Sunshine Act Meetings

Federal Register
Vol. 57, No. 184
Tuesday, September 22, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 57 F.R. 41971.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., Tuesday, September 29, 1992.

CHANGES IN THE AGENDA:

The Commodity Futures Trading Commission has added to the agenda an open meeting to discuss Rule 1.55—Proposed Risk Disclosure Simplification Amendments. The meeting will be held in the lower level hearing room.

The Rule Enforcement Review previously scheduled for 10:00 a.m. will be held at 11:00 a.m.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 92–23063 Filed 9–18–92; 3:22 pm]

BILLING CODE 6351–01–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, September 24, 1992.

PLACE: Room 600, 1730 K Street, N.W., Washington, DC

STATUS: Closed [Pursuant to 5 U.S.C. § 552b(c)(10)]

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Southern Ohio Coal Company*, Docket No. LAKE 91–650–R, etc. (Issues include whether the judge erred in concluding that Southern Ohio Coal Company violated 30 CFR § 75.1704–2(a), which requires that escapeways follow the "safest direct practical route" out of the mine.

It was determined by a unanimous vote of Commissioners that this meeting be held in closed session.

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 653–5629/(202) 708–9300 for TDD Relay 1–800–877–8339 for Toll Free.

Dated: September 17, 1992.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 92–23125 Filed 9–18–92; 3:24 pm]

BILLING CODE 6735–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Monday, September 28, 1992.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW, Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Federal Reserve Bank and Branch director appointments. (This item was originally announced for a closed meeting on September 8, 1992.)

2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: September 18, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–23127 Filed 9–18–92; 3:31 pm]

BILLING CODE 6210–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m., Monday, September 28, 1992.

PLACE: The Board Room, 5th Floor, 490 L'Enfant Plaza, S.W., Washington, D.C. 20594.

STATUS: The first two items are open to the public. The last item is closed to the public under Exemption 10 of the Government in Sunshine Act.

MATTERS TO BE CONSIDERED:

5464A—Highway Accident Report: Multiple Vehicle Collisions and Fire During Limited Visibility (Fog) on I–75, new Calhoun, Tennessee, December 11, 1990

5840—Railroad Accident Summary Report: Head-on Collision and Derailment of Norfolk Southern Train with Train 277 and Release of hazardous Materials, Knox, Indiana, September 17, 1991

5845—Opinion and Order: Richard Pine and William Ter Keurst v. Administrator; Docket SE–8920 and 9080; disposition of applicants' appeal. (Calendared by Member Hart.)

NEWS MEDIA CONTRACT: Telephone (202) 382–0660.

FOR MORE INFORMATION CONTRACT: Bea Hardesty, (202) 382–6525.

Dated: September 17, 1992.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 92–23027 Filed 9–18–92; 11:08 am]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

DATES: Weeks of September 21, 28, October 5, and 12, 1992.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of September 21

Thursday, September 24

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting)
a. Final Rule, 10 CFR Part 20, "Disposal of Waste Oil by Incineration"—Response to Petition for Rulemaking from Edison Electric Institute and the Utility Nuclear Waste Management Group

Week of September 28—Tentative

Tuesday, September 29

2:00 p.m.
Briefing on AEOD Annual Report (NUREG–1272, Vol. 6, Nos. 1 and 2) (Public Meeting)

Wednesday, September 30

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of October 5—Tentative

Wednesday, October 7

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of October 12—Tentative

Wednesday, October 14

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meeting Call (Recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504–1661.

Dated: September 17, 1992.

Andrew L. Bates,

Office of the Secretary.

[FR Doc. 92–23110 Filed 9–18–92; 3:23 pm]

BILLING CODE 7590–01–M

NATIONAL COUNCIL ON DISABILITY

Quarterly Meeting and Conference

AGENCY: National Council on Disability

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming hearings of the National Council on Disability on ADA Watch, and Minorities with Disabilities and the Implementation of the Americans with Disabilities Act. This notice also describes the functions of the National Council. Notice of this meeting is required under section 522(b)(10) of the "Government in Sunshine Act" (P.L. 94–409).

DATES:

ADA Watch Hearing

October 20, 1992, 8:30 a.m. to 5:00 p.m.

Minorities with Disabilities and the Implementation of the Americans with Disabilities Act Hearing

October 21, 1992, 8:30 a.m. to 5:00 p.m.

LOCATION: San Francisco Marriott Hotel, 55 Fourth Street, San Francisco, California, (415) 896–1600

FOR FURTHER INFORMATION CONTACT: National Council on Disability, 800 Independence Avenue, SW, Suite 814, Washington, D.C. 20591, (202) 267–3846, TDD: (202) 267–3232.

The National Council on Disability is an independent federal agency comprised of 15 members appointed by the President of the United States and confirmed by the Senate. Established by the 95th Congress in Title IV of the Rehabilitation Act of 1973 (as amended by Public Law No. 95–602 in 1978), the National Council was initially an advisory board within the Department of Education. In 1984, however, the National Council was transformed into an independent agency by the Rehabilitation Act Amendments of 1984 (Public Law 98–221).

The National Council is charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities and making such recommendations as it deems necessary to the President, the Congress, the Secretary of the Department of Education, the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research (NIDRR). In addition, the National Council is mandated to provide guidance to the President's Committee on Employment of People With Disabilities.

Both hearings of the National Council shall be open to the Public. The proposed agenda includes the following:

Day I

ADA Watch Hearing

Two Open microphone sessions will be held, one in the morning and one in the afternoon—any person is invited to present:

Overview panel—elected/appointed officials and consumers Public Sector panel—representatives of local government, transportation, consumers, police/fire department representatives
Private sector panel—employer/employee, small business owner, consumers
Non-Profit Sector panel—university/hospital/social service agency representatives, consumers
Closing Remarks

Day II

Minorities with Disabilities and the Implementation of the Americans with Disabilities Act Hearing

Two Open microphone sessions will be held, one in the morning and one in the afternoon—any person is invited to present:

Panel I—Title I, Employment
Panel II—Title II, Public Services
Panel III—Title III, Public Accommodations
Panel IV—Title IV, Telecommunications
Panel V—Title V, Miscellaneous Provisions
Wrap-up/Closing

Adjournment

Records shall be kept of all National Council proceedings and shall be available after the meeting for public inspection at the National Council on Disability.

Signed at Washington, DC on September 18, 1992.

Ethel D. Briggs,

Executive Director.

[FR Doc. 92–23167 Filed 9–18–92; 3:12 pm]

BILLING CODE 6820–BS–M

Corrections

Federal Register
Vol. 57, No. 184
Tuesday, September 22, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

Western Area Power Administration

Mutual Assistance Program, Notice of Proposed Cooperative Agreement

Correction

FR Doc. 92–22552 appearing at 57 FR 42994, Sept. 17, 1992, was a duplicate printing of FR Doc. 92–22553 appearing on the same page. The correct text of FR Doc. 92–22552 appears in the "Notices" section of today's Federal Register.

BILLING CODE 1505–01–D

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

4 CFR Ch. III

48 CFR Parts 9903 and 9904

Cost Accounting Standards Board; Recodification of Cost Accounting Standards Board Rules and Regulations

Correction

In correction document 92–7992 beginning on page 34167 in the issue of Monday, August 3, 1992, make the following corrections:

9903.201–4 [Corrected]

1. On page 34167, in the second column, in 9903.201–4, in the fifth line, "Disclosed" should read "Disclosure".

9904.405–60 [Corrected]

2. On page 34167, in the second column, in 9904.405–60, in amendatory item 12., the last line should read "line, insert a closing parenthesis after 'allocations'".

9904.413–60 [Corrected]

3. On page 34167, in the third column, in 9904.413–60, in amendatory item 22., in the fourth line, "$7,650.00" should read "$7,650,000".

Appendix A to Section 9904.414 [Corrected]

1. On page 34167, in the third column, in amendatory item 24., in the last line "subject o" should read "subject to".

9904.416–50 [Corrected]

2. On page 34168, in the first column, in amendatory item 30., in the second line, "9904.415–50" should read "9904.416–50".

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. 23345; Amdt. Nos. 21–70, 36–19, 43–34, 91–230, 147–6]

RIN 2120–AB53

Primary Category

Correction

In rule document 92–21541 beginning on page 41360 in the issue of Wednesday, September 9, 1992, make the following corrections:

1. On page 41363, in the first column, in the first full paragraph, in the second and third lines, "in appropriate" should read "inappropriate".

2. On page 41364, in the 3rd column, in the 3rd full paragraph, in the 17th line, "FAA" should read "EAA".

3. On page 41365, in the 1st column, in the 2d full paragraph, in the 11th line, "FAA-requested" should read "EAA-requested".

§ 21.184 [Corrected]

4. On page 41368, in the third column, in § 21.184(b), in the second line from the bottom, after "§ 21.24(a)(1)" remove the ",".

5. On the same page, in the same column, in § 21.184(c), in the fourth line, between "certificate" and "primary" insert a "-".

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 135

[Docket No. 26142; Amendment Nos. 91–231, 121–230, 125–17, and 135–44]

RIN 2120–AB45

Miscellaneous Operational Amendments

Correction

In rule document 92–22084 beginning on page 42662 in the issue of Tuesday, September 15, 1992, make the following correction:

§ 135.117 [Corrected]

On page 42675, in the third column, in § 135.117(a)(1), in the second line, after "smoking" insert "in".

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[FI–159–84]

RIN 1545–AG63

Differential Earnings Rate and Recomputed Differential Earnings Rate of a Mutural Life Insurance Company

Correction

In proposed rule document 92–19360 beginning on page 37495 in the issue of Wednesday, August 19, 1992, make the following corrections:

1. On page 37495, in the 3d column, in the 4th full paragraph, in the 14th line, "(1984); S. Prt." should read "(1984); 1 S. Prt."

2. On page 37496, in the 1st column, in the 2d full paragraph, in the 21st line, after "the" remove "ten".

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[IA-55-90]

RIN 1545-AO79

Clarification of Period During Which Interest Is Allowed With Respect to Certain Overpayments

Correction

In proposed rule document 92-20256 beginning on page 38457 in the issue of Tuesday, August 25, 1992, make the following corrections:

1. On page 38457, in the second column, in **FOR FURTHER INFORMATION CONTACT:**, in the fifth line, "111" should read "1111" and in the sixth line "2204" should read "20224".

2. On the same page, in the third column, the heading appearing after the first full paragraph should read: *"Interest on Overpayments That Are Credited Against Certain Additions to the Tax"*.

BILLING CODE 1505-01-D

federal register

Tuesday
September 22, 1992

Part II

Department of Transportation

Office of the Secretary

14 CFR Part 255

Computer Reservations System (CRS) Regulations; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 255

[Docket No. 46494, Amendment No. 255-9 and Docket No. 47762]

RIN 2105-AB47

Computer Reservations System (CRS) Regulations

AGENCY: Office of the Secretary, Transportation.

ACTION: Final rule and denial of American Airlines Petition for rulemaking.

SUMMARY: The Department is issuing a final rule governing computer reservations systems (CRSs). The Department initiated this proceeding because its existing CRS rules (14 CFR part 255) were originally scheduled to expire on December 31, 1990, unless extended (the Department has since changed the expiration date to December 11, 1992). The Department is adopting these rules because stronger rules appear necessary to enhance competition in the airline and CRS industries. These rules should enhance competition by eliminating various CRS vendor practices that may restrain competition.

The Department is denying a petition for rulemaking filed by American Airlines for a rule that would severely restrict the use of elapsed time as a factor for ranking flights in CRS displays. Many travellers consider elapsed time an important factor in choosing airline services. American's proposal would deny CRSs the ability to use that factor in ordering their displays.

EFFECTIVE DATE: This final rule is effective on December 7, 1992 and terminates December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Thomas Ray or Gwyneth Radloff, Office of the General Counsel, 400 Seventh St. SW., Washington, DC 20590, (202) 366-4731 or 366-9307, respectively.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Department's rules governing the United States operations of airline-owned computer reservations systems (CRSs), 14 CFR part 255, were originally adopted by the Civil Aeronautics Board (the Board) in 1984. By their terms the rules would have expired on December 31, 1990, unless they were renewed. Section 255.10(b). We assumed most of the Board's remaining responsibilities at the time of its sunset, December 31, 1984, including its responsibility under section 411 of the Federal Aviation Act (the Act), 49 U.S.C. 1381, to prevent deceptive practices and unfair methods of competition in the airline industry, the principal bases for the Board's adoption of the rules.

In view of the scheduled expiration of the rules, we began this proceeding to determine whether we should readopt the rules and, if so, with what changes. We first issued an Advance Notice of Proposed Rulemaking, 54 FR 38870 (September 21, 1989), to obtain comments on CRS issues. After considering the parties' proposals we issued a Notice of Proposed Rulemaking requesting comments on our tentative decision to readopt the rules with substantial changes. Notice of Proposed Rulemaking, Computer Reservations Systems, 56 FR 12586 (March 26, 1991) (the NPRM).

In our NPRM we tentatively determined that CRS rules remain necessary to prevent the carriers controlling the systems (the vendors) from using the systems to prejudice airline competition and mislead consumers. We accordingly proposed to maintain the current rules and to strengthen them in several respects. On certain issues, however, we chose not to propose new rules, since the record suggested that such rules could create harm or impose burdens that could outweigh their benefits. On other issues, we requested further comment.

We received comments and reply comments from the Justice Department (Justice), Congressman James L. Oberstar, a group of 17 states and one territory (Pennsylvania, New York, Arizona, Connecticut, Florida, Hawaii, Idaho, Illinois, Michigan, Minnesota, North Carolina, North Dakota, Ohio, Texas, Vermont, Washington, and the Virgin Islands), individual comments from Michigan and Pennsylvania, the European Civil Aviation Conference (whose comments were prepared in cooperation with the European Community Commission), the CRS vendors and the carriers controlling the CRSs (American, Covia, United, Worldspan, Delta, Northwest, TWA, and jointly by System One and Continental), six other U.S. airlines (Alaska, America West, Midway, Pan American, Southwest, and USAir), 15 foreign airlines and airline groups (Aer Lingus, Air Canada, Air France, Alitalia, British Airways, KLM, LTU International, Lufthansa, the Orient Airlines Association, Sabena, SAS, Swissair, TAP, Varig, and Virgin Atlantic), the two major travel agency trade associations (the American Society of Travel Agents and the Association of Retail Travel Agents, referred to as ASTA and ARTA), the United States Tour Operators Association, a number of travel agency parties, a manufacturer of third-party software (TravelPro Technologies), the National Business Travel Association, the Dallas-Fort Worth Parties, several individuals (including Jonathan Parker, Richard Eastman, Andrew Kleit, and Donald Pevsner), and the Competitive Enterprise Institute (CEI), and advocacy/research group. In addition to ASTA and ARTA, the travel agency parties include All-Around Travel, the American Automobile Association, American Express Travel Related Services, an anonymous travel agency president, Bliss Travel, CUC Travel

Services, Hewins Travel Consultants, the Long Island Travel Agents Association, Overland Stage Travel, Pegasus Travel, Sunbelt Motivation & Travel, a group of fifteen major travel agencies, Thomas Cook Travel, Travel Facilitators, Travel Consultants, and Woodside Travel Management Corporation.

In their comments, Justice, all of the U.S. and foreign airline parties except American and United, the two smaller U.S. systems (System One and Worldspan), ECAC, the two travel agency trade associations, and several travel agencies argue that CRS rules are essential for preserving airline competition and that the current rules must be strengthened significantly to stop various alleged anti-competitive practices of the CRS vendors. The two largest vendors, American and United, and Covia, the CRS managed by United, oppose any significant strengthening of the rules and suggest that no CRS rules are necessary (we will refer to these three commentors as the major vendors). The major vendors' position receives support from CEI and Andrew Kleit. Several of the travel agency parties oppose all or some of our proposed rules.

We have amended the rules to maintain the current rules for an additional period to give us time to analyze the issues and prepare this final rule. 55 FR 53149 (December 27, 1990); 56 FR 60915 (November 29, 1991); 57 FR 22643 (May 29, 1992).

We are incorporating into this proceeding a rulemaking petition filed by American in Docket No. 47762, since it concerns a CRS display issue discussed in the NPRM. American seeks a proceeding for adopting a rule that would restrict the use of elapsed time in ranking flights shown in CRS displays.

II. Summary of Decision

We are readopting the current rules and strengthening them in several respects because of the need to prevent the vendors from using their control of the systems to substantially reduce airline competition and to deny travel agents (and thus the travelling public) complete, accurate, and impartial information on airline services. In considering the extent to which we will regulate CRS operations, we have examined both the benefits likely to be provided by proposed rules and the burdens and costs likely to be imposed by such rules. We are adopting only those rules that will produce public benefits significantly outweighing their costs. We are also avoiding regulations that would force us to engage in an unnecessarily detailed oversight of CRS operations.

We recognize that the systems enable agencies to operate more efficiently and provide better service for their customers, as shown by the almost universal use of CRSs by travel agencies. We also recognize that the systems make it easier for carriers to provide information and booking capabilities to travel agents. And we appreciate that the systems' owners have made large investments in developing the systems and are entitled to profit from their innovations. Despite these facts, we find it necessary to regulate some aspects of CRS operations because the systems' benefits can be offset by abuses that would reduce airline competition and undermine the ability of travelers to find the airline service that meets their needs.

We conclude that CRS rules remain essential because each of the carriers operating the four CRSs may have the power and incentive to use its system to prejudice the competitive position of other carriers in ways that will raise consumer costs and reduce the level of airline service. Because market forces may not effectively prevent such injuries, some regulations are necessary. Our conclusion is consistent with the analysis presented by Justice in this proceeding and with the earlier findings of the Board.

The vendors have the power to reduce airline competition and the ability of consumers to find the best airline service due to several features of the airline, travel agency, and CRS businesses. First, carriers rely heavily on travel agencies for the marketing of airline services—and travel agencies hold themselves out to the public as neutral providers of airline information and tickets. Because of the efficiencies of the travel agency distribution system, no carrier could practicably create an alternative distribution system. Secondly, travel agencies rely heavily on CRSs to find out what airline services are available and to book seats for customers—and most agencies use only one system to carry out these functions. Each vendor thus largely controls the information seen by its subscribers on airline services. If a carrier's services are not displayed and bookable through a system, that carrier will receive few bookings from the agencies subscribing to that system. Since the profitability of a carrier's service in any market can be radically changed by the addition or loss of a few passengers on its flights in that market, no carrier can afford to lose sales from any significant group of agencies, so each carrier must participate in each system.

Each vendor can injure its competitors by omitting or hiding information on their services, thereby depriving them of passengers, and by raising their operating costs by charging supracompetitive fees for participation in its CRS. The public loses, both because such practices will reduce airline competition and because travelers are unable to learn efficiently which airline services best meet their needs.

As a result, we find it necessary to maintain the current rules and to strengthen them in several respects. Rather than dictate in detail how the systems must operate, we have chosen to rely in large part on a rule that we expect will open up competition and promote innovation and efficiency. That rule will prevent vendors from denying their subscribers the option of using hardware and software acquired from independent firms in conjunction with CRS services and the option of using agency-owned CRS terminals to access other systems and databases. Third-party hardware and software will enable agencies to operate more efficiently and obtain better information and transaction capabilities for their customers. The rule also creates the opportunity for new firms to offer travel databases to agencies and thereby break each vendor's current control over the airline information seen by its subscribers. In particular, this rule will enable carriers to set up direct links between their internal reservations systems and travel agencies and thereby create an alternative means of obtaining bookings without paying booking fees. The carriers' use of such direct links should limit the vendors' ability to charge supracompetitive booking fees.

We have also determined that some other changes to the existing rules are needed. In our consideration of rule proposals, we have followed the principle that only regulations whose benefits outweigh their costs should be adopted. We are therefore not adopting such proposals as those requiring vendors to make large expenditures for eliminating architectural bias, nor are we allowing booking fees to be set through cumbersome ratemaking cases or trying to determine the best possible method for constructing CRS displays of airline services. Our rules will provide more room for carriers to compete on the basis of price and service without denying the vendors the legitimate benefits of their investments and without requiring detailed management of CRS operations.

III. History of CRS Regulations and Studies

Before providing our analysis of the CRS and airline industries, we will summarize the current regulations and past investigations of the CRS business. The Board adopted the rules currently in force. 14 CFR part 255, adopted by Regulation ER–1385, 49 FR 32540 (August 15, 1984), and the Notice of Proposed Rulemaking, EDR–466C, 49 FR 11644 (March 27, 1984) (these documents are cited as the "Board's Final Rule" and the "Board's NPRM"). The Board made some revisions to the rules by ER–1396, 49 FR 46347 (November 26, 1984).

The current rules prohibit vendors from biasing their primary displays and from charging discriminatory fees for CRS participation by other airlines, require vendors to make domestic marketing data generated from CRS transactions available to other carriers, and prohibit certain vendor practices that could deny travel agency subscribers an adequate opportunity to use additional systems or switch systems. To ensure that a reexamination of the rules occurred, the rules stated that they would expire on December 31, 1990. The Board's rules were affirmed on review, *United Air Lines* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985), in an opinion written by Judge Posner.

Several years ago when we adopted rules on airline delay problems, we added rules requiring each system to display specified on-time arrival statistics for each domestic flight and prohibiting vendors from displaying any other delay information and from using the on-time arrival statistics as a factor for ranking flights. 14 CFR 255.3 and 255.4(e), adopted by 52 FR 34056 (September 9, 1987). Except for this change, the substantive CRS rules have remained the same since their adoption by the Board.

To help us reevaluate the CRS rules we undertook a study of the CRS business as part of our examination of domestic airline competition. Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry (February 1990). We also conducted an earlier CRS investigation, the May 1988 Study of Airline Computer Reservation Systems (these two reports are cited hereinafter as the Marketing Report and the 1988 CRS Study).

The conclusions reached by these studies on the basic structure of the CRS business and its impact on airline competition were substantially the same as the conclusions reached by the Board in its rulemaking. The CRS and airline industries have changed in several respects since the Board adopted its rules, and the vendors have greatly expanded the technical capabilities of the systems. Nonetheless, the basic structure of the CRS business and its impact on airline competition have changed little since 1984. We have therefore relied on the Board's analysis, as well as our own two studies, in this proceeding. We have also relied heavily in this proceeding on Justice's competitive analysis, an analysis derived from several Justice investigations into CRS issues. 56 FR 12588, 12589.

As discussed in the NPRM, both the European Community and Canada adopted CRS rules after the Board acted. 56 FR 12588. The International Civil Aviation Organization has also adopted guidelines for CRS operations.

IV. Airline Marketing and the Need for CRS Rules

A. The Travel Agency Industry

CRSs used by travel agencies are so important because of the dominant role of travel agencies in the marketing of airline services. The great majority of all airline tickets—at least 70 percent—are sold by travel agencies. Travel agencies have become so dominant largely because they provide the most efficient means for travellers to find out what travel options are available. As a result of airline deregulation, airline fares are continuously changing, and airline routes are not as fixed as they were before deregulation because carriers now have the ability to enter and exit routes without regulatory review or delays. In addition, the increased importance of hub-and-spoke service has expanded the number of service options in many markets. All these factors have made it difficult for travellers to obtain complete information on airline services on their own. Marketing Report at 12–14.

The travel agency system represents an efficient means for airlines to market their services. 56 FR 12587–12588; Marketing Report at 7–8. Carriers appear to have no practicable substitute for it.

A large proportion of travellers—perhaps 50 percent of leisure travellers and 25 percent of business travellers—do not have a preference for a particular carrier when they buy airline services. Marketing Report at 8; Woodside Comments at 2. Travel agencies thus have a significant ability to shift customers from one carrier to another, although they must keep in mind the need to book services that meet the customer's travel needs. Marketing Report at 28–29.

In contrast to distributors in other industries, travel agencies typically represent all carriers, and they hold themselves out as neutral providers of information and advice on airline services. 56 FR 12587; NW Reply, Levine Affidavit.[1]

Although travel agencies are generally viewed as being neutral, each airline structures its commission payments with many agencies to encourage them to shift more of its bookings to that carrier. These incentive commissions are often override commissions enabling the agency to obtain a higher commission rate on all of its bookings with the carrier if the carrier gains a larger share of the agency's business. Marketing Report at 26–30. Parties disagree over the impact of such commission programs and other preferred-supplier relationships on airline competition and the impartiality of the advice given customers by travel agencies. The propriety of override commission arrangements is largely outside the scope of this rulemaking, but the existence of such business ties between agencies and airlines is relevant to several rule proposals discussed below.

B. The CRS Business

Each CRS consists of a central computer database and processor that can be accessed by travel agents and others through computer terminals, such as PCs. An agent using a CRS can find out what airline flights and fares are offered in a market and whether seats are available, book seats for customers, and issue tickets. CRSs also enable agents to perform similar tasks for hotels, rental cars, cruises, and other travel services. CRSs are much more efficient for these tasks than any alternative means. 56 FR 12587. As a result, travel agents rely heavily on CRSs. In 1987, for example, 95 percent of all U.S. agencies used CRSs, and agents made 92 percent of their domestic airline sales through CRSs. 56 FR 12587. Our concern in this proceeding is with CRSs used by travel agents, but the vendors also provide CRS services to corporate travel departments and to home computer users.

Four CRSs operate in the United States: Sabre, owned by American's

[1] Although Woodside asserts that most agency customers know that agencies typically have preferred carriers, that assertion, while probably true for large business clients, is not accurate for leisure travellers and many business travellers. Thus it does not offset the common perception that agencies are neutral. See Marketing Report at 10, 18, 21.

parent corporation; Apollo, operated by a United subsidiary and owned by Covia Partnership, a group composed of United, USAir, and several foreign airlines; Worldspan, owned by Delta, Northwest, TWA, and a partnership of Asian airlines; and System One, owned by an affiliate of Continental. Sabre is by far the largest system, while Apollo is the second largest. 56 FR 12587. Sabre competes in foreign markets, either directly, as in Europe and Canada, or through affiliates, as in much of Asia. Worldspan also competes directly in Europe, while its Asian partners provide CRS services in Asia. Covia is affiliated with one of the two large European systems, Galileo; several of the European carrier owners of Galileo are partners in Covia; and Covia and Galileo have announced plans to merge. July 1, 1992 Covia Comments at 9.

The owners of the CRSs obtain most of their compensation for providing CRS services from the booking fees paid by airlines and other firms whose services are booked through a system. While many travel agencies also pay fees for CRS services (usually monthly lease charges), many agencies—particularly large agencies whose use of a system will generate large streams of booking fees for the vendor—receive CRS services at little or no cost. Marketing Report at 23; Ten Major Agencies Comments at 14.

In addition to the fees paid by airlines, other travel suppliers, and travel agencies, each of the airlines controlling a system—a vendor—receives additional airline bookings from its system's subscribers that it would not receive if those agencies were using another system. These additional revenues—often called incremental revenues—stem from the travel agencies' tendency to give a disproportionately large share of their bookings to the carrier controlling the system used by the agency.

When choosing which CRS to use, agencies rarely consider the systems equally attractive. To obtain the best information and transactional capabilities on an airline that owns a CRS, the agent must use that carrier's system. In addition, agencies believe that they will receive more marketing support from a carrier if they subscribe to its system. These factors usually cause an agency to prefer a system offered by a carrier with a large airline market share in the agency's city, since a large proportion of the agency's business will be with that carrier. Marketing Report at 24–26; Woodside Comments at 7. Each system therefore tends to have a large share of the CRS market in cities where its principal airline owners are the major providers of airline service.

For example, according to American's figures for 1991, 87 percent of all CRS bookings in Dallas were made on Sabre, 50 percent of the bookings in Denver were made on Apollo, 56 percent of the bookings in Minneapolis-St. Paul were made on Worldspan, and 47 percent of the bookings in Houston were made on System One. These cities are, respectively, an American hub, a United hub, a Northwest hub, and a Continental hub. In Chicago, a hub for American and United, 86 percent of all bookings were made either on Sabre or Apollo. American Supplemental Comments, app. C.

For the most part, each travel agency office (or location) uses only one system. While some agency locations use more than one system, even those locations transact most of their business on just one system. Agencies infrequently use multiple systems for several reasons. Using more than one system increases training costs and can make it more difficult to keep track of records. The vendors, however, also discourage agencies from using multiple systems. All vendors prohibit U.S. subscribers from using a CRS terminal to access more than one system; having to obtain a second terminal for accessing a second system is too inconvenient and expensive for most agencies. In addition, the vendors' subscription contracts often contain terms (for example, minimum use clauses) that as a practical matter can impose substantial costs on an agency if it makes substantial use of a second system. 56 FR 12593–12594; Marketing Report at 87–88.

C. The Sources of the Vendors' Market Power

The carriers' dependence on agencies for marketing their services and the agencies' reliance on CFRs for choosing and booking airline services are among the factors that give each of the vendors market power over other carriers. Market power is the ability to raise prices above the economic cost of providing service (or to provide less service than would be provided in a competitive market). Justice ANPRM Comments at 10. The vendors' market power and their incentives to abuse it provide the primary basis for our finding that CRS rules remain necessary.

In the NPRM we explained in detail why each system had market power. 56 FR 12591–12600. Both because the issue is relevant to our discussion of the various rule proposals and because a few parties have challenged our competitive analysis, we will restate the analysis that leads us to conclude that each vendor could have the ability to cause harm to airline competition if CRS operations were unregulated.

Airlines sell a service that cannot be stored, and the high proportion of fixed costs involved in operating a flight means that the gain or loss of a few passengers on a flight can often determine whether it will be profitable. Justice Comments at 7. Airline operating margins, moreover, are usually thin. Because marginal revenues are so important to airline operations, each airline cannot afford to loss access to a significant source of traffic, because then it cannot operate successfully. 56 FR 12592.

If a carrier's services are neither displayed nor saleable in a CRS, it will lose access to a significant source of traffic: the travel agencies using that system as their primary CRS. Since agents depend so much on CRSs when advising customers on airline options and selling tickets, and because the great majority of agencies depend on one system for all their CRS transactions, a travel agency will have no easy way to obtain information on a carrier's services or to book seats on it unless that carrier participates in the CRS used by the agency. A carrier that drops out of a system will thus lose a large proportion of the bookings it would otherwise have received from the agencies using that system as their primary system. For example, Continental lost so many bookings when it stopped participating in PARS in 1984, even though PARS continued displaying many Continental flights, that the carrier was compelled to resume its participation in that system. 56 FR 12594.

Participation in each system is also important because, despite the low national market shares of the smaller systems, each system dominates some regional CRS markets. As shown by the figures stated above, for example, a carrier seeking travelers at Chicago will be severely handicapped if it does not participate in Apollo and Sabre, since their subscribers make over 80 percent of the CRS bookings in that area.

Vendors accordingly do not need to compete for airline participants in their systems. As Justice summed up this situation, Justice ANPRM Comments at 10–11 (footnotes omitted):

> [T]he different CRSs are not substitutes for one another from the perspective of air carriers. Travel agents subscribe to only one CRS, and therefore, for a carrier to have access to most of the travel agents in a region, it must participate in every CRS that controls a significant group of travel agents in

that region. Thus, from the perspective of an air carrier, each CRS constitutes a separate market—providing access to a discrete group of agents—for which there is no acceptable substitute. Each CRS constitutes a separate market for air carriers, and each is a monopolist with market power over carriers that want to sell airline tickets in areas where the CRS has a significant number of travel agents.

See also NW Reply, Fisher affidavit, para. 10–11; Woodside Comments at 2.

Even though travel agencies will probably remain the dominant means of distributing airline services, the current vendors would be less able to hold market power if entry into the CRS business were practicable. For a variety of reasons, however, entry is unlikely. Among other things, there are large economies of scale in CRS operations, so it would be difficult for a new entrant to obtain an adequate subscriber base for efficient operations. 56 FR 12594–12595. See also Justice ANPRM Comments at 31–32; NW Reply, Fisher affidavit at para. 4–5. No one in this proceeding has refuted our findings on the unlikelihood of new entry under current industry conditions. However, one of the goals of our rules is to create alternative means for carriers to make their services saleable by travel agencies and to create the possibility of entry for new databases on travel services. This should weaken each vendor's grip over the information on airline services obtained by its subscribers.

We recognize that one U.S. carrier—Southwest—has prospered without participating in any CRS. Southwest's ability to succeed without CRS participation stems from the unusual nature of its operations. 56 FR 12593 n.3. See also NW Reply, Fisher affidavit, n.3. No party in this proceeding claims that Southwest's ability to succeed without CRS participation could be duplicated by any other carrier. Because Southwest's experience is unique, we will ignore Southwest in the rest of our discussion of the airline competition issues.

In an effort to rebut our conclusions on the vendor's market power, American and CEI have submitted economics papers contending that vendors do not have such power (in addition, one of the paper's authors, Andrew Kleit, personally filed his article as a comment and also submitted a reply comment). Those papers are Kleit's "Computer Reservations Systems: Competition Misunderstood", included in the comments filed by American and CEI as well as his own comments; Donald J. Boudreaux and Jerome Ellig, "Why DOT's Proposed CRS Rules Would Injure Consumer Welfare," submitted in CEI's comments, and Boudreaux and Ellig, "Beneficent Bias: The Case against Regulating Airline Computerized Reservations System," submitted in American's supplemental comments. As explained below, we find that these papers rely on theories about the marketing of airline services that are contrary to the airline industry's experience and not as persuasive as the analyses provided by Justice and by Dr. Michael Levine and Dr. Franklin Fisher in Northwest's reply comments. Moreover, even though American submitted two of them, it has provided no factual information supporting the claims made in the articles (for example, one the factors influencing a vendor's choice of editing and ranking criteria in CRS displays).

Ellig and Boudreaux contend that airlines can avoid CRS participation through direct advertising. "Beneficent Bias" at 19; "DOT's Proposed Rules" at 8. We cannot agree. While that strategy apparently works for Southwest due to the unique nature of its operations, no other carrier can do without access to the subscribers of each of the CRSs. Advertising, for example, cannot tell a traveler (or an agent) whether a seat is available on a particular flight and what fares are offered. Airlines also cannot practicably use advertising to inform consumers of their flight schedules, except perhaps for certain unusually dense markets capable of supporting hourly service, *e.g.*, the Washington-New York and New York-Boston shuttle markets.

D. The Vendors' Incentives to Use Their Market Power

Since each vendor has market power over other carriers, it can increase prices for carrier participation above competitive levels and reduce the quality of service below competitive levels. That ability by itself would not necessarily mandate regulation against competitive abuses. After all, for many years the Official Airline Guide was the major source of airline information for U.S. travel agencies, yet its status as the monopoly source of information did not compel the regulation of its operations. *Cf. Official Airline Guides, Inc.* v. *FTC* 630 F.2d 920 (2d Cir. 1980). Even today the rental car firms and hotel companies have not complained that regulation is needed to prevent vendor conduct contrary to the antitrust laws. The difference between the airlines and the rental car and hotel companies is that the systems' owners compete with other airlines but not with hotel chains or rental car firms. We need to regulate the systems' treatment of airline services because each system is owned and operated by one or more airlines or airline affiliates that may have an incentive to use their control of the systems to disadvantage competing airlines.

In determining that CRS rules remain necessary, we are relying in part on the vendor's conduct before the current rules took effect. Since the Board's adoption of the current rules stopped the major abuses, some of the most telling examples of the vendor's potential power occurred before the Board acted. As we noted in the NPRM, for example, several smaller carriers tried to obtain more favorable treatment in Apollo by promising United that they would not compete aggressively with it. 56 FR 12593. These examples remain relevant, however, because neither the CRS rules nor economic and industry developments have changed the CRS industry's structure. The vendors accordingly would have substantially the same ability to engage in similar abuses if the rules were not readopted.

Of course, an identification of the ways in which vendors may prejudice airline competition does not automatically mean that rules should be adopted to block such conduct. One example of the vendors' power concerns their ability to charge discriminatory bookings to other carriers that are not based on the vendors' costs, as discussed next. While the current rule barring discriminatory fees seems to have worked well, adopting a rule directly regulating the level of fees would not be wise, as we explain below when we discuss the various rule proposals on this issue (we believe, however, that our rule authorizing agencies to use CRS terminals to access other databases, including internal airline reservations systems, will provide some discipline on fees).

E. Booking Fees

Before the Board prohibited discriminatory booking fees, vendors compelled the least-favored carriers to pay as much as $3 per booking while other carriers paid as little as thirty cents—and the disfavored carriers usually received the worst service, since their flights were subject to the most display bias. 56 FR 12593. The carriers paying the highest fees and suffering the most display bias in a system tended to be the vendor's major competitors. Board Rule, 49 FR 32543.

The parties' comments on whether we need to require vendors to provide adequate billing information additionally confirm the vendors' power. As discussed below in connection with

the rule proposals on this issue, participating carriers have demonstrated that they have been unable to obtain enough billing information from the vendors in a usable form to enable carriers to audit the accuracy of the bills. If the carriers had some ability to bargain with the vendors, they surely would have been able to obtain adequate billing information, since such information ordinarily would be supplied by suppliers in competitive industries.

In the NPRM we found that the fees charged participating carriers for CRS services are not subject to competitive discipline and do not appear to be based on the vendors' costs. 56 FR 12595–12596; Justice Comments at 5. See also NW Reply at 6–7; Alaska Reply at 7–8. In our 1988 study we calculated that the major vendors' booking fees substantially exceeded their costs, although the study's cost allocations were arbitrary in some respects. 56 FR 12595–12596. We have not estimated the vendors' costs and profits for more recent years, and the major vendors' profits from airline booking fees may well be lower now than shown by our study. However, there have been no developments in recent years which would have significantly reduced the vendors' ability to charge participating carriers discriminatory booking fees not based on costs.

Although Covia, American, and CEI challenge our conclusions that the vendors are able to charge discriminatory or high booking fees, we find their arguments unpersuasive. First, while Covia contends that the findings of our 1988 study are incorrect, Covia provides no cost analysis that would refute that study's findings. Instead, Covia claims that the study made a number of unreasonable assumptions that invalidate its conclusions. Covia also claims that the fee charged per CRS booking is reasonable compared to fees charged by similar businesses such as Ticketron. Covia Comments at 14, 18–19. We analyzed similar Covia claims in our NPRM and found them unconvincing. Among other things, Covia has not shown that the firms providing the analogous services have the same costs as CRS vendors. 56 FR 12595.

Equally unconvincing is Covia's assertion that it cannot afford to raise fees too high because carriers would then withdraw from the system and reduce its attractiveness to travel agencies. Covia Comments at 13. Our finding that vendors like Covia have market power does not mean that they have unlimited ability to raise fees above competitive levels; obviously at some point fees could become so high that participating carriers would lose money on the passengers booked through the system. Nonetheless, the vendors have some ability to raise fees above competitive levels. 56 FR 12595; Justice ANPRM Comments at 11–14. See also NW Reply, Fisher affidavit, para. 11,21. *Cf. Eastman Kodak Co.* v. *Image Technical Services*, 60 U.S.L.W. 4465, 4470 (June 9, 1992).

