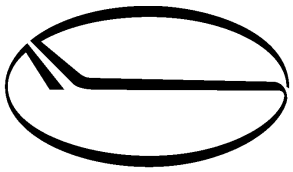

December 10, 2010

U.S. Federal Trade Commission
Office of the Secretary
Room H-135 (Annex J)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: **Comments of the Air Transport Association of America, Inc. on the Federal Trade Commission's Proposed Revisions to the Guides for the Use of Environmental Marketing Claims**

The Air Transport Association of America, Inc. ("ATA") submits the following comments on the Proposed Revisions to the Guides for the Use of Environmental Marketing Claims, which the Federal Trade Commission ("FTC" or the "Commission") published in the Federal Register on October 15, 2010.[1]

INTRODUCTION

ATA is the principal trade and service organization of the U.S. airline industry with its members and affiliates collectively representing more than 90 percent of all U.S. airline and cargo traffic.[2] In that capacity, it regularly comments on issues of importance to commercial aviation. ATA carriers have a strong environmental record and are committed to the principles

[1] Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552 (proposed Oct. 15, 2010) (to be codified at 16 C.F.R. Part 260).

[2] The members of ATA are: ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., American Airlines, Inc., ASTAR Air Cargo, Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.; associate members are: Air Canada, Air Jamaica Ltd.

of truth in advertising with respect to all marketing claims, including environmental claims. However, as explained more fully in these comments, the Department of Transportation has exclusive authority to regulate unfair and deceptive practices, including those pertaining to environmental marketing activities, of the airline industry. To that end, ATA submits these comments on the Proposed Revisions to the Guides for the Use of Environmental Marketing Claims ("Proposed Guidance") on behalf of its members.

COMMENTS

I. Commercial Aviation's Strong Environmental Record

For generations, flying has contributed to a better quality of life in America. Commercial aviation has been essential to the growth of our economy, yielded breakthrough technologies, brought people together and transported critical cargo – while achieving an exceptional environmental track record. For example, long before climate change was an international concern, the U.S. airlines were committed to reducing energy consumption and the associated greenhouse gas emissions. The U.S. airlines improved their fuel efficiency by approximately 110 percent between 1978 and 2008, resulting in 2.7 billion metric tons of CO_2 savings – roughly equivalent to taking more than 19.5 million cars off the road each year. Joining the world's airlines in a commitment to achieve an additional 1.5 percent annual average fuel efficiency improvement through 2020, and to render any subsequent growth in emissions "carbon neutral" after 2020 (subject to critical air traffic system improvements achieved by governments), the U.S. airlines are spending tens of billions of dollars to upgrade fleets, implement cutting-edge technology, implement new cruising and approach procedures, and fly more direct routes. ATA and its member airlines are also working hard to stimulate the development and deployment of

commercially viable alternative fuels. ATA co-founded the Commercial Aviation Alternative Fuels Initiative ("CAAFI") in 2006 to hasten the production and use of more economically viable and operationally reliable alternative fuels. These efforts have borne fruit recently, as certain blends of alternative fuels have been determined to meet international standards.

In sum, ATA airlines are committed to reducing their environmental impact in every aspect of their operations. ATA member airlines continue to identify new ways to improve their environmental performance, including improved environmental management practices, fuel management, stormwater management, airline recycling programs, noise reduction, aircraft drinking water and more.

II. The Proposed Guidance Does Not Apply to Commercial Air Carriers Because Congress Vested the Department of Transportation with Exclusive Authority to Regulate Airline Advertising and Marketing

The preamble to the Proposed Guidance states that the Commission and commenters have not identified any overlap or conflict with other federal, state, or local laws or regulations.[3] However, Congress, the courts, and the ongoing administrative practice of the Department of Transportation ("DOT") have established that environmental advertising and marketing activities of the airline industry are specifically exempt from the Commission's statutory authority and from state and local regulation. Unfortunately, the Proposed Guidance does not adequately recognize and address this exemption.

A. Commercial Air Carriers are Exempt from FTC Jurisdiction Under Section 5 of the Federal Trade Commission Act

[3] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,558.

