§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 Nicholasville, KY [New]

Lucas Field Airport, KY
(Lat. 37°52′17″ N, long. 84°36′38″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-radius of Lucas Field Airport; excluding that airspace within the Lexington, KY, Class E airspace area.

* * * * *

Issued in College Park, Georgia, on November 22, 2005.

Mark D. Ward,

Acting Area Director, Air Traffic Division, Southern Region.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

Docket No. OST–2005–23194

RIN 2105–AD56

Price Advertising

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Department is considering amending its rule on price advertising, and it is seeking comment on several options. Under the existing rule, the Department considers any advertisement that states a price for air transportation that is not the total price the consumer will pay to be unfair or deceptive in violation of the statute under which this provision was adopted in 1984. Although it has not amended the codified rule, in practice the Department has long allowed an exception to it for certain taxes, fees, and other charges that are imposed by a government entity. As a matter of prosecutorial discretion, the Department does not take enforcement action against any advertisement that omits these charges from the quoted fare, provided that the charges are collected on a per-passenger basis and are not *ad valorem* in nature, and provided further that the advertisement clearly indicates the existence and amount of these charges so that consumers can easily calculate the total fare. The Department has consistently prohibited sellers of air transportation from breaking out other cost elements, such as fuel surcharges, from the advertised fare. Although the Department has denied a recent request to allow separate listing of the fuel surcharges that carriers are adopting in response to soaring fuel costs, the Department has also decided that the time is ripe after 21 years of marketing innovations for a reexamination of the fare-advertising rule and its long-time enforcement policy. Therefore, the Department is asking interested persons to comment on four alternative options: Maintain the current practice either with or without codifying all of its elements in the rule; end the exception for government-imposed charges and enforce the rule as written; revise the rule to eliminate most or all requirements for airfare advertisements but to require that consumers be apprised of the total purchase price before the purchase is made; or eliminate the full-fare advertising rule in its entirety.

DATES: Comments must be received by February 13, 2006. The Department will consider late-filed comments to the extent practicable.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number OST–2005–23194] by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Betsy L. Wolf, Senior Trial Attorney, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 400 Seventh St., SW., Room 4116, Washington, DC 20590, tel: (202) 366–9342, fax: (202) 366–7152, e-mail: *Betsy.Wolf@DOT.GOV.*

SUPPLEMENTARY INFORMATION:

Background

The Department of Transportation requires generally that in advertisements of air transportation, the price advertised must be the full price that the consumer will pay. Our Statements of General Policy, codified in 14 CFR part 399, include a rule on price advertising adopted by our predecessor agency, the Civil Aeronautics Board, in December of 1984. The rule states that the Department considers any advertisement of passenger air transportation, a tour, or a tour component that states a price that is not the entire price the consumer must pay to be an unfair or deceptive practice. Our rules governing public charters, codified in 14 CFR part 380, contain an analogous requirement for charter air transportation.

Both rules were adopted pursuant to 49 U.S.C. section 41712 (formerly section 411 of the Federal Aviation Act), which empowers the Department to prohibit unfair and deceptive practices and unfair methods of competition in air transportation and its sale. Specifically, this provision provides among other things that the Department may investigate and decide whether an air carrier, foreign air carrier, or ticket agent is or has been engaging in an unfair or deceptive practice or an unfair method of competition in air transportation or its sale and that if, after notice and an opportunity for a hearing, the Department finds in the affirmative, it may order the offending party to stop the conduct at issue. Violations of regulations adopted pursuant to section 41712 are also violations of the statute itself and may incur civil penalties, *see* 49 U.S.C. 46301(a)(7).

Air transportation is unlike other industries in that we have the sole authority to regulate airlines' fare advertisements by prohibiting practices that are unfair or deceptive. (Two other Federal agencies enforce provisions relating to airline fare advertising, but these regulations do not bear on unfair or deceptive practices. First, under Department of Homeland Security regulations, carriers must specifically identify the Transportation Security Administration's $2.50 security service fee as the ''September 11th Security Fee'' in fare advertisements, 49 CFR 1510.7.