Covia also argues that its overall profits are low, an assertion supported by some very summary financial figures. Covia Comments at 15–18 and App. C, Exhibit 1. The figures are so summary that they do not establish Covia's actual profitability. Furthermore, Covia calculated its profits by treating its capital investments as expenses, an atypical method of calculating profitability. Air France Reply at 12–13.

Covia and American state that their overall CRS profitability has declined in recent years, but that decline would not disprove our conclusion that vendors have the ability to charge high booking fees. The systems have two sets of customers, participating carriers and travel agency subscribers. While vendors need not and do not compete for carrier participants, they compete to some extent for subscribers, especially large agencies whose business will produce large sums of booking fees. It may well be that the vendors' competition for subscription contracts from the larger agencies have reduced the total profitability of their systems, but their competition for travel agency subscriptions does not affect their power over participating carriers. See, *e.g.*, NW Reply, Fisher affidavit, para. 9, 24–25.

The papers submitted by American and CEI argue that a carrier can deter booking fee increases. They claim that a carrier can offset an increase in a system's booking fees by reducing the commissions paid travel agencies using that system by an amount equal to the fee increase. Assertedly this would make the system unattractive to agencies, thereby deterring the vendor from unreasonably increasing fees. Kleit Comments at 10–13; "DOT's Proposed Rules" at 3; "Beneficent Bias" at 28. This theory ignores the economic practicalities of airline marketing and is belied by industry experience, for no carrier has ever thought such a strategy worth trying. If a carrier reduced its commissions to those agencies using a system charging increased booking fees, those agencies would be likely to book their customers away from that carrier. The revenues lost through this decline in bookings would far exceed any future savings on booking fees. See, *e.g.*, NW Reply, Levine affidavit at 2–4. In addition, a vendor would lose few subscribers in the near term if carriers did reduce their commissions to its subscribers, since almost all agencies have contracts requiring them to keep their system for a five-year term. Thus, even if a carrier could encourage agencies to switch away from a system charging higher booking fees, the carrier's strategy would have little effect for several years. Justice Comments at 11–12. See also Alaska Reply at 12–13. In response to these points, Kleit only says that carriers are always interested in cutting their costs and consequently would adopt his strategy. Kleit Reply at 2–3. But a carrier's wish to control its costs does not give it the ability to do so when a supplier has market power, as do the vendors.

These papers similarly theorize that travel agencies allegedly know that participating carriers may react to fee increase by lowering their commission rates and so will protect themselves in their subscriber contracts by obtaining limits on a vendor's ability to increase its fees. See, *e.g.*, "DOT's Proposed Rules" at 3–4. This theory too finds no support in the evidence in this proceeding or in any analysis of the actual operation of the CRS and agency industries.

Even more untenable is Kleit's suggestion that vendors obtain most of their compensation from carriers rather than agencies because the vendors want to save transaction costs. Kleit Comments at 8. Kleit provides no factual support for this theory. The vendors' decision to obtain more compensation from participating airlines than from travel agencies presumably reflects the differences between the vendors' competition for airline participants and their competition for subscribers.

Kleit further errs in his claim that the varying booking fees charged by vendors before the rules took effect were not discriminatory. Kleit Comments at 12. The Board found that to a substantial extent the fee differences could not be explained by such factors as the size of the participating carrier and the date of its contract to participate in a system. Board Rule, 49 FR 32543; Board NPRM, 49 FR 11651.

F. The Use of Display Bias to Reduce Competition

Without CRS rules vendors could also use display bias to prejudice the competitive position of other carriers. A CRS can display a limited number of flights on its screen at a time; if more

flights are available in a market than can be displayed on a single screen, an agent using the CRS must ask to see additional screens to see more flights. Travel agents often work under significant time pressure, and as a result agents are more likely to book a flight that shows up on the first screen than flights appearing on later screens, even if the latter would better meet a customer's needs. 56 FR 12592. In addition, a CRS display for any market will not list all of the services that are available in the market, largely because many flights are relatively unattractive so that few travellers would book them (for example, connecting services requiring long layovers).

Before the rules took effect, each vendor gained a larger share of its subscribers' bookings by biasing its displays in favor of its own flights, even if other carriers offered better flights. In addition, our NPRM cited several instances drawn from the Board's record where a vendor used its control of CRS displays to prejudice airline competition. When New York Air entered one of America's major markets, American substantially increased the display bias against all New York Air services, an action that led to New York Air's withdrawal from the market. 56 FR 12593. When Continental began offering a set of new discount fares, American waited several months before adding Continental's new low fares to a Sabre display that purportedly included all airline fares. 56 FR 12593.

The vendor's display bias affected a significant amount of revenue. For example, when Frontier Airlines obtained a better status—cohost status—in Apollo's displays, its systemwide bookings increased by four percent. Board Rule, 49 FR 32545. Similarly, a United expert estimated that bias increased a vendor's revenues by 13 percent at agencies switching to its system, although other evidence indicated that his estimate was too low. Board Rule, 49 FR 32546. In view of the importance of marginal passengers in the airline business, that diversion of revenues could make a route unprofitable for a rival and eliminate competition for the vendor.

In light of this experience with bias, we cannot accept the argument presented in the papers submitted by Ellig, Boudreaux, and Kleit that display bias neither threatens airline competition nor deceives consumers. We consider in the next section the effect of bias on consumers requesting information on airline services. Here we will explain why bias undermines airline competition.

In their analysis of CRS bias, Ellig and Boudreaux begin by making the erroneous assumption that a vendor's strategy for marketing its CRS is the sole determinant of any decision to use bias. "Beneficent Bias" at 14,16. That assumption ignores each vendor's incentive and ability to gain additional airline bookings by biasing its system's displays to give its own flights a better display position than they deserve on the basis of neutral service criteria. The vendors' conduct before the prohibition of display bias demonstrated that they would operate the systems so as to increase their airline revenues. Board NPRM, 49 FR 11651. We agree with Ellig and Boudreaux that the vendors' competition for subscribers limits their ability to bias their displays, since travel agencies generally prefer neutral displays, but that competition for subscribers did not prevent vendors from biasing their displays before the rules took effect, in part because vendors could hide the extent of the bias. Board Rule, 49 FR 32547.

Boudreaux and Ellig err as well as in suggesting that agents would not book a flight merely because it is listed first in a CRS display. "Beneficent Bias" at 12–13. Here, again, experience demonstrates that their theoretical arguments do not accurately describe the CRS industry. While agents often will take the trouble to look for flights not listed first in a display, agents are often pressed for time and do book a flight more often if it receives a high display position. Internal American studies submitted by Justice, for example, show that a flight's display position significantly affects the number of bookings made on it by subscribers. Justice ANPRM Comments, App. 70,82.

Ellig and Boudreaux further argue that display bias in any event presumably reflects the preferences of travel agency subscribers, who would rather book customers on their vendor's airline services if possible. They have not shown that the display bias in fact was created or adjusted to meet travel agency demands. In fact, the record before the Board indicated that vendors were refining their bias so that it was both more effective and less easily detectable by agents. Board NPRM, 49 FR 11651. ASTA and ARTA have always opposed display bias, a position that indicates that many agencies, if not all, dislike display bias. Board Rule, 49 FR 32543. While Kleit notes that a number of agencies were willing to use the biased secondary displays offered by Apollo after the Board's rules took effect, Kleit Comments at 17, that does not prove that agency demands led to the systems' use of bias. Neither here nor in the Board's rulemaking have vendors shown that agency preferences led to the creation of display bias. The history of display bias thus indicates that bias was created to shift traffic to the vendor carrier, not to meet agency desires for displays favoring the vendor carrier.

On the ground that display preferences are commonly sold in other industries (*e.g.*, as shown by shelf positions in grocery stores and location of advertisements within newspapers), Kleit suggests that allowing vendors to sell display positions in CRSs could be procompetitive and result in the best display position being used for the carrier most interested in buying that position. Kliet Comments at 15–16.[2] The fundamental flaw in this argument is again its inconsistency with the CRS industry's experience before the Board adopted the CRS rules. At that time some vendors sold display preference (that is, cohost status), but usually only to carriers competing little with that vendor. Vendors did not, however, enable any participating carrier to obtain bias on a systemwide or market-by-market basis that was more favorable than the bias given the vendor's own services. Furthermore, Kleit wrongly assumes that the carriers receiving the worst display position did so because they chose not to pay for a better display position. Kleit Comments at 18–19. However, the carriers who paid the most for CRS access typically were the carriers subjected to the most display bias. Board Final Rule, 49 FR 32543.

Boudreaux, Ellig, and Kleit ignore the vendors' past use of display bias in constructing their theory about its possible beneficial effects. Ellig and Boudreaux recognize that a vendor might be unwilling to sell display bias to a competitor in some markets because no carrier would pay a price as great as the vendor's anticipated increase in airline profits if it keeps the advantage of bias. "Beneficent Bias" at 16–17. They fail to take into account the vendors' past practice, which suggests that the vendors believe they would obtain more airline profits from the additional traffic created by display bias than any participating carrier would be willing to

[2] The CRS industry's display of airline services is comparable to other cases where the same firm provides the display capability and competes with firms using that display space, the firm can use its control of the display space to prevent competition. See, *e.g.*, Home Placement Service v. *Providence Journal Co.*, 682 F.2d 274, 279–281 (1st Cir. 1982), holding that a newspaper could violate the antitrust laws by denying advertising space to a firm providing information on housing vacancies.

pay to obtain a preferential display position.

That the theories proposed by Boudreaux, Ellig and Kleit are inapplicable to the systems' use of display bias is additionally confirmed by other vendor uses of display bias. As shown by American's retaliation against New York Air and the offers United received by carriers to end their aggressive competition with United, vendors used display bias to deter airline competition. And Kleit, Boudreaux, and Eilig have never explained how American's delay in displaying Continental's discount fares benefited any travel agent or traveller.

G. Display Bias and Consumer Deception

Given the evidence that improving a flight's position in the display means that agents will book it more often, display bias contrary to customer preferences can keep a significant number of agency customers from using the flight best suited for their needs. Before display bias became unlawful, moreover, bias could take the form of hiding information from the public, as indicated by American's delay in displaying Continental's new discount fares. Another example concerned the vendors' omission of some hubs of their competitors from the display of connecting services, so that an agent would not know of all service options without undertaking the effort of constructing his or her own connections. Board ANPRM, 48 FR 41177; Civil Aeronautics Board, Report to Congress on Airline Computer Reservations Systems at 46–47.

As a result, our rules are necessary to prevent consumer deception. As we pointed out in the NPRM, in the absence of rules against bias, the vendors would be free to resume biasing their displays against other carriers with the result that travellers and their travel agents would have more difficulty in finding the best service for their needs. 56 FR 12601–12602. We note in that regard complaints by carriers in this proceeding that some vendors still arbitrarily limit the number of competitors' hubs used for constructing displays. For example, American claims that Apollo at times refuses to add new hubs in its display of connecting services on the ground that the display is full, whether or not the new hubs would provide better service for customers than some of the hubs already included. American Reply, App. F. Similarly, Sabre was using all of American's hubs in constructing displays of connecting services while using fewer of its competitors' hubs. 56 FR 12612.

Justice, several agency parties, such as ARTA, and almost all carriers agree that we should maintain the prohibition of display bias, because it threatens airline competition or denies the public accurate and complete information on airline services. See, *e.g.*, Justice ANPRM Comments at 5, 14.

While in theory travel agencies should be able to prevent display bias by refusing to purchase CRS services from vendors providing biased displays, in practice the vendors' competition for subscribers did not eliminate display bias when no rules prohibited it. In part the vendors could continue biasing their displays by hiding the bias. Board Rule, 49 FR 32547. To some extent, agencies may not insist on neutral displays because their customers have an imperfect ability to check the accuracy and completeness of an agent's advice. 56 FR 12601. Several of the travel agency parties assert that travel agencies cannot afford to give customers poor or biased advice because they will lose too much business as a result. Even so, travel agents seemingly have some ability to give customers flight recommendations that are not the best for a customer's needs because travellers cannot easily check the accuracy of agent advice on airline services. A traveller wanting to check the accuracy of an agent's recommendations would have to call all the airlines or some other agencies, a time-consuming task. In addition, because the availability of seats and fares often changes, a traveller cannot readily determine whether an agent's failure to choose the best flight and fare resulted from poor advice or from changes in the availability of seats and fares. Travellers also cannot easily determine whether one agency's advice is more accurate and impartial than another's, particularly since carriers now authorize some agencies but not others to sell discount fares free of some restrictions. If consumers had to check with several agencies to ensure the accuracy of the information they received, they would lose some of the efficiency advantage of using a travel agent in the first place. Moreover, given the travel agencies' reputation as neutral providers of travel advice, relatively few travellers would call several agencies before booking airline service. See, *e.g.*, NW Reply, Levine affidavit at 5–7.

In addition, if all systems contain some bias, as was true before the rules took effect, travellers will be unable to find an agency using a neutral system. In any event it is clear that vendors have some ability to bias their displays in the absence of regulation and that the bias will shift a significant number of travellers to a vendor's flights, even when another carrier's service would better meet a traveller's needs, because the vendor's service has received a better display position.

Only the papers submitted by American and CEI argue that display bias (which they prefer to call "display preference") is not a problem requiring government intervention. They assert that a CRS would lose subscribers (and its subscribers would lose customers) if its ranking of flights gave a preference to unattractive flights, that display bias does not cause unsuitable flights to be listed before flights meeting customer needs, and that allowing vendors to sell display preference would be pro-competitive. While we generally agree with theoretical principles underlying the arguments made by these parties, we find their arguments unpersuasive as to the airline industry because their theories about the benign and even beneficial effects of display bias are contrary to the industry's actual experience. Moreover, these parties have presented no evidence of changed conditions which would make that experience irrelevant to determining now whether display bias should remain prohibited.

H. International Aviation Obligations

We also found in the NPRM that CRS rules appeared to be necessary to carry out the United States' obligation under its bilateral aviation agreements to ensure that carriers from other countries had a fair and equal opportunity to compete. We noted, for example, that we have taken the position that foreign governments must ensure that CRSs operating in their countries fairly display the services of United States carriers. See *e.g.*, *American Airlines* v. *British Airways*, Order 88–7–42 (July 25, 1988). We accordingly determined that the prohibitions against display bias and discriminatory treatment seemed necessary for protecting the bilateral rights of foreign carriers. Moreover, readopting our rules will be consistent with the actions taken by Canada, the European Community, ECAC, and others to prevent vendor abuses that would deny carriers a fair opportunity to compete. 56 FR 12602.

No party has challenged that tentative determination that our bilateral obligations require the adoption of rules preventing vendors from discriminating against competitors.

I. Arguments Against Regulation

Despite our tentative finding that CRS operations should be regulated to

prevent abuses that would reduce competition or cause consumer deception, the major vendors argue for various reasons that CRS regulations would be unwise. We agree with them, of course, that regulating business conduct is not desirable unless clearly necessary. Regulation obviously imposes costs of its own, *e.g.*, by interfering with management decisions to respond to market forces (and, in this case, potentially frustrating technological change). However, while we recognize the disadvantages of regulation, we cannot accept the arguments made by the major vendors against having any CRS regulations (or stronger regulations).

American contends on the basis of a selective citation of authorities that the most recent economic and judicial analyses of the CRS business agree that there is no need for regulation, contention primarily based on the papers by Kleit, Ellig, and Boudreaux (American also relies on the recent Ninth Circuit decision in the private antitrust suit against American and United, a decision discussed by us in our examination of our statutory authority for adopting rules). As shown above, we find the analyses in those papers unpersuasive. Moreover, the recent report of the Transportation Research Board on airline deregulation, Winds of Change, examined the competitive effects of airline-owned CRSs and agrees with our analysis of the competitive effects of the systems. Another recent analysis of the CRS industry, "Computer Reservations Systems and Their Network Linkages to the Airline Industry" by Margaret E. Guerin-Calvert and Roger G. Noll, an article cited by Justice, generally reaches the same conclusions we do. Its authors base their conclusions on a thorough analysis of the history and current practices of CRS operations.

The major vendors also argue that their past willingness to invest large sums in the development of the systems has produced great benefits for consumers, travel agencies, and the airline industry. We recognize that the systems have enabled travel agents to obtain more information on airline services more efficiently and thereby provide their customers with a higher quality of service. We also recognize that the vendors have continued to invest large sums in the systems *e.g.*, by developing "look and book" direct access features, that have provided further benefits for the travel agencies and thus for the travelling public and other airlines. We have taken into consideration the vendors' improvements in their systems. As discussed in detail below, these improvements are a major reason for our decision not to adopt rules requiring the separation of the CRS computer from the host's internal reservations system or mandating equal functionality.

Obviously the efficiencies provided by CRSs benefit the non-vendor carriers as well. Nonetheless, as we explained in the NPRM, the efficiencies created by CRSs make participation in each of the systems essential for airlines, a factor that gives the vendors substantial market power. The vendors, moreover, can use that power to prejudice airline competition. 56 FR at 12601.

Covia claims that further regulation of the CRSs is unjustified because -Covia, at least, operates as a stand-alone system, not as an arm of the marketing department of any of its owners. Covia Comments at 21. Covia concedes that a United subsidiary is the managing general partner for the CRS, Covia Comments at 21, and United holds a majority of the partnership interests. Covia, moreover, appears in several respects to implement strategies benefiting United's airline sales rather than the common interests of all its owners. For example, Covia was providing United fare information from bookings on Covia without providing that information to its other U.S. carrier owner or to participating carriers, as discussed below. And, as noted in the NPRM, Covia has consistently argued that CRS regulations are unnecessary, a position shared by United but competely contrary to the position of the other six partners in Covia. 56 FR 12600.

American, on the other hand, seems to suggest that we should not worry about CRS problems because it offered Alaska and America West, the largest U.S. carriers without a CRS ownership interest, the opportunity to buy a share of Sabre, and neither carrier was interested. American Supp. Comments at 13. Since American did not describe the terms of its offer, we do not know whether those two carriers could afford to buy a large enough interest in Sabre to obtain any control over its operations or whether American offered to give up control, yet such an investment would be attractive only if the new investors obtained possession of some control. If the new carrier investors did not obtain control, moreover, Sabre's operations could continue to favor American's airline services. In any event, Alaska and American West would not be the only victims of the CRS abuses that could arise without regulations.

American and Covia complain that stronger rules would unduly hamper their ability to compete with foreign-owned systems not subject to the same restrictions. See, *e.g.*, Covia Reply at 23–24. This complaint has no merit. If any foreign-owned system wished to compete in the United States, it would be obligated to follow our rules. Furthermore, the two major foreign systems—Amadeus and Galileo—mainly operate in areas subject to the European Community rules, which are substantially more restrictive than our own. Sabre itself must comply with those rules in its operations within the European Community, and Covia's Canadian affiliate must comply with similar rules in Canada. Neither of the major vendors has submitted evidence in this proceeding showing that the European Community rules (or the Canadian rules) significantly interfere with a vendor's ability to operate profitably. Finally, Covia has agreed with its European affiliate, Galileo, that Galileo rather than Covia will market CRS services in all of Europe and Asia except Japan. American June 16, 1992 Comments, Att. B. We accordingly cannot agree that our rule changes will injure any U.S. vendor's ability to compete with foreign systems.

CEI has submitted a paper by Jerome Ellig arguing that any regulation reducing the vendors' profits could discourage technological innovation. His paper, "Computer Reservation Systems, Creative Destruction, and Consumer Welfare: Some Unsettled Issues", suggests that the vendors' opportunity to earn supracompetitive profits (*i.e.*, rents) has fostered innovation in the CRS industry. We agree with Ellig that our rules should encourage innovation and not penalize the vendors for the profits gained from their willingness to accept the risks of investing in the systems. However, our rules certainly will not keep the vendors from being profitable. We are not, for example, limiting the vendors' ability to charge fees. Our rules are designed to eliminate only anticompetitive practices, not legitimate uses of a carrier's control of a system. We also doubt that the vendors would have failed to create the systems if they had known that display bias and similar profit-reducing practices would be prohibited.

In large part, moreover, we intend to spur innovation through our rules. We believe that our rule allowing agencies the freedom to use hardware and software from third-party firms and to access different databases from a single terminal will promote innovation (but without stifling the vendors' technological developments). After all, in recent years much of the innovation

in the CRS industry has come from the efforts of the smaller vendors and firms like Megadata and TravelPro. See, *e.g.*, Hewins Reply at 6.

As stated above, we appreciate the need to limit our intervention in the CRS business so that we do not deny the vendors the legitimate benefits of their development of the systems. If a vendor has devised means of using its system to enable it to operate more efficiently, it is entitled to the rewards of its investment. For example, we are rejecting Air France's charge that American is unfairly using Sabre to obtain more detailed and current information on travel agency bookings than is available to other carriers. May 6, 1992 Air France Comments. Despite Air France's complaint, American is only gaining the benefits of its investment in creating a program for analyzing the marketing data provided by Sabre and the other systems. We see no reason for denying American the use of a program that it had the foresight to develop. Any other U.S. carrier can already acquire the same data, and our new rules will allow Air France and other foreign carriers the opportunity to acquire and use the same information.

V. Statutory Authority for the Rules

Given our findings on the potential for consumer deception and anticompetitive practices resulting from airline-owned CRSs, we have the authority under sections 204(a), 411, and 1102(a) of the Act, 49 U.S.C. 1324(a), 1381, and 1502(a), to adopt these rules. Section 411 authorizes us to define and prohibit unfair methods of competition and deceptive practices, while section 1102(a) requires us to act consistently with the United States' obligations under treaties and bilateral agreements. Section 204(a) gives us a broad rulemaking authority. We tentatively concluded in the NPRM that these sections authorized our adoption of the rules that were proposed there. 56 FR 12602–12603. We also pointed out that the Seventh Circuit had affirmed the Board's adoption of CRS rules based on the same section 411 analysis that we tentatively adopted. *United Air Lines* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985).

In response, American argues that we cannot rely on antitrust principles as a basis for regulating CRS practices under section 411. American bases this argument in large part on the decision in favor of the major vendors in the antitrust suit filed by several non-vendor carriers against them, *Alaska Airlines* v. *United Air Lines*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3688 (April 7, 1992), a decision that allegedly undermines our factual and legal findings.

The only other objection to our legal authority to adopt the proposed rules comes from CEI, which argues that the rules display bias would violate the First Amendment of the Constitution. These issues are discussed below.

A. Unfair Methods of Competition

1. Unfair Methods of Competition under Section 411

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

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

As a result, we may define a practice as an unfair method of competition and prohibit it without finding that it is in fact a violation of the antitrust laws. Nonetheless, we doubt that we could adopt rules on competitive grounds unless the practices being prohibited are comparable to practices that would violate the spirit or the letter of the antitrust laws. *See, e.g., E.I. Du Pont de Nemours & Co.* v. *FTC*, 729 F.2d 128 (2d Cir. 1984). Since the principal basis for our adoption of the new CRS rules is our decision to prevent vendor practices constituting unfair methods of competition, we must explain why antitrust principles justify that decision. However, as was true of the Board's proceeding, Board NPRM, 49 FR 11659, we are making no finding in this proceeding that any party has violated the antitrust laws.

In the NPRM we tentatively concluded that our proposed rules appeared necessary to prevent unfair methods of competition. We reasoned that the practices we proposed to prohibit were analogous to those proscribed by the antitrust laws. 56 FR 12602–12603.

Due to American's challenge to our antitrust reasoning and the Ninth Circuit's decision in the private antitrust suit, we have reexamined our tentative conclusions. We conclude again that the vendors have market power and that the rules are therefore needed to prevent practices similar to conduct prohibited by the antitrust laws. We also find that the Ninth Circuit's decision in its CRS case does not undermine our basis for adopting CRS rules.

2. Basic Findings on Market Power

As we said earlier, market power is the ability to raise prices above the economic cost of providing service (or to provide less service than would be provided in a competitive market). Justice ANPRM Comments at 10. The Supreme Court has defined it as the power "to force a purchaser to do something that he would not do in a competitive market," *Jefferson Parish Hospital* v. *Hyde*, 466 U.S. 2, 14 (1984).

For the reasons described earlier and in the NPRM, we find that each vendor has market power over other carriers. The best evidence of this is, as indicated, a vendor's ability to set prices for its CRS services without regard to costs, because vendors need not and do not compete for participating carriers. Their control over pricing was further demonstrated before the rules were adopted by their ability to set discriminatory prices. *Cf. United Airlines* v. *CAB, supra*, 766 F.2d at 1114.

As explained above, each vendor's market power arises because carriers have no adequate alternative to the travel agency system for efficiently distributing their services, because travel agents have no alternative to CRSs for quickly and efficiently obtaining information and bookings on airline services, because the great majority of agencies use only one system (or predominantly only one system) at each location, because entry into the CRS business under current conditions would be extremely difficult, and because the economics of the airline business make it impossible for a carrier to operate successfully if its services cannot be readily marketed by a significant group of distributors. As Justice points out, each system as a practical matter holds a monopoly over the carriers' access to its subscribers.

We recognize that our finding that each vendor has market power over other carriers at first sight appears to be inconsistent with most antitrust holdings, since there are four systems,

none of which has a monopoly share of the national market. However, like the courts, we must base our competitive analysis on the economic realities of the relevant market. *Eastman Kodak Co.* v. *Image Technical Services*, 60 U.S.L.W. 4465, 4469 (June 9, 1992). Our analysis of the economic realities of the CRS and airline industries, like the analyses of the Board and Justice, compels us to conclude that each vendor has market power.

3. CRSs as Essential Facilities

Under the essential facility doctrine, a firm that controls a facility essential for competition must give its competitors access to the facility on reasonable terms. The firm's denial of access will violate section 2 of the Sherman Act. A facility is essential if it cannot be feasibly duplicated by a competitor and if the competitor's inability to use it will severely handicap its ability to compete. *See, e.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956; *Twin Laboratories* v. *Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990); *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 2041.

The rationale of the essential facilities doctrine authorizes our adoption of rules that would prevent a vendor from unreasonably denying other carriers access to its CRS or from imposing unreasonable terms as a condition to access. Each system is comparable to an essential facility, for, as shown above, no one can feasibly duplicate a CRS and denial of access to a CRS will impose a substantial handicap on a carrier's ability to compete.

In this case the conduct proscribed by the rules—display bias, discriminatory booking fees, and denial to other carriers of access to the marketing data generated from a system's bookings—would severely prejudice the competitive position of carriers attempting to compete with a vendor in city-pair markets where the vendor dominates the CRS business at one or both endpoints. As a result, the vendor would obtain the power to raise prices above competitive levels and reduce service below competitive levels in such airline markets. American's successful retaliation against New York Air's entry into the New York-Detroit market shows that a vendor can use its system to eliminate competition in a city-pair market. Under section 411, that kind of threat to competition is sufficient to authorize our adoption of these rules.

American nonetheless argues that the essential facilities doctrine is inapplicable because each vendor's operation of its system cannot violate sections 1 or 2 of the Sherman Act. According to American, the essential facility cases were section 1 cases involving either the ownership of an essential facility by several competitors, *e.g., U.S.* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), or a contract denying use of an essential facility to one party's competitors, *e.g., Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, or were section 2 cases where the denial of use of the facility resulted in monopolization or attempted monopolization of a relevant market, *e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). Since the vendor conduct at issue here involves single-firm conduct, the section 1 cases are inapplicable, and the asserted lack of any monopolization or attempted monopolization of an airline market by a vendor makes section 2 essential facility cases irrelevant as well, according to American.

We cannot agree. First, two of the systems—Apollo and Worldspan—are owned by several airline competitors, so they would be covered by the essential facilities doctrine even under American's narrow reading of it. But for our purposes American's reading is not controlling. Under section 411 we need not find that any vendor's conduct would be a violation of the antitrust laws under the essential facilities doctrine. We may adopt CRS rules if we find that the vendors' past or potential conduct would resemble the kind of conduct proscribed by the doctrine. A vendor's denial of the use of its system on reasonable terms to a competitor would present enough of a threat to competition in one or more city-pair airline markets to justify the adoption of the rules under section 411. Under that section we may act before a vendor's conduct threatens to create a monopoly in an airline market.

4. Monopoly Leveraging

The second basis for our determination that we may prohibit anticompetitive vendor conduct as an unfair method of competition is the monopoly leveraging theory, the principle that a firm may not illegitimately use its monopoly power in one industry to acquire an unfair competitive advantage in a second industry. Although this principle is controversial (and was rejected by the Ninth Circuit in *Alaska Airlines*), two courts have accepted it as a valid antitrust principle. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093; *Kerasotes Michigan Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087. The monopoly leveraging theory is also consistent with the Supreme Court's reasoning in *United States* v. *Griffith*, 334 U.S. 100 (1948). In our view, this principle can support a finding that certain conduct is an unfair method of competition under section 411, because it violates the spirit of the antitrust laws, even if the courts ultimately conclude that monopoly leveraging is not a violation of the Sherman Act.

The leveraging conduct barred by the rules—primarily display bias and discriminatory booking fees—is clearly exclusionary conduct that provides no benefits for consumers and that keeps airlines from competing on the merits of their fares and services. *Cf. Aspen Skiing Co., supra*, 472 U.S. at 605–611. That conduct constitutes an illegitimate use of the vendors' market power in the CRS industry to obtain a competitive advantage in the airline industry. If the vendors' conduct represented a legitimate use of their position in the CRS industry, we would not prohibit it, for firms with legitimately-acquired monopoly power may use the efficiency benefits of their size in a second industry without violating the antitrust laws. For example, American is entitled to take advantage of Sabre's ability to improve American's yield management program and its use of marketing data acquired from the CRSs. However, despite the theoretical arguments presented by the Kleit, Ellig, and Boudreaux articles, no one has shown that conduct as display bias and unreasonable terms for carrier participation actually benefits consumers or travel agencies, strengthens airline competition, or involves the use of the advantages of the vendors' size in the CRS business. We therefore find that the monopoly leveraging principle supports our conclusion that the vendor conduct we are proscribing constitutes unfair methods of competition.

Although American claims that the monopoly leveraging principle is invalid under the antitrust laws, as the Ninth Circuit held in *Alaska Airlines*, we disagree with American's conclusion that the principle cannot support a finding of unfair competitive practices under section 411. First, two other circuits have endorsed it. Secondly, as the Second Circuit pointed out in *Berkey*, the Supreme Court used similar reasoning in *United States* v. *Griffith*, 334 U.S. 100 (1948). There the Court held it a violation of the antitrust laws for

movie theater owners to use their monopoly power in some towns to gain an edge in obtaining films in towns where they did not have a monopoly. The Court, moreover, stated that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." 334 U.S. at 107.

We recognize that the Ninth Circuit has rejected the Second Circuit's reasoning and that other circuits have questioned (but not rejected) the validity of the monopoly leveraging theory when the monopolist's leveraging will not result in monopolization or attempted monopolization in the second industry. *Association for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 586, n. 14 (D.C. Cir. 1984); *Consul. Ltd.* v. *Transco Energy Co.*, 805 F.2d 490, 494, n. 11 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050. However, a holding that monopoly leveraging is not barred by the antitrust laws would seem to be inconsistent with *Griffith*. In addition, the *Alaska Airlines* decision—based on the dichotomy between sections 1 and 2 of the Sherman Act—may have exaggerated the difference between the two sections. The Ninth Circuit reasoned that monopoly leveraging was outside the scope of the antitrust laws on the basis of a distinction between the two sections, a distinction based on statements in *Copperwald Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). The Ninth Circuit held that section 1, which prohibits contracts in restraint of trade, applies only to concerted conduct, while one firm's unilateral conduct can be unlawful only if it violates section 2's prohibition against monopolization or attempted monopolization. 948 F.2d at 542. We believe, at least for section 411 purposes, that the court's distinction is too rigid, since a single firm's conduct, albeit enforced through a contract, can be unlawful under section 1. As the Supreme Court recently held in *Eastman Kodak Co.* v. *Image Technical Services, supra*, 60 U.S.L.W. 4465, a single firm's use of its market power in one business to force customers to buy products or services from it in a second line of business can be an unlawful tying arrangement proscribed by section 1. Similarly, a firm's use of an exclusive contract to capture of all of another firm's purchases of a good or service can be unlawful under section 1. See, *e.g.*, *Jefferson Parish Hospital* v. *Hyde, supra*, 466 U.S. at 44–45 (O'Connor, J., concurring).

5. The Alaska Airlines Case

In challenging our antitrust analysis, American relies heavily on the Ninth Circuit's decision in *Alaska Airlines*, the private antitrust suit, holding that American and United had not violated the antitrust laws. As noted above, the court held that the essential facility principle was inapplicable to the operations of Sabre and Apollo and that the monopoly leveraging principle was contrary to the antitrust laws.

Although American argues that the Ninth Circuit decision should resolve the section 411 issues here, we cannot agree. First, our authority to proscribe unfair methods of competition under section 411 is broader than the courts' power to find antitrust law violations. Congress did not confine our authority to define and proscribe unfair methods of competition to conduct that violated the antitrust laws. By giving us broader authority, Congress intended that we should bar airline conduct that will lead to a substantial reduction in competition if the conduct is not the result of an exercise of efficiency advantages or innovation or other procompetitive practices.

Secondly, the Ninth Circuit based its decision on the record before it and on the parties' agreements in the case. For example, the court relied on the plaintiffs' apparent admission that the vendors did not have the power to eliminate competition in the air transportation industry. 948 F.2d at 545. Our decision, on the other hand, must necessarily be based on the record in this proceeding and our expertise in CRS matters. Our record indicates that a vendor, particularly one with Sabre's market share, could use its control of the system to eliminate competition in individual city-pair markets, although not in the national market. Furthermore, the court did not conclude that the major vendors did not have market power over other carriers due to their control of the CRSs, since that issue was not addressed by the trial court. 948 F.2d at 545, n. 12.

In addition, the Ninth Circuit's interpretation of the scope of the essential facilities doctrine is inconsistent with the holdings of other courts. The Ninth Circuit held that the essential facilities doctrine applies only if the denial of use of a facility to others would eliminate competition. Other courts have held the doctrine applicable if the denial of a facility would impose a severe handicap on would-be competitors. *See, e.g., Twin Laboratories* v. *Weider Health & Fitness*, 900 F.2d 566, 569–570 (2d Cir. 1990).

6. Tying Arrangements and Exclusive Dealing

Each vendor requires its subscribers to obtain the vendor's consent before using in conjunction with its CRS any equipment or software acquired from a third-party firm, and each vendor prohibits its U.S. subscribers from using their CRS terminals to access another system or database. These restrictions resemble tying arrangements and exclusive contracts barred by the Sherman Act. Since these issues relate to our decision to adopt rules banning those restrictions, we will discuss them as part of our explanation for adopting those rules.

B. Unfair and Deceptive Practices

Without a prohibition of display bias, vendors could resume their earlier practices of biasing their display against competitors, thereby preventing agents and travellers from obtaining complete information on airline services. Since section 411 authorizes us to prevent deceptive practices in the sale of air transportation, we may adopt rules prohibiting display bias on the ground that they are necessary to prevent consumer deception. The Board used the same rationale for prohibiting display bias, and the Seventh Circuit upheld it. *United Air Lines, supra*, 766 F.2d at 1112–1113.

No one has challenged our authority under section 411 to prohibit display bias.

C. Fair and Equal Opportunity to Compete

Section 1102(b) of the Act, 49 U.S.C. 1502(b), requires us to act consistently with the United States' obligations under treaties and bilateral agreements. Since many of the United States' bilateral aviation agreements with other countries assure the carriers of each party a fair and equal opportunity to compete, we must adopt rules to the extent necessary to ensure that foreign carriers have such an opportunity. As we stated in the NPRM, we have held in ruling on complaints filed under section 2(b) of the International Air Transportation Fair Competitive Practices Act ("IATFCPA"), 49 U.S.C. 1159b(b), and in negotiations with foreign countries that the right of U.S. carriers to a fair and equal opportunity to compete means that they are entitled to have their services displayed fairly in CRSs operated abroad by foreign carriers and to market their CRSs effectively in such countries. Foreign carriers accordingly are entitled to the same rights in the United States. To ensure that foreign carriers have that

opportunity, we determined to maintain the rules' prohibition of display bias and discriminatory treatment. 56 FR 12602. No one has objected to our determination that section 1102 supports in part our adoption of these CRS rules.

D. First Amendment Issues

Our new rules will maintain with some changes the current rules' standards for CRS displays. We will continue to prohibit vendors from offering biased primary displays and extend that prohibition to secondary displays, thereby incorporating in the rules the vendors' existing agreement that secondary displays will not be biased. We will also maintain the requirement that vendors must include the airline flight delay statistics in their primary displays and the bar against the use of on-time performance statistics in ranking flight displays (§ 255.4(e), adopted in our 1987 rulemaking on airline delays). On the other hand, we will end the prohibition against a vendor's display of any other delay information. With the exception of the rules on the use of the on-time performance statistics, the rules neither prohibit vendors from offering whatever information they wish in their CRS displays, as long as flights are ranked and edited without bias, nor prescribe the use of any specific factors in constructing such displays.

CEI nonetheless claims that our proposed regulation of CRSs would violate the First Amendment right of free speech. According to CEI, CRS displays are commercial speech entitled to First Amendment protection, and we have allegedly failed to show that a need exists for regulating the vendors' speech that would override their First Amendment rights. However, CEI does not explain how the rules would keep agents and travellers from receiving useful information. In addition, no vendor, airline, or travel agency party argues that the rules will violate its free speech rights. In our view, our rules on display bias do not violate anyone's First Amendment rights.

In light of our finding that the rules against display bias are necessary to prevent potentially misleading speech, our rules are consistent with the First Amendment. The prohibition of display bias prevents vendors from editing and organizing their displays in a manner that gives vendor flights an unwarranted display position, thereby causing travel agents to book flights that are not necessarily the best suited for their customers. Despite the arguments by CEI and others, we find that display bias does not provide travel agents or their customers with useful information.

The First Amendment allows governments to regulate deceptive or misleading speech. The Court thus stated in *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n*, 477 U.S. 557, 563 (1980):

> [T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.

Accord, Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626,638 (1985). Since our regulations of display bias are intended to prevent deceptive or misleading messages, they do not violate the First Amendment.

Even if our rules prohibit some communications which are not misleading or deceptive, they would still be permissible under the First Amendment. The federal government may constitutionally regulate speech in the course of regulating a field of economic activity; restrictions or prohibitions on certain types of speech imposed by the antitrust laws, securities laws, and labor relations laws are thus constitutional without requiring justification under the commercial speech standard. See, *e.g.*, *SEC* v. *Wall Street Publishing Institute*, 851 F.2d 365, 372 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1066, *citing, inter alia, NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). *See also NLRB* v. *Retail Store Employees*, 447 U.S. 607 (1980). Our restrictions on display bias come within the bounds of permissible economic regulation, for we are prohibiting display bias in part to prevent unfair methods of competition and to carry out the United States' obligations under bilateral aviation agreements with foreign governments.

