS vendors will also have the option of affording non-paying carriers full service without bias. If it does so, however, other carriers will be entitled to the same treatment and the CRS vendor will have, in essence, imposed a zero fee requirement upon itself.

In some measure, our willingness to tolerate bias against non-paying carriers would appear to be inconsistent with our conclusion that bias injures air transportation competition and consumers. However, upon more careful analysis the inconsistency disappears. So long as we permit CRS vendors to charge other carriers for CRS access, as we concluded they must be free to do, the question arises as to what is permissible treatment of non-paying carriers. All of the options we could afford CRS vendors include some type of bias. Complete exclusion is in many ways the ultimate form of bias. By eliminating the non-payers information from the system, it dramatically reduces the chances that the carrier's services will be sold, and substanially impedes the carriers ability to compete in the air transportation industry. Similarly, it is more harmful to consumer because agents from whom they purchase air transportation will not have an efficient source of information on their schedules and fares.

Moreover, prohibiting bias as a response to non-payment may give the large CRS carriers the power to force a Hobson's Choice on smaller and new entrant CRS vendors. If the large carrier refused to pay, the small vendor would either have to provide full service to that carrier (and all other non-payers) for free or exclude the large CRS carrier thus making its system much less attractive to agents. Consequently, permitting CRS vendors to bias against non-paying carriers will cause less competitive injury and harm to consumers than any alternative.

While we recognize the concerns of certain commenters that this approach may serve as a vehicle for re-introduction of significant bias and discriminatory fees, we do not believe it will have that result. Vendors have substantial incentives to set fees at reasonable levels. While incremental passengers have been the most

important revenue source for vendors in the past, fees from participating carriers have become an important supplement. We do not believe that vendors will be willing to forgo that revenue source totally in favor of incremental revenues or that a system with only high fees and significant bias could survive in competition with systems that conform to our rules.

The clarifications that we are making will reduce the risk that our free rider provision will become a major loophole while still providing flexibility to vendors. As written, our proposed rule arguably would have allowed vendors to establish varying degrees of bias for different carriers, and also to charge a lower, but positive fee for biased display. If this were true, the free rider rule would indeed have served as a vehicle for reintroduction of bias, and for continued discrimination in fees. Of course we never intended that result.

Thus, the rule will make clear that if a vendor wishes to provide lesser services to non-paying carriers, it cannot do so by biasing a display and charging a lower price. If it chooses to use bias, it can collect no fees from the free rider. This does not, however, preclude a vendor from offering unbundled services. For example, a vendor could offer unbiased display of schedule and fare information for a lower uniform fee than for full ticketing and reservation services. Under no circumstances, however, can biased displays be treated as a lesser service for which a lower price can be charged.

Secondly, the vendor must establish a uniform policy toward non-paying carriers. If it grants full service to one free rider, it must grant it to all. If it deletes one free rider from its system entirely, it must delete all. If it elects to bias against free riders, it must adopt a uniform level of bias which is applied to all free riders equally. In addition, under the disclosure rules, which benefit subscribers as well as participating carriers, it must disclose the details of free rider bias in describing its display formats.

These two requirements should substantially reduce the risk that the free rider rule will preserve the current system of bias and discriminatory fees. Vendors will not be able to sell varying degrees of preference. Carriers will be eligible to receive unbiased display for a non-discriminatory price or they may get a uniform level of bias at no fee. Likewise, vendors cannot use the free rider provision to maintain favored treatment for some carriers. Whatever means a vendor chooses to handle any one free rider at a given point in time, it must apply to all. Vendors will not, however, be entirely deprived of the flexibility of using bias for non-paying carriers.

Of course, should our assessment prove wrong, and the exemption result in substantial bias being retained in CRS's, a reevaluation of the non-participating carrier exemption may be required. Such a review might simply result in an elimination of the bias rule, or it may require a more fundamental adjustment in our pricing rule. Adoption of the zero fee rule, for example, would eliminate the need to provide for treatment of non-participating carriers altogether, and hence would avoid the drawbacks of either of the alternatives that we have considered.

