

March 14, 2003

The Honorable Norman Mineta
Secretary
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: Docket Nos. OST-97-2881, OST-97-3014, OST-98-4775, and OST-99-5888 Computer Reservations System (CRS) Regulations; Statements of General Policy

Dear Secretary Mineta:

The Office of Advocacy is pleased to submit these comments on the Department of Transportation's ("DOT") proposal for Computer Reservation Systems. DOT deserves credit for exploring ways to remove regulatory barriers that can impede job creation and economic growth. We are proud to play a lead role in following through on the President's commitment to eliminate unnecessary or duplicative regulations that can stymie entrepreneurial success. It is our intention that these comments will help you accomplish both the regulatory goal of DOT and the goal of the President's small business plan, to create an environment where businesses can flourish.

The Office of Advocacy ("Advocacy")¹ monitors and reports on agencies' compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Flexibility Act of 1996 ("SBREFA").² The purpose of these laws are to bring the voice of small business into the regulatory development process. The requirements of small business impact analysis, small employer outreach and input, and consideration of less burdensome alternatives were enhanced by President Bush's Executive Order 13272. The Executive Order, signed on August 13, 2002, requires agencies to implement policies protecting small entities when writing new rules and regulations.³

Advocacy is an independent entity within the U.S. Small Business Administration ("SBA"), so the views expressed in this letter do not necessarily reflect the views of SBA or the Administration.

¹ Congress established the Office of Advocacy of under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress.

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ In addition, E.O. 13272 instructs regulatory agencies and Advocacy work closely together as early as possible in the regulation writing process to address disproportionate impacts on small entities and reduce their regulatory burden. Section 3(c) of the E.O. requires agencies to respond to Advocacy's written comments in an explanation or discussion of the final rule that is published in the *Federal Register*.

DOT's Proposed Rule

On November 15, 2002, DOT published a proposed rule on the “Computer Reservations System (“CRS”) Regulations; Statements of General Policy” in the *Federal Register*, Vol. 67, No.221, on page 69366. The purpose of the proposal is to examine whether the existing CRS rules are necessary and, if so, whether they should be modified. DOT asserts that it may be possible to eliminate some of the rules in a way that may promote competition in the airline industry and that rules regulating the sale of airline service over the Internet may be unnecessary. DOT is proposing to reduce its regulations in ways that could give airlines more flexibility in bargaining with the systems. DOT is also reviewing its policy regarding disclosure of fees by travel agencies.

The proposal contains provisions that may help small businesses as well as provisions that may harm small businesses. Advocacy commends DOT for proposing changes that assist small businesses. However, after reviewing the proposal, Advocacy would like to encourage DOT to issue a revised initial regulatory flexibility analysis (“IRFA”) that provides information about the affected industries, the projected economic impact of the proposal, and regulatory alternatives to achieve DOT’s objectives while minimizing the impact on small businesses.

RFA Requirements for a Proposed Rule

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an IRFA. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁴

DOT's Compliance with the RFA

DOT states that the rule will have a significant economic impact on a substantial number of small entities and that it prepared an IRFA pursuant to the requirements of the RFA. Although DOT has provided an explanation of the proposal, other information that is required by the RFA is not in the IRFA. For the reasons stated below, Advocacy encourages DOT to prepare a supplemental IRFA that addresses all of the elements that are required by Section 603 of the RFA.

⁴ 5 U.S.C. § 603 and 5 U.S.C. § 607.

Description of the Impact of the Proposed Rule on Small Entities

Section 603(a) of the RFA requires an agency to provide a description of the impact of the proposed rule on small entities. Although DOT states the economic impact of the proposal will be significant, there is no indication of the amount of the economic impact. Instead, DOT provides general statements about possible increased costs and potential savings.

Advocacy asserts that DOT should have sufficient data to perform an analysis and provide the information on the anticipated economic impact to the public. For example, DOT states that the proposal to restrict or prohibit productivity pricing may increase CRS costs for some travel agencies, but DOT states that the affected travel agencies would be larger agencies.⁵ DOT, however, does not provide the information or assumptions upon which this statement based. Does DOT have any indication of the amount of the costs? Advocacy's data indicates that approximately 95% of all travel agencies would be considered small under SBA size standards. It would be beneficial for the public to know how DOT determined that only 5% of the industry, the large agencies, would be affected by the new restrictions.

The example provided above illustrates the type of generalizations that we feel need to be explained. Advocacy encourages DOT to perform the necessary analysis and provide the information in a supplemental IRFA. If DOT does not have the information to perform the analysis, Advocacy encourages DOT to ask specific questions to obtain the needed data and perform outreach to trade associations that represent small business interests affected by this rule.

