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United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP
WASHINGTON, DC 20510-6350

June 9, 2003

BY FACSIMILE
ORIGINAL BY U.S. MAIL

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-97-4775, and OST-99-5888
Computer Reservations System (CRS) Regulations; Statements of General Policy

Dear Secretary Mineta:

As the Chair and Ranking Member of the Senate Committee on Small Business and Entrepreneurship, we maintain a high interest in how agencies comply with the requirements of the Regulatory Flexibility Act¹ (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).² Unfortunately, the Department of Transportation's (Department, DOT) recent proposed rulemaking changing the regulation of Computer Reservation Systems (CRSs) included an Initial Regulatory Flexibility Analysis (IRFA) which failed to satisfy many of the requirements of the RFA.

DOT's Proposed Rule

On November 15, 2002, DOT published a proposed rule on the "Computer Reservations System ("CRS") Regulations; Statements of General Policy"³. 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

¹ See 5 U.S.C. §§ 601-612.

² See P.L. 104-121.

³ See 67 Fed. Reg. 69366.

flexibility in bargaining with the systems. DOT is also reviewing its policy regarding disclosure of fees by travel agencies.

While the proposed regulatory change may help small businesses, the IRFA conducted by the Department does not adequately address the potential impacts on small businesses. We urge 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

We applaud DOT for recognizing that the rule will have a significant economic impact on a substantial number of small entities and for preparing 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, most notably any attempts to quantify the number of small entities that will be affected by these changes, or the impacts of the changes. Therefore, we encourage DOT to prepare a supplemental IRFA that addresses all of the elements that are required by Section 603 of the RFA as outlined below.

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.

⁴ See 5 U.S.C. § 603 and 5 U.S.C. § 607.

We believe that DOT should have sufficient data to perform an analysis and provide the information on the anticipated economic impact to the small entities. For example, DOT states that the proposal to restrict or prohibit productivity pricing may increase CRS costs for some travel agencies, but DOT indicates that the only affected travel agencies would be larger agencies.⁵ How is it possible if the DOT admits that the regulatory changes meet the threshold for triggering an IRFA, that the agency is unable to say how many small travel agencies would be affected? The Department must have made a calculation about the level of impact and the number of small entities affected in a quantified manner to make the determination to conduct an IRFA. Unfortunately, the Department does not provide the information or assumptions upon which this determination was based. If the Department could explain its determination that these changes triggered the requirement to perform an IRFA, i.e. that they will have a significant economic impact on a substantial number of small entities, many of the issues with the IRFA would likely be resolved.

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. This is an excellent example of the type of problem with the IRFA that would be solved by publishing the support for the determination to conduct the IRFA.

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.

These regulatory changes have attracted an enormous amount of public attention and many of the comments have offered suggestions on how DOT can avoid the impacts on small entities. We encourage DOT to review those comments and suggestions from small entities affected by these changes to identify less burdensome alternatives. These alternatives should be identified and discussed in the supplemental IRFA we hope DOT will publish.

⁵ 67 Fed. Reg. 69424.

General Concerns

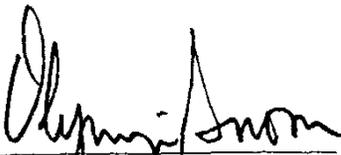
Although DOT claims the rule is designed to help small businesses, we have heard from many representatives of the travel industry about the potential impact of this rule on small businesses, most notably travel agents. As their comments to the record will reflect, travel agencies are concerned about 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.

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. We recommend that DOT publish a supplemental IRFA to cure the defects in the original IRFA which does not provide small businesses with sufficient information to determine what impact, if any, the particular proposal will have on their 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. We also encourage DOT to work closely with SBA's Office of Advocacy in developing its supplemental IRFA to ensure that it meets the requirements of the Regulatory Flexibility Act.

We appreciate the multiple and extended comment periods the Department has provided for this rulemaking. These changes have triggered extensive comments and involvement from small businesses affected by this rulemaking and it is to DOT's credit that they have made accommodations to make sure all these views are heard.

Sincerely,



Senator Olympia J. Snowe
Chair, Committee on
Small Business and Entrepreneurship



Senator John F. Kerry
Ranking Member, Committee on
Small Business and Entrepreneurship