Second, the Internal Revenue Service enforces a tax-code provision that imposes restrictions on the display of taxes in fare advertisements, 26 U.S.C. 7275.) Congress modeled section 41712 on section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C.A. section 45, but by its own terms, that statute cannot be enforced against ''air carriers and foreign air carriers,'' 15 U.S.C. section 45(a)(2). The States are preempted from regulating in this area (49 U.S.C. 41713, *see Morales* v. *Trans World Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). Thus, unlike advertising in other industries, where either the States or the FTC, or both, can take action against abusive practices, if we do not exercise our authority, consumers and competitors have no governmental recourse against advertising that is unfair or deceptive. We do not believe, moreover, that 49 U.S.C. section 41712 gives rise to a private right of action, *see Love* v. *Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002), *Boswell* v. *Skywest Airlines*, Inc., 361 F.3d 1263 (10th Cir. 2004); *see also Alexander* v. *Sandoval* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

For many years, as a matter of enforcement policy, we have allowed limited exceptions to the general rule that fare advertisements must state the entire price of the advertised air transportation or tour. Specifically, as a matter of prosecutorial discretion, the Department does not take enforcement action against any advertisement that omits government-imposed fees, taxes, and other charges from the quoted fare, provided that such charges are collected on a per-passenger basis and are not *ad valorem* in nature, and provided also that the advertisement shows the existence and amount of these charges clearly so that consumers can readily determine the total fare. *See, e.g., Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Prohibition on Deceptive Practices in the Marketing of Airfare[s] to the Public Using the Internet,'' http://airconsumer.ost.dot.gov/rules/20010118.htm* (January 18, 2001); Order 2001–12–1 (December 3, 2001); Order 88–8–2 (August 2, 1988). We originally allowed the separate listing of charges that are approved by a government in addition to those that are government-imposed, but recently the Enforcement Office eliminated the exception for the former, reasoning as follows:

> The ''government approved'' surcharges [that we allowed to be listed separately] were limited to security surcharges approved in the mid-1980's [sic] that affected foreign air transportation only and were approved by both the foreign government involved and the U.S. government. Recently, tariff regulation, owing to expanded open-skies agreements and other factors, has been revised to the extent that there is no longer a consistent practice of joint approvals of surcharges, in many instances resulting in the filing of tariffs that may include surcharges that are approved by only one government. In addition, the desire of carriers to pass on the higher costs of certain expenses discretely, such as insurance and fuel, has led to such expenses being filed separately from the 'base' fare in tariffs, a situation that the Department cannot effectively monitor. [footnote omitted] In view of these developments, the Enforcement Office will no longer allow the separate listing of ''government-approved'' surcharges in fare advertising.

Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Disclosure of Higher Prices for Airfares Purchased over the Telephone via Airline Telephone Reservation Centers or at Airline Ticket Counters, and Surcharges That May Be Listed Separately in Fare Advertisements,'' http://airconsumer.ost.dot.gov/rules/index.htm (November 5, 2004).

The history of our enforcement policy begins at the end of 1984, when the Civil Aeronautics Board adopted § 399.84 to address the widespread practice of advertising attractive fares and featuring ''add-on'' costs much less prominently. The Board found that this practice misled and deceived consumers and made price comparison difficult. *See Civil Aeronautics Board, 14 CFR part 380 [Special Regulations; Amendment No. 18 to Part 380; Docket 41184; Regulation SPR–195], Public Charters, Final Rule*, 49 FR 49438–49440 (December 20, 1984), and *14 CFR part 399 [Policy Statements; Amendment No. 88 to Part 399; Docket 41184-PS–113], Statements of General Policy, Final Rule*, 49 FR 49440 (December 20, 1984). Barely one year later, after this Department succeeded to the CAB's jurisdiction in this area, we granted an industry-wide exemption from § 399.84 and § 380.30 to allow exclusion of the U.S. international departure tax from the advertised price, provided that the amount of this tax was clearly stated elsewhere in the advertisement. To reach this result, we balanced the air carriers' asserted need for greater flexibility in advertising against the traveling public's need to know all charges they must pay for air services. Order 85–12–68 (December 24, 1985). We later broadened this exemption to include other per-passenger government fees by Order 88–3–25 (March 10, 1988), once again taking both the needs of the carriers and the imperative that consumers know the total cost of air transportation services into account. We clarified this amendment by Order 88–8–2 (August 2, 1988), where we recognized that consumers can benefit from knowing what portion of their fare is passed on to government entities and what portion retained by the carrier, as long as they can easily determine what the total fare will be. Although the U.S. Court of Appeals struck down the latter two decisions on procedural grounds in *Alaska* v. *Skinner*, 868 F2d. 441 (D.C. Cir. 1989), our Enforcement Office has continued to base its discretionary enforcement policy on their substance.