Furthermore, the rules would pass muster under the usual test for determining whether a government regulation of commercial speech is permissible under the First Amendment, even if display bias were not deceptive or misleading. The Supreme Court held in *Central Hudson* that a government may restrict commercial speech that concerns lawful activity and is not misleading, if the government has a substantial interest and if the restrictions directly advance that interest and are no more extensive than necessary to serve that interest. *Central Hudson, supra*, 447 U.S. at 566. *See also Board of Trustees* v. *Fox*, 109 S. Ct. 3028 (1989).

We have a substantial interest in CRS displays, even aside from their potential for deceiving the public, because a vendor's use of a biased display would cause a substantial diversion of revenues that would significantly reduce the ability of non-vendor carriers to compete. The restrictions imposed by our rules directly advance our interest in preserving airline competition, for the rules prohibit bias. The restrictions are no greater than necessary to carry out that purpose because they merely prohibit bias without dictating to the vendors what criteria must be used (or may not be used) in ranking and editing flight information. While CEI complains that we failed to consider other alternatives to the rules against display bias, it cites only one possible alternative, a requirement that travel agents tell customers which CRS is being used. As explained below, no party in this proceeding sees any merit in such a proposal as a replacement for other CRS rules. Such a requirement would provide little useful information for most consumers and would not help travel agents, whose ability to find the best service for their customers is hindered by biased displays.

VI. Procedural Issues

We tentatively determined in the NPRM that we could use notice-and-comment rulemaking procedures to adopt final CRS rules. 56 FR 12603. As we pointed out, the Seventh Circuit affirmed the Board's use of such procedures in its CRS rulemaking. *United Air Lines* v. *CAB, supra*, 766 F.2d at 1119–1121. No party challenges that determination as to the rules we are adopting (some parties argued that a formal hearing would be required before we could adopt certain other rules, but that issue is moot).

Several parties filed requests for leave to file reply comments, supplemental comments, and comments out of time. We will grant all such motions. We are also treating as comments a number of other documents submitted for the record without motions for leave to file, including several travel agency letters.

Even though our basic choice of procedures is uncontested, several other procedural issues require discussion.

A. Adequacy of Record

We have given the parties ample opportunity to present their views on the issues of whether we should readopt CRS rules and, if so, which rules should be adopted. We issued an ANPRM in this proceeding, received comments on the ANPRM (and allowed several parties to file reply comments), issued an NPRM with our tentative findings, authorized parties to file comments and reply comments on our proposals, and

again allowed parties to file additional pleadings.

In addition to relying on the parties' comments, we have been relying for certain purposes on our past detailed studies of the CRS business and its impact on airline marketing, the *1988 CRS Study* and the *Marketing Report* (published in early 1990), as well as on the Board's findings and the evidence submitted by Justice in the Board's rulemaking. Since the basic structure of the CRS and airline businesses has not changed significantly since the board conducted its rulemaking, we have found the earlier studies and the Board's analysis helpful in analyzing the potential competitive and deception problems that could arise if we allowed the rules to expire. Obviously the Board's analyses and even our 1990 study are not particularly useful in considering other issues in this proceeding, such as the alleged need for stronger rules on equal functionality, in light of the continuing technological developments in the CRS business in recent years.

Nonetheless, despite the parties' ability to file several rounds of comments and our limited use of earlier CRS investigations, Covia, United, and KLM charge that the record in this proceeding is too out-of-date to allow us to adopt new rules

We disagree with the assertions that the record is too old to be useful in deciding what CRS rules are necessary. First, the CRS industry's essential features—for example, the agencies' reliance on CRSs, the need of every carrier to participate in each system, and the unlikelihood of new entry—have remained the same for the last eight years. Furthermore, the developments cited by KLM—for example, the European Community's adoption of CRS rules—were considered by us. See, *e.g.*, 56 FR 12588, 12600.

More importantly, we have been liberal about allowing parties to file comments after the end of the formal comment period, a number of parties have filed such comments, and indeed we specifically invited parties to submit material updating the record if they thought recent developments were relevant to the issues, 57 FR 22645 (May 29, 1992). The parties accordingly have been able to update any of the evidence and analyses used in this proceeding.

B. Confidentiality of Reliability Information

In order to obtain additional information on one of the major issues in this proceeding, the extent of architectural bias, we directed each of the vendors to file information on the reliability of its system's transactions and related issues. Order 91–8–63 (August 30, 1991). The vendors' submission of reliability information has generated several requests for confidential treatment of the filings. When Northwest initially asked us to obtain the information from all vendors, it submitted information on the reliability of PARS, the system owned in part by Northwest, for which it requested confidential treatment. Covia opposed the request. We stated that we would rule on the motion later. Order 91–8–63 at 6.

Covia and System One asked for confidential treatment of their responses to the question asking for the total number of airline bookings made, measured by the number of segments booked, for each CRS service during specified periods of time (question 4 in App. A to Order 91–8–63), and Worldspan requested confidential treatment for all of its responses. We will rule on the requests for confidential treatment by a separate order.

VII. Specific Rule Proposals

Our general findings on the need for CRS rules and our authority for adopting them do not resolve the issue of which rules should be adopted. In discussing why we are or are not adopting specific rules and proposed rules, we will follow the same order followed by the NPRM. As a result, the order of the major issues is as follows: (i) The scope of the rules' applicability, (ii) the use of third-party hardware and software by subscribers and their use of one terminal to access several systems, (iii) display bias, architectural bias, and related issues, (iv) booking fees, (v) marketing information, and (vi) subscriber contracts. Given the complexity and number of issues, we will not discuss the less important issues raised in the comments.

A. Readoption of the CRS Rules

Due to the expiration date set by the CRS regulations, a provision designed to force us to reexamine the need for the rules, the first issue here is whether there is any need for the current rules. Justice and the great majority of the other parties in this proceeding contend that those rules are still essential (and should be strengthened). Only CEI, American, Covia, United, Kleit, and some travel agencies contend that CRS rules are unnecessary. We find that CRS rules remain necessary to prevent deception and a substantial reduction in airline competition, as explained in our discussion of the competition and deception issues. The more difficult issues in this proceeding concern whether the additional or stronger rules are needed. Those issues are discussed below.

B. The Coverage of the Rules

The first rule at issue concerns the scope of the regulations. The current rules cover the operation within the United States of CRSs owned by airlines and used by travel agencies for obtaining information, making bookings, and issuing tickets on passenger air transportation. The rules do not cover computer systems that provide some but not all of these CRS functions, systems not affiliated with an airline, and systems not used by travel agencies (that is, systems used by corporate travel departments and home computer users). 56 FR 12604–12605.

The limited scope of the rules results from the Board's reasoning on the need for CRS rules. Airline-owned CRSs posed a threat to airline competition because their owners had the incentive and ability to use the systems to weaken the competitive position of other airlines. The efficiencies provided by CRSs—their ability to enable travel agents to obtain information quickly, make bookings, and issue tickets—caused travel agents to rely on them in selling airline services. The Board therefore had its rules apply only to airline-owned CRSs, not to all services providing airline information and booking capabilities to travel agencies, and excluded the one non-airline system then operating. Similarly, given the significance and nature of the travel agencies' role in the marketing of airline tickets to the public, the Board excluded CRS operations from the coverage of the rules if the systems were not being used by travel agencies. Board Rule, 49 FR 32548, 32549.

In the NPRM we tentatively determined to readopt these limits on the rules' coverage without change. 56 FR 12604–12605. ARTA, ECAC and several foreign airlines contend that the rules should govern systems without an airline affiliation, systems used by corporate travel departments and home computer users, and systems without all CRS functions (*e.g.*, systems that cannot issue tickets). Several parties state that the rules should cover new databases developed in the future, even if they do not have an airline affiliation. America West and Midway ask that systems used by corporations and home computers and systems offered by non-airlines should also be covered. Southwest contends that non-airline systems should be covered, while System One wants the rules to govern systems used by corporate travel

departments. KLM argues that we should prohibit bias in CRSs used by corporate travel departments and available through home computers. The American Automobile Association argues that non-agency CRS users should be regulated to avoid putting travel agencies at a competitive disadvantage.

Two parties argue against expanding the scope of the rules: Covia, which asserts that the rules should not apply to foreign systems accessible by U.S. subscribers through a U.S. system, and the National Business Travel Association (NBTA), which seems to suggest that the rules should not apply to corporate travel departments.

Finally, the United States Tour Operators Association (USTOA) contends that the rules should cover tours (packages of air transportation and land arrangements), not just passenger air transportation.

1. Coverage of Non-Airline Systems

We will again limit the rules' coverage to airline-affiliated CRSs used by travel agencies. This decision flows largely from our basis for readopting the rules. CRSs present potential competitive and deception problems because the systems are owned or affiliated with carriers who have the incentive (and the ability) to use their control to prejudice the competitive position of other airlines. As we explained in the NPRM, no non-airline system operates in the United States and none appears likely to enter the CRS business in the future, given the various barriers to entry that exist, including the agencies' reluctance to use any system not marketed by a major airline. 56 FR 12594. In addition, if a non-airline firm did not operate a CRS, it would not have an incentive to use the system to capture additional airline bookings. Such a firm would also have to market its system on the basis of its value as a stand-alone system. See, e.g., Marketing Report at 49.

Although several parties urge us to apply the rules to non-airline systems, none of them has shown that a non-airline system is likely to enter the CRS business in this country. Their concern that at some time a non-airline system might become viable is at this point theoretical and not an adequate basis for adopting rules. Some parties express concern that a vendor could circumvent the rules by selling its system to a non-airline firm subject to a condition that the latter firm bias the displays in favor of the former vendor. Such a transaction seems unlikely, particularly since we are amending the rules to make them applicable to systems marketed by a carrier or its affiliate.

2. Systems Without All CRS Functions

CRSs require regulation because their combination of capabilities—the provision of information on almost all airline services and the ability to quickly make bookings and issue tickets—causes travel agents to rely on them to determine what airline services are available and to book flights. Because the systems are so efficient, airlines cannot practicably provide these information and transaction capabilities to agencies through any alternative means.

Delta, several foreign carriers, ECAC, and ASTA urge us to apply our rules to systems and databases lacking one or more CRS functions. However, any system that does not provide both airline information and a booking and ticketing capability is not likely to be relied upon by any agency as either its primary information source or means of booking airline seats. Although admitting that such a system would be no more than a supplementary system, ASTA nevertheless asks that we regulate them. ASTA Reply at 20. We are unwilling to do so at this time, since such systems would not be used as an agent's primary information source. We note, moreover, that we do not now regulate other sources of airline information, such as the Official Airline Guide.

We recognize that our rules on third-party hardware and software will enable new firms to provide information on travel services to travel agencies. Indeed, our expectation that new databases will appear is a major reason for our adoption of those rules, as explained below. Although some parties urge us to regulate any new databases, we decline to do so for the reasons stated above. An agency will only subscribe to such a service if it is a useful addition to the CRS services already purchased by the agency, so the market should prevent abuses from occurring. On the other hand, our rules impose some detailed requirements on the display of airline services and on other system operations, and we prefer not to burden new entrants with those regulations unless there is a clear need for doing so.

We also expect that our rules on third-party hardware and software will enable carriers to create direct links between their internal reservations systems and travel agency CRS terminals. If an agent accessed a carrier's internal system through such a direct link and the internal system provided the information and functions of a CRS, it would become subject to the rules. SAS, a carrier that wishes to create such direct links, states its willingness to do so in accordance with the rules. SAS Comments at 19. If the internal system does not meet the definition of a "system", it would not be subject to the rules.

Under the definition of "system", the rules apply to a reservations system that provides information on carriers besides the owner or affiliate and that provides a booking and ticket issuance capability, even if only on the carrier that owns or markets the system. We think that applying the rules to direct links like that contemplated by SAS will be overly burdensome and unnecessary, since such a link is not likely to serve as an agency's primary tool for obtaining airline information and making bookings and since the rules would bar the carrier from paying travel agencies to use its direct link for bookings. We will therefore modify the current definition by adding the condition that a "system" charge carriers other than the owner for system services. If a carrier providing a direct link does not charge other carriers, it should be a type of service that need not be regulated, since the carrier owner would be unable to obtain the type of compensation relied upon by the existing systems for their profitability.

3. Systems Not Used by Travel Agencies

We also will not apply the rules to systems used by persons other than travel agencies. First, systems used by corporate travel departments should not require regulation, because corporations operating their own travel offices can choose which system they will use and control their employees' airline bookings. This being the case, there is no need to apply the bias rules to CRSs used at such locations, since the companies should be able to protect themselves. Similarly, other carriers should be able to compete with a vendor for a corporate travel department's airline business and thereby make the application of the rules unnecessary. The Board similarly saw no reason to extend the rules to systems used by corporate travel departments. Board Rule, 49 FR 32549. Although the American Automobile Association complains that applying the rules only to CRSs used by travel agencies will give other ticket sources a competitive advantage, AAA Comments at 3, it has not provided a factual basis for this assertion.

Although some vendors provide airline information and booking capabilities to home computer users, Marketing Report at 14, we will not make our rules applicable to systems

available to home computer users. In our competition study, we found that home computers accounted for a very small proportion of all airline bookings. Marketing Report at 14. Nothing in this record indicates that that proportion has increased significantly. More importantly, the record has no evidence on the manner in which CRS services are marketed to persons using home computers and no proof that vendors have used home computer systems in a way prejudicial to airline competition. In view of these evidentiary gaps, we could not reasonably apply the rules to CRS services directly offered to consumers.

4. CRS Display of Tours

USTOA asks that we require the vendors to provide better information on tour packages. Tour operators package air travel with land arrangements and, according to USTOA, compete with the airlines (including the vendors) and travel agencies. USTOA alleges that the CRSs discriminate against the products of independent tour operators by giving preference to the vendors' in-house tour products. In addition, the systems' failure to provide adequate information and functionality for tour packages hampers the marketing of independent tours.

We will not expand the reach of our rules to cover tour products. USTOA has not shown in detail how the systems fall short in handling tour products, how they discriminate in favor of the carriers' own tour operations, or how the vendors' alleged practices affect competition in marketing tours. Without facts like these, we have no basis for regulating the CRS's handling of tour packages.

In addition, USTOA misunderstands our role when it argues that we should impose rules on the vendors because they assertedly have fallen behind the Europeans in developing CRS capabilities for tour products. Telling the vendors (or anyone else) how they should operate their business is outside our authority in this proceeding unless we find a specific competition or consumer deception problem requiring action under section 411. If there is a demand for better CRS information and functionality on tour packages, either the vendors or other firms will meet that demand.

5. Foreign CRSs Provided to U.S. Subscribers

Unlike most of the parties commenting on the scope of the rules, Covia contends that their scope is too broad, for assertedly the rules should not apply to foreign systems made available to U.S. subscribers. Covia alleges that it may wish to give U.S. subscribers access to its European affiliate, Galileo. Covia Reply at 19. Worldspan, on the other hand, supports applying the rules to foreign systems available to U.S. subscribers. Worldspan Comments at 34–35.

In our view, if a U.S. travel agency can gain access to a foreign CRS that is within our definition of a "system", that CRS should comply with our rules. Otherwise a vendor like Covia, for example, could evade the rules by allowing (or encouraging) its subscribers to access its foreign affiliate. Covia has shown no reason why applying the rules to foreign systems would be unfair or burdensome. Our rules would apply only to their operations within the United States. We note, moreover, that the major foreign systems—Amadeus and Galileo—operate under the more stringent European rules, so they should be able to comply with our rules without difficulty.

C. Definitions

The rules' proposed definitions drew little comment except for the proposed terms "system owners" and "system vendors" (and except for the definitions delineating the scope of the rules discussed above). Under our proposal, a "system owner" would be any carrier that held an equity interest in a system or that had an affiliate that owns such an equity interest, while a "system vendor" would be any carrier or its affiliate that controlled or operated a system. Under § 255.2 of the proposed rules, every carrier that owns, controls, operates or markets a system would be responsible for ensuring that the system complies with the rules. However, the rules make system vendors directly responsible for following the regulations. A system owner has an additional obligation: it must participate in the features of other systems, to the extent such participation is commercially reasonable, and provide other systems complete and accurate information on its fares and services under proposed § 255.7.

American, Covia, and USAir suggest that the definition of "system vendor" should be clarified, since the proposed rule's wording assumes that each system is controlled by a single airline or airline affiliate. They suggest that the applicability of the rules to Worldspan would be unclear, since that system has no majority owner. American is concerned that any reduction in the amount of United's ownership could raise a question about the applicability of the rules, since Covia would also have no majority owner. Wordspan and Aer Lingus, on the other hand, contend that the definition of "system owner" is too broad, since it would require mandatory participation in other systems by carriers with a very small share of a U.S. CRS (for example, the Asian carriers who are partners in Abacus). American and Covia, however, assert that all owners should be deemed system owners.

In view of the ambiguities noted by America, Covia, and USAir, we will modify the wording of the rules. As American suggests, we will make the entity directly responsible for carrying out the rules "the system," not the "system vendor." As a result of that change, we need not create the term "system vendor." We will leave in place the proposed obligation that every carrier owning, controlling, operating, or marketing a system must ensure that the system operates according to the rules.

The term "system owner" is primarily relevant to the requirement of mandatory participation in other systems but is used elsewhere in the rules as well (for example, in defining "participating carrier"). As a general matter, we agree with American that every owner should be considered as a system owner for most purposes. The only exception concerns the mandatory participation requirement. This rule is intended to prevent a carrier from limiting its participation in competing systems so that agencies at its hubs—agencies that usually need the best information and transaction capabilities on that carrier—will be forced to subscribe to its system. Given this intent, applying that definition to every carrier with an ownership interest in a CRS, no matter how small, is unnecessary. We will therefore adopt Aer Lingus' proposal that carriers owning less than five percent of the equity of a system will not be deemed system owners. A carrier with such a small ownership interest is unlikely to have the incentive or the ability (particularly if it is a foreign carrier) to limit its participation in competing systems in order to further the marketing of the system in which it holds an equity interest.

We will also adopt American's proposal that both direct and indirect ownership will be used in determining whether a carrier is a system owner, but not Covia's suggestion that one carrier's equity interest in another carrier with a CRS interest should be excluded in determining whether a carrier is a system owner. The latter proposal could enable a major carrier to evade compliance with the rules by transferring its CRS interest to an affiliated carrier.

D. Third-Party Hardware and Software; Access to other Databases

1. Introduction

In the NPRM we proposed rules allowing subscribers to use third-party hardware and software in conjunction with their CRSs, subject to the condition that the third-party products must be compatible with the system, and allowing subscribers to access more than one system and other databases from a single CRS terminal. We tentatively found these rules necessary and procompetitive, because the vendors restricted their subscribers' ability to use third-party hardware and software and denied U.S. subscribers the ability to access other databases from their CRS terminals, a denial that made it relatively impracticable for agencies to use more than one system. We also observed that the vendors' restrictions on the use of third-party products appeared to be tying restrictions that could be unlawful under the antitrust laws. 56 FR 12605–12608.

Most commentors urge us to adopt the rules. System One, Delta, Southwest, America West, Midway, Alaska, ASTA, ARTA, Woodside, Hewins Travel, Aer Lingus, Air France, Alitalia, Sabena, SAS, Varig, and Virgin Atlantic support the third-party hardware and software proposal, while Alaska, America West, Midway, ASTA, ARTA, Hewins Travel, Aer Lingus, Air France, Alitalia, Sabena, SAS, Varig, and Virgin Atlantic support the proposal allowing agencies to access different databases from a single terminal. Southwest takes no position on the latter proposal, since it assumes that the third-party product rule will allow agencies to run a link between their CRS terminals and other databases, such as internal airline reservations systems.

Several of these commentors strongly support the proposals. America West, for example, calls them "beyond question, the most important step the U.S. government has ever taken with respect to enhancing the competitive environment for computer reservations systems." America West Comments at 15. Equally importantly, Southwest and two foreign carriers state their eagerness to use the rules to set up direct links between their internal reservations systems and travel agency CRS terminals so that agents can book them without going through a CRS. Woodside suggests, moreover, that travel agencies are likely to use such direct links to internal carrier reservations systems, which would put downward pressure on booking fees. ARTA notes that the travel agencies' ability to use third-party hardware and software will make other regulations (for example, on the terms of subscriber contracts) less necessary.

However, not all parties endorsed the proposals. American, USAir, Air Canada, and TAP oppose the third-party hardware and software proposal, while Covia, United, Delta, USAir, Air Canada, and TAP oppose the proposal allowing agents to access different databases from a single terminal. To a large extent, however, their opposition stems from the mistaken assumption that the proposals would limit the vendors' freedom to operate their systems and even place an affirmative obligation on vendors to modify their CRSs to facilitate agency use of a single terminal to access different systems.

Although Justice had supported similar proposals in its comments on the ANPRM, 56 FR 12605–12606, its comments on the NPRM assert that the rules on third-party products and giving agencies the right to access several systems from a single terminal will not be effective and will not solve the major CRS problems, which Justice considers to be supracompetitive booking fees and architectural bias. Justice Comments at 10–17.

We have determined to adopt the proposals with one significant change. We find them necessary and desirable on competitive grounds. While we will give all agencies the right to use third-party software and hardware if they wish, we will not require vendors to allow subscribers to use vendor-owned equipment to access other databases and systems. If a subscriber is using terminals owned by the vendor, we think the vendor should have some ability to control the use of its equipment.

While we seek to give agencies the opportunity to use third-party hardware and software and to access multiple systems and databases, we will require vendors neither to modify their systems to facilitate the use of third-party products nor to provide support for such products. We will preserve the vendor's right to protect the integrity of its system against its subscriber usage of incompatible equipment and programs.

2. The Vendors' Restrictions on Third-Party Products

Because subscribers are increasingly using PCs as their CRS terminals, they have the technical ability to obtain and process information and access several systems and databases from a single terminal. The vendors, however, impose contractual restrictions on their subscribers which have thwarted the agencies' ability to use existing technology to exercise the full capability of their PC terminals.

We found in the NPRM that each vendor supplies the equipment used by agencies as CRS terminals, that each controls the use of that equipment and prohibits its subscribers from using that equipment to access other systems or databases, and that each restricts the ability of its subscribers to use third-party software and hardware in conjunction with its CRS terminals. 56 FR 12605–12606. We further found that the record indicated that vendors unreasonably denied agencies the ability to freely use third-party hardware and software in conjunction with their CRS equipment, as shown by comments filed by Justice and Megadata, and that vendors never allowed U.S. subscribers to access more than one system from a single terminal. 56 FR 12606.

No one has denied that vendors bar their U.S. subscribers from accessing more than one system from a single terminal. American and Covia nonetheless claim that they are willing to allow agencies to use third-party software, and American recently announced its creation of programs to help independent firms design third-party products for use in conjunction with Sabre. June 30, 1992, Letter of Richard J. Fahy, Jr. While American's new programs are welcome, they still assume that the independent firms should work with American in developing their products rather than doing so on their own.

Furthermore, the comments on the NPRM have provided additional evidence that vendors unreasonably restrict the use of third-party hardware and software by their subscribers, even though they allow subscribers to use some products produced by independent firms. For example, TravelPro, a firm that developed a program and communications capability allowing an agent to access any system from a single terminal, has shown that no vendor would allow its subscribers to use its product except as a back-office system (that is, a system performing recordkeeping and accounting functions). No vendor contended that TravelPro's product would damage the integrity of its system. Instead, Covia stated that it was declining to consider TravelPro's request for certification of its product as a front-office program for Apollo subscribers largely because "at this time we are not in a position to understand the advantage to our customers" of the product's use. TravelPro Reply, Attachment B. Similarly, Worldspan told TravelPro that it would consider certifying its product only if so requested by a

subscriber or potential subscriber, that it therefore would not act on TravelPro's request for certification, and that no supplier of third-party products certified by Worldspan was permitted to advertise the certification. TravelPro Reply, Attachment C.

Travel Facilitators, a Florida travel agency, charges that neither System One nor Worldspan will allow the agency to access its system unless the agency uses equipment purchased from the vendor. Jonathan Parker, a lawyer with computer expertise who recently negotiated a subscriber agreement for a Florida travel agency, alleges that Sabre arbitrarily refused to let the agency use certain equipment in conjunction with Sabre even though the equipment was clearly compatible.

These vendor practices have nothing to do with a vendor's legitimate interest in preventing the use of incompatible equipment and programs. Furthermore, travel agencies should have the right to determine for themselves whether a product like TravelPro's would be advantageous. Vendors should not be able to usurp a subscriber's right to determine what is in its best interest.

3. Benefits of Terminating the Restrictions

We find that eliminating the vendors' unreasonable restrictions on the use of third-party hardware and software and on using a CRS terminal to access other databases will promote competition in the CRS and airline industries, enable agents and travellers to obtain more accurate and complete information on airline services, enable travel agencies to operate more efficiently, and promote technological innovation. These benefits can be obtained, moreover, without imposing any obligations or costs on the vendors. And a rule establishing the agencies' right to use third-party hardware and software should reduce the need for detailed regulation of other CRS issues.

While the rules on third-party hardware and software (and on using one terminal to access different systems) will all be pro-competitive, their benefits are somewhat different. We will begin by discussing the third-party software rule.

In the NPRM we identified the primary benefit of giving agencies the freedom to use third-party software as the ability to use programs to reconfigure the display of information provided by a CRS in ways which may better reflect customer preferences than the display algorithms now used by vendors. If agencies could create better displays, they would be more likely to choose the best possible airline services for their customers. 56 FR 12605–12606. Third-party software can also enable agencies to automate various steps in selling air transportation and thereby increase their efficiency. Marketing Report at 22.

Enabling agencies to use third-party hardware would similarly improve agency efficiency, since agencies could obtain equipment that would perform CRS and related functions more efficiently than the equipment provided by the vendors. See, *e.g.*, Megadata ANPRM Comments. In addition, if agencies owned their own terminals, they could use them to access several different systems and databases, which would enable new travel information firms to arise. Carriers could also set up direct links between their internal reservations systems and travel agency terminals that would bypass the CRSs entirely.

In theory, of course, agencies can access several different systems now, and carriers could establish links between their internal reservations system and travel agencies. However, each vendor's refusal to allow any subscriber to use the same terminal to access its system and another system or database makes it uneconomical and impractical for most agencies to use more than one system, since the agency must then pay for additional equipment and its agents must continually switch between different terminals. See, *e.g.*, ASTA Comments at 18; Woodside Comments at 2. While there are other reasons deterring agencies from using multiple systems (for example, the expense of training agents to use different systems and additional recordkeeping costs), the vendors' insistence that a separate terminal must be acquired for each system accessed by the agent is a substantial impediment to the use of multiple systems. 56 FR 12607. No commentor has claimed the contrary.

If agents had easy access to different systems and databases, they could acquire more accurate and complete information on the airline services available for their customers. The agents' ability to switch between systems would encourage vendors to compete more on the quality and range of their information and system capabilities, 56 FR 12606–12607, a factor that should further reduce architectural bias. Furthermore, three carriers—Southwest, SAS, and Varig—contend that they would use a third-party hardware and software rule to establish direct links between their internal reservations system and agency CRS terminals. That would increase travel agency efficiency and save costs for the carriers, since they would pay no CRS fees on bookings made through such links. SW Reply at 3–4; SAS Comments at 19; Varig Comments at 23. The carriers' ability to enable agents to bypass CRSs for some bookings could also hold down booking fees, since fee increases could cause carriers to establish more direct links with more agencies. TravelPro Reply at 5, 11; Woodside Comments at 9. Finally, the agents' ability to use the same terminal to access different databases would enable new databases and systems to do business in this country, something that is otherwise unlikely to happen due to the existing vendors' hold on travel agencies. See, *e.g.*, ASTA Comments at 18.

We also believe that these rules will promote technological innovation. Independent firms have created a number of programs that benefit travel agency CRS users, and in some cases (TravelPro being only one example) the vendors have tried to stifle their use. See, *e.g.*, Hewins Reply Comments at 6; Megdata ANPRM Comments.

Moreover, these rules allowing agencies the ability to use third-party hardware and software and to access several databases from a single terminal would make CRS practices consistent with those in other information businesses. For example, computer information services like Compuserve and Prodigy do not restrict their subscribers' ability to buy equipment of their choosing, and we doubt that any such service tries to prohibit its subscribers from accessing competing services. ARTA Comments at 7. As we noted in the NPRM, our rules will be comparable to the FCC decisions barring telephone companies from arbitrarily denying their customers the ability to connect third-party equipment with the telephone system. 56 FR 12605.

The rules will additionally make our regulations on this subject consistent with the European rules, which specifically deny vendors the authority to impose unreasonable restrictions on the use of third-party hardware by their subscribers.

American points out that our authority under section 411 is limited to the marketing of airline transportation. American Comments at 17. While we are modifying our rule accordingly, we trust that vendors will not seek to deny subscribers the ability to use their equipment (unless the vendor owns the equipment) to access non-airline databases, given our findings on tying.

4. Antitrust Analysis

Because they hamper airline and CRS competition, the vendors' restrictions on

third-party hardware and software and on using one terminal to access different systems and databases are comparable to tying and exclusive contract practices prohibited by the antitrust laws. In the NPRM we stated, "Unreasonable denials of agency requests to use hardware and software supplied by independent firms could well be considered an unlawful tying of equipment sales or rentals to CRS services in violation of the antitrust laws," a statement supported by the citation of *Jefferson Parish Hospital* v. *Hyde*, 466 U.S. 2 (1984). No vendor has challenged our tentative finding that their practices could be unlawful tying arrangements. Given the effects of the vendors' practices, we think that the vendor restrictions are contrary to the principles of the antitrust laws. However, as is true of our other findings on unfair methods of competition, we are not finding that the vendors' conduct does violate the antitrust laws. No such finding is required for our adoption of the rules.

As the Court recently reaffirmed in *Eastman Kodak Co.* v. *Image Technical Services*, 60 U.S.L.W. 4465 (June 9, 1992), a tying arrangement—a seller's agreement to sell one product only on condition that the buyer purchase a second product from the seller (or promise not to buy the product from another seller)—is a per se violation of the Sherman Act if the seller has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. Tying arrangements are objectionable because they force buyers to accept conditions that they would not accept in a competitive market. See, e.g., *Jefferson Parish Hospital*, 466 U.S. at 12–15.

The vendor restrictions are comparable to illegal tying arrangements. First, each vendor is willing to provide CRS services to travel agents only on the condition that a subscriber either purchase equipment and software from the vendor or agree not to purchase such products from others without the vendor's consent. As Justice suggested in its comments on the ANPRM, the vendors appear to impose these restrictions in part to keep agencies from buying third-party programs that compete with programs offered by the vendors and in part to deny agencies the ability to offset the factors in their displays that make it harder to find better services offered by other carriers. 56 FR 12606. Secondly, CRS services and hardware and software are separate products that could be and would be sold separately if the vendors allowed it. Thirdly, the vendors have the market power in the tying product—CRS services—to compel agencies to accept the condition that no hardware or software can be acquired from other sources without the vendor's approval. In several cities, such as Dallas-Fort Worth, one airline's dominant position in the airline market makes its CRS the only attractive system for most agencies. In other markets, such as Chicago, only two systems will be attractive for most agencies, since only those systems are marketed by carriers with a major share of the local airline market. Fourthly, the tying arrangements affect a substantial volume of commerce, given the number of CRS terminals used in this country. For example, there were over 62,000 Sabre terminals in use at the end of 1988, 56 FR 12605.

In addition, the vendor restrictions at issue are similar to the kind of exclusive dealing contracts that violate the Sherman Act, given the market share of each vendor, the widespread use of the restrictions in U.S. subscriber contracts, and the lack of any apparent justification for them. *Cf. Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *see also Jefferson Parish Hospital, supra*, 466 U.S. at 44–45 (O'Connor, J., concurring).

Finally, the vendors' denial of the use of their terminals for access to other systems and databases could be viewed as comparable to monopolization and attempted monopolization practices prohibited under the Sherman Act. As discussed above, in several cities a vendor's market share of the CRS market exceeds 60 percent. By restricting their subscribers' ability to use alternative systems and databases, vendors with market power are protecting their market share against competition. Furthermore, each vendor's subscribers (with few exceptions) are unlikely to use other systems or means of information to learn what services are available and to book them. By unreasonably limiting its subscribers' ability to use their existing equipment to access other information sources, each vendor maintains its market power over access to the agencies using its system.

5. Lack of Justification for the Restrictions

According to the vendors, the proposals should not be adopted for several reasons. First, at least some claim that they are liberal about allowing agencies to use third-party hardware and software. However, as shown above, those claims are contrary to the record, and no vendor claims that its subscribers may use CRS terminals to access more than one system.

Vendors assert, with some merit, that restrictions are necessary to protect the integrity of their systems, since incompatible software could damage a system. In that regard USAir cites a problem caused by an agency's use of incompatible software in connection with its access to USAir's internal reservations system. USAir Comments at 2–3. We agree that vendors are entitled to some assurance that agencies will not use products that are likely to damage a system. We are accordingly adopting a condition allowing them to bar the use of third-party hardware and software unless its use is certified by the vendor.

We see no justification, however, for allowing vendors to exercise unlimited discretion over the use of third-party products. As shown, the record demonstrates that the vendors have denied permission for the use of third-party products on incompatibility grounds (or imposed onerous certification requirements) where there is no likely incompatibility. See, e.g., Parker Comment; TravelPro Reply. ARTA, moreover, points out that Compuserve and Prodigy do not impose compatibility restrictions on their subscribers, even though they operate similar computer information networks. ARTA Comments at 7.

Vendors also claim that the proposals will impose burdens on their operations, but these claims are largely based on a misunderstanding of our proposals and are overstated. Vendors, for example, claim that the use of third-party hardware and software by subscribers will increase the costs of servicing CRS equipment and can downgrade the quality of the CRS service received by a subscriber. Even if this claim is true (and no vendor cited evidence in support of it), that could not justify the broad restrictions placed by vendors on the use of those products. Moreover, vendors can charge agencies for increased service costs.

The vendors have expressed other concerns that require a clarification of the intent of the rules. American is concerned that it may no longer be free to upgrade its system, as it has been doing, because its improvements might make useless the third-party products used by its subscribers. Our rule will not have that effect. Subscribers must bear the risk that system improvements will make programs and equipment acquired from independent firms unusable.

Vendors also portray our proposal as a requirement that they become

responsible for creating the communications links and software needed for an agent to access more than one system from a single terminal. We never intended to make the vendors responsible for implementing the links, and we see no reason why any effort would be required on their part. TravelPro's product, for example, would give agents access to all systems from a single terminal without any need for additional work by the agent's original vendor. Furthermore, Southwest and others point out that a carrier or a database firm can easily make its services available to a travel agent by running a communications line into the agent's terminal. Any messages between the agent and the carrier or other firm would travel on that line and would never enter the CRS' network. SW Reply at 3–4. We are imposing no obligation on vendors to modify their systems or to provide communications links with other databases. We have reworded the rules in several respects to clarify this.

Moreover, we find that neither rule will significantly interfere with the economics of the CRS business. CRS vendors should be able to do business without compelling subscribers to acquire their equipment and software. In fact, we understand that some U.S. vendors provide CRS services to subscribers overseas through a terminal used for access to the national carrier's system. 56 FR 12607; SW Comments at 3–4. Similarly, the CRSs are likely to remain the only services providing agents with availability and other information on all airline services and the ability to make bookings, so other databases accessed by agents will only supplement the CRSs. Given the capabilities provided by the systems, we doubt that travel agents will stop making substantial use of them. Indeed the vendors claims that few agents will make use of the freedom to access other databases, a claim that is consistent with out findings that the rule should have little impact on the vendors' business.

We think that each vendor can preserve the efficiency of its operations by adopting pricing structures ensuring that it will receive compensation for making CRS services available to agencies that also use other systems and make some bookings directly with a carrier. While Southwest urges us to prohibit productivity pricing on the ground that it may discourage agencies from using direct links with the internal reservations systems of carriers like Southwest to make bookings, almost all commentors support productivity pricing, including many supporters of the third-party hardware and software rules. We will therefore not prohibit it (but we are prohibiting minimum-use clauses, which unreasonably interfere with agency usage of multiple systems). We are, moreover, revising the language of the rules to make it clear that vendors may charge subscribers on a transaction basis, as requested by American and Covia. American Comments at 11; Covia Comments at 41.

While Covia fears that the agencies' ability to switch between systems could cause great variability in the volume of a system's transactions, Covia Comments at 46–47, we find that unlikely, especially given the vendor's claims that few agencies will wish to use a switch capability. The systems, moreover should have devices that can protect them against a surge in usage. Covia Comments at 41; Travel Facilitators Comment.

Furthermore, while our rules will prevent an agency's current vendor from limiting the agency's use of non-vendor equipment to access other databases and systems, the agency will still have to obtain another vendor's consent before it can begin using that vendor's CRS services. ASTA Reply at 22, n.7; TravelPro Reply at 1. While our NPRM suggested the possibility of restricting a second vendor's ability to deny CRS services to an agency using another system, we have determined not to adopt any such rule. A vendor would violate the rule, however, if it refused to provide CRS services to an agency because the agency is using third-party products or is accessing other systems and databases from a single terminal.

According to American and others, travel agencies will use third-party software to create biased displays. We recognize that some agencies may choose to introduce bias into their CRS displays, but travel agencies will lose business if they give customers poor or incomplete advice. Therefore, as discussed below in connection with proposals to ban the use of biased displays by travel agencies, we do not expect many agencies to use third-party software in a way that would result in customers receiving inaccurate or biased information.

With respect to our proposals that agents should have the option of accessing other systems or databases from a single terminal, the vendors claim that we should not adopt it because most agencies will be uninterested in using that freedom. See *e.g.*, Covia Comments at 42–43. This argument is extraordinary—while the vendors elsewhere ask that we rely solely on market forces to resolve alleged CRS problems, here they argue that we should decide what travel agencies should want. We prefer to rely on market forces where we can. Travel agencies can then decide for themselves whether they want to use the ability to link their terminals with different systems. We believe that a number of them will want that freedom, as shown by the support of ASTA and ARTA for our proposals.

6. Conditions on Compatibility

In the NPRM we proposed to allow vendors to ensure the compatibility of third-party software and hardware used by travel agencies. However, given the complaints about past abuses of certification process, we proposed to limit the vendors' authority to disapprove the use of third-party hardware and software to those products whose use would damage the system and to bar unreasonable certification procedures. We also asked whether we should create a presumption that a product is compatible with a system's functioning unless shown otherwise. 56 FR 12606.

The commentors generally support limiting the vendor's ability to establish unreasonable and expensive certification requirements but dislike the presumption proposal. A number of parties suggest that the best solution for encouraging compliance with compatibility requirements would be the adoption of a rule requiring vendors to publish the specifications of their systems so that developers of third-party products can ensure that compatibility of their software and hardware. See *e.g.*, American Comments at 13; ASTA Comments at 20; ARTA Comments at 7; TravelPro Reply at 6.