B. Foreign Carrier Participation

The proposed rule's effect on foreign air transportation sparked debate on a number of points. Proposed § 255.9(b) exempts CRS vendors from the rules with respect to those foreign airlines whose CRS's do not display flights of U.S. carriers "equally" with their own. JAL, Lufthansa, Swissair and KLM urge us either to eliminate this section or, at most, to adopt it as proposed. They oppose any direct application of the rules to foreign carriers because this would be illegal, unnecessary, or inappropriate. They assert that the International Air Transport Competition Act provides the forum—via complaint procedures and governmental discussions—suited to claims of discrimination or unequal access.

U.S. flag carriers, on the other hand, generally argue that the section needs strengthening. They claim that to allow U.S. vendors leeway to respond to bias against foreign carriers is merely to continue the status quo: the hosts will arrange to receive preferential treatment in foreign CRS's in return for the same (or lack of unfavorable bias) in their own systems. The bias in those foreign systems against other U.S. carriers will continue, to the advantage of major U.S. vendors, unless all U.S. systems must bias against any foreign airline whose CRS discriminates against any U.S. carrier. The history of U.S. carrier claims against unfair treatment abroad, they say, shows the failings of the IATCA alternative.

Except for one minor revision, we are adopting the foreign air carrier provision as proposed. We do not intend, by this proceeding, to turn carrier owned CRS's into a weapon to redress the complaints of other U.S. carriers against foreign carriers. As we have repeatedly indicated, our purpose is to foreclose specific conduct we have found to be unfair. Moreover, we are not convinced that the complaint procedure established under IATAC and the bilateral negotiations process are inadequate to resolve such disputes.

We will, however, make it clear that the protections of our rules do not apply when a foreign air carrier indirectly operates—i.e., through an affiliate or through an entity that commonly controls the airline and the CRS operation—a CRS outside the U.S. that does not display the flights of all U.S. carriers equally with the flights of the foreign carrier.

IX. Review and Termination (§ 255.10)

No party has objected to our proposed review and termination section. We therefore will adopt section 255.10 as proposed. These rules will be reviewed within 5 years of their effective date, with a termination date of December 31, 1990 unless extended by our successor after its review of the rules.

Effective Date of Rule

In EDR–466C, we proposed that if we adopted CRS rules, there would be a 90-day transition period to enable vendors to renegotiate contracts and reprogram their systems. Three carriers—United, Eastern, and KLM—assert that the period is too short. Eastern suggests that it needs additional time and that the amount of time is affected by any decision on connecting flights. KLM asks for 120 days. United seeks 240 days to reprogram, renegotiate contracts with over 500 carriers and some travel agents, decide what types of reports it will divulge and program its system to accomplish that. TACOS too seeks additional time: 60 days for carriers to file a compliance plan; 30 days for Board review; and another 60 days for implementation. American only suggests that to meet the 90-day goal, we must address the contract issue. The Muse Group, on the other hand, asserts that 30 days is adequate as the vendors have had substantial advance notice of the probability of Board action.

We have decided to make our rules effective ninety days after their publication in the Federal Register, as we proposed. Admittedly, it will be a short transition period. However, we do not believe it is unrealistic. As United acknowledges, it is capable of eliminating bias from its system within ninety days. *See* United 4/26/84 comments at 63–64. It asserts, however, that such a "quick fix" will leave the preferencing logic in a dormant state and somehow increase the risk of error when information is input into the system. In its view, four to nine months is needed to properly reprogram its system. The weakness in this argument,

of course, is that several of the various CRS's currently have dormant logic in their systems without adverse effects. In fact, we believe APOLLO is one of those systems. In this regard none of the other CRS vendors apparently believe themselves unable to eliminate bias from their systems in ninety days. Eastern's request for additional time only relates to the possible need to increase the number of connect points in its system.

Nor does the fact that CRS carriers will have to renegotiate contracts with as many as 500 carriers justify a longer period. As we have repeatedly indicated, one of the primary objectives of our rules is to ensure non-discriminatory treatment of participating carriers. As a result, there should be very little variance in carrier contracts. Ninety days should be adequate to work out a standard contract with other carriers.