Recently, with fuel costs both rising significantly in the past year and surging in the wake of Hurricane Katrina, the Air Transport Association of America (ATA) informally requested relief from § 399.84 to allow its air-carrier members to list fuel surcharges separately in the manner of government-imposed charges. Our Enforcement Office has consistently taken the position, however, that while nothing in § 41712 or § 399.84 precludes carriers from stating in advertisements that fares include a fuel surcharge and specifying the amount, fuel surcharges must be included in the advertised fare in order to avoid confusing or deceiving consumers. *See, e.g., Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Prohibition on Deceptive Practices in the Marketing of Airfare to the Public Using the Internet,'' http://airconsumer.ost.dot.gov/rules/20010118.htm* (January 18, 2001). (All of the Enforcement Office's notices and industry letters may be found at *http://airconsumer.ost.dot.gov/rules/guidance.htm*.) Although the Secretary has denied ATA's fuel surcharge request, with the passage of over twenty years since the adoption of § 399.84, and with the extensive and intensive changes in both marketing and consumer sophistication that the

revolution in electronic communications has fostered, we have decided that the time has come to reconsider our full-fare advertising rule in light of current conditions.

We are therefore proposing four alternative approaches to the regulation of airline price advertising and inviting interested persons to comment on these proposals and reasonable alternatives. The first option is to leave current enforcement policy unchanged, either with or without codifying it explicitly in § 399.84. The second option is to enforce the rule as written by ending the exceptions we have long allowed for government-imposed fees, taxes, and charges. Thus, any price advertised for air transportation would have to be the total fare that the consumer would pay. The third option is to amend the policy statement so as to do away with most of our existing requirements for fare advertising and mostly rely on the language of 49 U.S.C. 41712. We are proposing two alternative approaches for the third option: one, a rule that requires only that the total price of any air transportation be disclosed to the consumer before any purchase is transacted, and two, a rule that requires both this and also that any fare advertisement set forth all elements of the fare so that consumers can add them together to determine the total price. This latter option is consistent with the general approach to advertising taken by the FTC—namely, that an advertisement is deceptive if it contains a representation or omission that is likely to mislead consumers acting reasonably in the circumstances and is material to the consumer's decision to buy the advertised product or service, *see FTC Policy Statement on Deception* (October 14, 1983), *http://www.ftc.gov/bcp/policystmt/ad-decept.htm*. Under either approach of this third option, while we would no longer routinely take enforcement action against advertisers that list fuel surcharges and other cost elements not imposed by governments separately from the fare, we would retain the power under section 41712 to take enforcement action whenever advertisements constitute unfair or deceptive practices or unfair methods of competition. The fourth option is to eliminate the full fare advertising rule in its entirety, leaving any fare advertising enforcement action to be undertaken solely under section 41712.

We invite interested persons to comment on all four proposals. In addition, we invite comments on whether we should amend § 380.30, our rule on price advertising in charter solicitation materials, in light of developments over the past two decades and, if so, how. We can issue a Notice of Proposed Rulemaking to amend § 380.30 if the comments so warrant. The comments we receive on our proposals for § 399.84 should help us determine which of them now strikes the most appropriate balance between the public interest in preventing consumer deception and the public interest in allowing the market to function efficiently.

Price-Advertising Proposals

Option I: Amend § 399.84 To Codify the Enforcement Office's Long-Standing Policy or Leave § 399.84 as Written but Continue the Enforcement Policy

This proposal would maintain current enforcement practice and Department case precedent regarding full-fare advertising. One approach would be to amend the rule to incorporate all elements of this practice. Our advertising enforcement precedents under 49 U.S.C. section 41712 that relate only tangentially to full-fare advertising—*e.g.*, the requirement that a reasonable number of seats be available at advertised prices and disclosure requirements for ''percentage off'' advertisements and for when seats at an advertised fare are limited and/or not available on all flights—would not be incorporated in the amended 14 CFR 399.84. In addition, the amended rule would not incorporate our policy of allowing Internet travel agents to list their service fees separately from advertised airfares under certain limited conditions (*see Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, ''Revised Enforcement Policy on Deceptive Practices Regarding Service Fees Charged by Travel Agents in the Marketing and Sale of Airfares to the Public via the Internet,'' http://airconsumer.ost.dot.gov/rules/20011219.htm* (December 19, 2001) and Order 2001–12–7 (December 7, 2001)), because this exception is very narrow and we are not aware of its being used. Thus, the following exceptions and clarifications would be added to the existing text of the rule:

