

THE PRACTICAL NOMAD

EDWARD HASBROUCK

1130 Treat Avenue, San Francisco, CA 94110, USA

phone +1-415-824-0214

edward@hasbrouck.org

<http://hasbrouck.org>

The Practical Nomad: How to Travel Around the World (3rd edition, 2004)

The Practical Nomad Guide to the Online Travel Marketplace (2001)

<http://www.practicalnomad.com>

13 February 2006

Docket Management Facility
USA Department of Transportation
400 Seventh Street, SW.
Nassif Building, Room PL-401
Washington, DC 20590-001, USA

**Comments Re: OST Docket No. 2005-23194, Notice of Proposed
Rulemaking (NPRM) to Amend 14 *Code of Federal Regulations* 399,
"Price Advertising", RIN 2105-AD56,
70 *Federal Register* 73960-73966 (14 December 2005),
<[http://dms.dot.gov/search/document.cfm?
documentid=377599&docketid=23194](http://dms.dot.gov/search/document.cfm?documentid=377599&docketid=23194)>**

COMMENTS:

=====

(I am a travel expert and consultant, consumer advocate for travellers, author of two books of consumer advice for travellers on issues including airline ticket purchasing and Internet airfare information, author and maintainer since 1991 of the Usenet FAQ on international airfares <<http://hasbrouck.org/faq>>, author/publisher of a Web site of consumer advice and information for travellers, and staff employee of an Internet travel agency.

These comments are submitted strictly on my own behalf, and as a traveller, travel agent, and independent consumer advocate. They do not necessarily represent the opinions or beliefs of my publisher, my employers, or any of my consulting clients.)

The Department of Transportation (DOT) “considers any advertising or solicitation by a[n] air carrier ... or an agent ... for passenger air transportation ... that states a price for such air transportation ... 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, or agent, for such air transportation” (14 Code of Federal Regulations 399.84).

However, “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” certain conditions are met. The Department also allows, as a matter of prosecutorial discretion, advertising of half round-trip prices as “each way” fares or “one way based on round trip” prices, even when no one-way tickets are offered at these prices, and the total price is twice these advertised “half round-trip” prices.

By this “Notice of Proposed Rule-Making” (70 Federal Register 73960-73966, 14 December 2005), the Department has invited public comment on both the regulation defining these price advertising practices as unfair or deceptive, and the Department’s policy for the exercise of its discretion in enforcing this regulation.

The Department has outlined four options. As a traveller and consumer advocate, I urge you to adopt “Option II” as stated in the NPRM: “Change the Long-Standing Enforcement Policy To Discontinue Exceptions to the Strict Terms of § 399.84.”

Consumers are routinely misled by advertising in which the advertised “price” or “fare” is not the total amount to be paid, either because it excludes some taxes, fees or surcharges or because it is only half of a round-trip price, and not a price at which one-way tickets are actually offered.

Sophisticated travellers know airlines routinely engage in this sort of fraud, and know not to believe the prices in airline ads, but many travellers do not. And even sophisticated travellers suffer from the Department’s enforcement policy, since they are unable to rely on airline advertising as a meaningful source of comparative price information. At best, they have to read all the fine print to compare prices, instead of being able easily to skim the bold prices in the ads to compare prices.

The damage caused to consumers by the Department's enforcement policy is growing, for two reasons: (1) taxes, fees, and "surcharges" make up an increasing percentage of total ticket prices, especially on international routes, making it more important to know the total price, not just the base fare, to determine whether an advertised price is sufficiently affordable to make it worthwhile to read the rest of the advertisement; and (2) more discounted one-way fares are available from low-fare airlines on a one-way basis, making it more important than it was when essentially all discounted fare were round-trip fares for consumers to be able to distinguish at a glance between true one-way fares and "one-way based on round-trip purchase" prices.

In addition to its adverse direct effects on consumers, the Department's non-enforcement of the current rule against advertising of half round-trip prices unfairly benefits airlines that offer only round-trip fares, and unfairly disadvantages airlines that actually offer inexpensive one-way fares, since the distinction between "one-way" and "one-way based on round-trip purchase" prices is much less conspicuous than the difference between total one-way prices and total round-trip prices.

The Department acknowledges in the NPRM that it has a special responsibility for strict enforcement of the consumer protection provisions of current Federal laws related to airlines, since state and local consumer protection authorities are preempted by the Airline Deregulation Act of 1978 from enforcing consumer protection laws that would otherwise apply to airlines, or from enacting any airline-specific rules.