The suggestion that United needs more than ninety days to choose what reports it wants to generate is unfounded. The rule imposes a continuing obligation on CRS vendors. Whenever they choose to generate data or reports from their CRS's, it must be made available. Consequently, if United chooses to generate a new report two years from now it is covered. Similarly, CRS vendors can discontinue reports whenever they choose. The fact that United may want to generate reports in a different format some time in the future is not good cause for retaining exclusive use of reports in the current format for the next 240 days. We have already addressed the question of the impact of our rule on subscriber contracts—we conclude that our rules will not require modification of those agreements beyond the provisions specifically prohibited. Finally, in view of the fact that we are not requiring a CRS owner to load other carriers' information as frequently as it does its own, we need not address United's argument that it needs more time to devise a program to accomplish that result.

Divestiture and Applicability of the Antitrust Laws

ACAP, Continental and Tymshare again raise the issue of divestiture. ACAP suggests that we should consider divestiture a viable option if the rules prove ineffective. Continental asks that we initiate a second inquiry into divestiture and claims it could prevent CRS vendors from abusing their competitive advantage. Tymshare simply wants us to reconsider the issue. In addition, ADAPSCO argues that the entities should be maximally separated to avoid cross-market power.

The Joint Carriers reply that ADAPSCO's "Chinese Wall" is necessary but also recognize why we did not pursue such a remedy. They ask that we explicitly state the reasons for our reluctance to provide such relief; that we not short circuit the ability of carriers to seek such relief; and that we state that our rules are not a substitute for the antitrust laws. Delta and USAir also ask that we state that our rules do not displace the antitrust laws.

By EDR–466C, at 41, we determined that at this point divestiture was not appropriate for a variety of reasons. First, it appeared to be greater intervention than is necessary to accomplish our objectives. We concluded that general rules would eliminate unfair conduct while still encouraging innovation and greater efficiency of the CRS industry. Second, divestiture would require adjudicatory-type procedures that would take years to resolve and which would severely constrain our ability to deal effectively with CRS problems that exist today and would continue during such a proceeding. Third, we concluded that vertical integration into the CRS industry by air carriers may produce efficiencies not otherwise attainable. Of course, divestiture would eliminate such efficiencies. We believe, however, that divestiture may be worth considering if our rules prove ineffective and the facts warrant such action.

We also consider Frontier's contingent discussion authority proposal premature at this time. In essence, Frontier's proposal is a request for a declaratory order stating that we would authorize discussion authority in certain circumstances. Such a declaratory order is inappropriate and unnecessary at this time as we have the power to authorize such discussions at any time under section 412. Moreover, as we noted in EDR–466C, such discussion authority may itself raise serious competitive questions. Our consistent policy has been not to authorize such discussions absent a clear showing of need and without some opportunity to assess the potential competitive effects of such authority in the context of a specific request. *See, e.g.* Order 83–2–17, February 7, 1983. For these reasons, we will not include discussion authority in the rule.

We have decided, however, to include in the rule a provision that states that the rule does not serve to preempt private rights under the antitrust laws. It was never our intention that the CRS rules would have that effect. However conscientious we may be, it is simply impossible to predict all practices in which vendors might engage, and to adopt a general rule which is guaranteed to cover all possible circumstances. Under these circumstances, retention of private rights of action under laws other than section 411 provides an important supplement to our rules in preventing abuses of market power. To avoid any questions on the matter we will include a provision on preemption in the final rule.

Paperwork Reduction Act

The collection-of-information requirement in § 255.5(c) of this proposal are subject to the Paperwork Reduction Act, Pub. L. 96–511, 44 U.S.C. Chapter 35. This requirement has been submitted to the Office of Management and Budget (OMB) for review and comment. Persons may submit comments on the collection-of-information requirement to OMB and to the Board. Comments sent to OMB should be addressed to: Office of Information and Regulatory Affairs, ATTN: Desk Officer for Civil Aeronautics Board, Office of Management and Budget, Washington, D.C. 20503.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act, Pub. L. 96–354, is designed to ensure that agencies consider flexible approaches to the regulation of small businesses and other small entities. It requires regulatory flexibility analyses for rules that will have a significant economic impact on a substantial number of small entities.

The analysis describes the need, objectives, legal basis for, and flexible alternatives to the agency's action. These requirements are met by the discussion above. In addition, the analysis must include a description of the small entities that the rule would affect, the reporting, recordkeeping, or other compliance requirements of the rule, and any other Federal rules that may duplicate, overlap, or conflict with it.

We find that this rule may have a significant economic effect on a substantial number of small entities such as airlines operating aircraft with less than 60 seats, travels agents, and new, low-cost airlines.