- Government-imposed taxes and fees that the carrier collects on a per-passenger basis may be excluded from the advertised fare, provided that they are not *ad valorem* in nature, and provided that the advertisement shows the existence and amount of these charges clearly so that consumers can easily determine the total fare. An indication of the existence of the taxes and fees listed separately must be situated close to the advertised fare, and the information provided must be easily readable.
- In advertisements where multiple destinations are listed and not all entail the same government-imposed charges, the advertisement may state a maximum fee, a fee for each destination, or a range of fees. Also, the word ''approximately'' or a range of amounts may be used to account for minor currency-exchange fluctuations.
- Advertising ''two-for-one'' fares is deceptive if the fare that must be purchased to take advantage of the promotion is higher than the carrier's other fares in the same market, unless this fact is prominently and clearly disclosed.
- Advertisements of each-way fares that are available only when bought for round-trip travel must disclose the round-trip purchase requirement clearly and conspicuously—*i.e.*, the disclosure must be prominent and proximate to the advertised fares. A banner or pop-up internet advertisement of an each-way fare that is only available with a round-trip purchase must disclose this fact in the advertisement itself.
- In internet fare advertisements, including not only web sites but also banner, pop-up, and e-mail advertisements, the per-person government charges that may be listed separately may be noted by a prominent hyperlink, proximate to the listed fare, that takes the viewer to a display showing the nature and amount of these charges.
- In advertisements of ''free'' air transportation in conjunction with the purchase of one or more other tickets, restrictions, fees, and other conditions that apply to the ''free'' transportation must be noted prominently and proximate to the offer, at a minimum through an asterisk or other symbol directing the reader's attention to the information elsewhere in the advertisement. The information must be presented in easily readable print. This requirement applies to advertisements in all media: the internet, billboards, television, radio, and print media.
- Advertisements of fares that are higher if purchased by telephone or in person than over the Internet must prominently disclose that the stated fares are only available over the Internet. The advertisements must also disclose that tickets cost more than the advertised price if purchased by telephone or in person, and they may disclose the price increment. If the advertisements state a price differential, they may not characterize this amount as a ''service fee.''
- In any billboard advertisement that breaks out taxes and fees, a sum of the

taxes and fees must be legible to drivers passing the billboard at the posted speed limit.

• In television advertisements, the sum of any taxes and fees that are broken out must be disclosed. It may be presented on screen in a readable manner or disclosed audially.

• Radio advertisements must include the sum of any taxes and fees that are broken out.

We invite comments on whether any of the Department's other enforcement policies on fare advertising should be included in the expanded rule.

This first approach would codify the Enforcement Office's long-standing practice. The Enforcement Office has acted aggressively to ensure that airlines and travel agents comply with 14 CFR 399.84 and the refinements set forth above. It has, for example, issued numerous formal and informal warnings in response to advertisements that did not comply with the Department's advertising requirements. Also, as a result of the Enforcement Office's investigations, the Department has issued 86 cease-and-desist orders concerning violations of 14 CFR 399.84, as enforced, and has assessed a total of $2.26 million in civil penalties in these orders.

We can identify a number of advantages in continuing this practice and codifying it. First, it enables consumers to determine the maximum fare being advertised with ease: they need only add the broken-out charges to the advertised fare. Second, breaking out government-imposed taxes and fees lets consumers know for the most part how much of their fares go to government entities and how much to the carrier. (Our enforcement policy prohibits separate listing of the 7.5 percent Federal excise tax or any other *ad valorem* tax due to the potential for consumer confusion.) Third, our practice ensures that consumers are protected from hidden surcharges, many of which are entirely under the seller's control. Fourth, while we recognize that the internet affords consumers an unprecedented level of highly detailed information on prices for air transportation, we also recognize both that not all consumers have access to the internet and that those who do not tend to travel less frequently and be less familiar with airline pricing practices than those who do. We are concerned that either allowing advertisements with additional per-person or *ad valorem* ''add-ons'' or allowing advertisements that do not include all elements of the fare could increase the risk of consumers not being able to determine the actual fares or of their buying tickets at higher prices than necessary. Fifth, our disclosure requirements promote competition in air transportation, both by facilitating price comparison by consumers and in another respect. We are concerned, for example, that a carrier that has succeeded in hedging its fuel costs might be deprived of the competitive advantage its lower costs should confer if its higher-cost competitors list fuel surcharges separately and thus advertise fares that appear to match or undercut those of their lower-cost rival. Sixth, sellers might prefer the greater certainty of a detailed codified rule to the lesser certainty of a discretionary enforcement policy that currently allows exemptions to the rule but could easily be changed. Seventh, as noted above, unlike price advertising in other industries, the States and the FTC are barred from regulating airline advertising. Curtailment of our traditional role would thus create a vacuum of regulation.

