



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 7th day of December, 2001

SERVED DEC. 7, 2001

Application of

ORBITZ, L.L.C.

**for an exemption, to the extent
necessary, pursuant to 49 U.S.C.
§40109**

Docket OST-01-11086 - 2

ORDER GRANTING CONDITIONAL EXEMPTION

By this order, we find that Orbitz, L.L.C.'s practice of listing its service fees separately rather than as part of the airfares in fare displays on its website may amount to a violation of 49 U.S.C. §41712 and 14 CFR §§399.80 and 399.84, but we conditionally grant its application for an exemption from these provisions, as discussed below.

Orbitz is an on-line travel agent. It claims to be the only on-line agent that constructs its displays of flight and fare information without any type of bias; it also professes a commitment to foregoing the commission override payments that carriers offer travel agents as an inducement to book their flights. Orbitz relates that it is in the process of introducing a service fee for airline ticketing, a step that it says many if not most other travel agents have taken already. Orbitz does not include its service fee in its initial display of fares. Instead, it says, it prominently discloses the existence and amount of the fee on its initial search results page and makes additional information on the fee available via a pop-up box. For each itinerary displayed on the initial fare display, Orbitz shows the cost of the air transportation payable to the airline, including all taxes and airline-associated fees, but not the service fee.

Only after a consumer has selected an itinerary does the total cost, including the fee, appear. Orbitz states that it also informs customers of the service fee by requiring currently registered customers to check a box indicating their understanding that Orbitz has added a service fee to its terms and conditions and by requiring new users to agree to its terms and conditions, including the service fee, before booking their first ticket.

Orbitz asks the Department either to clarify that its practice regarding service fees, which it implemented on December 1 or 2, 2001, complies with the law or to authorize its continuation by exemption. While filing its application as a precaution because of what it characterizes as "very little existing guidance from the Department on the subject of travel agent service fees,"¹ Orbitz believes that its practice is consistent with both 49 U.S.C. §41712, which prohibits unfair and deceptive practices and unfair methods of competition in air transportation and its sale, and the Department's regulations. Orbitz asserts that it provides consumers with clear and accurate fare, service, and price information; Orbitz asserts further that its service fee is not a component of the air transportation itself. By listing the service fee separately, Orbitz contends, it enables consumers to make better-informed choices among air transportation distribution channels. In support of its practice, it points to Order 70-5-35, a 1970 case in which the Civil Aeronautics Board held that fees a travel agent charges for its general expertise should not be included in fare quotes, and to 14 CFR §399.80(f), which prohibits travel agents from misrepresenting fares and charges for air transportation. Orbitz also cites an article in *Consumer Reports Travel Letter* (June 2001) that advocates separate disclosure of travel agents' service fees as the best and fullest form of disclosure.

We find that Orbitz's practice may constitute a violation of 49 U.S.C. §41712, 14 CFR §399.80(f), and 14 CFR §399.84. We further find, however, that granting Orbitz an exemption from these provisions to allow it to list its service fee separately is consistent with the public interest provided that we also put strict consumer safeguards in place. We therefore grant Orbitz's application, subject to the conditions specified below.

14 CFR §399.84, our rule on price advertising, states that "any advertising or solicitation by . . . [a travel] agent . . . for passenger air transportation . . . that states a price for such air transportation . . . [is] an unfair or deceptive practice,

¹ Application of Orbitz, L.L.C. for, to the extent necessary, an exemption pursuant to 49 U.S.C. §40109, Docket OST-01-11086, December 3, 2001 ("Application"), at 4.

unless the price stated is the entire price to be paid by the customer to the . . . agent . . . for such air transportation" This regulation, adopted by the Civil Aeronautics Board on the eve of its sunset at the end of 1984, supersedes the earlier case cited by Orbitz.² Failure to comply with it is a violation of 49 U.S.C. §41712.³ Over the years, the Department's Office of Aviation Enforcement and Proceedings ("Enforcement Office") has adapted its compliance activities associated with this rule to take account of new government fees and new advertising approaches in newspapers, television, radio, and on the Internet, but it has consistently interpreted the rule and the statute as prohibiting the separate listing of surcharges imposed by airlines or travel agents:

As a matter of long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and other sellers of air transportation, such as passenger facility charges (PFCs) and departure taxes, to be stated separately in fare advertisements so long as the charges are approved or levied by a government entity, and are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full price to be paid. However, any fuel surcharges, as well as *ad valorem* taxes or any additional carrier or vendor fees, must be included in the advertised fare.