The Commission's authority to develop and enforce the Proposed Guidance derives from Section 5 of the Federal Trade Commission Act ("FTCA"). The FTCA empowers the Commission to regulate and prevent "unfair methods of competition," and "unfair or deceptive acts or practices in or affecting commerce," including advertising and marketing.[4] However, Congress explicitly carved out an exception from Section 5 of the FTCA: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except* [among others] *common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49 . . . .*"[5]

Congress' exemption of commercial air carriers from FTC jurisdiction was deliberate and unequivocal. When Congress passed the Airline Deregulation Act of 1978 ("ADA"),[6] it expressly "retained the [Civil Aeronautics Board's, and now the Department of Transportation's] previous enforcement authority regarding deceptive trade practices."[7] Congress could have chosen at that time to vest enforcement authority of airline deceptive practices in the FTC, but declined to do so. Congress instead chose to legislatively confirm the *status quo* that existed prior to the ADA, pursuant to which the Supreme Court held that entities such as banks and

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4 15 U.S.C. § 45(a)(1) (2006). *See also* FTC Policy Statement on Deception (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

5 15 U.S.C. § 45(a)(2) (2006) (emphasis added).

6 Pub. L. No. 95-504, 92 Stat. 1705 (recodified at 49 U.S.C. § 40101 et seq. (2006)).

7 *Morales v. Trans World Airlines*, 504 U.S. 374, 379 (1992).

common carriers were exempted from FTC jurisdiction, because they were already subject to extensive oversight by other federal agencies.[8]

B. The Airline Deregulation Act Expressly Authorizes DOT to Enforce Against Unfair or Deceptive Practices by Commercial Airlines

Under the ADA,[9] the Secretary of Transportation has been given the authority to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation."[10] This provision is modeled on, and serves as the counterpart to, Section 5 of the FTCA, which exempts commercial air carriers from FTC jurisdiction. The ADA's conferral of authority is clear — the Secretary is authorized to investigate whether an air carrier has engaged in such unfair or deceptive practice "if it is in the public interest."[11] There is no other language in the statute that qualifies or limits the Secretary's authority, nor is there any provision that relinquishes the Secretary's powers to another agency when advertising or marketing activities are in question.

C. Federal Courts Have Confirmed that Commercial Airlines' Activities are Categorically Exempt from FTC Jurisdiction.

Federal court precedents further support the conclusion that DOT has exclusive authority and jurisdiction over activities, including advertising and marketing, carried out by commercial

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8 *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 336 n.11 (1963) (citing *T.C. Hurst & Son v. Federal Trade Comm'n*, 268 F. 874, 877 (E.D. Va. 1920)).

9 *See* Letter from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Dep't of Transp., to Hanspeter Thür, Office of the Federal Data Protection and Information Commissioner FDPIC, Switzerland (Nov. 26, 2008), *available at* http://www.export.gov/safeharbor/swiss/eg_main_018532.asp (*see* "Letter from the Department of Transportation ("PDF") concerning its authority in protecting the privacy of consumers with respect to information provided to airlines").

10 49 U.S.C. §§ 40101(a)(9), 41712 (2006).

11 *Id.* § 41712.

airline carriers. In *Federal Trade Commission v. Miller*,[12] the Commission attempted to bring an enforcement action against the respondent, a mobile home transportation company (which is classified as a common carrier similar to airlines), arguing that the Interstate Commerce Act which governed the respondent does not regulate advertising. The court held that the Commission had no jurisdiction over the respondent, explaining that the FTCA's common carrier exemption is defined "in terms of *status* as a common carrier . . . [and] not activities . . . ."[13] In other words, if an entity is identified as a common carrier under the FTCA, the FTC has no jurisdiction over the entity's "unfair or deceptive practices," regardless of its activities.[14] Thus, if the environmental marketing activities addressed in the Commission's Proposed Guidance are carried out by or on behalf of the commercial airlines, the FTCA's exemption for air carriers applies and such activities are subject to the jurisdiction and administration of DOT, not the Commission.

D. DOT Practice Confirms the Well-Established Rule that Only DOT Has Authority Over Commercial Airline Advertisements

The Department of Transportation understands and interprets its statutory authority to regulate airlines' activities pursuant to 49 U.S.C. § 41712, including advertising and marketing,

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12 549 F.2d 452 (7th Cir. 1977).

13 *Id.* at 455.

14 *See also Official Airline Guides v. F.T.C.*, 630 F.2d 920, 923 (2d Cir. 1980) (affirming the *Miller* court's interpretation of FTCA exemption based on an organization's status, and finding that a non-carrier may be subject to FTC jurisdiction).

to be comprehensive and exclusive. As recently as June 2010, the Secretary of Transportation reiterated this authority in a Notice of Proposed Rulemaking (NPRM),[15] stating the following:

> Air transportation is unlike any other industry in that the Department has the sole authority to regulate airlines' fare advertisements by prohibiting practices that are unfair or deceptive. Congress modeled section 41712 on section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C.A. § 45, but by its own terms, that statute cannot be enforced by FTC against ''air carriers and foreign air carriers,'' 15 U.S.C. § 45(a)(2) . . . . 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*.[16]

ATA agrees with DOT's assessment that DOT exclusively governs the airlines' environmental advertising and marketing activities, and that commercial airlines belong to a category of entities that are expressly exempt from the Commission's FTCA jurisdiction and, by extension, the Commission's Proposed Guidance.