We can also identify disadvantages in continuing and codifying our long-standing practice. First, the fast pace of change in the marketing of air transportation due to evolving technologies has made it increasingly difficult for us to keep our price-advertising requirements current. Codification of all elements of our policy will make future refinements even more difficult and time-consuming. Second, even under the current practice, some sellers advertise a full price while others exclude taxes. This variation makes it more difficult for consumers to compare prices. Third, we are aware that many sellers of air transportation believe our requirements to be unnecessary or unduly restrictive or burdensome, especially given the plethora of price information available on the internet and the ease of using that source to find and compare airfares. These sellers take the position that relaxing or eliminating our full-fare advertising requirements will clear the way for better marketing innovations and increases in efficiency that may in turn mean lower prices for consumers. Fourth, our advertising requirements are not consistent with requirements applicable to other industries, as is discussed below in connection with the third option.

An alternate approach to maintaining our long-standing enforcement practice would be to do so without change to the language of § 399.84. Since enforcement is by nature discretionary, this alternate approach has the advantage of retaining our flexibility to make further refinements to our enforcement policy without the delays associated with rulemaking. Some might argue that this approach has a corresponding disadvantage in that codifying all elements of our enforcement policy in the CFR will make the policy as a whole more accessible to sellers and consumers of air transportation. Given, however, both that (1) sellers and lawyers practicing in this area are already familiar with the policy and the relevant case precedent and that (2) all of this information is readily available on-line at *http://airconsumer.ost.dot.gov/rules/guidance.htm*, as noted above, this disadvantage may be marginal at best.

We invite commenters to address both whether and to what extent consumers continue to need the level of protection that our disclosure requirements afford them and how these requirements affect competition in air transportation.

Option II: Change the Long-Standing Enforcement Policy To Discontinue Exceptions to the Strict Terms of § 399.84

This proposal would change current practice by requiring that all advertised fares include all price components. No longer could government-imposed per-passenger charges be broken out and listed separately. While we recognize that crafting an advertisement or display that includes all government-imposed charges in the listed fares may not be possible given that the applicability of some charges varies with the routing chosen, we would consider an advertisement to be in compliance with § 399.84 if it either set forth a range of prices for each city-pair—*i.e.,* the minimum and maximum—or used the word ''from'' along with the minimum price. This approach would have the virtue of simplicity, and it would ensure uniformity of fare advertisements and thus facilitate price comparison by consumers to the greatest extent. Nevertheless, unless sellers were to continue to list government-imposed charges separately despite being required to include these charges in the advertised fare, which we deem unlikely, this approach would deprive passengers of potentially useful information concerning the composition of airfares. It would also deprive sellers of flexibility that they have long enjoyed. Some Internet sellers of air transportation might incur minimal costs for reprogramming their displays to include government charges, but not all of them would: many already display total fares. We invite commenters to address the advantages and disadvantages of this approach.

Option III: Amend § 399.84 Either (1) To Require Simply That the Total Price of Air Transportation Be Disclosed Before the Consumer Makes the Purchase or (2) To Require This and Also That Price Advertisements Set Forth All Elements of the Fare So That Consumers Can Add Them Together To Determine the Total Price

This proposal would reverse over twenty years of enforcement practice and eliminate virtually all of our traditional full-fare advertising requirements. In their place we would adopt either (1) a rule requiring that in any sale of air transportation the seller must inform the consumer of the total price before the purchase is transacted or (2) a rule requiring both this and that fare advertisements contain all information necessary to enable consumers to calculate total fares. Advertisements could not feature airline-imposed security charges under either approach, because the Department of Homeland Security prohibits airlines from collecting surcharges for their own security costs, *see* 49 CFR 1510.9(d).