The rule will have an overall beneficial economic impact on a substantial number of small air carriers. First, they will benefit by the prohibition on display bias. Currently, these carriers are not system vendors and do not enjoy the benefits of build-in display preference. Under the new rules, their

flights will be displayed strictly on the basis of service criteria, thus improving their display and allowing these carriers to compete more effectively.

The prohibition of tying arrangements will also benefit small aircraft operators. Currently, vendors force small airlines to sign interline ticket agreements as a condition for access to the system. Under the new rule, this cost would be eliminated.

The general availability of service enhancements also may improve the quality of service offered to travel agents for all carriers, including those using small aircraft. Under the rule, if a system vendor has the technical capability to provide service enhancements to other carriers, it must allow any participating carrier access to that service. This change will provide small aircraft operators the opportunity to compete with larger, more established airlines on new service elements.

New low-cost airlines should receive significant benefits from this rule too. Presently, new entrants are among the greatest competitive threats to the established airlines that own the systems. As a group, they currently pay the highest fees for access to the system. Under the new rules, these entrants will pay the same fees as everyone else, which may result in substantial cost savings. Similarly, flights by new entrants tend to be displayed inconspicuously. The prohibition against bias should result in more favorable displays, which in turn should increase sales and lower the cost per seat. Finally, the elimination of interline ticket fees should also help lower carrier costs.

Finally, the rule will allow small airlines to obtain booking and other information that was previously unavailable. For example, a small carrier will be able to analyze booking information to develop markets or change flight schedules.

Under the rule some small carriers may have to pay higher fees. Currently, few small aircraft operators directly compete with the system vendors. Many of them pay little or no fees for display. Under the new rule, fees must be non-discriminatory, with a rebuttable presumption in favor of equal fees. Indirect subsidy will no longer be allowed.

The Travel Agents Computer Society (TACOS) asserts that travel agency costs will increase substantially and that the increase will not be offset by gains brought about by a less-biased CRS. TACOS reasons that the bargaining power of travel agents will be reduced by vendors, because of less bias, will have less incentive to sell their systems. CRS technological advances will be slowed for the same reason. Moreover, TACOS asserts that cumbersome bureaucratic entanglements are inevitable as the industry adjusts to regulation. Finally, it notes that cost savings realized by carriers will not be passed on to travel agents.

In EDR–466, we indicated that a significant number of travel agents would be affected by this rule. Of the approximately 24,000 travel agents, 75–80 percent use automated reservations systems. The Board estimates that over three quarters of them would be considered small entities for the purposes of the Regulatory Flexibility Act.

We recognize the possibility that this rule may result in higher fees for travel agents. However, we are not persuaded by TACOS' arguments that the change will be substantial as contracts may be unchanged, and other benefits will result.

The elimination of bias should increase efficiency and lower agency costs, since personnel will no longer be required to take time to overcome bias. Even if agents currently do not expend time or resources to overcome bias, an unbiased system will allow them to provide better services to clients, thus encouraging further business.

Despite TACOS' assertions, bargaining power of agents should change for the better as a result of the rule. True, vendors will not be able to receive incremental revenues anymore, but each should remain active participants in the distribution system. Competitive interplay between the vendors may, in fact, be heightened by the rule as each seeks to increase its "halo" or good will with agents through the sale of CRS's. In addition, the contract rules will enable agents to take advantage of CRS competition to achieve lower costs. Further, under a regime of individual carrier commission rates, travel agents will have greater opportunity to recoup through increased commissions any cost increases associated from the rules. In effect, carriers that now have higher costs because of bias will have an incentive to share with agents their cost savings resulting from the rule. Finally, to the extent that service enhancements are available and used by other carriers, travel agents using computerized reservation systems will be able to offer better service than they do now.

The rule does not contain any direct reporting, recordkeeping, or other compliance requirements. System vendors must disclose to interested subscribers and participating carriers what criteria were used in determining the order of display and the construction of connecting flights. In addition, the vendors must make available any marketing data generated by their system. The vendors are not required, however, to provide this information to the Board.

There are no other Federal rules that duplicate, overlap, or conflict with this proposed rule.