We have determined to preserve the vendor's ability to disallow the use of incompatible third-party products, subject to the limits proposed in the NPRM, but with a rule requiring the publication of specifications rather than the creation of a presumption of compatibility. The vendors have not refuted our tentative conclusions that existing certification procedures can be unduly time-comsuming and expensive, and the TravelPro documents cited above demonstrate that the vendor's current procedures are burdensome and arbitrary.

In the NPRM we asked whether we should require vendors to publish a list of the products certified for use on each system. 56 FR 12606. We will not adopt such a requirement, since a firm whose products have been certified can advertise the fact (obviously Worldspan's prohibition against a

supplier's advertising a certification would violate our rule against unreasonable restrictions on the use of third-party products).

We will endorse the proposal that vendors be required to provide specifications to third-party vendors of hardware and software so they could develop products that would be compatible. This rule should be less burdensome than the creation of a presumption of compatibility and should facilitate the development of third-party hardware and software.

7. Vendor-Owned Equipment

We originally planned to grant travel agencies the freedom to access other systems and databases from any CRS terminals they used, whether the equipment was owned by the agency or the vendor. We have determined to limit the rule to equipment owned by the agencies. If an agency is using terminal equipment owned by the vendor, the vendor should have some control over its use, particularly since the vendor is entitled to compensation for the use of its property and since its charges for the property presumably assume the agency's use of the terminals for a certain level of bookings. Since an agency can obtain the ability to access other systems and databases from a terminal if it buys its own equipment, it can evade any vendor's restriction on the use of vendor-owned equipment. Thus our rule allowing agencies to use third-party hardware should eliminate the exclusionary effects of the vendors' current conditions on the use of their equipment.

8. Transition Period

We have determined to create no special transition period for the rules on third-party hardware and software. The restrictions against the use of third-party products are contrary to the spirit of the antitrust laws and to the Board's original findings that agencies should have the ability to use multiple systems if they wished. Moreover, vendors have been on notice since March 1991 that we were considering the adoption of these rules. They have had an opportunity to adjust to their likely impact. The record also indicates that relatively few agencies will take immediate advantage of the options created by these rules. See *e.g.*, ASTA Comments at 19.

Our decision to make these rules effective on the effectiveness of the entire rule will not, of course, excuse an agency from its obligations to pay for equipment currently being leased from a vendor.

9. Non-Vendor Payments to Agencies

The rules now prohibit each vendor from conditioning its payment of a commission to a travel agency on the agency's use of that carrier's system. Section 255.6(d). The rule neither covers non-vendor carriers nor would prevent a vendor or non-vendor carrier from paying an agency to use a direct link between the agency's CRS terminals and the carrier's internal reservations system. For now we will maintain this rule. If a carrier wants to cause travel agencies to use a direct link, it is likely to compensate them for doing so, a result which should make economic sense for the carrier, which then saves the CRS booking fee. However, until we see how the third-party product rules operate in practice, we do not wish to allow vendors to pay agencies to use one CRS rather than another.

E. Vendor Participation in Other Systems

In the NPRM we proposed a rule requiring each system owner to participate in other systems and their enhancements, to the extent that the price for such participation was commercially reasonable, if the system owner participated in such an enhancement in its own system. That requirement would include the obligation to provide other systems with complete, timely, and accurate information on all services and fares that it made generally available to the subscribers of its own system. We based this proposal on our concern that some vendors were handicapping the marketing efforts of other CRSs by refusing to participate in enhancements offered by the competing systems. 56 FR 12608.

Covia, Worldspan, America West, USAir, ARTA, and Swissair support the proposal, but ECAC, Air France, and Lufthansa oppose it. Delta supports the proposal that system owners provide complete information to other systems and supports in principle the mandatory participation proposal, but it asserts that the latter proposal should be drafted carefully to avoid denying vendors the ability to bargain over participation in enhancements offered by other systems.

We have determined to adopt the proposed rule. The rule is necessary, for some system owners do not participate in enhancements in other systems and do not provide complete information on their fares and services to competing CRSs, as we tentatively found in the NPRM. No one has argued that system owners never limit their participation in other systems as a weapon to obtain more subscribers at their hubs, and no one has denied the potential usefulness of such tactics. While a system owner will lose bookings from subscribers in another system when it reduces the level of its participation in that system, the loss in airline bookings can be outweighed by the gain in CRS subscriptions (and the likely increase in its airline revenues from the new subscribers). We conclude that this requirement is justified on competitive grounds, since it will keep a CRS owner from using its dominance of a regional airline market as a tool for obtaining dominance in the area's CRS market.

We do not believe that this rule will require us to review the reasonableness of vendor fees for participation in enhancements or of the quality of service provided by participation in an enhancement. We expect that the refusal of many carriers to use a particular enhancement should conclusively demonstrate that the terms for participation are not reasonable because the price and other expenses are too high. On the other hand, if every carrier but one system vendor participates in a particular enhancement, that would strongly suggest that the latter's refusal to participate is not based on a determination that the terms of participation are unreasonable.

Since, as discussed above, we have revised the definition of "system owner" to exclude carriers with a small equity interest in a system, few carriers will be subject to the requirements of this rule.

This rule will also be consistent with our decisions that U.S. airlines would be denied a fair and equal opportunity to compete in a foreign country if the dominant carrier in that country denied subscribers using the U.S. carrier's system the authority to use it to issue tickets. *American Airlines* v. *British Airways*, Order 88-7-11 (July 8, 1988). Having taken that position as to the obligation of a foreign carrier dominating its homeland market, we should require U.S. carriers holding a dominant market share in some areas to participate fully in competing U.S. CRSs.

For the same reasons, we will require system owners to provide complete and accurate information on their own services and fares to other systems. A system unable to obtain such information from a competing CRS owner will be unable to compete effectively for subscribers in that carrier's hub. See, *e.g.*, Delta Comments at 38; Long Island Travel Agents Ass'n Comments.

We do not intend to impose a rigid participation requirement on system owners. Nonetheless, Delta has stated a

concern that the rule could reduce a system owner's ability to negotiate for better terms and features in another system's enhancements. We believe that the rule would not have such an effect. It states that a system owner would not have to participate in another system's enhancement if the terms of participation were not commercially reasonable. Delta mistakenly assumes that the only relevant terms would be the fees charged by the other system. If, however, as Delta suggests, the enhancement or feature offered no significant benefits for the participating carrier or its travel agency distributors, then the terms of participation might well be unreasonable. If participation in the enhancement or feature required a significant investment in software or communications links by the system owner, that would also be relevant to determining whether the terms for participation were commercially reasonable. If the feature contains other flaws, participation would also not be required. Moreover, we find impracticable Delta's proposed solution, a rule that would require a system owner's participation in a particular enhancement or feature of another system only if the owner's unwillingness to participate resulted from its intent to handicap the marketing of the other system. We believe that our rule should be relatively easy to apply. Delta's proposal, on the other hand, could require the resolution of relatively difficult issues of intent.

Delta is additionally concerned over the possibility that a vendor's bundling of enhancements will, as a result of this rule, force owners in other systems to participate in enhancements against their will. Delta has not explained, however, why it would refuse to participate in an enhancement if the overall terms of the package of features was available on reasonable terms. If the inclusion of the objectionable enhancement made the terms for the whole package unreasonable, then Delta could legitimately decline to participate in the package.

As indicated, the rule will also require each system owner to provide complete, accurate, and current information on its services and fares. Delta and Worldspan urge us to broaden an owner's obligation by requiring each of them to provide competing systems with all of the information it provides its own system. According to Delta, a system owner can give its own system a competitive advantage by providing seat maps and frequent flyer information updates only to its own system. Delta Comments at 38–39. Despite Delta's reasoning, we will not extend the requirement so far. The requirement of system owner participation in enhancements on commercially reasonable terms should prevent such practices as a system owner's refusal to provide seat map information to other systems, since seat selection is an enhancement in CRSs. Requiring owners to provide all information, on the other hand, would create an open-ended obligation that we are unwilling to impose, particularly since carriers traditionally do not provide information on subjects like frequent flyer information to other systems.

A related matter involves complaints that some carriers offer corporations special discount fares that may be booked only through an agency using their CRS. American and Covia charge Northwest with using such a tactic to compel agencies to use Worldspan. American Comments at 36; Covia Comments at 90. On the other hand, System One and Aer Lingus claim American also offers fares that may be booked only through Sabre. System One Comments at 7; Aer Lingus Reply at 9–10. Hewins similarly complains that vendors are coercing travel agencies into taking a vendor's system by telling corporate clients that they can obtain corporate discounts only through an agency using the vendor's system. Hewins Final Comments at 2. Obviously a vendor's tactic of telling businesses that certain discount fares may be obtained only through its subscribers could be an effective means of using a dominant share of the local airline market as a tool for obtaining a larger share of the local CRS market. If the fare was widely available to corporations, this tactic would resemble an unlawful tying of discounted airline service and CRS usage. On the other hand, American has noted that an airline offering some corporations special discount fares typically will make them available only through its own system. American Reply, App. C, at 9. At this time we will not adopt a general prohibition against an airline's tying the availability of special corporate fares to use of its affiliated system for booking the fares. If, however, an airline widely offers a discount fare to businesses on the condition that they use its CRS for booking the fare, that would be a violation of the requirement that commonly available fares be made available to all systems.

Worldspan asks that the language of the rule be clarified so that a system owner's denial of certain information to some subscribers does not exempt it from providing that information to other systems. We are modifying the rule to require each system owner to provide other systems with the fare and service information that is "commonly available" to its own system's subscribers, that is, available to the majority of a system's subscribers. This reflects our intent that fare and service information available to a large proportion of a system's subscribers (*e.g.*, the majority of subscribers within the category of large agencies) must be made available to other systems as well. Information made available to a few subscribers—for example, discount fares that few agencies are authorized to sell—would not have to be disclosed to other systems.

F. Display Bias

Before the Board adopted the CRS rules, vendors biased their displays of airline services in favor of their own flights and against the flights of competitors. The bias took two forms: Whenever possible each vendor placed some of its own flights at or near the top of the first screen provided travel agents, even if competitors offered flights better suited for the customer's travel needs, and each vendor eliminated many flights of competing carriers, *e.g.*, by not using competitors' hubs as possible connecting points when constructing displays of connecting services. Board ANPRM, 48 FR 41177. These practices led to consumer deception, since agents were led to book customers on the vendor's flights when competing carriers offered better service. Board NPRM, 49 FR 11646; Board Rule 49 FR 32547.

The Board accordingly prohibited display bias in each system's primary display. This prohibition, contained in § 255.4, bars the use of criteria directly or indirectly related to carrier identity in ranking and editing flights and in choosing connecting points. Each system must also use at least nine points in constructing displays of connecting services, unless in a particular market fewer than nine points meet the carrier's editing criteria for displaying connecting services.

We have modified the display rules twice since the Board's sunset. First, because vendors began using secondary displays that resurrected the bias barred in primary displays by the Board's rules, we obtained each vendor's agreement that it would not offer biased secondary displays to its subscribers. Marketing Report at 82. Secondly, our rulemaking on flight delays and airline service quality imposed a requirement on the systems to display certain delay information and a prohibition against

the display of other delay information. 52 FR 34056 (September 9, 1987), adding § 255.4(e) to the CRS rules in part 255. Except for the requirements imposed by that rulemaking, the rules give the vendors the discretion to select criteria for ordering and editing flight displays, as long as they are not based on carrier identity.[3]

Our NPRM proposed to maintain the current rules with some changes. We proposed to increase the required number of connecting points and to make the rules applicable to secondary displays as well as each system's primary display. Since the accuracy of CRS displays depends on the quality of information provided by participating carriers, we tentatively decided to adopt a requirement that such carrier must provide complete and accurate information. In addition, we asked for comment on whether we should regulate the creation of biased displays by travel agencies. On the other hand, we chose not to adopt numerous suggestions for additional changes, including rules that would prohibit the use of various factors in ranking and editing displays. 56 FR 12608–12613. After considering the comments, we have determined to readopt the current rules with the changes proposed by the NPRM.

Before discussing the specific changes sought by parties to the general prohibition against display bias, we must address the need for keeping that rule. As explained earlier, display bias can mislead travel agencies and their customers and can substantially reduce airline competition. Justice and most other parties contend that display bias should remain prohibited. While a few argue that display bias should be allowed, we found their arguments unpersuasive, as discussed above. We accordingly find that the current rule against display bias should be readopted.

However, while most parties agree on the need for a prohibition against biased displays, they disagree on what constitutes bias. Various carriers, for example, urge us to outlaw the use of service features for ranking and editing flights in CRS displays that, according to other parties, give travel agents useful advice on available airline services. The display bias issue as a result involves a lengthy discussion of a number of specific ranking and editing criteria.

1. Secondary Displays

The current display bias rules apply to a primary display of schedule, fare, and availability information offered by each vendor but do not apply to other displays (secondary displays) of such information offered by the vendor. After the Board rules took effect, some vendors introduced secondary displays that were equivalent to their previous biased displays; vendors also provided travel agencies the ability to force their agents to use only the biased secondary displays. Because these biased displays became controversial, each vendor agreed with us that it would stop offering such secondary displays to its subscribers. Marketing Report at 82.

In the NPRM we proposed a rule ratifying this agreement, since biased integrated secondary displays created by a vendor could recreate the competitive and consumer harm that was to have been ended by the rule against biased primary displays. 56 FR 12611. Alaska, System One, Worldspan, and Air Canada support the proposal, although System One and Covia have concerns about its effects on access to internal reservations system displays and Covia claims the rule is unnecessary.

We see no reason not to adopt our proposal. While Covia suggests that a ban on biased primary displays should be sufficient to protect the public interest, experience has proven the contrary. Covia, moreover, does not claim that biased secondary displays benefit travel agents or consumers.

We intended that the rule would apply to all integrated displays of airline information, not just the basic availability display. As shown by Sabre's omission of Continental's new discount fares from its display of low fares, a vendor can prejudice competition and hide information from the public by creating misleading displays of fare information. Applying the prohibition against bias to such displays is consistent with our goal of ensuring participating carriers equal treatment in the systems when that can be done without imposing substantial costs on vendors.

Because we agree with System One and Covia that our rule should not prohibit subscribers from gaining access to a carrier's internal reservations display (for example, by using direct access), we will modify the rule to make this clear, as suggested by System One (Comments at 24). However, under our rule on enhancements, each vendor must make available to all participating carriers the ability to provide its subscribers with access to their internal systems. We will make this requirement explicit, as suggested by Air Canada. Air Canada Reply at 12–13.

2. Prescribed Algorithm

ECAC, British Airways, KLM, and Varig are dissatisfied with the discretion given vendors by the current rules to choose the criteria used in ranking flights, subject to the prohibition against the use of criteria directly or indirectly relating to carrier identity. In arguing that giving the vendors this discretion is unfair and injures competition, these parties seize upon our statement in the NPRM that vendors now may be choosing seemingly neutral display criteria that will improve the position of their flights in the display. 56 FR 12609. They argue that we must prescribe an algorithm for ranking services, preferably the European Community's algorithm (the algorithm is the set of rules for editing and ordering a system's displays). The European Community algorithm requires the display of all nonstop flights first, followed by all single-plane flights with stops, with all connecting flights being shown last. On the other hand, Worldspan and Delta oppose our creation of an algorithm to be followed by all vendors.

We see no reason to dictate how flights will be ranked in CRS displays. As we stated in the NPRM, when vendors choose criteria benefiting the display of their own services, those criteria will give the same advantage to similar services operated by other carriers. We reasoned that maintaining the vendors' current discretion seemed unlikely to create substantial competitive disadvantages for other carriers. In addition, we doubted that there was a single best way for displaying airline services. Justice also believed that any effort by us to create a standard algorithm would be unwise. 56 FR 12609.

The comments urging us to impose a standard algorithm on all systems have not persuaded us that this reasoning was wrong. Moreover, we do not believe it is appropriate or necessary to engage in a micromanagement of the systems, which would be the result of granting this and other requests by parties for additional and more detailed CRS display rules. For example, the required use of elapsed time in European systems gives a high ranking in displays of transatlantic connecting services to connections including a Concorde flight, even though relatively few travellers would be interested in such service due to the cost. This experience confirms our view that it would be difficult—and perhaps impossible—to construct an algorithm that always displays the best service first.

[3] The vendors, however, agreed they would not use elapsed time to rank nonstop flights, as noted in the NPRM. 56 FR 12610.

Furthermore, subscriber demands seem to be causing vendors to offer travel agents alternative displays using some algorithms similar to the European standards. For example, Covia states that it has added an ECAC display due to agency demands. Covia Comments at 59. American created a display ranking nonstop flights first, other single-plane flights second, and connecting flights last as part of a settlement of a CRS dispute with British Airways, Order 88–12–35 at 3 (December 15, 1988), and Varig points out that both System One and Worldspan offer subscribers the choice of a European-type display. Varig Comments at 20–21. These developments suggest that there is little need to prescribe an algorithm. More importantly, as Delta points out, "[A] prescribed algorithm would reduce the multiple algorithm choices available today from CRS vendors." Delta Comments at 19.

In addition, the parties requesting a standard algorithm have not refuted our tentative conclusion that a vendor's discretion to choose an algorithm was not causing significant competitive harm. They complain that certain ranking factors, primarily the on-line preference, downgrade the position of their flights in the displays, but they do not show that the vendors' discretion in general has caused competitive harm (the on-line preference issue is discussed below). While the Orient Airlines had submitted a series of examples purporting to show that vendors discriminated against their flights, we found the study to be unpersuasive for several reasons. 56 FR 12609, n.5. Although the Orient Airlines continue to argue that the study is compelling evidence, Orient Airlines Comments at 36–37, we disagree. The Orient Airlines have not provided enough information to convince us that the study demonstrates that the vendors' algorithms are badly biased. However, our rules should address some of the Asian carriers' concerns, such as the arbitrary exclusion of connect points used by non-vendor carriers.

On the ground that the vendors' algorithms prejudice foreign carriers by using ranking criteria that give an unwarranted preference to U.S. carrier services, several foreign carriers contend that we will deny their fair and equal opportunity to compete if we do not prescribe an algorithm or at least bar such U.S. CRS practices as the on-line preference. However, the right to a fair and equal opportunity to compete does not guarantee foreign carriers the exact same opportunities that U.S. carriers have. See, *e.g., Visit USA Fare/Export Inland Contract Rate Investigation*, Order 84–8–55 (August 10, 1984) at 36–37, *aff'd, Japan Air Lines* v. *Dole*, 801 F.2d 483 (D.C. Cir. 1986). As pointed out there, for example, U.S. and foreign carriers must each contend with the practical advantages of route structure and market identity that competing carriers have within their own countries. As a result, we find unpersuasive the complaints of several foreign carriers that the United States will violate their bilateral rights if we do not adopt all their proposals.

As an alternative to a prescribed algorithm, the Orient airlines have proposed a requirement that each vendor demonstrate that its ranking and editing criteria meet consumer demands. Orient Airlines Comments at 49–51. While this proposal would avoid our dictation of an algorithm for all systems, it would still obligate us to review and second-guess carrier decisions about ranking and editing criteria, a task that would be burdensome for us and would be unlikely to lead to significant changes in the vendors' display algorithms. Since our rules require vendors to publish their display criteria (and since we are tightening that requirement), the Orient airlines can see what criteria are being used by each vendor, can complain to the vendor about objectionable criteria (and enlist subscriber support on criteria that make an agent's search for the best service more difficult), and can complain to us.

3. On-Line Preference

A number of foreign carriers have long complained about the preference given on-line connections over interline connections in the primary displays of all CRSs except Sabre and DATAS II. In the NPRM we tentatively concluded that we should not bar the use of such a preference, for it is consistent with the preference of most travellers for on-line service. We noted, however, that the vendors' use of the on-line preference had caused a series of disputes with foreign governments and that the preference had some troubling aspects. We accordingly invited parties to comment further on this issue. 56 FR 12609–12610.

Covia, United, TWA, and Alaska support our tentative decision on the on-line preference. On the other hand, Aer Lingus, Air France, British Airways, Lufthansa, the Orient airlines, Sabena, SAS, Varig, and Virgin Atlantic urge us to prohibit the use of the preference. They claim that the preference overstates the advantages of on-line connections, at least for international flights; that it gives U.S. carriers an unfair advantage over foreign carriers, since U.S. carriers can provide on-line connecting service to U.S. points beyond U.S. gateways while foreign carriers cannot; and that allowing the preference to continue would violate the United States' obligation under its bilateral aviation agreements to ensure that foreign carriers have a fair and equal opportunity to compete.

We have determined to make final our tentative decision to allow use of an on-line preference. Travellers usually do prefer on-line service, as conceded by several opponents of the preference. See, *e.g.*, ECAC Comments at 5; British Airways Comments at 7. See also United Reply at 13–14. The opponents' complaint involves whether the size of the display advantage accurately reflects the degree of consumer preference for on-line service. Adopting their proposals of allowing an on-line preference only when the on-line service is superior would require a detailed management of the systems that would be unwise and impracticable. We note, moreover, that these commentors have not proposed a guideline for determining when on-line service would or would not deserve a preferential display position.

Furthermore, the U.S. vendors no longer universally use displays that include an on-line preference. Sabre has no display with such a preference, and the other three systems make displays available to travel agents that do not give on-line connections better treatment than interline connections. Varig Comments at 20–21; Covia Comments at 59. Although Varig complains about the treatment of its interline connections on the Apollo display using an on-line preference, Varig notes that Apollo offers agents a display without an on-line preference. Varig Comments at 22, fn.

Even if the on-line preference gives U.S. carriers an advantage in obtaining international traffic from interior U.S. points, foreign carriers have similar opportunities in their homelands. Their services to the points beyond their homeland gateways receive a preference in U.S. systems and presumably thereby attract more passengers to those points due to the preference. In addition, code-sharing agreements between a U.S. carrier serving an interior U.S. point and a foreign carrier providing transoceanic transportation can obtain the benefits of on-line preferences. SAS, for example, notes that it has benefited from the preference as a result of its code-sharing agreement with Continental, SAS Comments at 4, although SAS opposes the on-line preference.

While we had been concerned that the on-line preference could prejudice the competitive position of smaller U.S. carriers, 56 FR 12610, we note that Alaska supports the preference, Alaska Comments at 34, and no U.S. carrier opposes it. This suggests that the preference does not create a significant competitive handicap for smaller U.S. carriers.

4. Change of Gauge Flights

Some carriers operate "change of gauge" flights—flights using a single flight number for the entire trip although passengers transfer from one aircraft to another at an intermediate stop. CRSs usually display change-of-gauge flights as direct flights involving one or more stops, not as connecting flights, and in the past did not always disclose the change in aircraft. In the NPRM we proposed to require CRS displays to give notice of the change in aircraft, a requirement that would be consistent with our existing enforcement policy on this issue of notice. At the same time, we declined to adopt proposals that change-of-gauge flights be listed as connecting flights rather than as direct flights. As we pointed out, change-of-gauge service differs from typical connecting service, because the airline will usually hold the second aircraft for the arrival of the first aircraft in change-of-gauge service. 56 FR 12610.

TWA supports our tentative decision to allow the display of change-of-gauge services as direct flights, subject to the notice requirement, and American and Alaska support the notice requirement. Aer Lingus, British Airways, SAS, Swissair, ARTA, and the Dallas-Fort Worth Parties assert, however, that change-of-gauge flights should be treated as connecting flights, not as direct flights with a stop.

We have determined to make our tentative decision final. Since no one questions the desirability of the proposed rule requiring notice of any change in aircraft, the only controversy concerns our view that we should not bar the display of change-of-gauge flights as direct flights. We are not convinced that additional regulation is needed. In particular, the proponents of additional regulation have not questioned our finding that change-of-gauge service is different from connecting service. See also SAS Comments at 15, fn.; TWA Comments at 7.

Of course, while we are not prohibiting the display of change-of-gauge flights as direct flights, we are not prescribing how such services should be treated. Any vendor can choose to treat them as connecting services in any or all of its display formats if it wishes. We also note that each U.S. system already offers a display that does treat them as connecting services in accordance with the European display rules. TWA Comments at 7.

British Airways contends that our notice requirement by itself will be inadequate, because vendors cannot always tell from the schedule information provided by participating carriers that particular flights involve a change of aircraft. British Airways Comments at 10. However, we are requiring participating carriers to provide sufficiently accurate and complete information to vendors to enable the systems to display flights in conformity with our rules. Our rule will therefore require carriers operating change-of-gauge service to mark those flights so that they can be displayed accurately.

5. Padded Displays

Because some parties believe that vendors unfairly list some flights several times (*e.g.*, twice if the flight is operated as a code-sharing flight, since then the flight is listed separately under the code of the carrier operating the flight and the code of its partner), they have urged us to adopt a rule prohibiting such "screen padding." We declined to take such action in the NPRM, largely because the vendors themselves should have enough interest in providing a useful display to travel agents that they would curb abuses in this area. 56 Fed. Reg. 12610.

In response to the NPRM, Alaska, America West, Aer Lingus, the Orient airlines, and ARTA request a prohibition against screen padding.

We will not adopt a prohibition or limitation on screen padding. Listing a flight several times may affect the display position of competing flights and make the display less useful for travel agents, but it also allows each participant in a code-sharing agreement to establish its own market presence. Those parties supporting a rule on screen padding typically seek to eliminate the perceived problem by prohibiting funnel flights, change-of-gauge services, and code-sharing flights. We do not find that the record supports a prohibition of screen padding on competitive grounds, especially since each provides some benefits (*e.g.*, code-sharing encourages the code-sharing partners to offer better service by coordinating their flight connections).

6. Funnel Flights

A related issue involves so-called funnel flights. A funnel flight is a flight (*e.g.*, a transatlantic flight) connecting with a number of other flights (*e.g.*, from the U.S. gateway to interior points in the United States) where a single flight is used for each connecting flight combination, with the result that the transatlantic flight is listed under a variety of flight numbers in different city-pair markets. Our NPRM did not address the issue of the display of funnel flights, but a number of parties—Delta, Northwest, Air France, Lufthansa, Sabena, Varig, Virgin Atlantic, and the Dallas-Fort Worth Parties—urge us here or in a docket created by American's petition for a rulemaking on this issue (docket 47546) to prohibit the display of funnel flights. In their view such services should be displayed as connecting flights.

We will not adopt a rule on the display of funnel flights in this proceeding. The issues raised by funnel flights can be better considered in the rulemaking requested by American, since the parties opposing funnel flights believe that the alleged deception problems created by the use of funnel flights are not limited to CRS displays. This broader issue cannot be considered in this rulemaking, which is limited to CRS issues, and the CRS aspect should not be decided separately from related funnel flight issues.

7. Code-Sharing Flights

CRS displays use a two-letter code to identify the airline holding out the service (for example, American's code is "AA"). For many years carriers have had cooperative service arrangements that include code-sharing whereby one carrier uses the other carrier's code in information sources like CRSs and the Official Airline Guide. Such arrangements began with substitute service agreements between USAir and the Allegheny Commuters. EDR–470, 49 FR 9430,9431 (March 13, 1984). Our rules prohibit a vendor from refusing to display a carrier's services on the ground that it is using another carrier's code, 14 CFR part 256, a provision not subject to the expiration date of part 255.

In order to ensure that travellers receive adequate notice on the identity of the carrier operating a flight under a code-sharing arrangement, seven years ago we adopted a policy statement, 14 CFR 399.88, that states that the sharing of a single airline designator code by two or more airlines would be considered a deceptive and unfair practice unless the airlines give reasonable notice of their code-sharing arrangement. Such notice must include, among other things, identifying flights operated by one carrier under another carrier's code in the carriers' written

schedules and in schedules given the Official Airline Guide and CRSs.

Although Varig and ARTA ask that the Department prohibit or more strictly regulate the display of code-sharing flights in CRS, we see no need to take such action. In our opinion our policy statement has taken care of the potential deception created by code-sharing arrangements. Furthermore, code-sharing arrangements often provide for a better linking of flights between the code-sharing partners and for better coordinated services that result in travellers receiving improved service. See *e.g.*, PSDR-65, 49 FR 43709, 43711 (October 31, 1984). Restricting the use of code-sharing arrangements could therefore lead to poorer rather than better service.

8. Use of Elapsed Time

Several parties ask us to adopt a rule on the use of elapsed time as a factor in ranking flights in CRS displays, but their positions are totally opposite. On the one hand, American asks that we cut back the use of elapsed time as a factor for ranking flights. On the other hand, ECAC, the Orient airlines, Sabena, and Virgin Atlantic argue that we should require the use of elapsed time as a ranking factor.

We find both positions unpersuasive and will adopt no rule either prohibiting or mandating the use of elapsed time in CRS algorithms.

In the NPRM we rejected American's argument that the use of elapsed time should be banned, because we saw no harm from it and because travellers and travel agents often use elapsed time as an important factor in determining which multistop flight or connecting flight is the best. We pointed out as well that an American document submitted by the Justice Department indicated that ending the use of elapsed time as a ranking factor would benefit American by improving the display position of its flights in other CRSs. 56 FR 12610-12611.

Despite our rejection of that request, American thereafter filed a separate rulemaking petition (docket 47762) asking for a rulemaking to outlaw the use of elapsed time as a criterion for ordering CRS displays (except to the extent that a flight is at least 90 minutes shorter than another flight). In its comments American contends that elapsed time should not be usable unless the difference in flight times is at least 30 minutes. American Comments, App. D at 6. American's petition claims that restrictions on the use of elapsed time are needed to discourage carriers from publishing unrealistic schedules. American, however, does not address our observation that its earlier proposed ban was self-serving, since it would improve the display position of American flights in those systems currently using elapsed time as a ranking factor. United, Worldspan, ECAC, and the Orient airlines filed answers opposing American's petition.

Since the issue presented by American's rulemaking petition in docket 47762 has already been considered in this proceeding and is closely related to the other issues in this proceeding, we will rule on that petition in this final rule.

American has again failed to justify its proposal that a factor of importance to consumers—elapsed time—should be substantially eliminated from the ranking of flights in CRS displays. Although American claims that a restriction on the use of elapsed time is important to keep carriers from providing false flight times in order to improve the display position of their services, American has not shown that carriers are engaging in such deceptive practices to any significant extent. Our rules on the disclosure of on-time performance data have discouraged the use of unrealistic schedules. Given American's repeated statements that we should allow market forces to operate in the CRS industry (including with respect to CRS displays) (see, *e.g.* American Supplemental Comments), we would be acting contrary to American's stated principles if we ordered the other vendors to reduce the importance of elapsed time in their algorithms.

Other parties, as noted, argued that we mandate the use of elapsed time as a crucial ranking factor. These parties—ECAC, the Orient airlines, Sabena, and Virgin Atlantic—say their services receive unfair treatment because their flights typically offer travellers a shorter elapsed time than those operated by other carriers and that the systems' failure to give adequate recognition to elapsed time also denies travellers an adequate opportunity to choose the best service.

However, we also see no need to require a greater use of elapsed time. While elapsed time is important to consumers, we are reluctant to specifically prescribe how vendors should rank flights without a showing that such action is essential. We do not believe such a showing has been made here.

9. On-Time Performance as a Ranking Factor

In our 1987 rulemaking on flight delays, we adopted several provisions in order to provide accurate on-time performance information to the public while avoiding both the release of misleading information and an over emphasis of on-time performance data that could encourage airlines to take undue chances with the safety of their operations. The rules adopted then require each carrier to report monthly to each vendor the percentage of time that each of its domestic flights arrived on-time. 14 CFR 234.4. Vendors must include that information on individual flights in their primary displays, 14 CFR 255.4(e), but they may not use the information to rank flights, 14 CFR 255.4(e)(2). The rules also prohibit vendors from displaying any information about on-time performance that is not based on data reported to us. 14 CFR 255.4(e)(3). When these rules were adopted as part of our rulemaking on flight delay issues, CEI sought judicial review of them, but the court refused to consider CEI's arguments since it did not have standing to challenge the rules. *Competitive Enterprise Institute* v. *U.S. Dept. of Transportation*, 856 F.2d 1583 (D.C. Cir. 1988).

CEI now demands that we delete the prohibition against the use of on-time performance standards as a basis for ranking individual flights. American urges us to require all vendors to include them in ranking flights. American Comments, Ex. D at 5. We will deny that request but we will end the current prohibition against the display of any on-time performance data other than the data whose display is required by the Department's rules.

In asking us to remove the prohibitions on the use of on-time performance data as a ranking factor and on the publication of other performance data, CEI wrongly contends that administrative convenience was the only reason for adopting them. Instead we took that action for two reasons: we did not want to encourage carriers to take chances in maintaining and flying their aircraft in order to avoid being stigmatized for having unreliable schedules, and we wished to reduce the vendors' ability to bias their displays against participating carriers by misusing on-time information, even though we also wished to provide accurate information to travellers on on-time performance.

We are reluctant to change here the rules adopted in the 1987 rulemaking. A number of parties commented on the issues in that proceeding while only two parties—American and CEI—have mentioned these rules here, and neither has provided any factual information on the issues. *See* American Comments, Ex. D at 4-6; CEI Comments at 4-6. Thus no other airline and no travel agency party

apparently sees any reason to loosen the restrictions on the display of on-time performance data. Nonetheless, we have determined that CEI is correct in contending that the rule's prohibitions may be broader than necessary, so we will reduce the scope of the rule. On the other hand, we do not believe that allowing algorithms to use on-time information would provide significant useful information to travel agents and their customers that would overcome our reasons for adopting the restrictions on algorithms. We will therefore maintain the prohibition against ranking flights on the basis of the on-time statistics.

American contends that on-time performance should be a factor used in ranking flights in CRS displays because it will reward carriers with dependable service and will provide more useful information to travel agents, who would like to recommend reliable flights to their customers. CEI agrees that vendors should be able to use important information like on-time performance in constructing CRS displays.

We cannot agree that allowing the use of on-time performance figures in CRS algorithms would provide additional information of significant value to travel agents and their customers. After all, the display itself must provide the actual statistics. Using those figures in ranking flights, on the other hand, would not convey that information to the agent, since other factors are used in ranking flights and the travel agent cannot tell the degree to which a flight's ranking reflects the reliability of its schedule rather than other factors. While allowing algorithms to use on-time arrival statistics to rank flights could benefit carriers with more reliable schedules, American has not shown that the former problem of unreliable schedules is still so prevalent that such action is necessary.

Furthermore, allowing vendors to use on-time performance figures for ranking flights would create a possibility that vendors would abuse their discretion and use the figures in a way that disproportionately benefited their own flights. A number of carriers submitted comments in the 1987 delay rulemaking that argued against giving vendors the discretion to use the figures because doing so would create new opportunities for biased displays. 52 FR 34065–34066, 34068 (September 9, 1987).

However, the current rules prohibit vendors from providing any on-time performance information in any display unless it is derived from on-time performance information filed with us. While no vendor has supported CEI's demand that this prohibition be terminated, we have decided that there appears to be no reason to maintain it. While our delay rule carefully considered whether on-time performance data could be used in CRS algorithms, the rule gave relatively little explanation for this prohibition against the use of other information. The prohibition is too broad because a vendor or other participating carrier should be able to use a system's bulletin board feature (the feature that enables carriers to provide information through the CRS to travel agents) to provide information in this area on its own flights, as CEI suggests. Any display of on-time performance information, however, will remain subject to the requirements of section 411 of the Act and to each vendor's obligation not to discriminate against other carriers in the display of information and provision of services.

10. Separate Algorithm for International Services

Our rules currently require each vendor to use the same algorithm in all markets, both domestic and international. However, we have granted limited exemptions from this requirement to allow Sabre and Worldspan to use somewhat different algorithms for the display of international services. See, *e.g.*, Orders 90–8–32 (August 14, 1990) and 90–7–34 (July 13, 1990). Nevertheless, when Worldspan requested open-ended exemption authority to establish a separate display algorithm for international services, we denied the request. Order 90–11–55 (November 28, 1990).

Several parties—American, USAir, ECAC, Aer Lingus, KLM, Swissair, and Varig—urge us to allow vendors to use one algorithm for domestic services and a different algorithm for international services, particularly if we do not accept foreign carrier proposals on such issues as the on-line preference and change of gauge service. Worldspan does not object to the request, but United opposes it.

We considered similar proposals in the NPRM, where we noted that the Board explained that it was requiring each vendor to use the same algorithm in all markets to keep vendors from varying "their display criteria market-by-market to maximize the sales on their flights and continue the very harm this rulemaking was meant to address." The Board declined to allow vendors to use different algorithms for domestic and international service, since the evidence did not justify such a departure from the general requirement. 56 FR 12610–12611. When we addressed this issue as a result of American's request for an exemption allowing Sabre to use a different algorithm for international markets, we held that American had not shown that a difference in treatment was warranted. Order 88–9–51 at 8–10 (September 23, 1988). See also Order 90–11–55, *supra*. In the NPRM we therefore tentatively declined to allow vendors to use one algorithm for domestic services and a different one for international services.

Giving vendors unlimited discretion to use different algorithms for domestic and international services continues to appear unwise. We are afraid that such a rule would give vendors some opportunity to vary their displays to give themselves an advantage over their competitors. Furthermore, as noted above, the vendors' practice of offering displays with different algorithms to their subscribers should alleviate the concerns of the foreign carriers. While we are not giving vendors blanket discretion to create a different algorithm for international services, we will continue to give careful consideration to requests by U.S. vendors for limited exemptions from the current rule so they can use somewhat different factors in ranking and editing international flights. Moreover, the adoption of these rules will not affect the validity of the existing exemptions granted Sabre and Worldspan.

11. Publication of Display Criteria

Under § 255.4(b)(2) of our current rules, each vendor on request must provide any person its current factors for ordering flights in the primary display and the weight given each factor. The Board adopted this rule to make the display bias prohibition more effective and enforceable. Board NPRM, 49 FR 11658. The comments on our ANPRM, however, indicated that vendors may not be complying with this requirement. Northwest and TWA thus asked that the rule be amended to require vendors to provide the instructions used by programmers to create the algorithm. We tentatively decided to modify the rule to include such a requirement in light of the apparent discontent with the lack of specificity in some vendors' publication of their display criteria. 56 FR 12611.

Covia, Worldspan, Northwest, America West, Aer Lingus, Air France, and Varig support this proposal; some argue that we should strengthen it, *e.g.*, by applying the requirement to fare displays. American supports the proposed rule in principal but contends that the better means of obtaining our goal would be a rule specifying the

information to be provided, not a rule requiring the delivery of programming instructions. No one opposes it.