A rule requiring simply that sellers inform consumers of the total price before the purchase is made has a number of advantages. First, it would allow the entire content of fare advertisements to be determined by the competitive marketplace. The FTC, which has authority to prohibit unfair and deceptive practices and unfair methods of competition in other industries, does not have any express price regulations comparable to our full-fare advertising requirements. Car-rental companies, for example, are thus under no Federal obligation to inform consumers in advertisements of the total price they will have to pay, but we have nevertheless observed a trend among Web sites to give total prices for rental cars when giving quotes for dates the consumer has entered. Another feature of Internet commerce in other industries is that consumers who compare base prices among various Web sites can see that some sites show low base prices but actually charge higher total prices when shipping costs are included. This transparency can result in competition over shipping rates as well as base prices, all to consumers' benefit. When sellers have this level of flexibility, consumers must take greater care in comparing prices before hitting the ''buy'' button, but as long as consumers know the total price of air travel before they commit themselves to buying it, this approach would merely align the purchase of air transportation with the experience of purchasing most other goods and services on line. Second, this approach would eliminate the difficulties that we face in keeping our enforcement policy current in an era of constant technological flux. Third, if consumers and competitors alike no longer need the level of protection that our requirements have provided, then this approach would clear the way for innovations that could benefit either or both. The Internet now gives those consumers who use it a vast amount of information about prices for air transportation and makes comparing prices fast and easy. (According to the U.S. Department of Commerce, as of October of 2003, 54.6 percent of U.S. households had Internet connections [*See A Nation Online: Entering the Broadband Age,* U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, September 2004]. Also, with the proliferation of computers in public libraries, even those who do not own computers or have internet connections at home can gain access to the Internet.) Moreover, on-line consumers can now take advantage of so-called ''meta'' search sites (*e.g.*, sidestep.com and kayak.com) that gather price information by ''scraping'' other Web sites and display a greater variation in prices than can be found elsewhere. Southwest, Delta, AirTran, and Jet Blue are now making 59 percent, 28 percent, 65 percent, and nearly 100 percent of their sales, respectively, through their own Web sites (*Airline Business,* June 2005 and November 2004), and consumers also buy air transportation through on-line travel agencies such as Expedia, Orbitz, Priceline, and Travelocity. Fourth, this approach would not preclude us from taking action under section 41712 against advertisers that engage in unfair or deceptive practices or unfair methods of competition. Advertising practices long held to be deceptive, such as ''bait and switch,'' for example, would still be subject to enforcement action. The FTC has regulations for bait advertising (16 CFR part 238), deceptive pricing (16 CFR part 233), and use of the word ''free'' and similar representations (16 CFR part 251) as well as policy statements on deception (*http://www.ftc.gov/bcp/policystmt/ad-decept.htm*) and unfairness (*http://www.ftc.gov/bcp/policystmt/ad-unfair.htm*). We anticipate that we would look to precedent under these regulations and under 15 U.S.C.A. 45 for guidance in determining whether advertisements that comply with the amended § 399.84 may nevertheless be unfair or deceptive within the meaning of section 41712.

This approach also has disadvantages. First, we are concerned that if we eliminate all requirements except that the consumer be told the total price before the purchase is transacted, some sellers of air transportation will begin publishing print advertisements that highlight absurdly low fares but disclose none of the taxes, fees, or surcharges that apply. Not all consumers have easy access to the Internet (In October of 2003, according to the Department of Commerce, 45.4 percent of U.S. households did not have Internet connections. [*See A Nation Online: Entering the Broadband Age, supra*]), and many still rely on print advertisements. These consumers would have to make telephone calls to learn the total price and might well be subject to long waits for a live agent. Moreover, some might view such advertisements as examples of ''bait and switch.'' We invite commenters to address the likelihood of this type of advertising and whether and to what extent it would harm consumers. We specifically invite those sellers that already display or otherwise advertise total fares to comment on whether and how they would change their practices if we adopt this option. Second, we recognize that the positive trends we have observed in car-rental advertisements on the Internet may reflect government initiatives taken at the State level. As noted above, the States are preempted from regulating airline advertising practices. We encourage commenters to address the extent to which a simple requirement that airlines inform customers of the total fare before selling the ticket might leave consumers uniquely vulnerable. Unlike consumers in other industries, consumers of air transportation would not be able to appeal for protection to the States, a circumstance that many believe justifies Department requirements that go beyond FTC requirements for advertising in other industries. Third, enforcement action against abusive advertising practices is likely to be considerably more costly and time-consuming for all parties than it is now. Fare advertising is commercial speech, which, the Supreme Court has held, enjoys certain protections under the First Amendment. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980), 100 S.Ct. 2343. The Court said in that case that ''the government may ban forms of communication more likely to deceive the public than to inform it'' (citation omitted). *Id,* at 563.

