

requested changes in the second, third, and fourth conditions, which involve airport facilities, limits on code-sharing flights, and joint marketing. They requested that we complete our review within 30 days. They acknowledged our legal authority under section 41712 to impose conditions, but asserted that, in their view, neither our conditions nor the conditions required by the Department of Justice were necessary to protect competition.

We invited public comment on the Alliance Carriers' proposed alternative language. 68 FR 10770, March 6, 2003. Our notice set forth the proposed language. We directed the commenters to discuss only whether the Alliance Carriers' three new proposals would adequately address the competitive concerns regarding the three corresponding conditions, which we explained in our January Notice, and not whether the findings and analysis in the January Notice were adequate or reasonable. We stated that we would decide whether the Alliance Carriers' proposals were acceptable within 30 days. We noted that, if we determine that the alternative conditions adequately address our concerns, and the Alliance Carriers formally accept them along with the other three conditions developed by us, we would not now institute a formal enforcement proceeding to determine whether the airlines' agreements violate section 41712. However, we would retain our full statutory authority to continue to monitor the three airlines' implementation of their alliance, and to take enforcement action under section 41712 in the future if necessary. We reaffirmed our conclusion that, if the alliance were implemented as originally presented to us, it would raise serious competitive issues and we would begin a formal enforcement proceeding if the Alliance Carriers implemented the alliance without conditions satisfactory to us.

As noted, we received comments from the Non-aligned Carriers, JetBlue, U.S. Airways, Galileo, ACI, Massport, the Montana Department of Transportation, the Memphis-Shelby County Airport Authority, and M. Michelle Buchecker. This notice discusses the arguments presented by the public comments. Due to the Non-aligned Carriers' request that their comments remain confidential, this notice does not discuss their objections. We have nonetheless given careful consideration to the Non-aligned Carriers' arguments.

#### Decision

Congress has given this Department the responsibility to prevent unfair

methods of competition in the airline industry through section 41712. Congress directed us, in interpreting and applying section 41712, to consider the factors set forth in section 40101. Our statutory authority is separate and independent from the Department of Justice's authority to enforce the antitrust laws. Section 41712 states that we should take enforcement action when we find that doing so is in the public interest, based on our consideration of the factors set forth in section 40101. After considering the comments, we have concluded that allowing the Alliance Carriers to go forward with their agreements, subject to the six conditions as modified, will best serve the public interest at this time. We presently believe that the six conditions, as modified with the alternative language, will adequately address our competitive concerns with the alliance. Therefore, at this time, we do not believe it necessary to institute a formal enforcement proceeding to determine whether the alliance will violate section 41712. We will therefore terminate our current review of the agreements under 49 U.S.C. 41720. As stated earlier, however, we will continue to monitor the alliance's implementation to see whether the Alliance Carriers' future conduct or changes in the airline industry's structure and competitive conditions raise competitive concerns requiring further review, including potential enforcement action under section 41712.

If the Alliance Carriers at any future time decide that they will no longer comply with the restrictions which they have agreed upon with us (which incorporate the restrictions they agreed upon with the Justice Department), they will have created a new agreement and must submit that new agreement to us under 49 U.S.C. 41720. Implementation of any such new agreement must be deferred until the end of the statutory waiting period. The same will be true if they materially modify the terms of the written agreements submitted to us for review on August 23. Under our established interpretation of 49 U.S.C. 41720, airlines that significantly modify a joint venture agreement must submit the modified agreement to us for review under that statute.

We do not agree with the commenters who have urged us to extend the waiting period under 49 U.S.C. 41720. They contend that we cannot now accurately assess the alliance's competitive impact when current world events such as war in Iraq and potential changes in the industry's structure may substantially change the alliance's potential impact

on airline competition. While no one can predict with certainty what may happen, we do not believe that these events warrant a delay in the alliance's implementation. The conditions should mitigate the anti-competitive effects of the alliance, and we intend to monitor closely the alliance's effects on competition in light of future developments. We retain our full statutory authority to take enforcement action at any time if we have reason to believe that the alliance has a significant adverse impact on airline competition, and we will do so.

Similarly, we are not persuaded that it is necessary to delay the implementation of the alliance pending a review of Delta's new low-fare operation, Song. According to JetBlue's comments, Delta will launch Song this spring, and Song should be operating 36 aircraft by the end of the year. JetBlue asserts that Song is designed to "attack" low-fare competitors, implying that such an "attack" is not a legitimate response to consumer demands and industry competition. We do not believe it necessary to block the implementation of the alliance pending a more detailed investigation of Delta's plans for Song's operations or to exclude Song from the alliance until completion of further review. Rather, we will continue to assess the effects of the alliance in the light of actual experience. As a general matter, we have no reason to block Delta, or any other airline, from restructuring its operations to meet competitive challenges from other airlines and to satisfy consumer demands for lower fares. Incumbent airlines may legitimately respond to competitive actions by others, and Delta is entitled to compete fairly for a share of the Northeast-Florida market. While JetBlue fears that Song will engage in unlawful conduct, JetBlue Comments at 3-4, we cannot assume now that Delta will operate Song unlawfully. If, after Song begins operations, JetBlue were to present evidence to us indicating that Song may be engaged in unfair methods of competition, we would have full authority to consider that evidence under section 41712 and determine what action would be appropriate at that time.

In determining whether to end our review of the Alliance Carriers' agreements, we considered the commenters' arguments that we should require the Alliance Carriers to accept our original conditions without modification. As discussed below, however, we presently believe that the alternative language proposed by the Alliance Carriers may be sufficient to address our competitive concerns.