Order 2001-12-1 at 1-2 (a consent order concerning fuel surcharges issued on December 3, 2001) (emphasis supplied); *see also* Notice of the Office of Aviation Enforcement and Proceedings, *Prohibition on Deceptive Practices In the Marketing of Airfare to the Public Using the Internet*, <http://www.dot.gov/airconsumer/20010118.htm>, January 18, 2001. The Enforcement Office has found that separate listing of these charges can confuse consumers, can keep them from making accurate fare

² As for §399.80(f), it prohibits travel agents from misrepresenting not just fares and charges for air transportation but also "services in connection therewith."

³ In considering §399.84 in the context of a challenge to a Department order exempting certain government-imposed charges from its ambit, the Court of Appeals for the D.C. Circuit affirmed that this regulation "unambiguously state[s] that advertisements are considered deceptive 'unless the price stated is the entire price to be paid by the customer to the . . . agent . . . for such air transportation . . .,'" *Alaska v. Skinner*, 868 F.2d 441, 444 (D.C. Cir. 1989); *see id.* at 446-447.

comparisons before deciding what to book and where, and can in some cases constitute "bait-and-switch" marketing.

Notwithstanding the history of the rule and its clear public benefits, Orbitz's assertion that consumers may benefit from knowing the service fees that travel agents are charging for air transportation has considerable merit. Currently, many travel agents are quoting fares to consumers that include a service fee. We are concerned that some consumers who receive quotes from these sellers will not realize that other sellers may offer the same flights at a lower price because they are charging lower service fees or no fees at all. We have therefore decided to allow Orbitz to list its service fees separately from the fares on its fare/itinerary displays, but in order to prevent deception to consumers, we will require that it comply with all of the following conditions:

- (1) Orbitz must present the total price to the consumer of purchasing a ticket or tickets, including its service fee, wherever it presents an itinerary that may be purchased.
- (2) Orbitz must place the following statement, prominently and in bold type, between its price matrix at the top of the fare/itinerary display page, which lists prices that do not include its service fee, and its display of flight itineraries, which under this exemption will list fares that do include its service fee:

Prices above are per person and may not be purchased on Orbitz without applicable service fees.⁴

⁴ It may be argued that with these conditions in place, the matrix display would not constitute an advertisement or solicitation regarding the prices in the matrix, so these prices would not be subject to 14 CFR §399.84. The reasoning goes as follows: the only prices on Orbitz's website that would not either include the service fee or be adjacent to a total fare that does include the service fee could not be purchased on Orbitz, and the required disclosure would alert consumers to this fact. We are not persuaded by this reasoning. It is the Department's position that the rule would apply because the page in its entirety is a solicitation, and therefore, without the instant exemption, the display may violate the rule and the statute.

The words "service fees" must be linked to a pop-up page that clearly sets forth Orbitz's fee schedule.

- (3) Orbitz must prominently disclose that it charges a service fee on the first page of its website and at a minimum provide a link to its pop-up explanation.
- (4) Orbitz's service fees may not be *ad valorem* in nature.⁵
- (5) The prices in Orbitz's fare matrix that do not include Orbitz's service fee must reflect the airlines' prices to Orbitz; all other fares displayed on Orbitz's website must either reflect the full price to be paid to Orbitz for a ticket or tickets, including any applicable service fee, or be adjacent to a full price that includes such fees.
- (6) The Orbitz website must be in full compliance with these conditions within seven days of the date this Order is issued and remain so.

With these safeguards, we believe that consumers using Orbitz will have the benefit of additional information that can be highly relevant to their purchase decisions without the risk of deception.

Because of the potential benefits for consumers once Orbitz has modified its website to comply with the conditions in this exemption, and given the need to secure these modifications as quickly as possible, the public interest requires that the Department act without waiting for the normal period for filing answers and replies to elapse so that this exemption can take effect immediately. This exemption will remain in effect until the Department has had an opportunity to consider the disclosure of service fees more comprehensively in a rulemaking proceeding with input from all interested parties.⁶ All of the issues Orbitz has raised will be considered in that context.

⁵ Orbitz's displays were in compliance with conditions (3) and (4) when it initiated its service fee practice in early December.

⁶ The Enforcement Office has advised us that it will take this exemption into account in carrying out its enforcement responsibilities under 49 U.S.C. §41712 and 14 CFR §§399.80 and 399.84 to ensure uniform treatment of all on-line travel agents.

ACCORDINGLY,

1. We exempt Orbitz from the provisions of 49 U.S.C. §41712 and 14 CFR §§399.80 and 399.84 to the extent necessary to list service fees for the purchase of air transportation separately on its website, subject to the conditions specified in the body of this order.
2. We will serve a copy of this order on Orbitz.

BY:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available
on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*