Thus, in reviewing an advertisement for compliance with § 41712, we must consider both the advertisement itself and its effect on an ordinary consumer to determine if it is unfair or deceptive. *Country Tweeds, Inc.* v. *FTC,* 326 F.2d 144, 148 (2nd Cir. 1964), Order 86–8–4. ''The important criterion is the net impression which the advertisement is likely to make upon the general populace, *Eastern Air Lines, Inc.* v. *National Airlines Enforcement Proceeding,* 33 CAB 436, 464 (1969), quoting *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676, 679 (2nd Cir. 1944). The ''likelihood of deception or the capacity to deceive'' has been held to be the standard for judging whether an advertisement is deceptive in violation of the law. *Montgomery Ward and Co.* v. *FTC,* 379 F.2d 666, 670 (7th Cir. 1967), CAB Order 82–7–107. Under these formulations of the government's burden, enforcement of section 41712 against fare advertising would be more cumbersome without § 399.84 as it is currently construed, both because there would be more elements of proof and because issues would have to be decided on a case-by-case basis.

The first concern stated above will not arise if we amend § 399.84 to require that fare advertisements set forth all elements of the fare so that consumers can add them together to determine the total price. Under this approach, sellers could exclude any fees and surcharges from the advertised fares, but the advertisement would still have to disclose all excluded price elements as well as their amounts. This approach would most closely approximate the policy followed by the FTC, as noted above. It would still leave sellers free, however, to advertise absurdly low fares in bold, large print and relegate large carrier-imposed surcharges to the fine print, a practice some might deem unfair and misleading.

We invite commenters to address each approach of this third option and to point out any other advantages or drawbacks that they perceive. Among other things, commenters may want to address the following: (1) The implications for both consumers and competition of there being no requirement that sellers use a consistent approach to advertising fares—*i.e.,* the same base fare with the same cost elements broken out—across all media—*i.e.,* Web sites, print advertisements, and broadcast advertisements, and (2) whether carriers are likely to break out booking or service fees from the base fare in order to make their offerings appear as attractive as those of travel agents, many of which now charge such fees, and if so, whether this will harm consumers.

Option IV: Remove § 399.84

The advantages and disadvantages of removing § 399.84 are similar to those of the first approach under Option III above, except that without an explicit rule requiring sellers to inform consumers of the total price of their transportation before purchases are consummated, consumers would have less regulatory protection. We invite interested persons to comment on whether an express disclosure requirement is necessary in light of (1) the potential for enforcement action under section 41712 against sellers that engage in practices that deceive or confuse consumers and (2) consumers' ability to bring contract actions against sellers that charge them prices to which they have not agreed. We invite comments on any other advantages or disadvantages of this option.

Charter Air Transportation

As noted above, § 399.84 has a counterpart in our charter regulations, § 380.30. While we are not proposing any specific changes to the latter rule here, we do invite interested persons to comment on whether and how current conditions may warrant its revision as well. We can issue a Notice of Proposed Rulemaking to revise the rule if appropriate.

Regulatory Notices

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit *http://dms.dot.gov.*

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The Department has determined that any of several of the options proposed for amending the existing rule, if adopted as a final rule, would be a significant regulatory action under Executive Order 12866 and under the Department's Regulatory Policies and Procedures. None of the proposed rules would require the disclosure of any information in addition to what is required under application of the existing rule, and the Department expects that adoption of any of the proposed rules will not significantly affect the regulatory burdens or benefits associated with the current rule. Therefore, this proposal is expected to have a minimal economic effect, and further regulatory evaluation is not necessary.

Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). The Department has determined that this proposal would not have a 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, that it would not impose substantial direct compliance costs on State and local governments, and that it would not preempt State law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13084

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because any of the proposed amendments, if adopted, would not significantly or uniquely affect the Indian tribal communities and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. I hereby certify that any of these proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities. None of the proposed amendments would increase the regulatory burden on air carriers and ticket agents substantially. The Department seeks comment on whether there are small entity impacts that should be considered.