Copies of this document can be obtained from the Distribution Section, Civil Aeronautics Board, Washington, D.C. 20428, (202) 673–5432, by referring to the "ER" number at the top of the document.

Regulatory Impact Analysis and Review

No party commented upon the tentative regulatory impact analysis contained in our notice of proposed rulemaking, EDR–466C. The changes made in the final rule from those proposed in the notice of proposed rulemaking will not change the analysis made in the preliminary Regulatory Impact Analysis.

List of Subjects in 14 CFR Part 255

Advertising, Air carriers, Air transportation-foreign, Antitrust, Consumer protection, Essential air service, Travel agents.

Chairman McKinnon and Member Smith concurred. Vice Chairman McConnell concurred and dissented and indicated there would be a statement to follow. Member Schaffer concurred in part and dissented in part and filed a concurring in part and dissenting in part statement which is stated below. Member Morales concurred and dissented and indicated there would be a statement to follow. On July 30, 1984, Member Morales filed a concurring and dissenting statement which is stated below. On July 31, 1984, Vice Chairman McConnell filed a concurring and dissenting statement which is filed below.

Statements of Members

SCHAFFER, MEMBER, CONCURRING IN PART, DISSENTING IN PART:

This rule represents a significant step to insure that consumers have available the degree of information necessary to make an informed choice among competing airlines. The bias that now dominates the major systems, as well as the potential for a small number of system owners to limit access to competing airlines, is inimical to both the letter and the spirit of deregulation.

I would, however, have provided for a system of arbitration of disputes between carriers and vendors over access fees. I believe that arbitration would provide a relatively inexpensive and expenditious means of resolving disputes. It may well be true, as the majority suggests, that the presumption in favor of equal fees will substantially reduce the number of potential

conflicts on the fee issue. However, those disputes which do arise will be required by our rule to be resolved by what is likely to be an involved and extended process before an administrative law judge. In proposing arbitration in its NPRM, the Board devised an innovative and creative solution to dispute resolution which had the potential to benefit all parties. I regret that the majority has decided not to finalize its arbitration proposal.

Gloria Schaffer

MORALES, MEMBER, CONCURRING & DISSENTING:

I concur with the majority of the Board's rule because it is the appropriate and measured response necessary to remedy the serious competitive deficiencies in the present CRS industry.

It has been nearly two years since the Board learned that vendor carriers were (1) ordering fare and scheduling information and (2) charging fees for access to their systems based on the degree to which the participating carrier competed with the vendor in the air transportation market. Both practices were adequately addressed in the rule and quite properly prohibited.

However, I must dissent in the strongest terms from the imagined solution to the imagined problem of non-participating carriers, or "free riders." The exemption for non-paying carriers, which allows the re-introduction of bias, threatens to undermine, if not overwhelm, one of the major pillars of our rule, the prohibition of bias. This very real threat is not worth the price of whatever may result from this hypothetical problem.

First, this problem, if it even exists, relates to only a couple of scenarios out of the hundreds of transactions involved in this rule. Moreover, the reasons the Board should not attempt to resolve the perceived free-rider problem by allowing bias are the same reasons that caused the Board to prohibit bias in the other 99% of the CRS industry's circumstances. Perhaps a review of the adverse effects of bias will emphasize the necessity for totally banning it from the CRS industry.

Carrier vendors bias displays to gain incremental revenues from their competitors. Non-airline vendors are effectively barred from entering the market because they cannot afford to develop a new system and sell it to travel agents at a price competitive with the biased airline CRS's already in place. The only reason airline vendors are able to offer their systems so cheaply to travel agents is that they are receiving incremental revenues as a direct result of bias. These incremental revenues, which subsidize the huge capital expense involved in developing a system, enable the vendor to offer artificially low fees to the travel agent. The cost of an airline vendor system is being borne by travel agents and carriers in the form of fees. In addition, participating carriers are paying a second time in the form of lost passengers or, more precisely, lost passenger revenue resulting from bias. No one can even begin to calculate the amount of this second charge.

The Board has come out firmly against bias in the main portion of the rule in order to (1) allow carriers a fair opportunity to compete in air transportation and (2) force the system to support itself "upfront" through fees to the beneficiaries of the system—participating carriers and travel agents.