We will make the proposal final. Despite American's suggestion (and the parties' apparent agreement that American in the past has provided adequate information to other carriers, unlike some vendors), we believe, as Northwest argues, that the proposal requiring the delivery of programming instructions is needed to ensure that other carriers obtain adequate information. We will modify the proposal, however, to make the obligation cover editing procedures, as Worldspan suggests, and expand the requirement to cover fare displays, as suggested by some, since fare displays affect competition. The requirement to provide programming instructions, however, does not obligate vendors to turn over proprietary information and trade secrets, except to the limited extent necessary to provide participating carriers and others with adequately detailed information on the construction of their displays.

12. Advance Notice of Algorithm Changes

While the rules require vendors on request to describe their algorithm, they do not require vendors to give advance notice of algorithm changes. Northwest and SAS contend that vendors should be required to give such advance notice. Northwest asserts that advance notice will give participating carriers an opportunity to adjust their own flight schedules so that the vendor's changes will not injure their display position. American contends that advance notice of algorithm changes is unnecessary but that vendors should be required to inform participating carriers within 30 days of any changes made to the algorithm.

The comments have not shown that requiring notice of algorithm changes is necessary. As we stated in the NPRM, we have no evidence that vendors routinely change their algorithms or that those changes put competitors at a significant disadvantage. 56 FR 12611. The commentors have not presented any evidence that algorithm changes are frequent or significant enough to undermine airline competition or that vendors conceal them.

13. Connecting Points

In view of the widespread use of hub-and-spoke systems, airlines cannot compete effectively for agency bookings and consumers cannot obtain adequate information if CRS displays provide inadequate or skewed information on connecting services. If a CRS does not use a carrier's hub as a connect point in constructing the display of connecting services in a particular market, it will not display any of the carrier's connections over that hub. Board ANPRM, 48 FR 41177. The Board accordingly imposed two requirements on the display of connecting services: vendors may not use factors related to carrier identity in editing or displaying connecting flights or in choosing connect points, and vendors must use at least nine connect points for each city pair in constructing connections for display. Section 255.4(c), adopted by ER-1395, 49 FR 44451 (November 7, 1984).

Despite these requirements, a number of carriers have complained that vendors choose connecting points under criteria that give a preference to their own hubs and deny participating carriers an equal opportunity to designate connecting points. Some vendors impose burdensome procedures on requests by other carriers to designate additional connecting points, as shown by documents submitted by the Justice Department. Justice Dept. ANPRM Comments, App. at 12. Northwest and TWA charged, moreover, that vendors had failed to comply with their obligation under § 255.4(c)(3) to provide detailed information on the display of connecting services. 56 FR 12612-12613.

The participating carrier complaints suggested a need for strengthening those rules. We accordingly proposed to increase the minimum number of connect points by requiring vendors to use fifteen single connect points and six double connect points in each city-pair market and to prohibit vendors from imposing unnecessary and burdensome procedures on requests for the inclusion of connect points. We also reaffirmed the vendors' existing duty to choose connect points without discrimination. We asked for further comments on the issue raised by Northwest and TWA regarding the vendors' alleged non-compliance with their obligation to provide detailed information on their choice of connecting points and display of connecting services. 56 FR 12612-12613.

In general the commentors support our proposals. Covia questions some details in the proposals but does not oppose them. American, Delta, Alaska, America West, USAir, Aer Lingus, Air Canada, Alitalia, the Orient Airlines, and Swissair support them. Some of these parties suggest that the rule should be further strengthened, and ECAC recommends a revision to the proposals.

We have determined to adopt our proposals with some revisions and clarification. We will require the use of at least 15 single connect points in constructing displays, subject to the application of reasonable editing criteria to eliminate points of little value as connecting points. Although the use of editing rules may reduce the number of connect points below 15 in some markets, the vendors' obligation to use nondiscriminatory editing rules should prevent a system from using editing to eliminate the hubs of competing carriers providing satisfactory connecting service in a market. This requirement should not impose any significant burden on vendors, particularly since the parties agree that each system can use more than the 15 single connect points proposed as a minimum by us. American states, for example, that each system can use 30 points. American Comments, App. D at 9-10.

We will also adopt the proposal requiring use of six double connect points in each market, again subject to a vendor's ability to use nondiscriminatory, reasonable editing criteria applied in all markets to eliminate unattractive airline service options. American states that Sabre is the only system currently incapable of using double connect points and will need 12 to 18 months to complete the programming needed for including double connect points (American represents that it was planning to include double connect points in its displays anyway). Am. Comments, App. D at 11-12. We will make this rule effective in one year, so American will have time for its programming.

The major connecting point controversy concerns the alleged limited willingness of vendors to accept carrier requests to include additional cities as connect points in individual city-pair markets. The vendors limit the number of connecting points a carrier may request for an individual city-pair market: Sabre allows five requests, System One four, Worldspan three, and Covia only one. Am. Comments, App. D at 11; Covia Comments, Blackney Affidavit, paragraph 1; USAir Comments at 6 (USAir believes that Covia accepts unlimited requests, however). American complains, moreover, that Covia will not accept carrier requests for the use of additional connecting points for a particular city-pair market if Apollo is unable to store any more points for that market, a practice that limits American's ability to have new hubs used as connecting points in Apollo displays. Am. Reply, App.F. Several commentors urge us to adopt a requirement that each vendor must accept all participating carrier requests for additional connecting points; if a system cannot accommodate all of the points requested

by the vendor and other participating carriers, the vendor must choose as many points as can be accommodated by its system on the basis of reasonable nondiscriminatory criteria.

We will require each vendor to allow each participating carrier to request five connect points in each city-pair market, as American suggests, but we will not require a vendor to use all points requested by participating carriers up to the limits of the system's storage capacity for connect points, as requested by several carriers. A vendor may eliminate points requested by other carriers only by using a nondiscriminatory editing standard that is applied to all markets. We expect these rules to alleviate concerns like those expressed by Air Canada, which fears that a vendor will abuse its discretion by devising editing standards for connect points that result in the inclusion of its hubs in its system's displays while excluding a disproportionate number of its competitors' hubs.

As is true of the current rules, a vendor need not use 15 connecting points in a particular city-pair market if fewer points satisfy the vendor's reasonable nondiscriminatory criteria for eliminating services of little or no value to travellers in a market (for example, in the Los Angeles-San Francisco market few, if any, intermediate points would offer connecting services of interest to travellers), as long as the vendor has used all points requested by participating carriers. A vendor using such criteria must apply the same criteria to all markets.

A vendor's standard for editing connect points must be reasonable. In that regard, we do not consider it reasonable for a vendor to reject new connect point requests because its system cannot accommodate any more connect points in a market, a practice followed by Apollo that Covia asked us to endorse. A practice of rejecting connect point requests merely because a system's storage capacity is already full does not represent a rational method of determining which connect points are the most useful for travel agents and consumers. A vendor may, however, eliminate connect points if travel agents have been making little or no use of them, a practice that Covia states is followed in its system, if this editing is done on a non-discriminatory basis.

Covia requested clarification of the NPRM's statement that a vendor must include all hubs of all carriers as connect points if it includes all of its own hubs. It assumes that a vendor would not violate the rules if it includes all of its hubs but not all of the hubs of all other carriers as connect points if this results from the application of its nondiscriminatory criteria for selecting hubs. Covia's interpretation is correct, although it seems unlikely that a vendor could develop reasonable nondiscriminatory editing criteria that would create this result.

Because participating carriers are entitled to request the use of connect points, and because a vendor's criteria for selecting connect points must be reasonable, nondiscriminatory, and applied in all markets, we are surprised by the Orient airlines' complaint that vendors rarely use foreign points as connect points. Orient Airlines Comment at 40. We would not consider the elimination of foreign points as hubs as a legitimate nondiscriminatory means of selecting connecting points. If the Orient carriers can demonstrate that vendors discriminate against foreign connecting points, we will consider taking enforcement action.

ECAC suggests that we prohibit vendors from displaying connecting services that are too circuitous. ECAC Comments at 10. While a system's display of excessively roundabout routings would reduce the usefulness of its displays, we are more concerned that such a rule would restrict the number of competitive services displayed in given city-pair markets. The consumer should be able to decide whether a particular routing is too circuitous.

Our rules now require each vendor to provide any person on request information on the connect points used in each market, the criteria used for selecting connect points and for editing connecting services, and the weight given each factor. Section 255.4(c)(3). Since the comments on the ANPRM filed by Northwest and TWA suggested that some vendors failed to provide the detailed information required by this rule, we invited parties to propose alternative rules that would be effective. 56 FR 12613. In response American states that Sabre, System One, and DATAS II (but not Apollo or PARS) provide an on-line display of the connecting points used in any market, and American contends that every vendor should have to provide such a display. American Comments, App. D at 12. Air Canada supports this proposal, since it would enable carriers to monitor a vendor's compliance with the rules. Air Canada Reply at 16. No other carrier commented on this issue.

While an on-line display of the connecting points used by a vendor for constructing the display of connecting services in market would be useful, such a display would not provide all of the information that participating carriers and others are entitled to obtain now under our rules. Moreover, few carriers have supported this proposal. We accordingly will not adopt American's proposal, but we remind vendors of their duty to provide the information on the display of connecting services required by the rules.

Finally, the Orient airlines complain that vendors use discriminatory editing criteria to eliminate the display of interline connections that provide better service than the on-line connections kept in displays. Orient Airlines Comments at 48. We doubt that we should adopt a rule on this issue, since the relative attractiveness of on-line services may make it reasonable for vendors to use somewhat stricter standards for editing interline connections.

14. Participating Carrier Obligations

In order to display the schedules, fares, and availability of other carriers, the vendors necessarily depend on those carriers to provide the necessary information. We pointed out in the NPRM that each vendor's ability to display information on airline services accurately and fairly depends on the accuracy and completeness of the information provided by participating carriers. We therefore proposed to require carriers to provide accurate and complete service information to vendors. The proposed rule would apply whether the information was provided directly or indirectly (*e.g.*, through the Official Airline Guide). 56 FR 12609.

We will adopt this proposal, which no one opposes. Although the current rules implicitly require vendors to display accurately the information provided by participating carriers (*e.g.*, § 255.4(d) in the Board's rules), we will make the vendor's obligation mandatory, as suggested by ECAC. ECAC Comments at 2–3. This rule does not authorize vendors to unilaterally determine that information submitted by participating carriers is inaccurate and will not be displayed; in such cases the vendor should seek corrective action from the participating carrier or enforcement action from us.

SAS suggests that the proposed rule should be strengthened, and the Orient airlines want us to prohibit each participating carrier from providing schedules to CRSs that are different from the schedules used for internal purposes. SAS' suggested strengthening primarily reflects its fear that carriers otherwise would not be obligated to provide the information necessary for the display of change-of-gauge and

code-sharing flights in accordance with these rules. SAS Comment at 16–17. Our final rule will incorporate its suggested language. The Orient airlines' request (Orient Airlines Comment at 47) is already included in the proposal, since a participating carrier would be in violation of the rule if it submitted schedules to CRSs that showed a shorter elapsed time than the schedules used internally by the carrier, unless the carrier could show that its internal schedules were inaccurate.

Since this rule applies to information provided vendors for use in constructing integrated displays, it does not cover information shown by a carrier in its internal reservations systems. If that information is inaccurate, the carrier would be subject to enforcement action under section 411.

15. Travel Agency Displays

Travel agencies hold themselves out to the public as providers of impartial advice on travel services. However, some airline parties fear that agencies prefer some carriers over other carriers, usually in order to obtain override commissions from the favored carriers, and that agencies accordingly give incomplete or biased advice to their customers. The travel agency parties, on the other hand, contend that an agency cannot afford to give its customers poor service because it will lose a lot of business as a result. See, *e.g.*, Woodside Comments at 6, n. 11; ASTA Reply at 4.

In the NPRM we stated our concern over the possibility that agencies might be creating biased displays to increase their commission revenues without giving notice to their customers of the use of the biased display. We proposed no rule on the issue, but we invited parties to comment on whether there was a problem with agency use of biased displays and whether we should adopt a rule on this subject. We also explained, however, that we were reluctant to generally regulate the manner in which agencies choose airline services for their customers. 56 FR 12611–12612.

System One and TWA ask us to prohibit the creation of biased displays by agencies but would support as an alternative a requirement that agents give customers notice if they use a biased display. Northwest, Alaska, Aer Lingus, British Airways, Sabena, Swissair, and Varig urge us to bar the use of agency-created biased displays. Delta and America West recommend the adoption of a notice requirement. The Orient airlines ask us to take some action on the problem. Since ARTA wishes to maintain the agencies' reputation for impartiality, it asks us to block agencies from using biased displays. Woodside thinks that a notice requirement would be unwise. ASTA asserts that agencies do not create biased displays but will accept a rule prohibiting the practice. Covia contents that agencies do not create biased displays.

We have determined not to adopt a regulation on this issue. We have no convincing evidence that many agencies are creating biased displays at this time.

ASTA, for example, alleges that the use of such displays by agencies is "very rare," ASTA Comments at 28, although Northwest claims some agencies do create biased displays, NW Comments at 5. We assume that agencies using biased displays now often do so because the customer has asked to fly on a specific carrier (or because the customer's employer has special fare arrangements with some carriers). American Automobile Ass'n Reply at 3. We also note that some systems at least provide agents with the ability to request displays showing the services of a single participating carrier. Covia Comments, Powers affidavit, para. 25; Covia Reply at 8–9. We know that United got some agencies to use biased secondary displays after the Board's rules took effect, Orient Airlines Comments at 26, but there is not enough evidence of a current problem with agency bias to demonstrate that a rule is necessary.

Moreover, travel agencies seem to have a limited ability to run the risk of losing business by giving customers incomplete or inaccurate information on airline options. Although there are only four CRSs in this country and a limited number of major airlines, there are many travel agencies, so customers dissatisfied with one agency's service can easily switch their business to another agency. Although it is not easy for customers to discover that an agency gave them poor advice, it is possible, and the risk of discovery should be great enough to deter most agencies from biasing their recommendations. See, *e.g.*, Woodside Comments at 12.

To the extent that agencies use biased displays when a customer has not requested a particular carrier, they are most likely doing so because of an incentive commission arrangement with a carrier. Woodside at least believes that preferred supplier arrangements including override commissions benefit agency customers. However, as we stated elsewhere, the subject of such commission arrangements is outside the scope of this proceeding. See also Covia Comments at 60. As we noted in the NPRM, moreover, carriers can compete to be a travel agency's preferred supplier. 56 FR 12612.

In any event, this record does not show that agents commonly provide biased information. The states submitted the results of a Pennsylvania investigation of travel agency responses to requests for information which purportedly shows that a number of the travel agents called by the state provided incomplete advice. We find the survey unpersuasive for several reasons. Among other things, the states did not tell us what questions were asked in the investigation, and the survey does not say whether some of the flights not mentioned in the agent responses may have had no available seats. The persons conducting the survey requested specific flight times, yet the survey does not indicate whether all of the carriers in the market even offered service at the requested times.

We also recognize that our rule allowing agencies to use third-party software will enable agencies who are so inclined to create biased displays. However, some agencies already have that ability now, and several systems give agents the option of obtaining a display limited to a single carrier's services. As explained above, agencies appear to be subject to enough competitive discipline to discourage most of them from using third-party software to create biased displays.

G. Travel Agency Notice to Customers

In the NPRM we requested comment on whether we should require travel agencies to give their customers notice that the agency was using a CRS affiliated with one or more air carriers and that that affiliation could affect the information being provided by the agencies. We asked whether such a notice might give consumers knowledge that could perhaps offset the effects of CRSs in influencing agent recommendations. 56 FR 12613.

No party suggests that such a notice would avoid the need for other CRS rules. America West supports such a requirement, along with certain other proposals on requiring travel agency notice of carrier ties, but urges us to adopt a number of rules as well. Covia states that it would not object to the proposal but that it disagrees with the premise that an agent's use of a system affiliated with one or more carriers will make the agent more likely to book those carriers. A number of parties, on the other hand, oppose any such notice requirement. They include Delta, Aer Lingus, Air France, American Express, ASTA, ARTA, Woodside, and the American Automobile Association.

These parties point out that such a requirement would impose significant costs on travel agencies and that the notice would not be helpful to agency customers. Delta, moreover, asserts that the problem of system bias should be dealt with directly, not through a notice requirement.

We agree with the opponents of the notice suggestion. If the notice requirement would not avoid the need for other CRS rules (and no party says that it would), the imposition of such a requirement would merely add another burden on travel agencies. Since notice would presumably be given on every customer inquiry, the total cost of such a notice requirement would be very large. That burden seems unlikely to produce significant competitive and informational benefits for travellers. Since travellers are unlikely to understand the effects of an agency's CRS affiliation, it is doubtful that they would ask the agent to check the services of carriers unaffiliated with the system and to make a booking on such a carrier if it provides the best service. The required notice would be time-consuming, since customers would presumably ask the agent what the notice meant. See, *e.g.*, ASTA Reply at 6. Finally, all systems except Sabre and System One are affiliated with several carriers, and explaining the affiliations of systems with multiple owners would probably be confusing and take more time.

H. Equal Functionality

1. Summary of Decision

The current rules require vendors to provide participating carriers with the basic CRS functions (displaying schedules, fares, and availability, making bookings, and issuing tickets) on non-discriminatory terms, but they do not require vendors to make other CRS services available to participating carriers or to provide the basic services in the same way that they are provided the vendor carrier, except that each vendor must apply the same standards of care and timeliness to the loading of each participating carrier's fare, schedule, and availability information that it applies to the loading of information on its own services. 56 FR 12613–12614. As we explained in the NPRM, the Board did not try to regulate CRS functionality in more detail because it sought to limit its intervention to areas where regulatory action was clearly required and because guaranteeing equal functionality was not technically feasible. 56 FR 12614.

Since the Board adopted the rules, each system has moved a long way toward providing equal functionality for the vendor and participating carriers. Nonetheless, each system treats its vendor differently than other participating carriers in some respects. See American Reply, app. A. As a result, bookings on the vendor are often more reliable and require less work from the agent. Architectural bias is the term commonly used for the differences in the quality and ease of functionality between transactions on the vendor carrier and transactions on other carriers.

As a result of architectural bias and other factors, each vendor continues to receive a disproportionate share of the bookings made by its subscribers, as shown by our past studies of CRSs and by the vendors' own internal studies. The additional revenues obtained by the vendors—usually called "incremental revenues"—are very large. 56 FR 12596.

Large revenue shifts from non-vendors to vendors impose a substantial competitive handicap on non-vendor carriers. We tentatively found that architectural bias creates a large share of the incremental revenues obtained by vendor carriers and that we should consider rule proposals that could eliminate the differences in functionality and thus a large part of the vendors' competitive advantages created by incremental revenues. We therefore invited parties to comment on two possible equal functionality rules. One proposal ("the dehosting proposal") would require each vendor to separate the CRS' computer system from the computer system used for the vendor's internal reservations system. Such a rule would require structural changes in only two of the four systems, since Worldspan is developing a "hostless" system and since Continental's internal computer system is separate from the System One computer system, which had grown out of Eastern's internal reservations system. The other proposal ("the equal functionality proposal") would require each vendor to provide the same level of functionality for itself and for participating carriers, at least for certain key functions. 56 FR 12614–12616. Since any proposal requiring radical changes in the functioning of the systems necessarily involves issues of feasibility and cost and require a judgment on whether its benefits would exceed its costs, we asked the parties to address a series of questions relevant to the dehosting and equal functionality proposals. 56 FR 12615–12616.

We also asked for comment on two other proposals that would not force radical changes in system operations: A rule requiring vendors to make all enhancements available to participating carriers and a rule directing vendors to provide participating carriers the ability to load their fares and schedules on the same basis as the vendor. 56 FR 12616–12617.

After reviewing the comments, we have determined to adopt the proposals requiring equal access to enhancements and equal loading of information, as well as a rule prohibiting systems from using defaults that favor the vendor carrier. We find, on the other hand, that the record in this proceeding does not justify a rule mandating either dehosting or equal functionality, since each would provide benefits of uncertain size while imposing substantial costs. In addition, the vendors have been moving toward providing more equal functionality without being required to do so. That movement toward equal functionality eliminates much of the need for a rule mandating radical changes in CRS operations in order to reduce architectural bias.

We note that our conclusion as to the lack of record support for the dehosting proposal is consistent with the determinations made by the GAO in their recent report on architectural bias Computer Reservation Systems: Action Needed to Better Monitor the CRS Industry and Eliminate CRS Biases (1992). The GAO concluded that there was not enough evidence for a conclusion that the benefits of dehosting would outweigh its costs.

The following discussion explains in detail the reasoning for our conclusions.

2. Incremental Revenues and Functionality Differences

It has long been apparent that each vendor captures a significantly larger share of an agency's bookings when the agency uses its CRS, 56 FR 12596–12597. Our study of airline competition concluded that there are two major causes of the incremental revenues received by the vendors: The on-going business relationship between the vendor and its subscribers that creates goodwill toward the vendor, and architectural bias. Marketing Study at 61. As we pointed out, however, there was no study demonstrating which was the primary cause of incremental revenues and no consensus in the industry on the relative importance of these two causes. *Id.* at 65.

Architectural bias primarily results when the same computer is used for both the CRS and a vendor carrier's internal reservations system (the vendor is then the "host" of the CRS). At this time, every system but System One has a host (System One's host had been

Eastern until that carrier ended its airline operations). The hosts in Sabre and Apollo are respectively American and United. Northwest and TWA are the hosts in PARS, and Delta in DATAS II. However, Worldspan is creating a hostless system that will replace PARS and DATAS II. A vendor's position as a host stemmed from the origins of the CRSs. Each system grew out of its original owner's internal reservations system.

Being the host gives a carrier significant advantages, since an agent using its CRS will obtain realtime access to the carrier's availability information since the CRS computer is the same computer used for handling the vendor's internal reservations system. In contrast, the CRS obtains availability information on other carriers for its primary display by means of communications links which create a risk of transmission errors and which involve delays that may make the information outdated when displayed in the CRS. Marketing Report at 65–67. The direct access features developed by the systems in recent years have eliminated much of this difference. "Look but not book" direct access enables an agent to gain access to the internal system of another carrier and obtain the same realtime information available for the host on the primary display. "Look and book" direct access allows an agent to make a booking in the participating carrier's internal system, thereby eliminating the delays inherent in making a booking off a system's primary display. Marketing Report at 67–69. However, while direct access features can eliminate or substantially reduce certain reliability problems in information-gathering and booking, using direct access requires somewhat more effort from travel agents. Marketing Report at 67–70. Nonetheless, Covia asserts that in 1990 over 80 percent of Covia bookings were made on United or through Inside Link, even though some U.S. carriers participate only partially or not at all in that direct access function. Covia Comments at 69.

Although architectural bias primarily stems from the advantages created when the vendor is the system's host, a vendor can intentionally structure its system's operations so that travel agents can obtain information and make bookings more easily and reliably on the owner carrier than they can on other carriers, even if the owner is not the host. See, *e.g.*, American Reply to Worldspan at 8–9. In particular, the record shows that in various respects vendors have created default mechanisms that make it easier for travel agents to book customers on the vendor carrier than on another carrier. For example, some fare information inquiries in System One default to Continental—not a host carrier in System One—unless the agent asks for a neutral display. American April 13, 1992 Comments at 9.

While the individual differences between a system's functionality for the host and participating carriers may be small, they seem to affect agent booking decisions. Agents generally work under substantial time pressure and may tend to prefer booking the host when doing so is quicker than booking another carrier, unless the customer wishes to fly on a carrier other than the host. Similarly, since errors irritate customers and cause more work, agents may often prefer to book the host because doing so is more reliable than booking another carrier, again assuming that the customer has no carrier preference.

The parties disagree on the extent to which architectural bias increases a vendor's share of its subscriber's bookings. American and United argue that the functionality differences are too insignificant to cause any shift in an agency's booking patterns. Woodside similarly contends that architectural bias has little, if any, effect on agent bookings. Woodside Comments at 4–6. On the other hand, Justice, the smaller vendors, and most U.S. and foreign carrier parties in this proceeding contend that architectural bias gives vendor carriers a major advantage in marketing their services. See, *e.g.*, Justice Reply at 2–7.

3. The NPRM's Findings

In the NPRM we tentatively found that architectural bias existed and that we should consider proposals to eliminate that seemingly unfair competitive advantage. We accordingly asked parties to comment on proposals made by Justice and Texas Air that assertedly would eliminate architectural bias, the dehosting proposal and the equal functionality proposal. 56 FR 12613–12616. At the same time, however, we noted that the proposals might be unnecessary or unwise, 56 FR 12616:

> [W]e are not yet certain that we should adopt a rule mandating the partial or complete elimination of architectural bias. It is possible that functionality factors are not as significant a cause of incremental revenues as we now believe, or that other changes * * * may * * * make a rule on architectural bias unnecessary or unduly burdensome * * *. Moreover, vendor competition for subscribers appears to be causing vendors to improve information-gathering and booking capabilities for participating carrier transactions, as shown by Sabre's recent announcement that it is upgrading its direct access feature * * *.

To help us judge whether either the dehosting or the equal functionality proposal should be adopted, we asked the parties to respond to a series of questions (some suggested by Justice). We asked, for example, how a vendor could comply with Texas Air's equal functionality proposal without dehosting its system and whether participating carriers would be willing to make the investments needed to take advantage of a rule requiring more equal functionality. 56 FR 12615.

The dehosting and equal functionality proposals drew many comments. While Justice, most carriers other than American and United (including every partner in Covia except United), and ARTA supported one or both of these proposals, the major vendors argued that neither proposal was necessary and that dehosting would be too expensive. ASTA stated that it would support the proposals only if they did not reduce the quality of the functionality on transactions involving the host, and Woodside alleged that architectural bias is insignificant and has no effect on travel agency bookings.

4. Submissions on CRS Reliability

The vendors' benefits from architectural bias assertedly result in large part because bookings made on the system's host are more likely to be accurately transmitted and recorded than are bookings on other carriers and because the communications links between a system and participating carriers at times do not function. At Northwest's suggestion, we directed the vendors to provide us additional information on the reliability of their systems. Order 91–8–63 (August 30, 1991). That order instructed each vendor to tell us, for its basic CRS service (*i.e.*, for information requests and bookings made from the primary display) and for each direct access service, the amount of time that the communications links were inoperable and the percentage of total transactions that could not be completed correctly due to communications failures and delays and other problems. Order 91–8–63 at 4 and app. A.

While the vendors were unable to provide all of the information we requested and while the information submitted to us may not fully measure the reliability problems faced by agents booking nonhost carriers, the vendors' information supports the position of Covia and American that the reliability of the booking process is substantially the same for vendor and non-vendor

carriers. The vendors generally reported that each direct access function operated correctly more than 99 percent of the time. We gave all parties in this proceeding an opportunity to comment on the information provided by the vendors. However, only Northwest and Worldspan chose to file comments questioning the reliability figures submitted by the vendors, and their comments do not show that the figures are inaccurate.

5. Potential Benefits of Dehosting and Equal Functionality Rules

To assess whether the dehosting and equal functionality proposals should be adopted, we must compare the probable costs of each proposal with its probable benefits. We will begin by measuring the likely benefits of those proposals, a question that involves estimating the amount of incremental revenues generated by architectural bias and the amount of architectural bias that will continue if we take no action.

On the basis of the record before us, we cannot determine with any exactness the benefits obtainable through the elimination of architectural bias. While, as indicated, vendors obtain incremental revenues from their systems, it is not clear what portion of those revenues is produced by architectural bias. Our past analyses indicate that other factors also produce incremental revenues, and nothing in the record of this proceeding (or in our earlier CRS studies) enables us to calculate the relative importance of these factors in producing incremental revenues.

A group of parties has submitted a study undertaken by Dr. Franklin Fisher which concluded that architectural bias imposes heavy expense on the public by causing travelers to take flights that they regard as inferior to other available services. "Architectural Bias in CRS: The Loss in Consumer Welfare," submitted by the July 14, 1992 letter of Raymond Rasenberger and Frank J. Costello. Dr. Fisher, however, failed to present all of the bases for his estimates, so we cannot fully evaluate his study. For example, he has not published the regression analysis on which he relies to derive demand elasticity. It appears, however, that his study incorporates both empirical and theoretical weaknesses that undermine its reliability.

On the other hand, as the major vendors point out, they have been improving the technological capabilities of their systems for bookings on other carriers, particularly by introducing "look and book" direct access features. Significantly, a growing number of carriers are participating in those features, which are relatively recent developments. For example, other carriers began participating in System One's "look and book" feature only recently. July 1, 1992 System One Comments, Lenza affidavit at 3. Because of these developments, the estimates in our earlier studies of the size of the vendors' incremental revenues almost certainly do not accurately measure the current impact of architectural bias, since those studies looked at CRS operations at a time when "look and book" features did not exist or perhaps were too cumbersome to use. See Marketing Report at 68–69 for a discussion of the flaws in "look but not book" direct access features. The travel agents' interest in ensuring the reliability of bookings is presumably a major factor affecting their booking patterns. *Cf.* Justice Reply at 4. CRS developments equalizing the reliability of bookings on the vendor and non-vendor carriers should therefore reduce the incremental revenues created by architectural bias. System One, for example, states that Continental gained a larger share of System One subscriber bookings during the period when it was the only carrier participating in that system's "look and book" feature. System One July 1, 1992 Comments, Lenza Affidavit at 3.

Furthermore, the vendors' competition for subscribers appears to be strong enough to encourage vendors to continue reducing functionality differences. While the Justice Department argues that the vendors' interest in obtaining incremental revenues will keep them from eliminating architectural bias, Justice Reply at 5–6, that argument seems to be contradicted by the record. If Justice were correct, we would not expect to see vendors develop features like "look and book" direct access. Presumably they have taken such steps because travel agencies have some desire for improved functionality on participating carriers and because enough competition for subscribers exists to encourage vendors to improve the information-gathering and booking capabilities of their systems for all carriers, not just the vendor. United Reply at 5–6; American Supplemental Comments at 7–9. The vendors' incentives and actions to reduce architectural bias would reduce the benefits realizable from a rule requiring dehosting or equal functionality, because the continuing technological improvements in the systems will lead to reductions in the level of unequal functionality even if we adopt no rule. In that regard we note American's statement that Sabre is developing a "seamless connectivity" capability that will virtually eliminate all functionality differences. American Supplemental Comments at 7–9. See also 56 FR 12616.

Congressman James L. Oberstar, the Chairman of the Subcommittee on Aviation of the House Committee on Public Works and Transportation, advises us in his July 2, 1992, letter that Covia and Sabre have represented to his Subcommittee and to other members of Congress that they are in the process of eliminating all functionality differences between the host carrier and other participating carriers. The Chairman's letter is consistent with our view that the vendors are working to equalize functionality.

While we recognize that functionality differences must influence agency booking patterns to some extent, the record does not convincingly demonstrate that non-vendor carriers are subject to serious disadvantages in functionality. Some of the differences cited by proponents of a rule involve matters that appear unlikely to shift a large number of bookings to the vendor and away from non-vendor carriers. And several of the differences in functionality (for example, the travel agent's ability to confirm the accuracy of frequent flyer program information for the vendor's members but not for members in non-vendor programs) result from the non-vendor carriers' unwillingness to share certain sensitive data with the vendor. Covia Comments, Blackney affidavit, para. 48, 54.

Moreover, while many of the parties urging us to adopt a rule eliminating architectural bias had argued that such action was required because of the alleged substantial differences in reliability between bookings on a vendor and bookings on a non-vendor carrier, the information submitted to us on this subject suggests that reliability is not a substantial problem, as explained above.

In addition, according to several parties' comments, some carriers (*e.g.*, United and Northwest) have declined to participate in certain enhancements offered by other systems, allegedly to encourage agencies in their hubs to subscribe to their systems. 56 FR 12608. Although any booking losses for those two CRS owners due to inferior functionality in other systems could be offset by greater CRS profits arising from a greater share of the CRS market, their alleged willingness to decline participation suggests that functionality differences may be less important than we thought earlier.

It is also not clear whether everybody would or could participate if we required vendors to provide more equal functionality. As noted, Northwest does not participate now in the look and book access functions offered by systems other than Worldspan, and Alaska and America West have not participated in all direct access functions. See, *e.g.*, Covia Comments at 61. The comments indicate that a carrier's participation in enhanced functionality could be quite expensive, a factor which could reduce the number of participants in any upgrading of functionality mandated by us.

Even if we adopted an equal functionality rule, it would produce no immediate benefits for participating carriers in view of the time needed for compliance with the rule. Northwest, for example, estimates that a vendor would need 30 months to achieve dehosting. NW Comments at 3.

Nonetheless, we believe that vendors continue to obtain additional airline bookings due to functional differences. We note in that regard Worldspan's estimates that United and American would each gain $200 million or more in additional airline revenues each year if architectural bias caused each carrier to get one more booking per week from each CRS terminal used by its system's subscribers. Worldspan Reply at 6–7, 17. However, as explained next, the costs of adopting either a dehosting or equal functionality rule would be so high that we could not justify such action without solid evidence that such a rule would provide substantial benefits. Worldspan's calculations of the possible impact of architectural bias are only theoretical.

6. The Costs of Dehosting

We will first assess the costs of requiring dehosting and in the next section discuss the costs of an equal functionality rule. As indicated, System One is a hostless system, and Worldspan is creating a hostless system to replace PARS and DATAS II. Thus any dehosting rule would impose costs only on Covia and Sabre. Although Sabre and Covia are the largest and most profitable systems, we would be reluctant to adopt a rule which significantly burdens them while not affecting their competitors unless there is good cause for such action.

Several parties have provided estimates of the costs required to separate a host carrier's internal system from a CRS computer. Worldspan, which supports the dehosting rule proposal, estimates that creating a new CRS processing system would cost between $44 million and $50 million; this estimate, based on Worldspan's own experience in creating a hostless system, includes the costs of programming, network development, computer processors for production and test systems, and planning, but not the costs of land and buildings or non-CRS production purposes, or the on-going expenses of operating two systems instead of one. Worldspan Comments at 22–23.

Northwest in conjunction with PARS developed an estimate of the costs of converting a system of PARS' size into a no-host system. Northwest estimates the task would cost perhaps $50 million spent over a period of thirty months. Northwest Comments at 20.

Covia alleges that dehosting would cost it tens of millions of dollars and require between one and two years. Covia Comments at 71.

American filed detailed estimates on the cost of dehosting. American initially estimated that a dehosting rule would force American to spend $65 million to build a new data center, $52 million to acquire additional hardware, and at least $5 million to develop new software. American Comments at 21–22. After considering the matter further, American concluded that its initial estimates were incomplete and too low. It now estimates "that separation of Sabre from its airline computer operation will cost over $215 million to accomplish, take three years to complete, and effectively stifle any Sabre innovation for that period" and will also increase ongoing CRS costs and require substantial increases in booking fees and subscriber charges. American Reply Comments, App. D at 3, 7.

The parties supporting a dehosting rule have not attacked the detailed analysis provided by American. Rather than argue that dehosting would not be an expensive requirement for the two major vendors, they argue that the costs of dehosting would be small compared to the major vendors' incremental revenues and overall revenues or if calculated as an amount per booking. See, *e.g.*, Worldspan Comments at 22–23. Such comparisons cannot justify our imposing large costs on the major systems unless we can expect to obtain comparable benefits. As shown, we have no evidence demonstrating that the benefits of a dehosting rule would offset its costs. The proponents of dehosting also concede that participating carriers would incur expenses as well to take advantage of the more equal functionality, Northwest Comments at 21, a fact which further reduces the attractiveness of that proposal.

In addition to the financial costs of dehosting, it would force Sabre and Apollo to have their programmers spend their time creating separate computer systems rather than developing improvements for their existing systems. See, *e.g.*, United Reply at 8–9.

Furthermore, a dehosting rule would necessarily impair the functionality of each system for transactions on its host for some period. Until the system was able to provide a level of functionality for all carriers equal to that provided now for the host, the functionality for the host could be no better than it is now for participating carriers. While this reduction in functionality might not be substantial, it would occur and would thus reduce the efficiency of agents using Sabre and Covia to book their hosts. As a result, while ASTA supports more equal functionality for participating carriers in principle, it opposes any rule that would impair the systems' current efficiency. ASTA Comments at 17–18.

7. The Costs of Equal Functionality

An equal functionality rule would apparently affect only Sabre and Covia, for System One represents that Continental receives no significant architectural advantages in its affiliated system. An equal functionality requirement, of course, would not be as expensive as a dehosting requirement, since its advocates assume that it would not require a vendor to create and operate a second computer system. Instead, they estimate that it would cost each vendor approximately $10 million to implement such a rule. 56 FR 13615, citing Texas Air's estimates. Despite that advantage, such a rule would have serious flaws.

First, as a practical matter, we do not see how an equal functionality requirement could be implemented without a separation of the computer operations for the CRS and the host carrier. The current differences in functionality result in large part from the inherent advantage created by the lack of any need for communications links when an agent requests information and engages in transactions on the host carrier. Similar tasks involving other carriers necessarily require communications links, and the existence of those links creates the potential for delays and errors that discourage agents from selling seats on participating carriers when the host carrier offers comparable service. Although an equal functionality requirement would eliminate other differences (*e.g.*, any difference between the host and other carriers in the number of keystrokes

required for transactions), such a rule could not eliminate the differences created when a vendor is hosted in its CRS. Justice accordingly argues that an equal functionality rule would not eliminate all architectural bias. Justice Reply at 9.

When we requested comment on this issue, we specifically asked parties to tell us how an equal functionality standard could be met by the hosted systems without creating separate computer systems for the host's internal system and the CRS. 56 FR 12615. No one answered that question.

Justice further points out that the inherent differences in the functioning of the systems for host and nonhost carriers "may make evasion of functional parity rules difficult to detect and prevent," Justice Reply at 9. Covia alleges that an equal functionality rule would inevitably force us to regulate technology. Covia Comments at 62. For this and other reasons (*e.g.*, the lack of objective performance criteria for determining whether a vendor was complying with the rule), enforcing such a rule would be difficult and costly. Justice Reply at 10.

The version of the equal functionality rule proposed by its original proponent, System One, would not cover every function. Instead, the rule would govern five key functions: Reservations and ticketing, creation of the passenger name record, seat selection and issuance of boarding passes, fare and schedule information, and frequent flyer program information. Limiting the rule in that way could create future problems. As other parties point out, the key functions for travel agents may change in the future. For example, the issuance of boarding passes is now a key function but did not exist as a function when the Board adopted the rules. While the rule would provide some protection for participating carriers at first, in the long term it could lose much of its effectiveness. See, *e.g.*, Justice Reply Comments at 9; Air Canada Comments at 34; Delta Reply Comments at 9.