III. References to Airlines in the Proposed Guidance Should Be Removed to Avoid Confusion About the Commission's Jurisdiction Over Commercial Airline Advertising and Marketing Claims

As discussed above, Congressional intent, statutory language, court precedent, and agency pronouncements all confirm that the Commission lacks FTCA jurisdiction over the commercial airlines' environmental advertising and marketing claims. Accordingly, ATA respectfully requests that the Commission: (a) expressly recognize and clarify this point in its guidance, and (b) remove any examples and references involving airlines from the Proposed Guidance, so that the public and other governmental agencies are not confused as to which

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[15] Department of Transportation, Notice of Proposed Rulemaking, Docket No. DOT-OST-2010-0140, RIN No. 2105-AD92 (June 2, 2010), *available at* http://airconsumer.dot.gov/rules/2105-AD92 NPRM June 2 2010 Final Copy dated.pdf.

[16] *Id.* at 37 (emphasis added).

federal agency has jurisdiction over commercial air carriers' environmental advertising and marketing claims.

Specifically, ATA requests that the Commission remove the example relating to airline offset sales under the Proposed Guidance on carbon offsets, as well as all other references to airplane ticket purchases in the preamble. In Example 1 of the Proposed Guidance on carbon offsets, the Commission references an airline advertisement in an effort to illustrate a deceptive claim about carbon offsets.[17] The discussion of carbon offsets in the preamble to the Proposed Guidance also references airplane ticket purchases as an example of common offset purchases.[18] While it appears that examples relating to the airline industry may have been included because they were part of the Commission's consumer perception study,[19] it is not necessary for these examples to specifically reference the airline industry, and as presented, they are potentially confusing regarding the scope of the Commission's authority. Accordingly, these examples should be replaced with other examples from an industry that is not exempt from FTC jurisdiction.

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[17] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,601. We note that this example appears to reflect a requirement for entities to pinpoint the time at which the carbon offset will actually occur. We believe it would be very difficult for offset providers to do this and thus, it would create unnecessary disincentives to the development of carbon offsets.

[18] *Id.* at 63,593.

[19] *Id.* at 63,595-96.

IV. The Proposed Guidance Should Recognize That, Under the ADA, States are Preempted from Regulating Airline Advertising and Marketing

In discussing the Proposed Guidance, the Commission emphasized in the preamble that "[the] guides do not preempt federal, state, or local laws," and that because "the Green Guides are not enforceable regulations, [they] cannot be legally preemptive."[20]

Notwithstanding the Commission's statement, we emphasize that the ADA *does*, in fact, preempt states or localities from regulating airline advertising, an important point warranting recognition, if the Proposed Guidance is to address preemption. This principle of preemption is well-established under Supreme Court precedent. In *Morales*, the Court held that because the ADA prohibits states from enforcing "*any law relating to rates, routes, or services of any air carrier*," the attorneys general of seven states did not have authority to regulate the airlines' fare advertisements under their states' respective consumer protection statutes.[21] In 2008, the Supreme Court unanimously reaffirmed the broad scope of ADA's preemption of state laws it had set forth in *Morales*.[22]

Accordingly, in addition to recognizing expressly that its guidelines do not pertain to the sale of air travel, the Commission should also explain that the guidelines do not pertain to, and are not intended to suggest any basis for state regulation of the sale of air travel. Rather, in order to delineate the reach of its guidelines clearly and unambiguously, the Commission should

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[20] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,558, 63,599.

[21] 504 U.S. at 378-79, 391.

[22] *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008).

expressly recognize that federal law preempts states from regulating airlines in this area and, therefore, the guidelines cannot be the basis of any such state regulatory action.

In this regard, environmental marketing practices, like fare advertisements, are necessarily "related to" rates, routes, and services. They are directly related to carrier business operations and the sale of commercial air service. Read against the broad preemptive intent that the Supreme Court confirmed in *Morales*, there is no doubt that advertising and marketing claims relating to environmental responsibility may influence consumers' perceptions of the airlines, their decisions whether to choose a particular carrier's services, and the prices they are willing to pay for those commercial air services. Indeed, given DOT's express authority over commercial air carriers' business practices, as discussed above, and the clear mandate of *Morales*, ATA submits that (1) DOT's authority to regulate environmental advertising and marketing claims must be regarded as exclusive, and (2) that state consumer protection laws are similarly preempted.