Therefore, the first effect of banning bias will be an immediate and, in some cases, significant infusion of passenger revenue to participating carriers because, basically, they will have their full market restored. Only then will we be able to determine the true cost of bias in lost revenue from stifled competition.

The second effect will be to give non-airline vendors a fair opportunity to enter the CRS industry. Until we have some non-airline CRS's in the industry, we will not have a true disciplining force on carrier vendors who, by their own view (and, admittedly, not a wholly unreasonable one), are simply maximizing the return on their investment and chasing an attainable profit.

Allowing vendors to bias against non-paying carriers may well eradicate these beneficial effects.

In addition to allowing the re-introduction of bias, the majority has seen fit to "rattle the regulatory sabre" with discussions of zero fees and divestiture. What is not appreciated is that, by not being true to their fundamental principles against *any* and *all* bias, the majority may pre-ordain the need for more severe regulatory intervention. The *incentive* of airline vendors to *retain* the exorbitant amount of funds gained from incremental revenues (a direct result of bias) may well allow the exception for bias to swallow the rule.

I firmly believe that if we attack all the entry barriers we can truly control (and there are probably none that we control better than bias and its resultant depressing effect on travel agent fees), the market just may cure itself in the next couple of years. A little competition in the form of just one strong non-airline CRS, can create the marketplace true deregulators seek.

Under the majority rule, with its paradoxical soft spot to an otherwise strong anti-bias rule, the next two years of industry experience with our moderate, temporary, and eminently reasonable regulation may well be wasted. It is simply too great a price to pay.

Diane K. Morales

McCONNELL, VICE CHAIRMAN, CONCURRING AND DISSENTING:

I concur with the Board's rule insofar as it seeks to eliminate air carrier bias from the computer displays used by travel agents. Access to accurate, reliable and current flight information is basic to the success of our deregulated airline industry.

This rule marks the CAB's effort to ensure that unfair methods of competition are not used to enhance carrier vendors' traffic. To that extent I endorse the CRS Rule. However, in my view, the Board majority became overzealous in its regulation of the fees CRS vendors charge carriers listed on their systems.

I believe as the Department of Justice urged that fee regulation is not necessary at this time. I would institute the anti-bias restrictions now, deferring any action with regard to the prices charged by vendors to the nonvendor carriers.

The user fee portion of the rule adopted by the majority reopens the regulatory abyss decried by deregulation and potentially leaves inordinate competitive power in the hands of the CRS vendors. If the Board regulates user fees, the Department of Justice's zero fee alternative offers a firmer step toward solving and underlying abuses in the CRS structure (as described in the preamble).

The most unfortunate product of the Board majority's effort to regulate fees is that they allow an exception to the anti-bias rule. In my opinion, this exception encourages inflated fees. Vendors will have an incentive to charge high fees, since if a carrier refuses to pay, the vendor may bias the display against that carrier.

Bias is the only CRS abuse against which the Board should take positive action at this time.

Barbara E. McConnell

Accordingly, the Civil Aeronautics Board amends 14 CFR Chapter II by adding a new Part 255, Carrier-Owned Computer Reservation Systems, to read:

PART 255—CARRIER-OWNED COMPUTER RESERVATION SYSTEMS

Sec.

255.1 Purpose.
255.2 Applicability.
255.3 Definitions.
255.4 Display of information.
255.5 Contracts with participating carriers.
255.6 Contracts with subscribers.
255.7 Service enhancements.
255.8 Marketing information.
255.9 Exceptions.
255.10 Review and termination.

Authority: Secs. 102, 204, 404, 411, 419, 1102 Pub. L. 85–726 as amended, 72 Stat. 740, 743, 760, 769, 797; 92 Stat. 1732; 49 U.S.C. 1302, 1324, 1374, 1381, 1389, 1502.

§ 255.1 Purpose.

(a) The purpose of this part is to set forth requirements for operation by air carriers of computer reservation systems used by subscribers so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation.

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

§ 255.2 Applicability.

This rule applies to air carriers and foreign air carriers that own, control or operate computerized reservations systems for subscribers in the United States, and the sale in the United States of interstate, overseas, and foreign passenger air transportation through such systems.

§ 255.3 Definitions.

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

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

"Carrier" means any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 1301(3), 49 U.S.C. 1301(22), and 14 CFR 298.2(f), respectively that are engaged directly in the operation of aircraft in passenger air transportation.