We also must consider the costs that an equal functionality rule would impose on those participating carriers that wanted to take advantage of it. System One estimates that a carrier would have to spend $5 million to participate in the upgraded functionality required by an equal functionality rule. System One Comments, Heinzman Affidavit at 2. Covia suggests, however, that some carriers—Alaska and America West, for example—would not make the investment needed to take advantage of equal functionality. Covia Comments at 61. Moreover, a vendor would make it quite expensive for a participating carrier to take advantage of an equal functionality rule by designing the improved connections so as to place much of the cost burden on the participating carrier rather than the vendor (any improved access feature like direct access requires enhanced communications links between the CRS and the participating carrier's computer and the development of an interface, which require a substantial investment from the participating carrier). Orient Airlines Comments at 16; Aer Lingus Reply at 4; Air Canada Reply at 34. We could not stop such conduct without engaging in detailed technical regulation of the systems, something we are not equipped to do. While the Orient Airlines suggest that this problem could be cured by setting up a committee to establish technical standards, Orient Airlines Comments at 18–19, that suggestion confirms our view that a practicable equal functionality rule would require substantial intervention by us into CRS management.

Because we are reluctant to engage in a regulation of the technical operations of the systems, we will not adopt American's proposal that we require each system to provide "seamless connectivity," a capability that American represents is being developed for Sabre to provide equal functionality on information requests and booking transactions for American and the participating carriers. American, moreover, has provided no cost estimate for this development, and Covia contends that any requirement of seamless connectivity would be unduly expensive for both the other vendors and for participating carriers. Covia Reply at 13.

8. Defaults in Vendor's Favor

Although we have determined not to adopt the parties' major proposals for eliminating or reducing architectural bias—dehosting and equal functionality—we wish to adopt rules reducing architectural bias when doing so will impose little or no cost on the vendors. There are three such rules we will adopt. The first of these will eliminate default features that favor the vendor (the other two, discussed below, will require vendors to make enhancements available to all carriers and to give carriers the ability to load fare and schedule changes as quickly and efficiently as the vendor).

The systems now follow procedures for some functions that assume that an agent is seeking information (or wishes to perform a transaction) on the vendor's services and automatically provide a display or capability for the vendor. In order to perform the same function with respect to another carrier's services, the agent must tell the system that he or she wishes to carry out the task on that carrier, a step which requires more keystrokes from the agent. These defaults typically involve requests for carrier information like seat maps and information on the status of a particular flight. Worldspan Comments at 12–13; Delta Comments at 15. System One and Sabre automatically respond to certain types of fare information requests with information on the fares of Continental and American, respectively, unless the agent specifically requests a neutral response. Orient Airlines Comments at 14.

In addition, a number of parties complain that the systems have created an autovalidation procedure that favors the vendor unless the agent chooses to override it. The systems normally validate a ticket on the host carrier whenever it is included in the passenger's itinerary instead of following the traditional procedure of validating the ticket on the first carrier included in the itinerary. This particular default feature gives the vendors cash flow benefits, since the ticketing carrier holds the customer's payment for the trip until the carriers provide the transportation, which may be months after the customer pays for the ticket. See, *e.g.*, Worldspan Comments at 25; Alaska Reply at 30–31; USAir Comments at 7; ASTA Reply at 24, fn.

American recommends the adoption of a rule prohibiting such defaults rather than a dehosting or equal functionality rule. American also represented it would eliminate all defaults favoring itself in Sabre. American Reply at 4–5. Several other carriers support rules eliminating defaults favoring the host. System One both concedes that the default features in its system benefit Continental and states its willingness to give them up if the other vendor carriers do the same. System One July 1, 1992 Comments, Lenza Affidavit at 3. Worldspan, Delta, USAir, Alaska, Aer Lingus, Alitalia, and ASTA urge us to proscribe the vendor practice of making the host carrier the validating carrier whenever it appears in an itinerary.

We have determined to adopt American's proposal. It is consistent with our original wish to provide more equal functionality for participating carriers, since it will equalize system functionality in certain respects for the host and other participating carriers. On the other hand, this rule will impose no significant costs on the vendors, since it will require only a modest amount of programming. American Reply at 5.

American estimates that it can complete the removal of defaults favoring American by April 1993. April 13, 1992 American Comments at 8. No other vendor commented on the amount of time needed to eliminate defaults. We will make this rule effective on October 1, 1993, which should give all vendors adequate time to remove the defaults.

9. Enhancements

The second of the three rules we are adopting on equal functionality concerns access to enhancements. Under section 255.7 of the current rules, a vendor must make an enhancement—a service like the ability to issue boarding passes that is not one of the basic CRS functions—available to all participating carriers on a nondiscriminatory basis only if it is offered to any such carrier. The rule thus allows a vendor to reserve an enhancement for itself. Our NPRM proposed a rule requiring vendors to make all enhancements available to participating carriers, although we would not require that the ease and reliability of access for enhancements be equivalent for participants and hosts. 56 FR 12616. We tentatively concluded that such a rule would provide important benefits by keeping vendors from using enhancements to benefit the marketing of their own airline services at the expense of their competitors. At the same time, we concluded that it would not discourage innovation and would not impose unwarranted costs on participating carriers, for each carrier could choose which enhancements it would use. We also noted that one vendor—Covia—stated that it made all enhancements available to all participating carriers and that the Worldspan partners did not object to such rule. Finally, we pointed out that the current rule required modification in any event, since it did not take account of the ownership of two of the CRSs by more than one carrier. 56 FR 12616.

Worldspan, Delta, and Alaska support the proposal. No one opposes a requirement that all enhancements be made available to all participating carriers. American claims that Sabre makes all of its enhancements available to participating carriers and that it does not oppose the proposal. American Comments at 23. Air Canada points out that the Canadian government imposed a similar requirement on the major Canadian system after American had urged Canada to take such action. Air Canada Reply at 20.

We will therefore adopt the rule as proposed for the reasons given in the NPRM. However, as we explained there, 56 FR 12616, the rule will not require vendors to make enhancements immediately available to all carriers, for we recognize that a vendor may need time to develop and perfect an enhancement before making it generally available and that making an enhancement available to all participating carriers at once may often not be feasible. Since we are not adopting an equal functionality requirement, we will not add Alaska's proposed condition that the use of enhancements be as reliable and easy for participating carrier transactions as they are for vendors.

The term "enhancement" requires some clarification. As defined in the NPRM, it excludes the display of information on schedules, fares, rules, and availability and the ability to make reservations or issue tickets, yet we believe that the industry would view direct access as an enhancement, even though "look but not book" direct access involves the display of information and "look and book" direct access involves both the display of information and the ability to make reservations. Worldspan accordingly points out that the proposed definition would be too narrow. Worldspan Comments at 34. See also Delta Comments, Ex. A at 4. Other parties have cited features benefiting a vendor that are comparable to the issuance of boarding passes and that should therefore be covered by our rule. For example, British Airways complains that Sabre allows American to show nine fare classes on transatlantic flights in its display while limiting British Airways to eight classes. British Airways Comments at 18. System One similarly notes that Sabre gives a travel agent the ability to see whether a particular American fare is available on any flight within a 30-day period but does not allow agents the ability to conduct similar searches on fare availability for other carriers. System One Comments, Lenza Affidavit, para. 13. Each of these features should be covered by a rule requiring participating carrier access to enhancements, unless technical requirements make access impossible (*e.g.*, if participation in the feature is impossible for a non-hosted carrier). As a result, we will modify the definition of "system enhancement". Once again, since we are not requiring dehosting, our rule on enhancements cannot require vendors to provide participating carriers access to a feature used for the host carrier if that feature is an inherent element of being a host.

We will make the rule on enhancements effective on the same date that this rule becomes effective, but, as noted, vendors are not required to make enhancements immediately available to all participating carriers if that is technically impracticable. If our rule requires vendors to modify their systems, we would not expect them to provide participating carriers with access to all enhancements on the effective date.

10. Loading of Fares and Schedules

Section 255.4(d) of the current rules requires vendors to apply the same standards of care and timeliness in loading information from participating carriers as they apply to the loading of their own information. However, several comments on the ANPRM charged that Apollo and perhaps other systems vendors load their own information on a quicker schedule, because the vendor provides its information directly to its own system while forcing other carriers to send their fare and schedule information through intermediaries (Airline Tariff Publishing Company, "ATP," for tariffs and Official Airline Guide for schedules). Covia conceded that United's information is sometimes loaded on a faster schedule than is information from other carriers. Covia ANPRM Reply, Powers Affidavit at 10–12. In addition, some systems imposed procedures on participating carriers for providing information on fare and schedule changes that appeared to be unnecessarily burdensome and costly. 56 FR 12616–12617.

We therefore proposed a rule requiring each system's owner to use the same procedures for loading its fares and schedules that were available to participating carriers. We tentatively found that a vendor's use of faster procedures would give it an unfair competitive advantage, since the owner's changed fares and schedules would then be available in its system before its competitors could have their changes displayed. Moreover, since each vendor alleged it always or almost always loads the information on participating carrier services as quickly as information on its own services, such a rule would not significantly burden any vendor or delay the availability of information on a vendor carrier's services. 56 FR 12616–12617. We also note that some systems allow hotels and rental car companies to update their information electronically. Air Canada Reply at 19, n. 8.

Worldspan, Delta, Aer Lingus, Lufthansa, and the American Automobile Association support our proposal. American states that the proposal would be acceptable as long as American is not precluded from using a relatively quick procedure for loading information merely because other

carriers choose to use a slower procedure. Covia contends that no such rule is necessary, although it admits that United's fare and schedule changes are sometimes loaded more quickly than are changes for other carriers. Covia Comments, Blackney affidavit, para. 50. Covia also does not claim that such a requirement would be burdensome or costly.

We have determined to adopt our proposal, since it would provide significant competitive benefits while not placing any significant cost burden on the vendors, as we explained in the NPRM. While Covia states that current information on fares and schedules is always available through direct access for carriers participating in that function, the information should be available on the primary display as well, if the carrier chooses to use the same procedures as the vendor.

American, moreover, is mistaken in thinking that the rule will force a vendor to abandon a loading procedure if many participating carriers choose not to use it. The rule only requires vendors to make available the ability to use the loading procedure that it uses. As a result, for example, if the vendor updates its information electronically, it must provide that capability to participating carriers. If some participating carriers choose to use another loading procedure, that would not bar the vendor from using the better procedure. Of course, if a system's loading procedures for the vendor are somewhat slower than they are for participating carriers, as American claims is the case for Sabre, participating carriers would not be interested in using the inferior procedure. American Comments, Ex. F.

I. Booking Fees

1. Background

Each vendor charges participating carriers fees (usually called booking fees) for having its services displayed and sold through its system. While our rules now require all fees for participating carriers to be non-discriminatory, the rules do not limit the amount of the fees. 56 FR 12617. Vendors typically charge a specified fee per booking for each level of service. See Marketing Report at 56. If a carrier participates only in the basic CRS display and booking functions, it pays one fee, while a higher fee is charged carriers that participate in a direct access function. After the vendors' 1990 fee increases, Sabre, Worldspan, and System One charged carriers $2 per segment for each basic booking and $2.25 per segment for each booking made on carriers participating in direct access. 56 FR 12595. In 1991 Sabre increased the basic booking fee from $2 to $2.15 per segment booked (the direct access surcharge remained $.25). NW Reply Comments at 6–7. Presumably the other vendors matched Sabre's fee increases. While Apollo earlier charged fees per booking like the other vendors, it recently began charging carriers fees based on the type of transaction (for example, $1 per segment for each basic booking, $1.15 per segment for each booking made on direct access, and $.20 for each canceled booking).

In the NPRM we found that these booking fees are not subject to competitive discipline and that supracompetitive booking fees injure airline competition. 56 FR 12600. Nonetheless, we did not propose a rule limiting booking fee levels, although we proposed to maintain the rule requiring nondiscriminatory fees. As we explained, 56 FR 12617:

> [W]e are reluctant to begin regulating fee levels * * *. We believe any effort to regulate fee levels may well have more disadvantages than advantages. A rule limiting booking fees would be equivalent to rate regulation, and rate regulation usually creates inefficiencies.* * * In addition, the smaller systems have had the highest costs due to the economies of scale in the CRS business, so any rule limiting booking fees could substantially reduce the profitability of the smaller systems. Moreover, * * * each of [the] proposals [for limiting fees] seems to have flaws that outweigh its merits.

In addition, we noted that our other proposals could reduce the vendors' ability and incentive to charge supracompetitive booking fees. We suggested that giving travel agents the ability to access several systems from a single terminal might give carriers the ability to withdraw from some systems charging high fees, which would decrease the need for a rule limiting booking fees. We stated nonetheless that we were willing to consider the issue further if someone proposed a practicable rule relying on competition to restrain fee levels. 56 FR 12617.

2. Comments

Justice and most of the carriers except the vendors urge us to adopt a rule limiting booking fees. The three largest vendors and several travel agency parties argue that we should not regulate fee levels.

Justice argues that we should adopt a "zero fee" rule that would prohibit vendors from collecting booking fees from participating carriers. Justice contends that such a rule is economically justified, because travel agencies, unlike the airlines, have some ability to choose between systems and to regulate the amount of use of a CRS. Justice Comments at 17–18. A zero fee rule would force vendors to obtain all of their compensation from travel agencies, whereas now they obtain the largest share of their compensation from booking fees. Justice considers that change beneficial to some extent, since it would eliminate the monopoly rents now obtained by vendors. Consumers now pay for those rents in the form of higher airfares. Justice Comments at 19–21.

While many carriers assert that a rule limiting booking fees is essential, none supports a zero fee rule. Instead, they suggest other possible rules, particularly rules limiting vendors to charging fees found reasonably related to their costs by someone (usually an arbitrator). Alaska and America West propose as an alternative a rule limiting each vendor's total booking fee charges each year to an amount equal to the charges paid by its subscribers. ECAC and several foreign carriers assert that we should adopt a rule requiring fees to be reasonably related to costs.

Some carriers, such as TWA, claim that even if all of the proposals for regulating the fee levels have flaws, the need to limit the vendors' imposition of supracompetitive fees requires us to adopt some rule. Midway and America West, on the other hand, ask that we hold a supplemental proceeding to develop an adequate rule if we dislike the current proposals.

American, Covia, and Worldspan oppose any regulation of fee levels. ARTA not only opposes any limit on booking fees—it demands that all CRS costs be paid by participating carriers and none by travel agencies. ASTA, American Express, and AAA oppose the zero fee proposal or any rule that would substantially shift CRS costs from airlines to travel agencies.

System One took no position on this issue.

3. Decision

We will readopt the rule barring discriminatory fees, which no one opposes. However, we will not now adopt a rule regulating booking fee levels, since each of the proposals for regulating fee levels has serious flaws and since none of the parties proposing such a rule has addressed the concerns stated in our NPRM. As noted above, we stated in the NPRM that we would consider a rule proposal on booking fee levels that relied on market forces. No such proposal has been made. Instead, the proponents of rules limiting booking fees either contend that we (or an

arbitrator) should directly regulate fee levels or, in the case of Justice, argue that we should confine the vendors' power to charge fees to those areas where competition will discipline fee levels. As we explained in the NPRM, despite the harm inflicted by supracompetitive booking fees, each proposal contains disadvantages and costs that exceed its potential benefits.

Moreover, we believe—and several parties agree—that our rule allowing agencies to use third-party hardware and software (and to access several systems and databases from a single terminal if not owned by the vendor) will begin to discipline booking fees by giving airlines an alternative to CRS bookings. As we discussed in connection with that rule, each carrier will have the opportunity to establish direct links between its internal reservations system and PCs used by travel agencies as CRS terminals. Because an agency can use the same equipment for accessing the CRS and a carrier's internal system, a number of agents should be willing to use such direct links to make bookings, especially since our rules would allow the carrier to pay the agency to use the direct link (the booking fee savings generated by use of the direct link could enable the carrier to make a substantial payment to the agency). As a result, the rules on third-party hardware and software should create some market discipline on the level of booking fees and thereby reduce the need for more intrusive regulation.

Furthermore, several other factors suggest that the need for a rule limiting booking fees is not so urgent that we should ignore the serious flaws in the various proposals before us. First, while the vendors have not shown that their fees are restrained by competition, their fees are below monopoly levels, apparently due to political considerations. Justice Comments at 5, n. 3; NW Reply, Levine affidavit at 4. Presumably for the same reason, the vendors' fee increases since 1985 have been less than the rate of inflation in the economy. In addition, the average fee is equal to somewhat more than two percent of the average ticket price per segment; travel agency commissions, in contrast, on average equal nine to ten percent of airline fares sold through agencies. Marketing Report at 14. These factors, of course, do not eliminate the desirability of finding a practicable market-based means of holding down booking fees, but they do eliminate the need to simply adopt any rule on booking fees, however troublesome, in order to prevent fee increases.

4. The Zero Fee Proposal

Of the fee proposals presented by the parties, the most rational in terms of economic theory is Justice's zero fee proposal, as we stated in the NPRM. 56 FR 12630. While vendors do not compete for airline participants, they do compete to some extent for subscribers.

Such a rule would be very disruptive if adopted, however, since it would shift the burden of paying CRS charges from the airlines to travel agencies. In 1988 Sabre and Apollo drew more than 70 percent of their revenues from booking fees, while PARS and System One generated about 60 percent of their revenues from booking fees. Marketing Report at 52. The major systems now obtain an even greater share of their revenues from booking fees and an even smaller share from travel agency fees. Covia July 1, 1992 Supp. Comments at 5. Thus shifting the burden of CRS charges to the agencies would force a restructuring of the agency business, even if a substantial portion of the fees paid by airlines represent monopoly rents that could not be obtained by vendors from travel agencies. See also NW Reply Comments, Fisher Affidavit, par. 48.

While Justice believes that travel agencies could recover their increased CRS costs by obtaining higher commissions from the airlines, travel agency parties claim that the carriers are unlikely to be willing to pay higher commissions. See *e.g.*, ASTA Reply at 10. Even if travel agencies ultimately did obtain higher commissions, that process presumably would require some time. Moreover, different types of agencies might be affected differently by the increased CRS costs and the payment of higher commissions. See, *e.g.*, Worldspan Reply Comments at 19. And CRS costs per booking are larger compared to a typical agency's revenues than they are compared to an airline's revenues. ASTA Reply at 9–10. A zero fee rule accordingly would force substantial changes on the agencies' cost structures and methods of operations.

The zero fee rule also presents a practical problem, since such a rule would require a determination of which CRS services would be covered by the ban against booking fees. 56 FR 12617–12618. See also Worldspan Reply Comments at 21.

As a result, we will not adopt the zero fee rule.

5. Rules Requiring Reasonable Fees

A number of carriers urge us to adopt a rule requiring reasonable (or cost-based) fees. We recognize that these proposals for reasonable fees (that is, fees related to costs) are consistent with traditional practices in public utility industries. But even in traditionally regulated industries, like the electric industry, public utility ratemaking has significant flaws. Reasonable rate requirements typically do not encourage regulated companies to be efficient, and rate determinations are often time-consuming and burdensome for the regulated firm, the agency, and other parties. Furthermore, the characteristics of the CRS business make the setting of CRS fees through ratemaking proceedings particularly unattractive. A CRS has three sets of users—the host carrier, participating carriers, and travel agency subscribers—and allocating costs between those groups would be extremely difficult, if not impossible. In addition, the economies of scale in the CRS business would create an anomaly if fees were set administratively: The smaller systems would be able to charge higher fees than the larger systems. 56 FR 12617, 12618. Ratesetting may be relatively straightforward in traditional public utilities because there is little technological change in the industries. In the CRS business, in contrast, technology is continuously developing.

The parties urging the adoption of a reasonableness standard for CRS fees have not refuted these objections to such a rule. Although they contend that CRS ratemaking proceedings would not be as cumbersome and difficult as we found in the NPRM, they have provided no explanation for that position.

Several parties seemingly misconstrue our opposition to the reasonable fee proposals as an unwillingness on our part to determine what fees are reasonable but a willingness to allow someone else to make such a determination. Our basic objections to a reasonable fee requirement flow not from the identity of the decisionmaker but from the serious flaws in any such requirement. Having an arbitrator determine what the fees should be, however, would further worsen such a rule, particularly if the arbitrator's award were largely insulated from agency or judicial review, as a number of parties have proposed. The arbitrator would not necessarily have any expertise in the complex ratemaking issues that would be presented in determining the reasonableness of CRS fees, and insulating the arbitrator's decision from agency or judicial review would enable a single person to make judgments that would shift millions of dollars in revenue between different types of users of a system. Unless the same arbitrator heard every case, there

would be no guarantee that the decisions on the different vendors' fees would be consistent. No party has given any reason for believing that an arbitrator could decide the ratemaking issues better than we could.

While we plan to watch booking fee developments, we are unwilling to impose the rule suggested by Varig requiring vendors to publish their costs. Varig's proposal could provide new information, since no vendor has provided such information in this proceeding. However, we have found from experience that the vendors' figures on profit, loss, and expenses provide little, if any, guidance unless adjusted to reflect general accounting principles and to provide identical treatment for each system's financial results. Given the amount of work involved in that task, requiring vendors to provide cost information does not seem useful. We also prefer not to compel a private firm to publish detailed financial statistics unless there is a clear benefit from doing so, since such a disclosure requirement would help its competitors and be contrary to the usual rights of private firms to keep detailed financial information confidential.

6. The Parity Fee Proposal

Alaska and America West support another proposed limitation on booking fees. Under their proposal, the total payments received annually by a vendor from participating carriers could not exceed the total payments received from subscribers. While we recognized in the NPRM that this proposal had some attractive features (*e.g.*, it would not require ratemaking and would give vendors the discretion to vary their fees for different services), we concluded that such a rule would create an accounting nightmare. We noted, for example, that the vendors' receipts from agencies covered their subscribers' use of the systems to book non-airline services, such as hotels and rental cars, and that some system owners (*e.g.*, Northwest and TWA) partially subsidized the CRS payments made by their system's subscribers. We noted that system owners could also offset the rule's limits by increasing the commissions paid their subscribers. 56 FR 12618.

In addition, the proposal would shift a substantial share of CRS costs from participating airlines to travel agency subscribers.

The parties supporting this proposal claim that the difficulties identified by us are not serious enough to make the proposal unworkable, but the proposal would require us to closely examine each system's receipts to ensure that the systems were not evading the limitation on carrier fees. We think such an audit of each system's income and the sources of agency payments would be overly complex and time-consuming. We therefore think that this proposal is not practicable. In addition, the proposal that carriers pay no more than half of the total CRS costs is itself somewhat arbitrary. ASTA Reply at 14.

The Orient airlines make a similar proposal, which has similar flaws.

7. Air Canada's Proposal

Rather than regulate the amount of fees, Air Canada proposes that we bar any system owner from initiating a fee increase if it receives more booking fees than it pays out. As a practical matter, such a rule would restrict only Sabre, since American is the only carrier whose fee receipts exceed its payments. We are unwilling to adopt Air Canada's proposal, which was not raised until Air Canada filed its reply comments, since other parties have not had an opportunity to comment on it.

8. Transactions Covered by Fees

According to a number of carriers, the vendors have also abused their power by charging carriers for transactions for which no fee could be fairly charged. In general these carriers contend that a participating carrier should be charged only for transactions that produce new bookings for it. They argue, for example, that we should stop vendors from charging booking fees when a traveller who made a reservation directly with a carrier then has a travel agent issue the ticket through a CRS. Some carriers also object to Covia's new fee structure. Although Covia established a lower fee for each booking, it created fees for such transactions as cancellations and schedule changes. In response the vendors argue that the cited transactions—whether or not they produce new revenue for the carrier—require processing by the system and so are legitimately subject to booking fees. See, *e.g.*, Worldspan Reply at 26–27.

When this issue was raised before, we tentatively concluded that we should not try to define which transactions would be subject to fees. We recognized that the vendors' apparent arbitrary power to determine what types of transactions would incur a fee liability further demonstrated the vendors' ability to ignore the wishes of participating carriers. Nonetheless, we also noted that vendors might have legitimate reasons for charging fees for transactions other than new bookings. 56 FR 12619.

Although a number of carriers urge us to limit the kinds of transactions subject to fees, we remain unwilling to take such action. In essence, their proposal would require us to determine on some basis when fees could be legitimately charged by a vendor. The customary approach to such questions for public utility regulation would involve a complex and partly arbitrary synthesis of cost analysis, equity, and the ability of different parties to pay charges. Deciding which transactions should or should not incur fees would require a similar analysis, which we are unwilling to do.

9. Booking Fee Bills

A related issue concerns the alleged inadequacy of the booking fee bills delivered to participating carriers by the vendors. In their comments on our ANPRM, several carriers complained that the vendors refused to provide carriers with enough information in a readily usable form to enable carriers to verify the accuracy of the bills without undue expense. We proposed to require vendors to provide detailed billing information, and we asked whether the rule should specify the type of information to be required and the media on which bills should be sent. We noted that a vendor could evade the prohibition against discriminatory booking fees by imposing false charges on carriers, which would be feasible if carriers could not conveniently audit bills. 56 FR 12619.

Northwest, Alaska, America West, a number of foreign carriers, and ECAC support our proposal and generally contend that we should specify the information to be included in bills. Several carriers assert that the vendors' continuing refusal to provide billing information on magnetic media makes the auditing of the bills unduly expensive. See, *e.g.*, Alaska Comments at 29. Varig, for example, alleges that correcting a half million dollar set of billing errors cost it thousands of dollars because of the cost of enlarging the bills' microfiche information and copying it on paper. Varig Reply at 5. Northwest provided more detailed evidence on the inadequacy of current bills, which, among other things, makes it very difficult for a carrier to identify fictitious bookings made by an agency to satisfy a productivity pricing contract with its vendor. NW Comments, App. D at 1–2. In January 1991 Covia sent Northwest a bill for 1 million bookings and over 440,000 cancellations supported by 51 microfiche cards totalling over 24,000 pages that provided only summary data on each transaction. For example, the transactions are not listed by the agency making the booking or cancellation. NW

Comments, App. D at 2–3. While Sabre is now providing billing information in a machine-readable form (for which it imposes an additional fee), the information is still hard to audit. *Id.* at 3–5.

Justice did not comment specifically on the proposal on adequate billing information, but its position that market forces have no effect on the level of booking fees is consistent with the NPRM's conclusion that a rule is necessary to ensure that vendors provide adequate billing information.

Covia and Worldspan say no rule on booking fee bills is necessary. If a rule is adopted, Covia would not object to a specification of the information required in bills. Covia Reply at 17. American agrees that a rule on the issue should specify the data required in bills. American Comments at 27.

Whether the vendors should be allowed to charge for providing bills on magnetic media was discussed by several commentors. American and Covia assert that vendors should be able to charge more for providing bills on magnetic media, which allegedly costs more, but they have provided no evidence to support this claim. Air France notes that American has proposed a fee schedule for magnetic media billing that would require each interested carrier to make an upfront payment of $4,000 (the total payments to Sabre potentially could exceed $1 million) as well as annual payments thereafter of $1,800 per carrier. Air France Reply at 17. In a late filing, Air France asserts that a magnetic tape costs less to produce than microfiche and that a tape is usually needed to produce a microfiche bill. September 3, 1992 Air France Comments at 13, n. 20. Alaska is not ready to agree with American's claim that magnetic media costs more and that vendors should be able to charge for billing information provided on magnetic media. Alaska Reply at 34.

We have decided to adopt the proposed rule requiring vendors to provide adequate information in booking fee bills and on magnetic media so that participating carriers can readily audit the bills. As explained above in our analysis of the basic need for CRS rules, participating carriers have no ability to bargain over the terms of their participation in the systems and therefore cannot cause vendors to provide adequate billing information, the kind of information that a supplier in a competitive business would provide if it wished to keep its customers. Furthermore, as we noted in the NPRM, without adequate billing information vendors could evade the prohibition against discriminatory fees by imposing false charges. The rule requiring vendors to provide enough information to allow the auditing of bills for fees is accordingly essential to maintain the rule banning discriminatory fees.

As the parties suggest, we will specify the information that must be included in bills, since a rule requiring "adequate" information would lead to disputes over what information was adequate. The items to be required shall consist of the following for each segment: PNR record locator number, passenger name; booking status, agency ARC number, pseudo-city code, CRS transaction date, city-pair information, flight number, flight date, class of service, and type of CRS booking (*e.g.*, direct access). We have based this list on the list proposed in the NPRM, 56 FR 12619, and the comments of several parties, who generally agreed that these items should be included. NW Comments at D–1; Alaska Comments, Appendix; British Airways Comments at 29; Orient Airlines Comments at 32–33; Varig Comments at 30; Air Canada Reply at 46. This list is comparable to the information now being provided by American. American Comments, Ex. G.

At this time we will not bar vendors from charging carriers for providing bills complying with the rules. It may be that providing bills on magnetic media is more expensive, as claimed by American and Covia. However, we will monitor any vendor charges, given the importance of assuring that participating carriers receive adequate informahe accuracy of bills.

Finally, we have reworded the rule so it does not specifically authorize a participating carrier to withhold payment pending receipt of adequate information.

J. Other Terms of Carrier Participation

The rules currently bar any vendor from conditioning a carrier's participation in its system on the purchase of other goods or services. The Board adopted this rule as a result of its findings that vendors had coerced participating carriers into agreeing to buy non-CRS services on unfavorable terms by threatening to exclude them from the system. Board Rule, 49 FR 32554–32555. The NPRM's proposed rules maintained the Board's prohibition.

No party has objected to the continuation of that rule. However, Northwest, Aer Lingus, and Air Canada have raised a related issue, since they complain that Sabre is forcing carriers who wish to participate in Sabre in the United States to agree to participate in Sabre and its affiliated systems on a worldwide basis. These parties view American's conduct as particularly unfair because Sabre and its affiliates operate in a number of countries where there are no regulations protecting participating carriers against display bias and discriminatory treatment and because the booking fees charged by Sabre outside the United States are frequently higher than the fees charged for transactions inside the United States. NW Comments at App. B; Aer Lingus Reply at 12–13; Air Canada Reply at 5–6. SAS made a similar complaint against a U.S. vendor but did not identify the vendor.

We believe that Sabre's conduct may violate the current prohibition against tying U.S. CRS participation to the purchase of other goods and services, since participation in a CRS outside the United States, particularly a CRS not even operated in this country (for example, Fantasia, Sabre's affiliate in the Far East), appears to be a different service.

On the other hand, in several instances a foreign carrier has refused to participate in a U.S. system in its homeland in order to keep that system from competing effectively with its own system, and those situations can lead to serious international disputes. If Sabre uses its leverage from its U.S. operations to cause foreign carriers to participate in its international operations, such disputes can be avoided. Sabre may also be correct in alleging that Northwest's complaint on this issue is designed to help the marketing of Abacus.

Furthermore, the major complaint of the carriers opposing Sabre's practice seems to be Sabre's unwillingness to agree to comply with the non-discrimination requirements of our rules (or similar rules) in countries where CRS operations are now unregulated. We will accordingly modify our rule on tying so that a vendor may require a carrier to participate in its system overseas as a condition for participating in it in the United States only if the vendor promises to comply with the provisions in our rules requiring unbiased displays and nondiscriminatory terms for carrier participation in its foreign CRS operations to the extent they are not regulated by another government. We will not require compliance with the rules on subscriber contracts or marketing data.

The Orient airlines and Air Canada urge us to outlaw other allegedly unfair contract terms imposed by vendors on participating carriers, such as disclaimers of warranties by vendors. We will not grant this request. No other carrier has supported it. Moreover, the

record does not indicate that other contract terms are particularly unfair or have caused significant harm. We do not wish to become responsible for reviewing and rewriting CRS contracts unless there is a strong need for such intervention. The carriers requesting our intervention have not made out such a case.

Air Canada suggests that the terms of participating carrier contracts should be made public to help carriers enforce their rights. Since no other carrier has suggested that vendors discriminate among participating carriers on contract terms, we will not adopt this suggestion.

K. Domestic Marketing and Booking Data

Under section 255.8 of the current rules, if a vendor chooses to generate any marketing, booking, or sales data from the bookings made on its system for domestic travel, it must make that data available to all U.S. participating carriers on nondiscriminatory terms (as discussed in the next section of this rule, international booking data is treated differently under the rules). The Board found this requirement necessary because only the vendor had access to the data that could be derived from bookings made on its system. The data appeared to give each vendor a competitive advantage because it could learn how many bookings were made by each of its subscribers on each airline in each city-pair market. Rather than prohibit vendors from using the data, a prohibition which seemed unenforceable, the Board chose to require vendors to make the data available to all U.S. participating carriers. 56 FR 12619–12620.

We tentatively determined not to change this rule, although we did propose to change the rules on access to international booking data, as discussed below. The rule enables other carriers to obtain access to the data from domestic bookings and thereby ended one competitive advantage possessed by the vendors. While we recognized that the vendors' practice of charging for access to the data and their manner of providing the information made its use difficult, the only proposal for alleviating that situation—a proposal that third-party firms be able to reprocess and resell the data to interested airlines—would have allowed many carriers to obtain access to data without paying any fee to the vendor. 56 FR 12620.

Several participating carriers suspected that vendors use CRS-generated data for marketing purposes without making the data available to other carriers (or that vendors delay the availability of the data). We pointed out that we have little evidence that vendors are unfairly using information derived from CRS bookings on a routine basis or that the vendors' use of such data would substantially harm their competitors. We further observed that a rule prohibiting vendors from making realtime use of the data would be very hard to enforce. 56 FR 12620. However, we noted that we were investigating one vendor's apparent violation of the rule. That vendor was Covia, which provided fare information to United from Covia bookings without making that information available to other participating carriers, not even USAir. Covia later agreed to stop giving United exclusive access to the information at issue.

In their comments on our tentative decision to readopt the rule on domestic data without change, several carriers have asked us to strengthen the rule. ASTA and ARTA, in contrast, argue that the rule should be revoked since it harms travel agencies.

We have decided to readopt the rule as it stands. We will first discuss the comments from parties seeking to eliminate or weaken it and then the comments from parties seeking to strengthen it.

ASTA and ARTA remain concerned that our rule enables carriers to have access to data on the operations of each agency. We recognize that their concerns have some merit. 56 FR 12620. However, we agree with the Board that a rule denying vendors access to the data generated from their subscribers' bookings would be unworkable. ASTA predicts that such a prohibition would be effective, if we announced that we meant to enforce it and would impose severe penalties on violators. ASTA Comments at 14. We are not so confident about the deterrent effect of such a statement. Nor can we agree with ARTA's claim that even American has represented to travel agencies that Sabre and the airline are operated independently so that we should assume that Sabre would be unlikely to violate a prohibition against use of the marketing data. ARTA Comments at 16. The record shows that Sabre takes into account American's airline marketing interests, just as would be expected from the common ownership of the airline and the CRS. ARTA claims that violations of the rule would be detected by agencies, since they would know when a vendor was using the data to pressure its subscribers to give it a bigger share of their airline bookings. *Ibid.* We are not convinced, particularly since vendors could use the data in ways not visible to their subscribers and since subscribers might be unwilling or uninterested in telling us about vendor uses of the data.

ASTA charges that requiring vendors to disseminate the booking and marketing data generated from CRS bookings is a violation of antitrust principles. ASTA Comments at 13. When we addressed this argument before, we pointed out that ASTA had failed to explain how the rule would have anticompetitive results and that competition usually benefits when competitors have access to more information. 56 FR 12620. ASTA still has not provided a theory on how competition would suffer from the participating carriers' access to more data.

We are also unable to agree with the travel agency associations' premise that the data generated from agent bookings is clearly proprietary data belonging to the agency. Travel agencies, after all, operate as the airlines' agents, and they use CRSs owned by other firms for airline booking transactions. These facts suggest that travel agencies do not necessarily own the data.

We will not grant ASTA's request that we require vendors to give each subscriber access to the data generated from the agency's bookings through a system. ASTA Comments at 14–15. ASTA may well be correct when it asserts that agencies would be better able to bargain with airlines and vendors if they had the data. However, improving business opportunities for travel agencies is outside the scope of this proceeding, which is based on our responsibility under section 411 to prevent unfair methods of competition (that is, conduct violating antitrust laws and principles) and consumer deception. ASTA has not shown that its proposal would further the goals of this proceeding. We also do not have general authority to impose regulations on vendors (or carriers) in order to compel them to act in a manner which meets our standards of fairness. *Cf. Continental Air Lines* v. *American Airlines,* Order 85–12–69 (December 24, 1985) at 6. Moreover, ASTA concedes that an agency can compile its own data from its CRS bookings when it has an adequate backoffice system. ASTA Reply at 17.

NBTA, on the other hand, is concerned with the possible loss of confidentiality of corporate bookings, particularly bookings made by corporations' in-house travel offices. However, bookings made by those offices, unlike agency bookings, would not be subject to the rule requiring that data be made available to participating carriers. To the extent that corporations

book travel through travel agencies, any data generated from their bookings should be treated like other data generated from agency bookings.

Unlike NBTA, ASTA, and ARTA, several carriers contend that the rule should be revised to ensure greater access to CRS-generated data. Worldspan contends that we should require vendors to make the data available to other vendors as well as other airlines, since Worldspan—a system owned by several carriers, none of which ha: a majority interest—is at a disadvantage compared to a system like Sabre, owned entirely by American's parent corporation. Worldspan Comments at 25. Worldspan has not provided a detailed explanation of why its competitive ability is hurt by lack of access to data, and we note that some data on travel agency bookings is available from ARC. Accordingly we will not expand the rule's beneficiaries to include vendors.

America West again urges us to revise the rule to allow third-party firms to buy the data and process the information for resale to participating carriers. America West Comments at 25–26. While we are aware that the data tapes provided by vendors are often expensive and difficult for carriers to use, adopting a rule requiring vendors to resell the data to third-party firms would be inadvisable without a more detailed record on the issue. We note, moreover, that carriers currently can have the data tapes processed by a third-party firm after buying them from a vendor, so no change in the rule is needed to allow that.

According to Northwest, participating carriers will not have a fair chance to use the data in competition with the vendors unless vendors make the data available to participating carriers under the same standards of timeliness, accuracy, and completeness used for providing the data to themselves. Since the current rule requires each vendor to make available to participating carriers the same data used by the vendor, the rule implicitly requires the same standards of accuracy and completeness to be used. We will make the requirement explicit. On the other hand, we are unwilling now to require that the data be made available at the same time—such a requirement would be hard to enforce, as we said in the NPRM, and we have no information that participating carriers are being harmed because vendors have earlier access to the data.

L. International Marketing and Booking Data

While the Board determined that U.S. carriers should have access to marketing data generated from bookings for domestic travel, it found it unwise to impose a similar requirement on data generated from bookings for international travel. The Board did not want to give foreign carriers access to such data because there was no assurance that foreign carriers would make comparable data from their systems available to U.S. carriers. ER–1396, 49 FR at 46347 (November 26, 1984). The Board then determined that U.S. carriers should not have access to the data because that would give them an unfair advantage over foreign carriers. 49 FR 46348–46349. The current rule accordingly prohibits vendors from giving any participating carrier data generated from any carrier's bookings for international travel without the latter carrier's consent. The rule, however, does not bar a vendor from using data derived from the bookings for international travel.