V. Partners or Agents of Commercial Air Carriers Are Also Exempt from the Proposed Guidance and Subject to the Exclusive Authority of DOT for Enforcement of Environmental Marketing Claims

Partners or agents of commercial air carriers should be exempt from FTCA jurisdiction and instead subject to DOT regulation, just like the carriers. According to DOT, the Department's authority under 49 U.S.C. § 41712 applies equally to ticket agents, including any person other than a carrier "that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for air transportation."[23] To "ensure there is no confusion about [ticket agents'] inclusion under [the Act's deceptive practice prohibitions]," it

[23] 49 U.S.C. § 40102(a)(40) (2006).

has been the "longstanding policy of the Department to consider ticket agents as defined in title 49 to be subject to [the Act]."[24]

Consistent with this regulatory rationale, third-party marketers who are partners or agents of the carriers should be governed by DOT alone. If DOT were to oversee the carriers' environmental marketing programs, while the Commission at the same time attempted to regulate the same programs conducted by third parties, then parties tied together by a common business relationship could be subject to different and potentially conflicting regulatory determinations. To avoid unnecessary confusion and enhance consistency in enforcement, DOT should exercise sole authority over both the carriers and their partners and agents with respect to environmental marketing claims.

While DOT has sole jurisdiction over marketing-related activities conducted by commercial air carriers and their agents, there may arise circumstances in which certain non-carrier entities may be subject to regulation by the Commission, even if they are *purporting* to conduct activities related to air travel. For example, the FTC may have jurisdiction over non-carrier third parties that are not affiliated or associated with the airlines, but independently offer products that they claim will offset carbon emissions related to air travel. In this context, it appears that the ADA would *not* preclude the Commission from regulating those unauthorized third-parties.[25] However, even in such circumstances, given the express authority Congress conferred upon DOT, any policies or actions pursued by the FTC should be undertaken only after

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[24] Department of Transportation, Notice of Proposed Rulemaking, Docket No. DOT-OST-2010-0140, RIN No. 2105-AD92 (June 2, 2010), *supra* note 15.

[25] *Cf. Official Airline Guides*, 630 F.2d at 923 (holding that a publisher of airline schedule guides was not a commercial carrier, and thus not exempted from FTC jurisdiction under Section 5 of the FTCA).

careful consultation with DOT and an opportunity for appropriate input by commercial air carriers.

VI. Other Comments

While it is generally desirable for regulatory agencies to adopt a consistent approach to shared policy and regulatory issues, Congress clearly intended to create a separate framework for DOT to regulate any potential instances of unfair and deceptive practices — including environmental marketing activities — of commercial airlines. Although the FTC lacks authority to regulate the airlines' unfair or deceptive practices relating to air transportation or the sale of air transportation, and only DOT has that authority, ATA recognizes that the Commission's revised guidance on environmental marketing claims could influence other regulators, such as DOT, with respect to the appropriate boundaries for environmental marketing claims. For this reason, ATA offers the following comments on the Proposed Guidance notwithstanding the guidance's lack of direct applicability to the activities of ATA members.

A. ATA Opposes Guidance on Renewable Claims that Would Limit the Flexibility of Airlines to Market the Use of Alternative Fuels

1. Renewable Energy Claims

The Commission's Proposed Guidance on renewable energy claims provides that the unqualified use of such claims is deceptive unless "all or virtually all" of the significant manufacturing processes involved in making the product or providing the service are powered with renewable energy or offset by renewable energy certificates.[26] This guidance is inapposite

[26] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,607.

in the case of commercial aviation and, if extended to the airline industry, could restrict the airlines' ability to make reasonable, unqualified claims relating to the use of alternative fuels.

Commercial aviation turbine fuel (or "jet fuel") must meet the safety requirements and specifications of ASTM standards D1655 and D7566. ASTM D7566 was developed specifically to accommodate the use of alternative fuels from the Fischer-Tropsch process, such as biomass, as these fuels become commercially available. However, the initial version of ASTM D7566 would allow the use of commercial jet fuel with up to 50 percent alternative fuel blended with fossil-fuel based conventional jet fuel. Because the maximum percentage of alternative fuel permitted for use in commercial jet fuel is currently limited to 50 percent, an airline using alternative fuels would not be able to establish that "all or virtually all" of the fuel is derived from renewable, or alternative, sources.