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

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

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

"Primary display" means any display presented by a system vendor to comply with § 255.4.

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

"Subscriber" means a ticket agent, as defined in 49 U.S.C. 1301(40) of the Act, that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system.

"System" means a computerized airline reservation system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and that provides subscribers with the ability to make reservations and to issue tickets.

"System vendor" means a carrier or its affilates that owns, controls or operates a system.

§ 255.4 Display of information.

(a) All systems shall provide a primary display or primary displays that include the schedules, fares, rules and availability of all carriers in accordance with the provisions of this section. Primary displays shall be at least as useful for subscribers, in terms of functions or enhancements offered, and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor.

(b) In ordering the information contained in a primary display, system vendors shall not use any factors directly or indirectly relating to carrier identity.

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

(2) System vendors shall provide upon request to all subscribers and participating carriers the current criteria used in ordering flights for the primary displays and the weight given to each criterion.

(c) System vendors shall not use any factors directly or indirectly relating to carrier identity in constructing the primary displays of connecting flights.

(1) System vendors may select the connecting points to be used in the construction of connection flights for each city pair on the basis of any service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including the system vendor, and to all markets.

(2) System vendors may select connecting flights for inclusion ("edit") on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including the system vendor.

(3) System vendors shall provide upon request to all subscribers and participating carriers current information on:

(i) All connecting points used for each market;

(ii) All criteria used to select connecting points;

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

(iv) The weight given to each criterion in (c)(3) (ii) and (iii) above.

(d) Upon receipt of information from any carrier, system vendors shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information.

(1) If a system vendor provides special loading capability to any other carrier, it shall offer the same capability to all participating carriers in a non-discriminatory fashion as soon as technically feasible.

(2) Each system vendor shall provide upon request to all participating carriers all current data base update procedures and data formats.

§ 255.5 Contracts with participating carriers.

(a) No system vendor shall discriminate among participating carriers in the fees for participation in its system, or for system related services. Differing fees to participating carriers for the same or similar levels of service shall be presumed to be discriminatory.

(b) No system vendor shall condition participation in its system on the purchase or sale of any other goods or services.

(c) System vendors shall provide upon request to carriers current information on their fee levels and fee arrangements with other participating carriers.

§ 255.6 Contracts with subscribers.

(a) No subscriber contract shall have a term in excess of five years.

(b) No system vendor shall directly or indirectly prohibit a subscriber from obtaining or using any other system.

(c) No system vendor shall require use of its system, by the subscriber in any sale of its air transportation services.

(d) No system vendor shall require that a travel agent use its system as a condition for the receipt of any commission for the sale of its air transportation services.

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

§ 255.7 Service enhancements.

In the event that a system vendor offers a service enhancement to any participating carrier, it shall offer it to all participating carriers on non-discriminatory terms.

§ 255.8 Marketing information.

Each system vendor shall make available to all participating carriers on non-discriminatory terms all marketing, booking and sales data that it elects to generate from its system.

§ 255.9 Exceptions.

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

(b) The obligations of a system vendor under this part shall not apply to any

foreign air carrier that operates or whose affiliate operates an airline computer reservation system for travel agents outside the United States that does not display the flights of all United States carriers equally with the flights of the foreign carrier.

§ 255.10 Review and termination.

(a) The Federal agency administering this rule shall conduct a review within 5 years after its effective date.

(b) Unless extended on the basis of the review specified above, this rule shall terminate on December 31, 1990.

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84-21731 Filed 8-14-84; 8:45 am]

BILLING CODE 6320-01-M

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14 CFR Part 389

[Regulation OR-216; Organization Regulations Amdt. No. 35]

Fees and Charges for Special Services; Elimination of Fee Refund Offset Procedures

AGENCY: Civil Aeronautics Board.

ACTION: Final rule.

SUMMARY: The CAB eliminates the offset procedures in its refund mechanism for past filing fees overpaid by the airlines. The Court of Appeals (D.C. Cir.) has ruled that the offset procedure in the CAB rules, which is based on cumulative fees paid in each calendar year, is invalid. The rule eliminates that procedure, thus replacing it with one based only on the individual fee paid.

DATES: Adopted: August 2, 1984. Effective: August 8, 1984.