We proposed in the NPRM to give both U.S. and foreign participating carriers access to data generated by a vendor from bookings for international travel, subject to the condition that a foreign carrier could obtain the data only if any foreign CRS affiliated with that carrier provided equivalent data to U.S. carriers. 56 FR 12620–12621. As we noted in the NPRM, we had already granted exemptions from the current prohibition so that American and Worldspan could provide data from bookings in certain international markets to foreign carriers who provided similar data to U.S. carriers. Orders 90–7–34 (July 13, 1990), 89–8–36 (August 21, 1989); 89–4–44 (April 19, 1989), and 88–12–35 (December 15, 1988). We asked parties to comment on whether foreign carriers should have access to data from all international bookings or whether, as in the Sabre and Worldspan exemption cases, each foreign carrier should have access only to data from bookings for travel between the United States and the carrier's homeland. 56 FR 12620–12621.

All of the parties commenting on the proposal—American, Covia, Delta, Northwest, Alaska, America West, USAir, Aer Lingus, Alitalia, British Airways, KLM, Lufthansa, Swissair, and ECAC—support a rule giving carriers access to international booking data. However, they disagree to some extent on whether reciprocity should be required of foreign carriers and how much data should be available to foreign carriers. Generally speaking, most parties view the reciprocity condition as reasonable and favor the widest availability of data.

We will adopt the proposal on providing U.S. carriers access to data drawn from bookings for international travel without further discussion, since no party has questioned our tentative finding that such a rule was desirable. The only issue concerns the conditions for foreign carrier access to data.

In response to our request for comments on the scope of data to be made available to foreign carriers, American, Covia, Delta, Northwest, Aer Lingus, British Airways, and ECAC assert that foreign carriers should be able to obtain data in all markets, not just in the markets between the United States and the carrier's homeland. Lufthansa, on the other hand, contends that carriers should have access only to data on markets served by the requesting carrier. We have determined to allow foreign carriers access to data on all international markets, subject to the reciprocity condition. Allowing them access to data on all markets should assist U.S. carriers in obtaining a broad range of data. Limiting a foreign carrier's access to data only for routes it serves would be too restrictive. A carrier operating between the United States and Germany, for example, is competing to a significant extent with carriers serving nearby European destinations from the United States. As noted, moreover, no U.S. carrier and no foreign carrier except Lufthansa has supported a rule that would limit the markets for which foreign carriers could obtain data.

As proposed, we will also condition a foreign carrier's ability to obtain data on bookings in the United States so that it may obtain the data only to the extent that any CRS affiliated with it provides comparable data to U.S. carriers. Without this requirement, a foreign carrier could obtain valuable marketing data from U.S. vendors without having to provide any data from systems operated by it in its homeland or other countries. Such a result would prejudice the competitive position of our carriers. We note that British Airways and ECAC consider a reciprocity condition reasonable. British Airways Comments at 27–28; ECAC Comments at 12. However, KLM believes that a reciprocity condition would lead to arguments between the United States and foreign governments, apparently because KLM views reciprocity as a United States dictation to foreign countries on CRS practices. Swissair considers reciprocity unfair, because it holds a small ownership interest in Galileo and so will be unable to cause

Galileo to provide data to U.S. carriers; Swissair is also concerned that Switzerland or the European Community may deny release of CRS-generated booking data, thereby preventing Swissair from obtaining any U.S. data.

We find the objections by Swissair and KLM unpersuasive. As indicated, no other foreign carrier or party objects to that proposal, and ECAC and British Airways consider it reasonable. We recognize that a carrier with a small ownership interest in a CRS cannot dictate the system's decisions on whether to release data to U.S. carriers, but it does have some ability to persuade its partners to agree to release data. The hypothetical difficulties cited by KLM and Swissair appear unlikely. KLM and Swissair are partners in Galileo with British Airways, and the latter does not seem to fear that Galileo will refuse to make data available. ECAC's acceptance of a reciprocity condition indicates that the European governments are unlikely to deny release of marketing data derived from CRS bookings, and neither KLM nor Swissair has cited any provision in the European Community rules which would require denying access to such data. Moreover, if an unusual case arises where a foreign carrier is denied access because of its affiliation with a foreign system that refuses to provide data, we can consider granting an exemption. Despite KLM's warnings, we doubt that a reciprocity condition will lead to any serious intergovernmental disputes, especially since we note that our rules and the European Community rules contain similar provisions authorizing vendors to discriminate against foreign carriers whose own systems do not provide nondiscriminatory treatment for other carriers.

Since some foreign systems like Galileo and Abacus operate in a number of countries, American asserts that the reciprocity condition should require affiliated carriers to provide data from bookings in all countries, not just bookings in the homeland of the particular carrier. American Comments, p. 29. We agree with American's condition, although that would require Sabre to make available to foreign carriers the data from its operations in all countries, not just the United States (and to make such data available to U.S. carriers participating in Sabre).

Covia suggests there is no need to require a vendor to provide notice to U.S. participating carriers when it begins providing data to a foreign carrier, a step which would entitle the U.S. participating carriers to obtain data from the foreign carrier. Covia alleges that most non-vendor carriers will have no interest in obtaining data from foreign carriers. We disagree. Providing notice to participating carriers should cost very little, and the cost will be worthwhile if a few carriers choose to obtain the information available from the foreign carriers.

American and USAir suggest that we allow carriers to provide a travel agency with information obtained from a vendor on the agency's own bookings. American Comments at 30; USAir Comments at 8–9. We are not prepared to incorporate such a provision in the rule, since we do not know the confidentiality restrictions placed by vendors on the use of data by participating carriers. The rule's purpose, however, is to give participating carriers the same ability to use the data for airline marketing that the vendors have—if a vendor discusses information with one of its subscribers drawn from that agency's bookings, the carriers participating in its system can do the same.

Finally, British Airways asks us to make it explicit that a vendor may not use any CRS-generated data that are not also made available to participating carriers. We think this limitation on the vendors' use of CRS data is already clear—it is the foundation of both the current rule and the revised rules on CRS-generated data.

M. Subscriber Contracts

1. Background

The Board found that travel agencies should have a realistic ability to switch or add systems in order to ensure that smaller or newer systems had an adequate opportunity to compete for subscribers. Unless the CRS rules limited vendor subscriber contract practices, the established vendors would impose contract provisions that would deny competing systems any opportunity to convert agencies that already had a CRS subscription. For example, some vendors were beginning to impose ten-year terms in their subscriber contracts. Board NPRM, 49 FR 11651–11652. The Board accordingly adopted rules prohibiting several types of restrictive contractual provisions: contract terms longer than five years, the tying of an agency's commissions to its use of a system, clauses mandating the use of the vendor's system for the sales of its tickets, prices for CRS services that varied according to which carrier was booked by the agency, and direct or indirect prohibitions by vendors on the acquisition or use of other systems by subscribers. 14 CFR 255.6.

The Board's expectation that these rules would give agencies substantial flexibility to change systems or to use more than one system has proven largely inaccurate. The vendors, particularly Sabre and Apollo, each adopted standard contract terms discouraging agencies from switching or adding systems. As we explained in the NPRM, the vendors created these various contract provisions in order to protect their subscriber base against the conversion efforts of other systems. 56 FR 12621.

Vendors rarely agree to a subscriber contract with a term of less than five years. They require subscribers to pay liquidated damages if an agency breaches its CRS contract (*e.g.*, by dropping a system in order to begin using another system), and the liquidated damages formula typically requires the agency to compensate the vendor for the booking fees that the vendor would have obtained if the contract had remained in effect until the end of its term. This liability for lost booking fees usually makes it economically impracticable for an agency to switch systems during the term of its CRS contract. Vendors also included "rollover" clauses in contracts that automatically renewed the contract for a new five-year term upon the happening of certain events (usually the subscriber's acquisition of more terminals or the opening of a new location). 56 FR 12621.

Other contract clauses deter subscribers from making substantial use of another system. In particular, under the vendors' "minimum use" clauses a subscriber who does not make a certain number of bookings on the system each month has breached its subscription agreement and become liable for liquidated damages including lost booking fees.

We therefore proposed to amend the existing subscriber contract rules to make effective their intent that agencies should have some ability to change systems and to use two or more systems. We proposed to fix the maximum contract term at three years instead of five years and to prohibit minimum use and rollover clauses (as discussed below, the proposed ban on minimum use clauses was so worded that it would have banned productivity pricing as well). Although a number of parties had asked us to prohibit the tying of an agency's CRS choice with its receipt of airline marketing benefits, we did not propose to expand the current prohibition against tying. 56 FR 12625–12626.

We recognized that these subscriber contract issues were complex, since the contract terms at issue could serve legitimate purposes and since the rule proposals could have untoward consequences. We therefore asked parties to address several questions involving this subject. 56 FR 12623.

2. The Parties' Comments

In general, the two major vendors oppose our tentative revisions of the rules on subscriber contracts. They contend that the contractual provisions at issue do not restrict the agencies' ability to switch systems (or add new systems) and that any restrictions are appropriate for protecting the legitimate economic interests of the vendors. Several large travel agencies assert that we should cut back the scope of the revisions and perhaps authorize the larger agencies to waive the protection of some rules. The two travel agency trade associations, on the other hand, support our proposed changes, as do some agencies, the smaller vendors, and several U.S. and foreign airlines. Almost all of the commenters, however, contend that productivity pricing must be allowed.

Justice believes that the vendors' restrictive contract provisions, including the five-year term almost invariably included in subscriber contracts, are designed to reduce competition, not to serve legitimate business goals. Nevertheless, Justice thinks that any effort to regulate such contract restrictions (other than the length of subscriber contracts) will be ineffective, primarily because the vendors have incentives to devise other contract terms that will prevent switching by agencies. Justice Comments at 4, n.2, and 13–15.

3. The Effects of the Contract Restrictions

We have determined to adopt our proposed changes with two substantial modifications: we will allow vendors to give travel agencies the option of a five-year contract term if they also offer a contract with a term no longer than three years, and we will allow productivity pricing. Before discussing the particular rule provisions at issue, however, we will explain in general why we have determined to adopt rules prohibiting certain restrictive contract provisions.

Promoting competition in the airline and CRS businesses requires us to eliminate vendor practices that unreasonably interfere with the ability of travel agencies to switch systems and use multiple systems, where taking such action is practicable. Not only do we wish to prevent the major vendors from foreclosing efforts by smaller systems to expand, but we want to give agencies an effective opportunity to use new databases and direct links with internal carrier reservations systems if they wish. However, we are unwilling to outlaw contract provisions that encourage efficiency and investment.

Obviously the contract terms at issue—five-year terms, "rollover clauses" that automatically extend the contract term, "minimum use clauses" that make an agency liable for damages for breach of contract if it fails to meet certain booking levels on the vendor's system, and liquidated damages clauses that impose substantial liabilities on agencies that breach their contract—restrict agency choices. Of course, any contract restricts the options of each party, since it must carry out its obligations or be liable for damages for breaching the contract. Usually such contract terms promote economic efficiency. However, as discussed below in connection with the specific rule proposals, we find that rollover clauses and minimum use clauses have no apparent purpose except to reduce competition for subscribers. Five-year contract terms, on the other hand, seem to provide some economic efficiency benefits.

The provisions at issue are of concern because of their widespread use. Very few subscriber contracts have a term of less than five years, and the major vendors at least impose minimum use and liquidated damages clauses as part of their contracts with the majority of their subscribers. ASTA Comments at 5;56 FR 12621. The record suggests that these contract terms are generally offered on a "take it or leave it" basis. Woodside Comments at 8; Parker Comments; see also NPRM, 56 FR 12622. American and Covia claim that travel agencies do not care about the restrictions and prefer to take the price benefits allegedly made possible by the restrictions. However, their reasoning is suspect in view of the opposition of the travel agency trade associations and the vendors' inclusion of restrictive terms in contracts where agencies pay undiscounted rates for CRS services. 56 FR 12623–12624.

The record indicates that the restrictive contracts do decrease CRS conversions and the use of multiple systems by agencies, a finding consistent with our conclusion that the restrictive contracts are designed to achieve that result. Justice ANPRM Comments at 29. Travel agencies, of course, would be reluctant to switch CRSs even if they had complete contractual freedom to do so, since changing from one system to another imposes costs for such things as retraining employees and transferring records. However, the contract provisions seem to make it much more difficult for agencies to switch systems.

While vendors initially competed vigorously for new subscribers, that competition occurred before the courts began upholding the liquidated damages clauses requiring subscribers to pay lost booking fees. Those decisions caused System One to substantially abandon its conversion efforts. 56 FR 12621, 12623. The record suggests that the number of conversions since then has declined significantly. Our NPRM invited commentors to provide more data on this issue in response to our tentative findings that competition had declined, 56 FR 12623, but only Covia of the parties opposing the proposed rules on contracts provided new data. Covia states that 300 Apollo locations switched to another system during a recent two-year period, Covia Comments at 11. Since Apollo had over 8,000 locations in 1988, Marketing Report at 51, in a two-year period less than four percent of Apollo's subscribers switched from Apollo to another system. This suggests that little switching now occurs, since in earlier years before System One's defeats in court more conversions took place.

We also find unpersuasive Covia's argument that the agencies already have the ability to use two or more systems, despite contract restrictions like minimum use clauses, since 20 percent of Apollo subscribers use at least one other system (Covia does not say whether this means 20 percent of the agency subscribers or 20 percent of Apollo locations). July 1, 1992 Covia Comments at 20. We noted in the NPRM that a significant number of agencies use two or more systems, but we pointed out that few make substantial use of more than one system. 56 FR 12593–12594. A minimum use clause may not prevent some agencies from using a second system, but the penalties for breaching the clause are severe enough that an agency will be unlikely to make substantial use of a second system.

American has provided no figures on the number of agency subscribers it has won or lost from other systems. Instead, American contends that in a number of markets there have been substantial changes in CRS market shares. March 2, 1992 American Comments at 12. However, significant market share changes in a few cities are consistent with the finding that the contract clauses reduce switching, since the cities where large market share changes have taken place have typically been

cities where a vendor established a hub or where the hubbing carrier acquired an interest in a CRS. NW Reply, Fisher affidavit. When a carrier has a large airline presence in a city, it can afford the expense of indemnifying agencies switching from other systems, since an increase in its CRS market share is likely to increase its airline revenues (and reduce its booking fee liability to other systems). See e.g., Delta Comments at 25; Justice ANPRM Comments at 29.

American and Covia also cite the decline in their net receipts from subscribers as proof that vendors still compete vigorously for subscribers. They claim that agencies are taking advantage of the vendors' competition for subscribers by demanding more CRS services for less money. While this argument seems plausible to some extent, it cannot substitute for more direct evidence on the number of agencies switching systems. Moreover, given the comments from the agency parties, we cannot accept the premise that most agencies have substantial ability to switch systems or use more than one system. See e.g., Woodside Comments at 8. We would prefer to have more data on the degree of switching, but given the modest scope of our rule changes—we are prohibiting only certain terms that seem to have no economic justification—the record on the number of CRS conversions is sufficient for our adoption of new rules.

We recognize that the travel agency industry includes large firms whose use of a CRS produces large amounts of booking fees and who are therefore very attractive CRS subscribers. As is apparent from the comments of several large agencies in this proceeding (*e.g.*, American Express and AAA), the largest agencies believe they have sufficient bargaining power not to need the protection of rules. However, large travel agencies do not produce most airline bookings. Large agency locations—those with annual revenues of $5 million or more—were responsible for 33 percent of the travel agencies' total revenues in 1987. Thus contract terms restricting only the CRS choices of medium-size and small agencies may still have a substantial impact on airline and CRS competition. Woodside's comments, moreover, suggest that vendors commonly refuse to waive restrictive contract provisions even when seeking large agencies as subscribers. Woodside Comments at 8.

As a result, we conclude that the restrictive contract terms significantly reduce the agencies' ability to change systems or to use multiple systems. That finding by itself cannot justify rules prohibiting the restrictions, since we must consider whether such rules would produce significant benefits.

Unduly restrictive contract terms are of concern to us because of their impact on competition in the airline and CRS businesses. We find that eliminating them would enhance airline and CRS competition. If subscribers are locked in to one system, other vendors will be denied the opportunity to compete for their business. As we explained in the NPRM, undue restrictions on the agencies' ability to change systems or use two or more systems injures airline competition in several ways. First, if agencies had a better opportunity to switch systems, that could enable a carrier with a CRS interest to enter a new city (or expand service at a city), because that carrier could expand its system's market share in that area and thereby support increased airline service. Secondly, the economies of scale in the CRS business place smaller systems at a competitive disadvantage. If the smaller systems had a greater ability to increase their market share, that could strengthen CRS competition (and thereby promote airline competition). Thirdly, increased competition for subscribers should cause vendors to improve the information-gathering and transactional capabilities of their systems (and thereby reduce architectural bias). 56 FR 12622.

The benefits of increasing agency ability to switch systems or use additional systems seem unlikely to be obtained through market forces. While Worldspan competed for subscribers for some time by offering them less restrictive contract terms, Worldspan states that it has become unwilling to offer less restrictive contracts because doing so exposes its subscriber base to conversions to other systems. See 57 FR 22643, 22644 (May 29, 1992).

Despite the benefits of the proposed rules, we would not regulate the contract provisions if they served legitimate purposes. However, the record indicates that they do not (and our decision to allow productivity pricing will enable vendors to obtain adequate compensation if a subscriber chooses to make little use of a system). Our review of the evidence caused us to conclude in the NPRM that the contract provisions at issue were developed to foreclose competition for subscribers. 56 FR 12621. No party has submitted evidence contradicting that finding.

Furthermore, the contract restrictions do not appear to be essential for the efficient marketing of CRS services. In the European Community, subscribers are free to terminate a contract at the end of its first year. In Canada, the maximum permissible term for subscriber contracts is three years. 56 FR 12623. We asked parties to comment on the effect of these foreign rules on CRS operations. No party provided any evidence that the European and Canadian limits handicap CRS operations.

While long-term contracts usually promote economic efficiency, as we noted in the NPRM, the vendors' contracts do not provide the benefits typically provided by multi-year contracts. 56 FR 12622. While the contracts protect the vendors' interests, they do not assure stability in price and service for most subscribers. As ASTA has pointed out, most subscriber contracts allow vendors to raise charges and fees significantly during the term of the contract. ASTA Comments at 5. No vendor has disputed that statement, although some large agencies contend that long-term contracts can benefit agencies. Covia claims nonetheless that the contract provisions are ineffective, since its subscribers continually receive buy-out offers from other vendors, which forces Covia to renegotiate the contracts and to offer better terms in order to keep subscribers. July 1, 1992 Covia Comments at 5. Covia's claims do not match other evidence on this issue and are inconsistent with Covia's arguments that the restrictive contract terms are necessary. If, as Covia asserts, it must renegotiate contracts every few years to keep subscribers from switching to another system, the restrictive contracts would presumably be ineffective. Covia nonetheless insists that it must be able to obtain such restrictions.

Covia also claims that our proposed rules will drive up agency costs and that the agencies likely to suffer the most will be the smaller agencies. Covia Comments at 30. We disagree. The rules are designed to increase competition for subscribers, so they should restrain agency price increases. Other parties doubt that the rules would have the dire effects predicted by Covia. For example, the Board's adoption of similar rules did not affect the quality of the deals offered agencies by subscribers. Ten Major Agencies Comments at 21. And Worldspan and System One have been seeking subscriptions from small agencies even though those two vendors make little use of minimum use clauses and other restrictions. Hewins Comments at 4–5. In addition, the larger agencies, not the smaller ones, are the recipients of free or discounted CRS

services. If subscriber charges increase, the smaller agencies would not necessarily be the primary victims.

On the other hand, we recognize that increasing vendor competition for subscribers will not be free of costs. It may facilitate efforts by the owners of smaller systems to use their airline dominance at their hubs to obtain a dominant position in the local CRS markets, as we recognized in the NPRM. 56 FR 12623. However, no one has shown that this threat at some cities outweighs the potential gains elsewhere in the country. In addition, if vendors compete more for subscribers, their costs may increase and thus lead to increases in booking fees. *Ibid.* The record does not indicate that increased booking fees are likely.

Even if the proposed rules would be beneficial in theory, we must consider whether they would be effective. We find troublesome Justice's observations that the vendors are likely to create methods for evading any contract rule, just as they did with the current rules; that trying to enforce stronger rules on contracts will be costly and ineffective; and that we will end up micromanaging contracts. Justice Comments at 13–14. Justice's comments have considerable validity and have helped persuade us not to adopt some of the rule proposals advanced by parties (*e.g.*, proposals to limit the damages obtainable by vendors on a subscriber's breach of a contract). However, given the relatively modest scope of our amendments on subscriber contracts, we doubt that Justice's concerns outweigh the apparent value of those amendments.

Against this background, we will now discuss our resolution of the specific rule proposals made by the NPRM and the parties.

4. Maximum Contract Term

Under the current rules, no subscriber contract may have a term longer than five years. In the NPRM we proposed to make the maximum term three years. After reviewing the comments, we have decided to modify that proposal by giving vendors the option of offering subscribers contracts with a term of not more than five years as long as the vendors also offer the subscriber a contract with a term of not more than three years.

When we proposed a three-year maximum term for subscriber contracts, we noted that the five-year rule had been based on American's representation to the Board that a five-year term was necessary to preserve certain tax benefits then available. The tax provision cited by American was later repealed, so the original justification for a five-year term no longer exists. 56 FR 12622. We proposed a three-year term to provide agencies a greater opportunity to change systems, but we requested comment on what maximum term should be allowed, since parties had made various proposals on this issue. 56 FR 12624.

The smaller vendors, ASTA, and ARTA support a rule prohibiting a term longer than three years. Other parties assert, however, that agencies should be able to obtain a five-year contract if they wish. Woodside supports a rule requiring vendors to offer travel agencies a three-year contract but allowing them to offer a five-year contract as well. Thomas Cook similarly would like a rule giving agencies the option of signing a five-year contract with lower fees for CRS services reflecting the cost savings obtained by vendors due to the longer term of the contract. The American Automobile Association suggests that agencies should be able to agree to a five-year term in an initial contract for CRS services, since the agency's expenses for first using the system would be amortized over the longer term. It also suggests that a three-year maximum term for renewal contracts would be workable. American and Covia state that a rule allowing a vendor to offer a subscriber a five-year contract as an alternative to a three-year contract would be acceptable to them. American Comments at 33; Covia Comments at 84. Finally, while ARTA supports our three-year proposal, it states that some of its members would prefer having the option of taking a longer contract instead of a three-year contract. ARTA Comments at 19.

We have determined to give agencies the option requested by several of them of choosing between a three-year contract and a five-year contract. Judging by the comments filed by some agencies, a longer term contract can provide economic benefits for subscribers by potentially providing some assurance that they will continue to receive CRS services from the vendor for a stated period and the possibility of lower CRS charges based on vendor cost savings from the longer contract.

We recognize that permitting agencies to accept a five-year contract will not create as much flexibility for subscribers as several parties wish. However, we think that the required offer of a contract with a maximum term of three years will provide substantially more flexibility for agencies desiring a greater ability to consider changing systems.

Since we are permitting vendors to offer a five-year contract in part because it may be more economical, vendors necessarily must be allowed to offer subscribers different terms if they agree to a longer contract. We expect, however, that the difference in terms will largely reflect the efficiencies created by the agency's acceptance of the longer contract. If the terms for the shorter contract are unduly onerous, then the vendor would not be deemed to have made a good faith offer of a contract no longer than three years in length as required by the rule.

5. Addition of New Equipment

In the ANPRM we tentatively found that the restrictive effects of the standard five-year contract term were aggravated by the vendors' common practice of making subscribers who acquired additional equipment sign a separate five-year contract for the new equipment. This practice often leads to an agency's obtaining CRS services and equipment under several five-year contracts that never expire at the same time. We therefore proposed to require vendors to include additional CRS equipment obtained during the term of an agency's subscription agreement under that contract, so that at its expiration the agency would be in a position to replace all of its CRS services at that time. 56 FR 12624. The proposed rule, however, contained the proviso that "the bona fide offering of alternative lease periods for additional components at commercially reasonable rates" would be permissible.

ASTA supports this proposal. ASTA Comments at 6–7. Covia considers it acceptable as long as the vendors may calculate their charges for the additional equipment in a way which reflects the remaining term of the agency's subscription agreement. Covia Comments at 90.

While our proposal might provide some additional flexibility to agencies, requiring the inclusion of new equipment within the term of an agency's existing contract, despite the proviso, could interfere with the goal of economic efficiency.

If an agency requested additional equipment when its existing CRS contract was close to its expiration date, the vendor might understandably be reluctant to provide the additional equipment. The rules as a result might preclude a subscriber from obtaining additional equipment as its contract neared the end of its term. Alternatively the price charged for the additional equipment might be unduly high due to the short time left on the contract. In either event the rule could have untoward consequences. In addition, the rule would probably be difficult to

enforce. We have accordingly determined not to adopt it.

6. Rollover Contracts

After the current rules took effect, vendors began imposing rollover clauses—clauses that cause a contract to be automatically renewed for an additional five-year term whenever certain events happen (usually the agency's acquisition of additional CRS equipment or its opening of a new location)—in many subscriber contracts. The clauses became controversial, since they further restricted subscribers' ability to switch to another CRS. Because of the controversy, vendors agreed not to enforce the clauses, although they apparently remain in many subscriber contracts. Marketing Report at 86, 88; ASTA Comments at 5.

In the NPRM we proposed to proscribe rollover clauses. 56 FR 12624. Our proposed rule received the support of Worldspan (Comments at 31), Woodside (Comments at 8), and ASTA (Comments at 5). They agree that rollover clauses serve no legitimate purpose and should be prohibited. No one has tried to defend rollover clauses.

We will adopt our proposal. The use of rollover clauses nullifies the Board's determination that subscriber contracts should not have a term longer than five years, and the clauses are not needed to protect a vendor's legitimate interests. If an agency opens a new location or adds CRS equipment, the vendor can refuse to provide the new services and equipment desired by the agency unless the agency agrees to pay the vendor enough for the added equipment and services.

7. Minimum Use Clauses

Soon after the Board adopted the current rules, the three largest vendors began requiring subscribers to accept minimum use clauses in their contracts. Minimum use clauses make an agency's failure to meet certain minimum booking levels a breach of contract, thereby obligating the agency to pay damages calculated according to the liquidated damages provisions. Because the liquidated damages include lost booking fees, a breach will make the subscriber liable for a larger amount of damages. Minimum use clauses accordingly discourage agencies from making significant use of more than one system. The clauses, moreover, seem designed to protect the vendor's subscriber base from competition rather than to ensure that the vendor receives adequate compensation for the services and equipment provided the subscriber. 1988 CRS Study at 124–126; Marketing Report at 87–88.

We accordingly proposed to prohibit minimum use clauses. 56 FR 12624. We also doubted at that time the value of allowing vendors to increase the fees due from subscribers when the latter did not meet specified minimum booking levels (such pricing is called productivity pricing). The draft rule would have prohibited productivity pricing as well. *Ibid.*

While most commenters supported our proposal to eliminate minimum use clauses, almost all parties commenting on the issue defended productivity pricing and asserted that it should be allowed. Consequently, while we will adopt the proposal on minimum use clauses, the comments have persuaded us that productivity pricing is economically efficient and should be allowed to continue. In this section we will discuss our decision to finalize the proposed ban on minimum use clauses and in the next section our changed decision on productivity pricing.

While productivity pricing encourages efficiency, minimum use clauses are not reasonably tailored to encourage productive usage of a system. Instead, in view of the severe damages a subscriber will incur if it breaches the clause (and thus breaches its contract), these clauses operate as a penalty giving the agency little ability to limit its usage of a system. Worldspan, Delta, System One, ASTA, ARTA, Woodside, and Hewins support the proposed proscription of minimum use clauses. The American Automobile Association states that prohibiting minimum use clauses would be acceptable, and American does not oppose the proposal. Covia, on the other hand, defends them.

We cannot agree with Covia's defense of the clauses. First, Covia plainly errs in saying that its clause cannot operate as a deterrent to use of a second system. Covia bases this assertion on the form of its minimum use clause, which requires an agency to continue using Apollo at half the rate of the agency's level of usage during the first six months of the contract term. In Covia's view, the agency itself determines the minimum usage level under the contract. Covia Comments at 29. However, an agency using Apollo as its only system during that six month term has no control over its usage level, since all of its bookings will be made through Apollo. Worldspan Reply at 29; see also System One Comments, Lenza Affidavit at 19. Furthermore, Covia has never explained why its alleged need for assurance of booking fee revenues requires it to treat the agency's failure to meet the minimum use requirement as a beach of the contract. If, as Covia asserts, it must ensure that it receives adequate revenues from each subscriber, it can adopt contract terms requiring the subscriber to pay additional fees if certain booking levels are not maintained, as is done by other systems. Finally, as we noted in the NPRM, booking fees represent in part monopoly rents, and we do not see a public interest in guaranteeing a vendor's ability to obtain monopoly rents. 56 FR 12624.[4] Given the lack of any necessary economic value to minimum use clauses (and the vendor's ability to protect their legitimate interests through productivity pricing), as well as the clauses' effect in discouraging an agency from making substantial use of a second system, we will prohibit minimum use clauses. In doing so we are acting consistently with the general provision in the current rules which prohibits vendors from directly or indirectly prohibiting subscribers from using other systems. Section 255.6(b).

We also proposed to ban the parity clauses that require an agency to use a number of terminals from the vendor that are proportional to the number used on other systems. This kind of clause also restricts agencies from making effective use of more than one system. 56 FR 12624. No party has attempted to justify parity clauses, and several support our proposal. We will therefore adopt the proposed rule.

8. Productivity Pricing

Productivity pricing differs from minimum use clauses because a subscriber's failure to meet the minimum booking requirement does not constitute a breach of the agreement making the agency liable for substantial damages. Instead, the agency must pay a higher rate for having access to the system. Apollo, for example, typically gives a subscriber a discount of 60 to 100 percent from the standard "rack" rates, depending on the number of bookings per terminal in the previous year. 15 Agencies Comment at 8–9.

Thus this type of pricing encourages the agency to make efficient use of its CRS equipment (and to avoid obtaining more equipment than reasonably needed for its business). Even the parties otherwise urging us to eliminate restrictive contract provisions—the

[4] As Covia notes, our enforcement staff dismissed a complaint by System One against Covia based in part on claims that Covia's minimum use clauses violated the current rules and section 411 of the Act. Order 90–1–32 (January 17, 1990) at 17–18. However, the enforcement staff's decision not to institute an enforcement proceeding on the basis of the record there cannot preclude us from determining on the record here that minimum use clauses should be prohibited, as was noted in that order.

smaller vendors, the travel agency trade associations, and agencies like Hewins—represent that productivity pricing serves legitimate goals and does not make it impracticable for agencies to choose to switch many or most of their bookings to a second CRS. Since productivity pricing often promotes economic efficiency and received the overwhelming support from the commenters, we will not prohibit its use.

We recognize that several smaller agencies complain that productivity pricing can have irrational results and result in heavy charges. Stowe Travel Comments; Parker Comments; Travel Consultants Comments. In some cases, productivity pricing apparently can force an agency to stop using CRS terminals that it had previously bought. Without knowing the details of these agencies' CRS charges and usage, we cannot judge whether the implementation of the clauses in those cases was irrational.

Southwest, on the other hand, urges us to prohibit productivity pricing since vendors can use it to discourage agencies from using other systems or databases (or direct links to a carrier's internal reservations system). While productivity pricing may deter agencies from making full use of their opportunity to use other sources of travel information and other means of booking airline services, the advantages of productivity pricing outweigh that threat. We note again that a number of parties supporting rules to ensure more competition for subscribers support productivity pricing.

In line with our goal of encouraging economic efficiency, we also wish to reaffirm the reasonableness of subscriber price structures that include charges based on usage. A vendor may rationally determine to charge subscribers more as they make more use of the system. Worldspan Comments at 32; American Comments at 35. Such pricing schemes can benefit participating airlines as well. Alaska Comments at 31–33. Some parties misconstrued our proposals as an indication that we wished to discourage transaction charges. However, we recognize that pricing structures that base charges on the number of transactions may promote efficiency by encouraging agencies to use a system more efficiently and by causing the heaviest users to pay more. We do not intend to bar such pricing structures.

9. Liquidated Damages

To deter subscribers from breaching their CRS contracts by switching to another system before the end of the contract term, vendors impose contract provisions requiring agencies to pay heavy damages upon a breach of the contract. The contracts typically provide for the payment of liquidated damages, that is, damages calculated according to a fixed formula rather than on the basis of a calculation of the actual damages suffered by the vendor from the breach. Liquidated damages themselves are not controversial and are used in many contracts outside the CRS business. The vendors' liquidated damages provisions, however, are controversial because they require the subscriber to pay the amount of booking fees that the vendor would have received had the agency kept using its system for its airline bookings. The inclusion of lost booking fees in the calculation of damages greatly increases the amount owed by an agency on its breach of the contract—and thus greatly increases the agency's desire to avoid a breach. 56 FR 12625.

However, as an agency nears the end of its contract, the amount of liquidated damages due upon a breach shrinks, because the amount of booking fees lost by the vendor will decline. Some vendors have adopted a pricing structure that results in an increase in the amounts owed by an agency on its breach as the number of years left in the contract declines. These contracts treat the discounts given a subscriber from the standard CRS charges as a credit which must be repaid if the agency terminates the contract before the end of its term. 56 FR 12621. For example, Pegasus Travel submitted a copy of System One's claim for damages if Pegasus quit using System One 13 months before the agency's subscription contract would expire; of the $34,000 demanded by System One, $18,000 consisted of a refund of various subsidies including the credits allegedly paid the agency by the vendor during the first 47 months of the contract. Pegasus Comments, Encl. 2.

In the NPRM we tentatively found no need to specifically limit the vendors' ability to obtain liquidated damages. 56 FR 12625. We pointed out that vendors were entitled to recover damages if a subscriber breached a contract and that a better cure for complaints about liquidated damages would be a shortening of the maximum contract term. Insofar as the inclusion of lost booking fees was concerned, we reasoned that our proposed rules banning minimum use and parity clauses would deny a vendor any reasonable expectation that the agency would have used its system for all or most of the agency's bookings had the agency not terminated the contract before the end of its term. Without such an expectation, the vendor could not under contract law recover lost booking fees as an element of its liquidated damages, because liquidated damages cannot operate as a penalty and must reflect a reasonable estimate of what the injured party's actual damages would be. 56 FR 12625.

We also declined to propose rules banning such practices as the treatment of discounts as credits that must be repaid if the agency breaches its subscriber agreement before the end of its term. 56 FR 12625.

ASTA supports a ban on liquidated damages including lost booking fees, ASTA Comments at 17, while Worldspan and Delta would also ban the recovery of amounts like discounts and promotional support. Worldspan Comments at 31; Delta Comments at 30. American Express suggests that the liquidated damages clauses are the main reason why agencies do not switch systems. Am. Express Comments at 6, fn.

We are not convinced that adopting a rule in this area is necessary or wise. The vendors' use of contracts enabling them to demand the repayment of "credits" on an agency's breach indicates the difficulty of attempts to regulate contract terms in detail. Presumably the vendors devised such contract terms either to avoid the controversy over liquidated damages or to supplement liquidated damage claims when a contract is breached near the end of its term. In either event, this experience supports Justice's contention that efforts to regulate contract terms are likely to be ineffective. Justice has pointed out that vendors can adopt contract pricing terms that will deter early contract terminations as effectively or almost as effectively as the damages clauses that some parties ask us to outlaw.

However, while we are not adopting a rule, we repeat that our rules are designed to ensure that vendors will not have a legitimate expectation of obtaining all or most of an agency's CRS bookings. Our prohibition of minimum use clauses and our rules allowing agencies to use third-party hardware should ensure that agencies have the ability to use different systems, not just the system offered by their current vendor. As a result, a vendor may not legitimately include an element for lost booking fees in its liquidated damages formula, since the vendor cannot reasonably count on an agency using its system for its bookings. Since we are permitting productivity pricing, vendors have the ability to obtain adequate compensation for providing CRS services and equipment to their

subscribers and to obtain adequate damages in the event of a breach, even if they cannot recover lost booking fees.

10. Exemption for Large Agencies

The rules proposed by the NPRM, like the current rules, would apply to all subscribers. American Express and the Fifteen Major Agencies ask us to allow large agencies (or any interested agencies) the right to waive various parts of the rules on subscriber contracts. The Fifteen Major Agencies recognize the value of our proposals for small and medium-sized agencies but assert that agencies as large as themselves do not need the protection of the contract rules and so should be able to waive them. American Express advances similar arguments. System One and ASTA oppose the creation of any waiver for large agencies.

We will not create a special exemption for large agencies. As System One points out, we are not adopting the subscriber rules in order to give travel agencies more bargaining power in negotiating with vendors. System One Reply at 8–9. The rules instead are designed to keep vendors from using contract restrictions that impair CRS and airline competition. Moreover, we have abandoned the proposal that the larger agencies mainly dislike—the suggested ban on productivity pricing—and we are giving agencies the ability to accept five-year contracts if they wish. No one has shown that either the existing subscriber contract rules or the rules we are adopting will significantly interfere with the operations of any agency, so we see no need to create an exemption for any class of agencies.

11. Tying Practices

Under the current rules a vendor may not condition an agency's receipt of commissions on the agency's use of that vendor's CRS. However, despite the rule, a number of parties have alleged that some vendors tell agencies that they cannot obtain favorable commissions (*e.g.*, override commissions) without subscribing to the vendor's CRS. In addition, parties complain that some vendors tell agencies that they cannot obtain airline marketing benefits (*e.g.*, the ability to waive restrictions on discount fares or to book important customers on oversold flights) without choosing the vendor's CRS. Since the success of many agencies depends on override commissions and airline marketing benefits, a vendor's threat to deny such benefits to an agency can effectively coerce the agency into subscribing to the vendor's system if that vendor is a major carrier in the agency's city. 56 FR 12625.

Since the tying of airline commissions and marketing benefits to an agency's CRS subscription distorts competition in both the airline and CRS industries, Justice and other parties asked us to consider adopting a rule prohibiting such practices. We agreed that such tying practices represented a competitive abuse, but we agreed also with Justice that a rule barring the tying of marketing benefits and CRS choices appeared at best difficult to enforce. The enforcement difficulty stems from the unlikelihood that either the vendor or the agency would tell anyone about an unlawful tying arrangement. 56 FR 12625–12626. While we did not propose to ban the practice, we asked parties to suggest methods for making such a rule enforceable. We also proposed to clarify the existing rule on the tying of commissions so that it expressly covered both CRS usage and subscriptions. *Ibid.*

Several parties—American, Covia, System One, Delta, Alaska, Southwest, Woodside, and Hewins—urge us to broaden the prohibition against tying so that it prohibits the tying of airline marketing benefits. Moreover, American goes on to argue that we should repeal the current rule if we do not extend its coverage to airline marketing benefits. The only party opposing a wider rule is ASTA, which claims that no limits should be placed on an agency's ability to negotiate for benefits.