Accordingly, the "all or virtually all" standard is inappropriate for commercial aviation. Commercial airline fuel is subject to a unique set of technical specifications and safety limitations that currently prevent airlines from offering flights that are 100 percent powered by alternative fuels. As a result, guidance prohibiting the use of unqualified renewable energy claims, unless "all or virtually all" of the product or service is powered by renewable energy, would have a disproportionate impact on the airline industry. Moreover, for applications such as commercial airline fuel, any increase in the concentration of alternative fuels would constitute a noteworthy environmental improvement that in turn may justify appropriate marketing claims, with little risk of consumer confusion or deception. ATA therefore opposes this overly broad guidance that (if adopted by DOT) would limit the flexibility of airlines to use unqualified claims

relating to alternative fuels by requiring "all or virtually all" of the fuel to be derived from renewable, or alternative sources.[27]

2. Renewable Materials Claims

The appropriateness of having the DOT address the marketing claims of commercial aviation is further illustrated by the Commission's Proposed Guidance on renewable materials claims, which provides that the unqualified use of such claims is deceptive, unless the product, excluding minor incidental components, is made entirely with renewable materials.[28] As discussed above in the context of renewable energy claims, guidance requiring that a product is made "entirely" with renewable materials in order to make an unqualified renewable materials claim has no reasonable application with respect to air carriers' use of alternative fuels. Commercial airline fuel is subject to a unique set of technical limitations that prevent the use of fuels with greater than 50 percent renewable content, a matter with which the FAA is well acquainted, and, in fact, falls within its regulatory jurisdiction regarding fuels. A requirement that alternative fuels be made "entirely" with renewable materials in order to make an unqualified renewable materials claim is therefore inapplicable to the airline industry. ATA accordingly submits that any FTC guidance that would limit the use of unqualified alternative fuels claims by requiring the fuel to be made "entirely" from renewable sources, be expressly and carefully qualified to state that such restrictions are legally and practically not applicable to commercial airlines.

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[27] As a general comment, ATA notes that unreasonable or overly restrictive limits on the ability of entities that use alternative fuels to make claims regarding their environmental benefits in connection with marketing efforts may dampen their development by reducing incentives for their use.

[28] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,607.

B. ATA Supports Development of Clearer Guidance on the Disclosure of Information Relating to Carbon Offset Claims

The Commission is proposing to issue limited guidance on the use of carbon offsets in environmental marketing.[29] As a general matter, ATA supports development of clearer guidance on the disclosure of information relating to carbon offset claims. Purchasers of carbon offsets, whether consumers or businesses, should be able to know that the greenhouse gas emission reductions they buy are indeed viable. However, the content, timing and logistics regarding disclosure of such information as it relates to air travel must be addressed by DOT, not the Commission.

The use of websites to qualify claims is illustrative. The preamble to the Commission's Proposed Guidance provides that any necessary disclosures for environmental claims must be "in close proximity" to the claim.[30] The preamble further states that "websites cannot be used to qualify otherwise misleading claims . . . because consumers likely would not see that information before their purchase."[31] Such guidance would not be appropriate for the airline industry, which relies heavily on the Internet for electronic ticketing sales and airport kiosks for check-in where additional services may be offered. Existing DOT guidance, for example, relating to taxes, fees,

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[29] Specifically, the Proposed Guidance provides that it is deceptive to misrepresent that emission reductions have already occurred or will occur in the immediate future, or to make a carbon offset claim based on reductions that are required by law. *Id.* at 63,601. We note that the first illustrative example of this principle is the example that should be eliminated in its entirety because it involves offsets related to air travel. The Commission also recommends that sellers of carbon offsets employ "competent and reliable scientific and accounting methods" to properly quantify the claimed emission reductions and ensure that the same reduction is not sold more than once, *id.*, but declines to issue guidance defining the term "carbon offset," establish a list of allowable project types, or identify acceptable methodologies for calculating emission reductions. *Id.* at 63,592-97.

[30] Guidance for the Use of Environmental Marketing Claims, 75 Fed. Reg. at 63,557.

[31] *Id.*

and other restrictions, allows commercial airlines to provide certain disclosure information via hyperlink from the primary webpage where airline tickets are sold.[32] We urge the Commission to consider the application of a similar approach in regulating industries subject to its jurisdiction.

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We hope you find these comments helpful. Please do not hesitate to contact me at (202) 626-4207 or nyoung@airlines.org if you have any questions regarding them.

Sincerely yours,

Nancy N. Young
Vice President, Environmental Affairs

[32] *See, e.g.*, U.S. DOT, Disclosure of Additional Fees, Charges, and Restrictions on Air Fares in Advertisements, Including "Free" Airfares (Sept. 4, 2003), *available at* http://airconsumer.ost.dot.gov/rules/20030904.pdf (allowing a "full explanation" of taxes, fees, and conditions to be provided by hyperlinks in order to accommodate the emergence of the Internet in the sale of air transportation).