Paperwork Reduction Act

None of the proposed amendments contains information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 2507 *et seq.*)

Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

Dated: Issued this Day of December 5, 2005, at Washington, DC, Under Authority Delegated by 49 CFR 1.56a.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

List of Subjects in 14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

For the reasons set forth in the preamble, the Department proposes to amend 14 CFR part 399 as follows:

PART 399—STATEMENTS OF GENERAL POLICY

1. The authority citation for part 399 continues to read as follows: 49 U.S.C. 40101 *et seq.*

Subpart G—Policies Relating to Enforcement

Option I

2. Section 399.84 would be revised to read as follows:

§ 399.84 Price Advertising.

(a) *Total Price Requirement.* (1) Except as specified in paragraph (a)(2) of this section, the Department considers any advertising or solicitation by an air carrier, a foreign air carrier, or a ticket agent for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground accommodations), or a tour component (*i.e.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, foreign air carrier, or ticket agent, for such air transportation, tour, or tour component.

(2) Government-imposed taxes and fees that the carrier collects on a per-person basis may be excluded from the advertised airfare, provided that they are not *ad valorem* in nature, and provided that the advertising or solicitation shows the existence and amount of these charges clearly so that consumers can easily determine the entire price to be paid. An indication of the existence of the taxes and fees listed separately must be situated close to the advertised fare, and the information provided must be easily readable.

(i) If an advertisement lists multiple destinations that do not all entail the same government-imposed taxes and fees, the advertisement may state a maximum sum of these charges, a sum for each destination, or a range of sums. Also, the word ''approximately'' or a range of sums may be used to account for minor currency-exchange fluctuations.

(ii) In Internet fare advertisements, including not only Web sites but also banner, pop-up, and e-mail advertisements, the per-person government taxes and fees that may be listed separately may be noted by a prominent hyperlink, proximate to the listed fare, that takes the viewer to a display showing the nature and amount of these charges.

(iii) In any billboard advertisement that breaks out taxes and fees, a sum of these charges must be legible to drivers passing the billboard at the posted speed limit.

(iv) In television advertisements, the sum of any taxes and fees that are broken out must be disclosed. It must either be presented on screen so that it can be read (*i.e.*, in sufficiently large print and for a sufficient amount of time) or be disclosed audially.

(v) Radio advertisements must include the sum of any taxes and fees that are broken out.

(b) Advertising ''two-for-one'' fares is an unfair or deceptive practice if the fare that must be purchased to take advantage of the promotion is higher than the carrier's other fares in the same market, unless this fact is prominently and clearly disclosed.

(c) Advertising ''each-way'' fares that are available only when bought for round-trip travel is an unfair or deceptive practice unless the round-trip purchase requirement is disclosed clearly and conspicuously. Specifically, the disclosure must be prominent and proximate to the advertised fares. A banner or pop-up Internet advertisement of an ''each-way'' fare that is only available with a round-trip purchase must disclose this fact in the advertisement itself.

(d) Advertising ''free'' air transportation in conjunction with the purchase of one or more other tickets is an unfair or deceptive practice unless restrictions, fees, and other conditions that apply to the ''free'' transportation are disclosed prominently and proximate to the offer, at a minimum through an asterisk or other symbol directing the reader's attention to the information elsewhere in the advertisement. The information must be presented in easily readable print or audially. This requirement applies to advertisements in all media: the Internet, billboards, television, radio, and print media.

(e) Advertising fares that are higher if purchased through one or more media (*e.g.*, by telephone or in person) than through another (*e.g.*, over the Internet) is an unfair or deceptive practice unless the advertisement prominently discloses that the stated fares are only available through the one medium and that tickets cost more than the advertised price if purchased through other media. The advertisement may state a price differential but may not characterize this amount as a ''service fee.''

Option II

3. Section 399.84 would be revised to read as follows:

§ 399.84 Price disclosure.

The Department considers the sale of air transportation to be an unfair or deceptive practice unless the total price of the transportation is disclosed to the consumer before the consumer makes the purchase.

Option III

4. Section 399.84 would be revised to read as follows:

§ 399.84 Price disclosure and price advertising.

(a) The Department considers the sale of air transportation to be an unfair or deceptive practice unless the total price of the transportation is disclosed to the consumer before the consumer makes the purchase.

(b) The Department considers any advertising by an air carrier, foreign air carrier, or ticket agent that states a price for air transportation to be an unfair or deceptive practice unless the advertisement sets forth all price components for such air transportation so that the consumer can determine the entire price to be paid.

Option IV

5. Section 399.84 would be removed.

[FR Doc. 05–23841 Filed 12–13–05; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR–4665–N–26]

Conference Call Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.