While we continue to believe that the tying of airline marketing benefits to the agency's CRS subscription is a competitive abuse, we have determined not to widen the current rule to cover marketing benefits. None of the parties advocating a stronger rule proposed an effective method for its enforcement. Moreover, the arrangements tying airline marketing benefits and CRS subscription are likely to be so informal and open-ended that it could be difficult to say whether a particular situation violated the rules. A vendor's threat to reduce or eliminate an agency's commission seems more likely to coerce the agency's choice of a system than would promises of marketing benefits. Thus, despite American's request to the contrary, we will maintain the current ban against the tying of commissions to CRS usage and subscriptions, with the clarification proposed by the NPRM. We will clarify the rule, moreover, as proposed in the NPRM, so that there will be no ambiguity in its language discouraging enforcement action.

12. Other Subscriber Contract Issues

On the ground that the vendors' discriminatory pricing of CRS services injures the ability of smaller agencies to compete with large agencies, ARTA asks that we require each vendor to charge the same amount to all its subscribers. We will not grant this request. ARTA has not shown that CRS pricing differences have any impact on airline competition or otherwise raise issues within our jurisdiction under section 411. ARTA's request could also interfere with the vendors' competition for subscribers; for example, a vendor may be able to compete for subscribers in markets where it has a relatively small airline presence only by offering discounted CRS prices.

ASTA proposes an analogous rule that would require the filing of all subscriber contracts (but with price terms omitted). Overland also suggests that all subscriber contracts should be public. We are not convinced that such rules would be beneficial, especially without the inclusion of price terms, while such requirements would impose a substantial paperwork burden on the vendors.

ASTA urges us to prohibit various other subscriber contract provisions, such as the vendors' denial of all warranties and requirements that any suits on the contract must be heard in the vendor's home state, that are assertedly unfair to travel agencies. Whether or not the terms are unfair, our authority under section 411 focuses on unfair methods of competition and deceptive practices, not on eliminating inequitable practices. See, *e.g.*, Order 92–5–60 (May 29, 1992) at 13–14.

KLM asks that we prevent vendors from providing CRS equipment to subscribers at less than cost. Here again there has been no adequate showing of harmful effects on airline competition—and no analysis of how such a rule would affect the economics of travel agency operations or CRS competition.

13. Grandfathering of Existing Contracts

A number of parties commented on whether the proposed new rules should apply to existing contracts. On the assumption that we would make final our proposal to bar productivity pricing, several parties argued that any such rule should not apply to existing contracts, because the subscribers had agreed to other terms in the contract in the belief that productivity pricing would be allowed. The major vendors argued, on the other hand, that we should not apply the new rules to current contracts, since each vendor had offered agencies various forms of bonuses and credits in the belief that it would obtain other benefits from the contract.

As discussed above, we are adopting only some of the subscriber contract

rules proposed in the NPRM. We are barring rollover clauses, minimum use clauses, and parity clauses, but we are not blocking subscribers from having productivity pricing clauses and the option of accepting a five-year contract.

We have determined to make the prohibition of rollover clauses, minimum use clauses, and parity clauses effective on the effective date of these rules. Those clauses do not serve legitimate purposes, and the vendors claim that they have not been enforcing rollover clauses anyway. Moreover, since we issued the NPRM well over a year ago, the parties have had substantial time to become ready to adjust their contract practices to the possibility that we would make our proposals final. On the other hand, we are allowing vendors to offer agencies a five-year contract as long as they also offer a contract with a term not longer than three years. Given our conclusion that five-year contracts may be beneficial in some respects, we have determined to apply the new rule on contract length only to contracts signed after the effective date of these rules.

N. CRS Contracts

We proposed in the NPRM to require contracts between vendors, on the one hand, and participating carriers and subscribers, on the other hand, to incorporate certain provisions of our rules that affect the parties' contractual obligations and expectations. If such provisions of the rules were incorporated in contracts, a party could obtain a judicial resolution of its rights and obligations, for example, if a dispute arose over the accuracy of a vendor's bill for booking fees. As we noted, these kinds of disputes involve issues typically resolved by the courts in contract cases and would neither require our expertise for decision nor raise significant policy issues. 56 FR 12626.

American, System One, Worldspan, Delta, Northwest, TWA, America West, Aer Lingus, Air France (albeit with qualifications), KLM, LTU, the Orient airlines, ASTA, and ARTA support the proposal. American represents that it already includes a similar provision in its contracts as a vendor. The only opponent is Covia, which argues that we do not have the authority to adopt the proposal.

We have decided not to make our proposal final, since it involves significant drawbacks. Contract suits can be expensive and time-consuming for all parties, so it is not clear that the proposal would provide an effective means for parties to enforce their rights. Furthermore, although many contract cases would not present policy questions requiring our expertise or judgment, some would. Finally, allowing the courts to interpret the rules could lead to inconsistent decisions.

O. Enforcement of the Rules

Under the current rules a vendor, participating carrier, or travel agency may obtain enforcement of the rules only if its filing of a third-party complaint under 14 CFR 302.200 *et seq.* causes us to institute an enforcement proceeding. In view of complaints that we have not adequately enforced the rules, we proposed to create an additional avenue of enforcement, an arbitration procedure subject to our supervision. We tentatively found that the creation of such a procedure would be within our statutory authority, as the Board had found when it was contemplating an arbitration procedure for resolving certain CRS issues. 56 FR 12626–12627.

The major vendors contend that the Department has no authority to require arbitration (American also claims that the availability of arbitration will lead to a lot of litigation). On the other hand, Worldspan, Northwest, Delta, TWA, System One, Alaska, America West, Southwest, ASTA, ARTA, and several foreign carriers urge us to adopt the arbitration proposal.

We have decided not to adopt the proposal. Despite the complaints about our failure to enforce the rules in the past, relatively few complaints about CRS violations were filed. In several cases civil penalties were assessed and cease and desist orders were issued. In several others, corrective action was taken by one or more vendors at the Department's request and enforcement action proved unnecessary. Still others were dismissed because the complaints did not show that an enforcement proceeding was warranted or because this rulemaking would be examining the issues raised by the complaints (*e.g.*, whether minimum use clauses should be prohibited). As a result, we have decided at this time not to adopt the arbitration proposal, which would be a significant departure from our past enforcement practices, albeit within our statutory authority.

We appreciate the importance of these rules for promotion competition in the airline and CRS businesses and the concern expressed by many parties that a failure to enforce the rules will frustrate their intent. If complaints alleging violations of the rules are filed, we will give them careful consideration and institute enforcement proceedings when appropriate.

P. International Issues

The current rules create an exception from the vendor's duty to comply with the rules because some foreign systems in the past have discriminated against U.S. carriers. Section 255.9(b) accordingly excuses a vendor from compliance insofar as a foreign carrier is concerned if that carrier or an affiliate operates a CRS that does not display the flights of all U.S. carriers equally with the foreign vendor's flights. We proposed to readopt this rule with two changes, one requiring the U.S. vendor to give 14 days notice to us and the foreign carrier before it could retaliate against that foreign carrier under this section, the other authorizing retaliation if a foreign carrier's system imposed discriminatory terms on U.S. carrier participation in its system. 56 FR 12627.

SAS, the only commentor on this proposal, asks that we allow retaliation only if the foreign system discriminates against U.S. carriers who have signed a participation agreement with the foreign system. We decline to make that change, since the U.S. carrier may choose not to sign an agreement because of the discriminatory terms for participation. As a result, we will adopt the rule as proposed.

Q. Effective Date

We have determined to make these rules effective 75 days after publication. As discussed above, several provisions in the new rules shall go into effect at a later date. For example, the rule requiring the elimination of default features favoring the vendor will not take effect for one year.

Covia argues that the new rules should not take effect for 120 days, but it provides no evidence supporting that claim. Covia Comments at 95. We doubt that so must time would be needed. After all, the Board made its rules effective 90 days after publication, and those rules required extensive changes in the CRS displays and contracts with participating carriers and travel agency subscribers. However, if a vendor or other party would be unable to comply with a provision in the new rules, they can request an exemption from the requirement at issue in order to have time to comply.

R. Sunset Date

When the Board adopted the existing rules, it included a sunset date (originally December 31, 1990) for the rules, so the need for the rules and their effectiveness would be reviewed after several years' experience. In the NPRM we proposed to establish a new sunset date for the new rules, a date

approximately five years after the adoption of the new rules. As we noted, however, the sunset date would not keep us from reviewing and modifying the rules at an earlier time if that appeared desirable. 56 FR. 12627.

Of the parties commenting on this proposal, none objected to a sunset date, although several argued that we should monitor CFR developments on a continuing basis during the term of the rules and that we should not wait until the sunset date to adopt additional rules that became necessary.

Since we believe that establishing a sunset date is wise, we will finalize our proposal, although we will have the rules terminate on December 31, 1977, rather than the earlier date proposed in the NPRM. Scheduling the next full-scale review of the rules for a date five years from now will not, of course, keep us from examining the impact of the new rules on a continuing basis after their adoption or from considering changes to the rules if experience suggests that they are necessary. In particular, the rule on third-party hardware and software may affect the CRS and airline businesses in ways that suggest that the rules should be modified.

Some parties asked that we formally designate staff members to monitor experience under the new rules. While we will not formally name someone, we suggest that anyone with comments on the new rules contact the two staff members most familiar with these rules and our past CRS studies, Laurence T. Phillips, Chief of the Industry Economics and Finance Division, Office of the Assistant Secretary for Policy and International Affairs, and Thomas L. Ray, Senior Trial Attorney, Office of the General Counsel.

S. Preemption

The group of sixteen states and one territory asks us to declare that our rules are not intended to preempt the states from enforcing their deceptive practices laws against travel agents. States Comments, p.9,n.8. ASTA, on the other hand, urges us to rule that the states are prohibited from enforcing their laws in areas where we have adopted regulations or determined not to adopt regulations. ASTA Reply at 18–20.

We are unwilling to issue any rules on preemption in this proceeding. We did not propose any rule on preemption. Without detailed comments on the issue, we could not develop an adequate standard for preemption, given the limited scope of our regulation of the travel agency business. We regulate travel agency operations only insofar as they involve the sale of air transportation; we do not license travel agencies or regulate their sale of other travel services, such as hotels, rental cars, and cruises.

However, the Act and established preemption principles limit the states' ability to regulate travel agencies. Under section 105 of the Act, 49 U.S.C. 1305, the states may not enforce any law relating to the rates, routes, or services of air carriers holding authority under the Act. *See Morales* v. *Trans World Airlines*, 112 S.CT 2031 (1992). The states also may not enforce laws conflicting with regulations adopted by us. *Cf. Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 485 U.S. 141, 153–154 (1982). Given these principles, we see no immediate need to adopt a rule on preemption. The states, moreover, are not threatening to begin regulating CRS sales of airline services, so ASTA's members do not have an immediate need for a ruling on the exact scope of preemption.

T. Divestiture

Alaska and America West contend that the best solution for CRS problems would be divestiture, a prohibition against CRS being owned by airlines or airlines affiliates. ARTA also recommends taking a look at this remedy.

We are unwilling to consider divestiture in this proceeding. As we pointed out in the NPRM, no one had suggested in their comments on the ANPRM that we should propose a divestiture rule. While Alaska, America West, and Midway then considered divestiture a possible remedy for CRS problems, they considered divestiture desirable only if accompanied by a ban against the new owners' sale of bias and discriminatory treatment and doubted that we had the authority to adopt such rules. In the NPRM we specifically stated that we would not propose a divestiture rule. 56 FR 12627. Since we never proposed such a regulation or asked for further comment on the issue, we can not now adopt a rule requiring divestiture. In addition, the affiliation between airlines and CRSs may provide important efficiency benefits.

U. Notice of Override Commissions

Finally, some parties urge us to adopt rules preventing travel agencies from giving biased advice to their customers in the hope of increasing their override commissions. Travel agencies participating in override commission programs receive higher commission rates when they book more customers on the airlines offering them such incentive commissions. See Marketing Report at 26–30. ASTA, ARTA, and Woodside deny that travel agencies give biased advice, since they contend that an agency will lose too many customers if it provides poor advice in order to obtain more commissions. Other parties disagree and urge us to adopt a rule such as a requirement that travel agencies tell customers which carriers are offering them override commissions.

The effect of override commissions on airline competition and agency operations is outside the scope of this proceeding, which has not focused on the competitive and consumer deception issues raised by incentive commission programs. Furthermore, the record does not show that override commissions distort the advice provided customers by travel agencies. As we discussed above in connection with proposals to regulate CRS displays created by travel agencies, we are not convinced that agencies engage in a significant amount of deception. Thus there is no basis in this proceeding to adopt a rule on the subject of override commissions.

Regulatory Impact Analysis

A. Introduction

Executive Order 12291 requires every executive agency to prepare a regulatory impact analysis for each major rule. In the Order a major rule is defined as one that is likely to result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions, or (3) significant adverse impacts on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This regulatory impact analysis seeks to assess the economic and competitive consequences of our final rules on the computer reservations system, airline, and travel agency industries. Under the terms specified in the Executive Order, our regulations constitute a major rule, since they could conceivably have an annual impact on the economy of $100 million or more.

The Civil Aeronautics Board adopted rules to govern airline-owned CRSs that became effective on November 14, 1984. The Board decided the rules were necessary to preserve airline competition. In brief, the Board concluded that the CRS industry was characterized by high national and regional levels of market concentration; barriers to entry into the CRS business were high; CRSs are the travel agents' primary source of information on airline

services, so every major airline had to participate in each system; and several of the vendors' marketing and business practices demonstrated their market power and incentives to use this power to disadvantage their airline competitors. The structural and competitive conditions that compelled the Board to adopt rules remain largely in place today.

We are adopting additional rules. By encouraging competition among vendors and by reducing their ability to use their market power to impede airline competition, these rules will foster airline competition. Our rules will make it easier for smaller vendors to gain market share and for non-airline firms to enter the CRS industry or to provide products and services to travel agents. The rules will reduce the advantage enjoyed by CRS-owning airlines in securing bookings from subscribers, diminish the magnitude of the incremental airline revenues now being earned by vendor airlines, and make it easier for other airlines to enter air travel markets or to expand their market shares. The rules will encourage competition among vendors for travel agent subscribers, which will benefit the travelling public.

Unfortunately, we do not have information of the type and detail that would allow us to quantify with accuracy the benefits to air travellers or to estimate the costs to the CRS vendors of complying with our rules, although our proposed regulatory impact statement specifically asked the parties to provide such information. Thus, of necessity our analysis will rely on a qualitative assessment of the costs and benefits of the rules. We are also not able to estimate the long-term consequences of our rules on CRS competition, including incentives for technological innovation and improved productivity. The overriding benefit of greater competition and higher productivity in the air travel industry is, of course, its downward pressure on air fares and the benefits consumers enjoy as a result.

B. The CRS Industry: Sources of Market Power

Because airlines rely on travel agents to sell the majority of their tickets and because almost all travel agents rely on CRSs to sell airline services, CRSs have become essential to the marketing of virtually every airline's services.

Although there are four major CRSs operating in the United States, each CRS vendor has the power to impair airline competition. Practically every travel agency relies on a CRS, but there are costs associated with installing and operating more than one CRS in an agency, and these costs are augmented by restrictive contract terms and non-contractual means of influencing subscribers. Thus each CRS vendor has a large measure of control over the marketing of air transportation by its subscribers.

There are four financial benefits of owning a CRS for an airline: the booking fees received from other airlines, the fees received from travel agents and other subscribers, the value of the reservations services provided to the airline owner, and the increase in airline bookings, revenues, and profits generated because CRS subscribers book more passengers on the owning airlines.

The booking fees charged by the major vendors have been found to be substantially above their costs. Over time booking fees have averaged about two percent of the average airline fare per segment travelled.

Two factors provide the vendors with the ability to exercise market power in setting booking fees. First, because each agent relies almost exclusively on a single CRS to make airline bookings, airline managers doubt that agents subscribing to a CRS in which they refused to participate would be willing to book their flights. Threatened with the loss of substantial airline revenues, almost all airlines consider it necessary to participate in any CRS that is used by a large number of travel agents.

Second, the airlines' ability to influence fee levels indirectly by guiding bookings on their flights through CRSs that impose lower fees is very limited. Airlines have no way of inducing potential passengers to patronize travel agents who use CRSs that charge lower booking fees or of persuading agents to equip themselves with such systems. Thus while airlines pay booking fees, travel agents choose their CRS and the service features they will use to make a reservation.

Long ago the vendors recognized that by automating travel agents, they could gain additional airline bookings and revenues. Travel agent recommendations are often decisive in persuading travellers to choose an airline; some agents claim they can influence one-fourth of all business travellers and one-half of all leisure travellers.

Airlines that receive substantial incremental revenues should have higher average passenger loads on their flights and earn greater profits than air carriers that do not receive such revenues (all other factors remaining constant). Because an airline's profit margin is small in relation to its total revenues, and because its costs are not changed significantly by the gain or loss of a few passengers on each flight, a small diversion of traffic to a competitor is often sufficient to render service unprofitable. Moreover, since less frequent service will alienate even more passengers, attempting to raise load factors by reducing the number of flights may be self-defeating. Incremental revenues also enable CRS-owning airlines to offer additional financial incentives to agents that non-owner airlines cannot match, further increasing the vendors' shares of agency bookings.

It is extremely difficult to measure incremental revenues. Nevertheless, some internal vendor studies indicate that vendors believe that they earn substantial incremental revenues.

While one cause of incremental revenues is the friendly relationship that often develops between the subscriber and the vendor airline, another cause is architectural bias. Architectural bias denotes faster and more reliable computer procedures and communications links that result in agents obtaining more accurate information on vendor airline services or recording bookings on vendors with greater speed and certainty.

Through the display of flight information, CRSs can have a profound effect on airline competition. Travel agents often book passengers on the first flights shown on the computer display. The Vendors' conduct and their internal studies demonstrate that a flight's position on the CRS display continues to affect how often a system's subscribers will book it. Indeed, the vendors estimate that changes in CRS display algorithms can increase or decrease an air carrier's bookings by millions of dollars annually.

We cannot determine whether the decisive factor giving CRS vendors a competitive advantage in airline markets is greater ease of booking, better information, more prominent display, or their relationship with subscribers. Nevertheless, the ability of vendors to obtain a disproportionate share of their subscribers' bookings—a share that is unrelated to traveler preferences—has an adverse effect on airline competition. The size of this effect is not solely dependent on the amount of incremental revenues obtained by vendor airlines. The most harmful consequence of the vendors' power to influence travel agent booking patterns is that the potential substitutability of the services of different carriers is concealed from the typical airline traveler. As a result, the ability of airlines to capture traffic

through lower fares or better service is diminished.

C. Final Rules

The ultimate objective of our regulatory policy is to promote consumer welfare by reducing the cost of airline transportation. While our rules will result in more efficient and competitive airline, CRS, and travel agency industries, they will impose few, if any, additional costs on those industries. Several of our rules sanction existing industry practices. In some instances, moreover, we allow vendors to charge for additional services; accordingly, these market transactions will be entered into only if they benefit both parties. Finally, if our rules raise the vendors' cost slightly, we are convinced that they offer substantial benefits to the travelling public.

Display Bias

Prohibiting display bias will promote airline competition, since all air carriers will have to compete for passengers on the basis of fares and service. The final rules maintain the previous prohibition against using factors related to airline identity for editing and ranking flights and extends it to cover all integrated displays. The new rules make some other changes (for example, requiring notification when a flight involves a change in aircraft). Compared with either the original rules or an unregulated industry, the provisions are essentially costless, although the vendors may bear some slight additional programming costs.

Construction of Connections

The new rules increase the number of connecting points that must be used in each display of connecting service, subject to each vendor's ability to use fewer points when fewer satisfy its editing criteria. This rule should not impose additional costs on the vendors, since all CRSs (except Sabre) have adequate computer capacity and are programmed to accommodate our requirements; we are deferring the rule's effective date for one year to give Sabre time for reprogramming. This rule will promote airline competition by ensuring that passengers obtain information on more service options and by preventing the strategic manipulation of flight information.

Publication of Editing and Ranking Criteria

Our rules make specific the previous requirement that vendors supply on request detailed information on the criteria used for ranking and editing flight displays, including displays of connecting services. This may impose some slight costs on vendors but will give participating airlines an enhanced ability to monitor the vendors' compliance with our rules and to understand how their services are displayed.

Equal Functionality

Several of our rules will reduce the advantages vendor airlines have over their airline rivals because it is easier and more reliable to book flights on vendor airlines.

To eliminate some of the vendors' advantages, the rules prohibit procedures that default to entries favoring the vendor.

It is also frequently alleged that vendors introduce service enhancements that can only be used for making bookings on their airlines. Under the new rules, vendors must offer enhancements to all participating airlines. No party opposed this rule or suggested that it would impose significant costs on the vendors or retard technical innovation. Vendors, of course, are free to charge for participation in an enhancement, and participating airlines are free to forgo participation if it is judged too costly. Participating air carriers, travel agents, and air travellers should all benefit from access to enhancements that make the booking process more efficient.

A new rule requires vendors to make available to participating carriers the same method of loading schedule and fare information that they use for their own flights. This rule may impose some additional costs for vendors, although it should reduce expenses for participating carriers, as well as promote airline competition. This rule will ensure that CRSs have timely information on all airline services.

Vendor Contracts With Participating Air Carriers

The new rules readopt the current rules prohibiting vendors from charging discriminatory fees to participating carriers and from conditioning participation on the sale or purchase of other goods and services. Despite the arguments made by some, without these rules vendors would impose fees to weaken airline competition and punish other carriers for entering their markets.

Billing Information

A new rule requires vendors to provide enough information in their bills for booking fees to enable participating carriers to audit them for accuracy. This rule will not impose significant costs on vendors. They can charge reasonable fees for providing billing information on magnetic media. The associated benefits of the rule lie in preventing violation of the rule against discriminatory fees and eliminating "hidden" fee increases through the creation of false booking records.

Vendor Participation in Other CRSs

The new rules require CRS-owning airlines to participate in each feature offered by any other CRS unless they have valid commercial reasons for not doing so. The purpose of this rule is to prevent vendor airlines from using their dominance in a local airline market to handicap rival CRSs and to compel agents to subscribe to their own system. Since most vendor airlines already comply with this requirement and since additional participation must be undertaken only on mutually advantageous terms, the rule's cost should be negligible.

Vendor-Subscriber Contracts

The record demonstrates that vendors have imposed certain restrictions in their subscriber contracts in order to protect their subscriber base, not to promote economic efficiency. As a result, most travel agencies have a limited ability to switch CRSs or use more than one CRS. Given the economies of scope and scale in the CRS business, a vendor cannot compete effectively without a substantial number of subscribers. In addition, a CRS-owning airline that wishes to expand service at a city where another CRS-owning airline has a high CRS market share cannot easily obtain a significant number of subscribers for its own system due to the restrictive contracts. Airline competition has suffered. Making it easier for travel agents to switch systems or use multiple systems will promote technological innovation by forcing vendors to upgrade their systems to make them more attractive to subscribers.

A new rule requires vendors to offer travel agents a subscription contract with a term no longer than three years, although they can continue to offer as an alternative contracts with terms up to five years. We believe the costs of this proposal will be quite low, partly because few contracts seem to last as long as five years anyway and because vendor competition for agents should keep subscription fees from rising.

Another new rule says that vendors may not adopt contract provisions that automatically extend the term of a contract upon the happening of some stated event. This rule formalizes current industry practice. Since it should make it easier for agents to switch

systems, it should improve productivity in the travel agency industry and enhance airline competition.

Minimum use clauses require subscribers to use their CRSs for a minimum number of bookings each month; a subscriber who fails to meet the requirement will breach the agreement and be liable for damages including "lost" booking fees. Because the damages can be substantial, agents are reluctant to make extensive use of more than one CRS. A review of the permissibility of minimum use clauses is appropriate because new technology can make it easier for agents to switch between systems without incurring other costs and because the reduced competition for subscribers calls for restraining certain business practices that might have been considered justifiable or transitory before. We will prohibit minimum use clauses, which will carry out the Board's original intention that agents have the freedom to use multiple systems rather that be bound to a single system. We will continue, however, to allow so-called productivity pricing.

We intend to adopt a rule prohibiting vendors from requiring a travel agent to use or subscribe to its CRS as a condition for receipt of any commission. This rule eliminates the uncertainty on the meaning of the previous rule. This rule is intended to promote CRS and airline competition by barring a locally-dominant CRS-owning airline from compelling agencies in the region to use its CRS as a condition for receiving override commissions or other financial inducements.

Marketing Information

The new rules maintain the previous requirement that vendors make available to all U.S. carriers all marketing data generated from their CRSs on domestic travel and extends this provision to data on international travel and to foreign carriers that provide reciprocal access to their data. Any costs imposed on the vendors as a result of this rule may be recouped by charging air carriers an appropriate fee. This rule will promote competition by making more information available to all parties.

Third-Party Hardware and Software

Most travel agents today use personal computers to make airline reservations. Personal computers and software are provided by vendors for a fee, although large agencies pay little or nothing for computer hardware and software. Vendors restrict their subscribers' ability to use third-party hardware and software. Each vendor also prohibits its subscribers from using CRS terminals to access another system or database.

We are adopting a rule that gives subscribers greater access to travel information and computer technology. This rule prohibits vendors from unreasonably denying subscriber requests to use third-party hardware and software in conjunction with their CRSs. While nothing would prevent a vendor from offering subscribers hardware and software on attractive terms, subscribers would be free, for the first time, to purchase or lease third-party, CRS-compatible hardware and software.

We believe this rule will be particularly beneficial to smaller travel agencies, since they often do not have the in-house computer programming capability or the bargaining power to obtain their vendors' consent to use third-party products. Smaller travel agencies will be more productive.

Some airlines may welcome the opportunity to make their internal reservations systems available to important agents in key markets, since it would allow them to forgo paying booking fees. This could put downward pressure on booking fees.

Our rules would neither require vendors to provide CRS services to agencies nor restrict the pricing of vendors' services. The rule would not require vendors to modify their CRSs, to provide technical support for third-party hardware and software, or to limit technological improvements so as to maintain the value of third-party hardware and software being used by agencies. We do, however, plan to adopt rules that would prevent vendors from taking unreasonable actions to prevent subscribers from using third-party products.

D. Summary of the Rules' Costs and Benefits

Our rules will make the CRS and airline industries more competitive. Many of our rules, for example, will foster competition among vendors for subscribers. At the same time, participating airlines will find that travel agents have more accurate information about their flights and more confidence in making a booking on them. In this environment, all air carriers—vendors and nonvendors alike—will have to compete for customers in terms of the price, convenience, and reliability of their services. In sum, the travelling public will be the ultimate beneficiary of our rules.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act, Public Law 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, if adopted, would have a significant economic impact on a substantial number of small business entities.

The analysis is required to describe the need, objective, legal basis for, and flexible alternatives to the agency's action. These requirements have been met through the NPRM, this rule, and the initial and final regulatory impact analysis. In addition, an analysis must describe the small business entities to which the proposed rules would apply, the proposed rules' reporting, recordkeeping, or other compliance requirements, and any other federal rules that may duplicate, overlap, or conflict with the proposed rules.

Our rules will have a significant economic impact on a substantial number of small business entities. In particular, the rules will affect travel agencies and air carriers, including regional air carriers. The rule giving travel agencies the ability to use third-party hardware and software and to use a CRS terminal to access other databases will benefit small business entities.

The travel agency industry is relatively unconcentrated, although the larger agencies have been increasing their market share. The larger agency locations, those with annual revenues of at least $5 million, accounted for 33 percent of the industry's revenues in 1987. The industry, however, remains very competitive.

Our rules should increase the efficiency of the travel agency industry. For example, agencies will have a greater ability to use third-party hardware and software. Travel agencies can if they wish modify the display of CRS information to give them a better ability to find the best airline services for their customers. Agencies will be able to acquire equipment that may be more efficient and productive than the equipment supplied by vendors. Each vendor now prohibits its subscribers from using a CRS terminal to access any other system or database. If agencies can use their CRS terminals to access other systems and databases, they may be able to obtain better information and booking capabilities on carriers than is possible using a single system. New firms may enter the business of providing information and transaction capabilities on airline services.

Our rules will require vendors in certain respects to provide better information on participating carrier

services on a more timely basis. This will help agencies operate more efficiently.

Our rules eliminating certain restrictive subscriber contract provisions—rollover clauses and minimum use clauses—will benefit agencies by giving them more flexibility in switching systems and in using multiple systems. As a result, there should be increased competition among the vendors for agency subscribers. Since the travel agency industry is so competitive, most of the benefit of improved CRS pricing and services will be passed on to agency customers.

While an agency will incur additional expenses if it uses third-party hardware and software (for example, it must purchase any new software programs and bear the expense of subscribing to additional databases), agencies will make these expenditures only if doing so will improve the overall efficiency of their operations.

We have not adopted several proposals that could raise travel agency costs. If we had adopted a rule limiting the booking fees paid by airlines, the vendors would have increased subscriber charges in order to offset the lower revenues from air carriers. We are not limiting the level of booking fees, however. While we have barred certain subscriber contract provisions that would unduly restrict agency ability to switch or add systems, we also determined that agencies could benefit if we adopted a rule requiring vendors to offer subscribers a contract not longer than three years in length and a contract of up to five years in length.

Our rules should benefit most air carriers, especially non-vendor air carriers. Our rules barring defaults favoring vendor carriers, requiring vendors to make available to other carriers equally timely methods of loading fare and schedule changes, and requiring vendors to make all enhancements available to other carriers will make it easier for travel agents to book non-vendor carriers and should increase those carriers' CRS bookings. Non-vendor carriers will incur lower costs due to the rule barring vendors from imposing burdensome procedures on non-vendor carriers for the submission of fare and schedule changes. Our rule giving travel agencies the right to access other databases from agency-owned CRS terminals will enable carriers to establish direct links between their internal systems and agencies, thereby making it possible for them to obtain some bookings from agencies without paying booking fees.

Another group of beneficiaries of our rules will be firms producing hardware and software for use in conjunction with CRS services. Most such firms are small business entities. The vendors now limit their subscribers' ability to use software and hardware acquired from independent firms. Our rules will allow subscribers to use such products in connection with CRS equipment and services, thereby creating a bigger market for the firms that develop such products. In addition, our rule allowing subscribers to use their own equipment to access other databases will enable firms providing such information and transaction capabilities a much greater opportunity to market their services.

Our rules do not contain any direct reporting, recordkeeping, or other compliance requirements that would affect small business entities. There are no other federal rules that duplicate, overlap, or conflict with our rules.

Paperwork Reduction Act

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

Federalism Implications

The rules we are adopting here will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, we have determined that these rules do not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 14 CFR part 255

Air carriers, Antitrust, Reporting, and recordkeeping requirements.

Accordingly, the Department of Transportation is revising 14 CFR part 255 to read as follows:

PART 255—CARRIER-OWNED COMPUTER RESERVATIONS SYSTEMS

255.1 Purpose.
255.2 Applicability.
255.3 Definitions.
255.4 Display of information.
255.5 Defaults and service enhancements.
255.6 Contracts with participating carriers.
255.7 System owner participation in other systems.
255.8 Contracts with subscribers.
255.9 Use of third-party hardware, software and databases.
255.10 Marketing and booking information.
255.11 Exceptions.
255.12 Termination.

Authority: 49 U.S.C. 1302, 1324, 1381, 1502.

§ 255.1 Purpose.

(a) The purpose of this part is to set forth requirements for the operation by air carriers and their affiliates of computer reservations systems used by travel agents 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 themselves or through an affiliate own, control, operate, or market computerized reservations systems for travel agents in the United States, and to the sale in the United States of interstate, overseas, and foreign air transportation and of other airline services through such systems. Each carrier that owns, controls, operates, or markets a system shall ensure that the system's operations comply with the requirements of this part.

§ 255.3 Definitions.

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

Availability means information provided in displays with respect to the seats 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 is engaged directly in the operation of aircraft in passenger air transportation.

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

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

Integrated display means any display that includes the schedules, fares, rules, or availability of all or a significant proportion of the system's participating carriers.

On-time performance code means a single-character code supplied by a carrier to the vendor in accordance with the provisions of 14 CFR part 234 that reflects the monthly on-time performance history of a nonstop flight or one-stop or multi-stop single plane

operation held out by the carrier in a CRS.

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

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

Subscriber means a ticket agent, as defined in 49 U.S.C. 1301(40), 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 reservations 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 provides subscribers with the ability to make reservations and to issue tickets, if it charges any other carrier a fee for system services.

System owner means a carrier that holds five percent or more of the equity of a system, that has one or more affiliates that hold such an equity interest, or that together with affiliates holds such an interest.

§ 255.4 Display of information.

(a) All systems shall provide an integrated display that includes the schedules, fares, rules and availability of all participating carriers in accordance with the provisions of this section. This display shall be at least useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor. No system shall make available to subscribers any integrated display unless that display complies with the requirements of this section.

(b) In ordering the information contained in an integrated display, systems shall not use any factors directly or indirectly relating to carrier identity.

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

(2) When a flight involves a change of aircraft at a point before the final destination, the display shall indicate that passengers on the flight will change from one aircraft to another.

(3) Each system shall provide to any person upon request the current criteria used in editing and ordering flights for the integrated displays and the weight given to each criterion and the specifications used by the system's programmers in constructing the algorithm.

(c) Systems shall not use any factors directly or indirectly relating to carrier identity in constructing the display of connecting flights in an integrated display.

(1) Systems shall select the connecting points (and double connect points) to be used in the construction of connecting flights for each city pair on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including each system owner, and to all markets.

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

(3) Systems shall provide to any person upon request current information on:

(i) All connecting points and double connect points used for each market;

(ii) All criteria used to select connecting points and double connect points;

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

(iv) The weight given to each criterion on paragraphs (c)(3) (ii) and (iii) of this section.

(4) Participating carriers shall be entitled to request that a system use up to five connect points (and double connect points) in constructing connecting flights for the display of service in a market. The system may require participating carriers to use specified procedures for such requests, but no such procedures may be unreasonably burdensome, and any procedures required of participating carriers also must be used by any system owner when it requests or causes its system to use specific points as connect points (or double connect points).

(5) When a system selects connecting points and double connect points for use in constructing connecting flights it shall use at least fifteen points and, after September 15, 1993, six double connect points, for each city-pair, except that a system may select fewer such connect or double connect points for a city-pair where:

(i) Fewer than fifteen connecting points and six double connect points meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria, along with all additional connecting points and double connect points requested by participating carriers.

(6) If a system selects connecting points and double connect points for use in constructing connecting flights it shall use every point requested by itself or a participating carrier up to the maximum number of points that the system can use. The system may use fewer than all the connect points requested by itself and participating carriers to the extent that:

(i) Points requested by the system and participating carriers do not meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria.

(d) Each system shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information or the information of a system owner. No system owner may use procedures for providing information on its own services to its system that are not available to participating carriers. Each system shall provide to any person upon request all current data base update procedures and data formats.

(e) Systems shall use or display information concerning on-time performance of flights as follows.

(1) Within 10 days after receiving the information from participating carriers or third parties, each system shall include in all integrated schedule and availability displays the on-time performance code for each nonstop flight segment and one-stop or multi-stop single plane flight, for which a participating carrier provides a code.

(2) A system shall not use on-time flight performance as a ranking factor in ordering information contained in an integrated display.

(f) Each participating carrier shall ensure that complete and accurate information is provided each system in a form such that the system is able to display its flights in accordance with this section.

(g) A system may make available to subscribers the internal reservations system display of a system owner or other participating carrier, provided that all participating carriers are offered the ability to make their internal reservations displays available to subscribers, and provided further that a

subscriber and its employees may see any such display only by requesting it for a specific transaction.

§ 255.5 Defaults and service enhancements.

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

(b) After October 1, 1993, no system may create or maintain a default in any system feature that automatically prefers one or more system owners over other participating carriers.

§ 255.6 Contracts with participating carriers.

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

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

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

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

(d) A system shall provide upon request to carriers current information on its fee levels and fee arrangements with other participating carriers. A system's bill to a participating carrier for any fee must contain adequate information and be on magnetic media so that the participating carrier can determine whether the bill is accurate. At a minimum, booking fee bills must include the following information for each segment: PNR record locator number, passenger name, booking status, agency ARC number, pseudo-city code, CRS transaction date, city-pair information, flight number, flight date, class of service, and type of CRS booking.

§ 255.7 System owner participation in other systems.

(a) Each system owner shall participate in each other system and each of its enhancements (to the extent that such owner participates in such an enhancement in its own system) if the other system offers commercially reasonable terms for such participation. Fees shall be presumed commercially reasonable if:

(1) They do not exceed the fees charged by the system of such system owner in the United States or

(2) They do not exceed the fees being paid by such system owner to another system in the United States.

(b) Each system owner shall provide complete, timely, and accurate information on its airline schedules, fares, and seat availability to each other system in which it participates on the same basis and at the same time that it provides such information to the system that it owns, controls, markets, or is affiliated with. If a system owner offers a fare or service that is commonly available to subscribers to its own system, it must make that fare or service equally available for sale through each other system in which it participates.

§ 255.8 Contracts with subscribers.

(a) No subscriber contract may have a term in excess of five years. No system may offer a subscriber or potential subscriber a subscriber contract with a term in excess of three years unless the system simultaneously offers such subscriber or potential subscriber a subscriber contract with a term no longer than three years. No contract may contain any provision that automatically extends the contract beyond its stated date of termination, whether because of the addition or deletion of equipment or because of some other event.

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

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

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

(c) No system owner may require use of its system by the subscriber in any sale of its air transportation services.

(d) No system owner may require that a travel agent use or subscribe to its system as a condition for the receipt of any commission for the sale of its air transportation services.

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

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

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

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

(2) A CRS terminal to access directly any other system or database providing information on airline services, unless the terminal is owned by the system.

(b) This section prohibits, among other things, a system's:

(1) Imposition of fees in excess of commercially reasonable levels to certify third-party equipment;

(2) Undue delays or redundant or unnecessary testing before certifying such equipment;

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

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

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

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

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

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

§ 255.10 Marketing and booking information.

(a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing,

booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

(b) Each system shall make available to all foreign participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to bookings on international services that it elects to generate from its system, provided that no system may provide such data to a foreign carrier if the foreign carrier or an affiliate owns, operates, or controls a system in a foreign country, unless such carrier or system provides comparable data to all U.S. carriers on nondiscriminatory terms. Before a system provides such data to a foreign carrier, it shall give written notice to each of the U.S. participating carriers in its system that it will provide such data to such foreign carrier. The data made available by a system shall be as complete and accurate as the data provided a system owner.

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

§ 255.11 Exceptions.

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

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

§ 255.12 Termination.

Unless extended by a document published in the **Federal Register**, these rules shall terminate on December 31, 1997.

Issued in Washington, DC on September 15 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

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