FOR FURTHER INFORMATION CONTACT: Richard B. Dyson, Associate General Counsel, Rules and Legislation Division, Office of the General Counsel, (202) 673-5442, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428.

SUPPLEMENTARY INFORMATION: In 1983, the Board's revised filing fees became effective (OR-204, 48 FR 635, January 6, 1983). The Air Transport Association appealed those rules and fee changes to the U.S. Court of Appeals for the D.C. Circuit. On April 20, 1984, the Court upheld the Board with respect to all changes but one. *(Air Transport Association of America* v. *CAB,* No. 83-1174.) In order to facilitate refunds, the Board had set a procedure whereby a claim for refund would be offset against any fee undercharges (under the revised fee schedule) based on a cumulative accounting for the calendar year in which paid. The Court decided that such an offset mechanism using a cumulative basis would be a retroative fee increase and could not be used.

In this rule, the Board is eliminating that part of the refund provision found invalid. Over the past 18 months, the Board has refunded approximately $86,200. No amounts have been offset. There have been few technical problems with the rest of the Board's refund procedure. The Board is thus keeping the remaining requirements: amount paid, date paid, and category of service. The Board believes that this information is a minimum burden on the claimants and the least data needed to process the claims efficiently. Refunds will be paid on fees paid since April 28, 1977, the date upon which their legality was first challenged. The amounts of overcharge will be determined by using the revised fee schedule for the date paid as set forth in Docket 30586. Categories of fees paid will be matched as closely as possible to the revised schedule. The Board's Comptroller will continue to have delegated authority to act on refund requests explaining the calculation.

Because this is a rule of agency organization and procedure, and because the provision being eliminated has been found invalid, the Board finds that public procedure and comment are unnecessary. The Board also finds good cause to make this rule effective upon publication in the **Federal Register,** so as to eliminate an invalid provision from our rules, thus preventing public confusion.

List of Subjects in 14 CFR Part 389

Administrative practice and procedure, Reporting and recordkeeping requirements.

PART 389—[AMENDED]

Accordingly, the Civil Aeronautics Board amends 14 CFR Part 389, *Fees and Charges for Special Services,* as follows:

1. The authority for Part 389 is:

Authority: Secs. 204, 1002, Pub. L. 85-726, as amended, 72 Stat. 743, 797; 49 U.S.C. 1324, 1502. Act of August 31, 1951, ch. 376, 65 Stat. 268; 31 U.S.C. 483a.

2. Paragraph (b) of § 389.27 is revised to read:

§ 389.27 Refund of fee.

* * * * *

(b) Any person may file an application for refund of a fee paid since April 28, 1977, on the grounds that such fee exceeded the Board's cost in providing the service. The application shall be filed with the Board's Comptroller and shall contain: the amount paid, the date paid, and the category of service.

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84-21735 Filed 8-14-84; 8:45 am]

BILLING CODE 6320-01-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Federal Hazardous Substances Act Exemption for Unlabeled Containers; Final Revocation

AGENCY: Consumer Product Safety Commission.

ACTION: Revocation of exemption.

SUMMARY: The Commission is revoking an exemption provision that covers the shipment of unlabeled containers from a packaging firm to a labeling firm. The Commission believes that the exemption is unnecessary because it is not aware of any such shipments. In addition, such a shipment would not violate the provisions of the applicable statute, the Federal Hazardous Substances Act.

DATES: The revocation will be effective on September 14, 1984.

FOR FURTHER INFORMATION CONTACT: Charles Jacobson, Directorate for Administrative Litigation and Compliance, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 492-6400.

SUPPLEMENTARY INFORMATION:

A. Introduction

Under the Federal Hazardous Substances Act (FHSA), the Consumer Product Safety Commission enforces statutory provisions and regulations that prohibit the movement in interstate commerce of certain products that are not labeled as prescribed ("misbranded hazardous substances"). 15 U.S.C. 1261(p) and 1263. An existing FHSA regulation exempts from these labeling requirements products that are being shipped from one establishment where they are packaged to a different establishment where they will be properly labeled. 16 CFR 1500.84.

In order to qualify for the exemption, the firms that are shipping and receiving the as-yet-unlabeled hazardous substances must have a written agreement between them. Since the agreement must be kept by the firms for two years after shipment, and since copies of the agreement must be made