The Federal preemption of protection of consumers against fraudulent airline advertising should create a strong presumption against a Department policy of non-enforcement of the Federal rules. While it is not a substitute for an end to Federal preemption of state truth-in-advertising and consumer fraud laws, Option II in the NPRM – enforcement of the current rules, and an end to the Department's policy of allowing price advertising which the Department knows to be in violation of the current Federal regulations – would also be the option most responsive to the desire of state and local officials responsible for consumer protection that airlines be subjected to a degree of policing against unfair or deceptive business practices more comparable to that applied to other industries. I urge the Department to consider, in deciding how to act on this NRPM, the bi-partisan letter on this subject from 45 state and territorial Attorneys

General to the Congressional leadership of 8 September 2000:
<<http://hasbrouck.org/documents/NAAG-8SEP2000.pdf>>

The Department's selective enforcement policy also unfairly disadvantages alternative modes of transportation, by making airline tickets appear, to those who merely skim the ads, to be less expensive relative to the costs of travel by other means that are not exempt from state and local truth-in-advertising laws, and which are thus required to advertise total prices.

And the Department's selective enforcement policy unfairly disadvantages those travel agencies (or any airline, although I know of no airline that complies with the current regulations on price advertising) that comply with the regulations as written, by making their advertised total price appear higher – increasingly so, as noted above – than the base fare exclusive of some taxes and fees, or half round-trip fare, advertised by airlines or other agencies. With taxes, fees, and surcharges sometimes exceeding US\$200 on an international round-trip ticket, the total price of a ticket advertised as \$199 each way based on round-trip purchase, exclusive of certain taxes and fees, may be more than three times that \$199 advertised “price”.

Finally, the NPRM states – erroneously – 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.”

As discussed further below, Option II, if adopted, would have a significant positive economic impact on a significant number (between 10,000 and 20,000) of small travel agencies, and substantially reduce the regulatory burden on those small entities. Conversely, Options III or IV would have a significant negative economic impact on those small entities, and significantly increase the regulatory burden on them. Accordingly, the Department is required to conduct an analysis of those impacts in accordance with the Regulatory Flexibility Act.

According to the most recent report of the Airlines Reporting Corporation, there were 20,033 retail travel agency locations appointed through ARC to issue airline tickets on behalf of ARC-participating airlines as of 31 December 2005:

<http://www.arccorp.com/forms/stat/2005dec.pdf>

As of 30 November 2004, there were 21,013 retail travel agency locations appointed through ARC to issue airline tickets: <http://www.arccorp.com/forms/stat/2004nov.pdf>

Also as of as of November 2004, according to the most recent Bureau of Labor Statistics "Occupational Employment Statistics" survey for which results have been reported, there were 88,480 people in the USA employed in the occupational category "Travel Agents": <http://www.bls.gov/news.release/ocwage.t01.htm>

The mean number of travel agents per retail agency location is less than 5. The overwhelming majority of the more than 20,000 ARC-appointed travel agencies issuing airline tickets in the USA are very small, "mom and pop" (or more often, given the gender demographics of the industry, "mom and mom") businesses.

When airlines advertise prices, many potential ticket purchasers contact travel agents – as agents of the airlines – for information concerning advertised "offerings".

Travel agencies and agents take a large part of the burden of explaining to consumers that the "prices" they have seen in airlines' advertisements are not the actual total amounts they would have to pay for tickets, and that no tickets are actually available at the advertised "prices", and the brunt of consumer anger at the deceptive price advertising practices (and other deceptive marketing practices such as code-sharing) that airlines are able to engage in, in spite of their illegality, because of the Department's selective enforcement policy.

This is a substantial burden of staff time, overhead expenses, and consumer ill-will (often directed at agencies and agents, and damaging to their reputations, in spite of being the result of illegal actions by airlines over which travel agencies have no control), which is directly attributable to the Department's selective enforcement policy.

Option I, as described in the NRPM, would maintain this unfair and unnecessary regulatory and enforcement policy burden on travel agencies and agents. Option III and Option IV would allow an even wider range of currently-forbidden deceptive advertising, which travel agencies would have to take even more time explaining to consumers. Option II would dramatically

reduce this regulatory and enforcement policy burden on travel agencies and agents, freeing them from spending so much time explaining that no tickets are actually available at the prices advertised by airlines, and freeing more of their time to spend selling tickets and providing services to people willing to pay the prices at which tickets are actually being offered.

As a travel writer, consumer advocate, and travel agent, I hear constantly from travellers who have been misled by airline advertising of "prices" other than total prices. I urge you to adopt Option II in the NRPM, and begin to enforce the existing regulations that prohibit this deceptive practice.

Respectfully submitted,

Edward Hasbrouck
13 February 2006

These comments are also available on the Web at:
<[http://hasbrouck.org/articles/
Hasbrouck_DOT_comments-13FEB2006.pdf](http://hasbrouck.org/articles/Hasbrouck_DOT_comments-13FEB2006.pdf)>