Description of the Estimated Number and Types of Small Entities to Which the Proposed Rule Will Apply

Section 603(b) (3) of the RFA requires an agency to provide a description of the estimated number and types of small entities to which the proposed rule will apply. Although DOT states that the proposal will impact small US and foreign airlines; firms providing services and databases that compete with those offered by the systems; and small travel agencies, there is no information regarding the estimated number of small entities that may be impacted by this rule.

Section 601 of the RFA requires an agency to use the definition of small business contained in SBA's small business size standards regulations, promulgated by the SBA under the Small Business Act.⁶ SBA's Office of Size Standards defines a small travel agency as a business with less than \$6,000,000 in receipts. Small airline reservation services are also defined as a business with less than \$6,000,000 in receipts. An airline is small if it has less than 1,500 employees.⁷

⁵ Fed. Reg. at 6924.

⁶ 15 U.S.C. § 632. Section 601 of the RFA also provides that an agency can use an alternate small business definition in its analysis if the agency consults with Advocacy to use another standard (and publishes the standard for public comment) or the statute on which a rule is based provides a different definition of small business, then an agency may use that definition without consulting with the Office of Advocacy. 5 U.S.C. § 601 (3).

⁷ See, Office of Size Standards website at www.sba.gov/size; 13 CFR 121.201.

Since the SBA's Office of Size Standards defines which businesses are small, the Office of Size Standards has the data on the number of businesses that would qualify as small using SBA's size standards as well as data on the economic breakdown of the particular industry. The Office of Advocacy encourages DOT to contact SBA's Office of Size Standards for this information. Once DOT has the information on the number of small businesses that may be defined as small, it should be able to provide an estimate of the number of businesses that may be impacted by the proposal. Without this information, Advocacy questions how DOT can determine the economic impact or consider alternatives to minimize that impact when DOT has not described the entities that will be impacted. For example, if hypothetically, the average small travel agency has \$500,000 in receipts, what percentage of those receipts will be lost or gained as a result of this rule? What alternatives will reduce that loss or increase the gain?

Significant Alternatives That Accomplish the Stated Objectives of the Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Section 603(c) of the RFA requires agencies to provide a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant economic impact of the proposed rule on small entities. Although DOT states that it did not adopt several proposals that could raise travel agency costs, DOT's IRFA does not discuss significant alternatives considered by DOT to reduce the impact on small entities. Advocacy encourages DOT to analyze alternatives that may reduce the economic impact on small entities, including the alternatives suggested by small businesses or their trade associations commenting on the rule, and publish the information for public comment as part of the supplemental IRFA.

General Concerns

Although the rule is designed to help small businesses, Advocacy has been contacted by representatives of the travel industry and small business representatives in general about the potential impact of this rule on small businesses. Pursuant to our statutory authority, Advocacy actively solicits input from small entities to assist our office in setting policy priorities and identifying rules with significant impacts on small entities. Advocacy's involvement in this rulemaking is the result of such outreach and consultation with affected small businesses.

As their comments to the record will reflect, travel agencies are concerned about whether the rule will prevent or limit their access to the professional tools that are needed for them to compete. They assert that one of the dangers of the rulemaking is that if mandatory participation is eliminated, then the airlines may withhold information from the travel agents about what flights, fares, etc. are available. Travel agents are also concerned that the proposal may eliminate bonuses and other incentives that airlines provide to travel agencies. Finally, travel agents want assurance that they will have flexibility in their contracts while maintaining a commercially reasonable relationship.

Small businesses have three major concerns that they believe are not addressed by this rule. First, small businesses are concerned that the rules will encourage the airlines to participate in self-dealing to drive out competition. Second, small businesses are concerned about the

enforcement of the rules. They assert that there must be meaningful enforcement if an airline abuses its power to obtain greater control of the marketplace. Third, small businesses would like assurance that the same rules will apply to everyone in the airline ticketing process (airlines, CRSs, Internet sites, travel agencies, etc.). Advocacy encourages DOT to carefully review the comments and alternatives submitted by travel agents and other small businesses.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. As noted above, Advocacy recommends that DOT publish a supplemental IRFA to provide small businesses with sufficient information to determine what impact, if any, the particular proposal will have on its operations. In addition to providing the public with specific information about the economic impact of the proposal, the supplemental IRFA should provide a meaningful discussion of alternatives that may minimize that impact.

The Office of Advocacy is available to work with DOT to ensure compliance with the RFA while accomplishing DOT's desire to improve the CRS system. Thank you for the opportunity to comment on this important proposal. If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533.

Sincerely,

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Jennifer A. Smith
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Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs