

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20590**

**EXTENSION OF COMPUTER RESERVATIONS
SYSTEMS (CRS) REGULATIONS**

:
:
:
: **Docket OST-2002-11577**
:
:
:
:

**COMMENTS AND REQUEST FOR EMERGENCY ACTION
BY THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

The American Society of Travel Agents, Inc. (“ASTA”) hereby responds to the captioned notice of proposed rulemaking in support of the annual extension of the rules and also requests emergency action by the Department to (1) ban, effective immediately, the enforcement of productivity pricing schedules that penalize travel agencies for booking segments on the Internet, and (2) ban, effective immediately, the sale of Management Data Information Tapes and other media containing travel transaction information generated by travel agencies except for information covering transactions on the lines of the purchasing airline.

I. EXTENSION OF THE RULES IS ESSENTIAL.

ASTA will not repeat what we have said in connection with the four prior extensions of the rules. The rules, some rules, are plainly necessary to maintenance of competition and prevention of market power abuse in the airline-travel agent-CRS relationship. Since the Department is obviously not ready to propose new rules, the old rules must be maintained, subject, however, to the changes set

out below.

II. EMERGENCY ACTION IS NECESSARY TO ADJUST THE RULES IN LIGHT OF THE ZERO COMMISSION POLICY ANNOUNCED LAST WEEK BY DELTA AIRLINES.

In the notice of proposed rulemaking, the Department notes that it “will consider acting more quickly [than on the whole rulemaking] on specific issues as necessary.” Recent events have made such action “necessary.”

At 2:00 pm on Thursday, March 14, Delta Airlines announced that it was eliminating base commissions paid to travel agencies, “effective immediately.” At the same time Delta stated it would institute a “pay-for-performance” compensation scheme, of unspecified nature, for what it described as “select” or “key” travel agencies. A copy of Delta’s press release is attached as Exhibit A.

This change by Delta differs substantively from prior commission cut and cap announcements by airlines in that it appears to have eliminated the financial consideration underlying the agency relationship between Delta and the agencies with which it will have no compensation arrangements. It also raises questions about whether Delta should be permitted to use the collective power of industry institutions such as the Airlines Reporting Corporation to enforce its policies against travel agencies that it is no longer compensating.

There are approximately 16,282 agency firms accredited by the Airlines Reporting Corporation still in business as of the end of February, 2002. Most of them are very small firms and will likely not end up with Delta’s “pay for performance” program, whatever it turns out to be. The implication of

Delta's new policy appears to be that those firms that do participate in its program will become de facto dealerships for Delta.

At this time it is impossible to predict whether all airlines will, as they have in the past, copy the Delta plan. For present purposes it does not matter. Two steps are essential: (1) travel agencies must be freed of the penalty clauses in their CRS contracts (generally called "productivity" clauses) so that agencies left in the cold by Delta can book on the Internet without being financially punished further by Delta's CRS (Worldspan) or any other CRS, and (2) that Delta not be placed in a further competitive advantage (it owns part of a CRS and owns part of Orbitz) by continuing to have access to the transaction information generated on competing airlines while it develops and controls its private distribution system.

A. Productivity Clauses Are Anti-competitive and Anti-consumer and Their Enforcement Should Be Banned, Effective Immediately.

Most CRS subscriber contracts contain clauses that in theory reward an agency for increased production and punish it for falling below the booked segment thresholds established when the contract was first created. In practice, these clauses have served mainly as a deterrent to the agency's looking to non-CRS sources, such as the Internet, to make bookings that more nearly conform to their clients' needs. They do this by imposing a financial penalty on the agency based on the number of segments booked. Internet-booked segments are not tracked and do not count against performance thresholds. The clauses then function primarily as de facto minimum use provisions.

When the concept of productivity clauses was first broached, it appeared to be a good idea, on the assumption that the clauses would genuinely operate in a bilateral fashion. The dominant power of

the CRS's combined with the continued growth of the Internet has changed the picture, however. Even more dramatically, the airlines have now instituted policies, which have proliferated throughout the industry, that offer lower fares on the Internet than are available in many cases through CRS's for the same flights, days, times and seats. These fares are not presented in a manner that agencies can effectively manage because the fares themselves are designed to bypass the agency channel completely, undermining public confidence in travel agents and making satisfaction of previously imposed booking thresholds impossible in many cases.

Not only do the airlines promote consumers to seek these "Internet only" fares, with offers of extra frequent flyer miles, for example, but the largest airlines have entered a joint airline venture, Orbitz, whereby they assure that their lowest fares from their own websites are also made available to Orbitz. In practice few of these fares ever are available for sale by regular travel agencies or even the online agencies that are Orbitz' main competition.

Now that Delta has eliminated base commissions for most agencies, it would be unconscionable to leave travel agencies subject to contract clauses imposed in a completely different economic environment. The clauses punish the agency every time it seeks to compete for business against the airlines' discriminatory pricing policies. No matter how long the primary CRS rulemaking takes, and experience in this regard is not favorable, the government must free the travel agencies from the bondage of their CRS productivity penalties so they can compete for business against the airlines.

If agents continue to be punished for booking on the Internet and other non-CRS sources, they will be compromised in their ability to serve the public's transportation needs. The vast majority of consumers still prefer to deal with a real person to buy travel services. The public should not have its

options restricted, directly or indirectly, by contract clauses imposed on agencies by CRS's.

B. Airline Access to Agency Transaction Details Should Be Terminated Immediately.

The current Part 255 regulations require that the CRS's sell to the airlines data tapes that contain fine detail about travel transactions generated by travel agencies. 14 CFR 255.10. This information is used by airlines to "poach" on each others' business by identifying high-yield transactions, then pressuring travel agents to move the business to the poaching airline. The practice is described in a recent article published in the online version of Business Travel News, and attached hereto in full. The information is also invaluable to a large airline seeking to deter or defeat competition from low-fare carriers, a practice that the Justice Department has regarded with such significance as to lead it to sue one of the major airlines for predation.

ASTA has objected to the sale of this information several times in the past and has suggested the Department should terminate the practice even if it could not otherwise deal with the issues involved in review/renewal of the entirety of Part 255. The sale of this information would almost certainly not occur in an open market subjected to the Sherman Anti-Trust Act. The ability of each major carrier (the only ones who can afford the data) to see transactions, in virtual real-time, on its competitors' lines is without precedent as far as we can determine and would surely lead to Justice Department action if it were engaged in through meetings of airlines trading such data across a conference room table.

Now that Delta has determined that the "shared agency" relationship managed through ARC, and in existence virtually since the dawn of civil aviation, does not meet its needs anymore, surely the

basis for permitting Delta to examine the agency-generated business transactions on its competitors has been vitiated.

ASTA has made these arguments before in the context of the traditional industry relationships that existed before March 14. Now that Delta has removed itself in this respect from the community of airlines, it is time to free the agents from the practices outlined in the attached article. Delta's disruption of the industry's fundamental relationships has been made effective immediately. Notice was given by a press release. The Department should immediately remove section 10(a) from Part 255 and add the following new section 255.10(a) provision:

“No system may make available to any U.S. participating carrier on any terms any marketing, booking or sales data relating to any carrier other than the purchasing carrier's own data.”

Corresponding changes would have to be made to subsections (b) and (c) of Part 255.10.

Respectfully submitted,

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

Paul M. Ruden, Esquire
Senior Vice President
Legal & Industry Affairs
American Society of Travel Agents, Inc.
1101 King Street
Alexandria, Virginia 22314
Tel. (703) 739-6854
Fax (703) 684-9185
paulr@astahq.com