

on airline competition. In an earlier case, we obtained the airline parties' agreement to make such changes in their agreement. In this case, we have proposed conditions to the three airlines that would alleviate our immediate competitive concerns with their proposed alliance. If the Alliance Carriers formally accept these conditions, we would not now need to institute a formal enforcement proceeding to determine whether the airlines' agreements violate section 411.

The Department's Investigation. With particular attention to our statutory responsibilities under 49 U.S.C. 40101, we reviewed the agreements as presented to us under our governing statutes to analyze their likely impact on airline competition if fully implemented. We have given outside parties the opportunity to review unredacted copies of the agreements and to submit comments based on that review and other information available to such commenters. 67 FR 69804 (November 19, 2002). We received written comments from a number of parties, including other U.S. airlines, civic parties, and the American Antitrust Institute. We have reviewed the comments, along with material obtained by us from the three airlines, we have met with the three Alliance Carriers and with parties opposed to their alliance, and we have analyzed the proposed alliance's potential impact on the basis of that material and the data presently available to us.

The proposed agreements, and their potential effects, are unusually complex. To allow sufficient time to complete our analysis, we extended the waiting period as to the code-sharing agreement for a total of 120 days, and we extended the waiting period for the frequent flyer agreement for 60 days. 67 FR 59328 (September 20, 2002); 67 FR 64960 (October 22, 2002); 67 FR 69804 (November 19, 2002); 67 FR 78036 (December 20, 2002). The airlines have not implemented either of those agreements.

In our meetings with the Alliance Carriers, we advised them that the agreements as presented to us raised serious competitive issues. We explained that this proposed alliance presents more serious competitive concerns than did the United/US Airways alliance, which we allowed to take effect subject to conditions imposed independently by the Department of Justice, in carrying out its separate statutory authority responsibilities to enforce the antitrust laws. This proposed alliance is fundamentally different from that presented to us by United/US Airways,

because of the much greater overlap between the route systems of these three airlines and their possession of a substantially larger share (approximately 35 percent) of the national airline market. We invited them to propose ways that they could alleviate our concerns. We reviewed their proposals and concluded that they were not adequate. We therefore presented specific comments to the three airlines that were intended to address our primary competitive concerns while preserving the alliance's principal benefits for the traveling public and the airlines. We have had lengthy further discussions with the airlines about the terms of proposed conditions and have considered their concerns. If the Alliance Carriers formally accept and agree to abide by the conditions set forth herein, we would not seek to block their implementation of their alliance agreements at this time.

The conditions we have developed are intended to lessen the likelihood of unlawful collusion, to prevent the three airlines from hoarding airport facilities at their hubs and to make underutilized facilities available to competitors, to address the three airlines' potentially dominant combined market share at many cities and the resulting detrimental effect on entry by competitors and therefore on consumers, and to prevent anti-competitive practices involving joint marketing. We have developed these conditions in furtherance of our statutory responsibilities under 49 U.S.C. 40101 and our authority under section 411 to prevent unfair methods of competition in the airline industry and on the basis of our analysis of the alliance's potential impact on airline competition. Our conditions, designed to address this Department's present concerns under our unique statutory scheme, are in addition to, and independent of, any conditions that may be required by the Department of Justice, pursuant to its separate and distinct statutory authority to enforce the antitrust laws, and its own independent review of the proposed alliance's competitive effects.

Public Policy Background. In carrying out our responsibilities in this matter, we are mindful that Congress has mandated that the Department "shall consider" the factors enumerated in section 40101. For purposes of this proceeding, a number of these factors are particularly relevant. We must analyze the potential effects of the Alliance Carriers' proposal in the context of the express statutory goals, among others, of

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation,

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier * * * unreasonably to increase prices, reduce services, or exclude competition in air transportation, and

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.²

Consistent with these provisions, Congress has charged us with a responsibility to review anti-competitive conduct in the airline industry. This Department's authority under section 411 to prohibit airlines from engaging in unfair methods of competition was intended to supplement, but in no way to supplant or interfere with, the Justice Department's authority to enforce the antitrust laws. As the Supreme Court has stated, "[S]ection 411 * * * was designed to bolster and strengthen antitrust enforcement." *Pan American World Airways v. United States*, 371 U.S. 296, 307 (1963).

When Congress deregulated the airline industry in 1978, Congress retained the pre-existing authority of our predecessor agency, the Civil Aeronautics Board, to prevent unfair competition in the airline industry. The Airline Deregulation Act did not reduce or modify the Board's authority to prohibit unfair methods of competition. Similarly, when Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat. 1703, it reaffirmed its intent that deregulation must be coupled with the authority to prevent anticompetitive conduct. Section 3 of that statute transferred to this Department the Board's authority to prohibit unfair methods of competition in the airline industry. Congress explained that maintaining that authority was both necessary and consistent with airline deregulation, H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5:

There is also a strong need to preserve the Board's authority under Section 411 to ensure fair competition in air transportation * * *. Although the airline industry has been deregulated, this does not mean that there are no limits to competitive practices.

² 49 U.S.C. 40101(a). Congress added these goals to the statutory statement of public policy goals when it enacted the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705, 1707 (1978). The statute's public policy goals provide the context for our enforcement of the prohibition against unfair methods of competition in the airline industry. *Pan American World Airways v. United States*, 371 U.S. 296, 307-309 (1963).