

formal enforcement action. We would not now take enforcement action against the three airlines' implementation of the alliance if they formally agreed to the conditions. If the three airlines do not promptly notify us of their agreement to accept the conditions set forth herein, we will direct our Aviation Enforcement office to institute a formal enforcement proceeding to determine whether the airlines' agreements constitute unfair methods of competition in violation of section 411 and, if so, what remedies would be required.

We have developed six conditions, after considering the three airlines' responses to our stated concerns. For convenience, our conditions are set forth below, along with a short summary of the basis for each of them:

1. The following condition is intended to reduce the possibility of collusion that would be inconsistent with 49 U.S.C. 40101 or unlawful under 49 U.S.C. 41712:

Steering Committee: The Alliance Carriers shall not establish the Steering Committee as defined in Section 10.1 of the Marketing Agreement.⁴ The Alliance Carriers shall not coordinate or agree upon pricing, scheduling (except for minor schedule adjustments to existing schedules to improve connectivity), capacity, route entry or exit, revenue/inventory management, frequent flyer terms, or upon any other matter as to which an agreement among competitors would be inconsistent with 49 U.S.C. 40101 or unlawful under 49 U.S.C. 41712. To ensure compliance with those sections, counsel shall monitor any communications concerning the above-specified topics. Monitoring by counsel shall not confer attorney-client privilege upon such communications. The Alliance Carriers shall maintain written records of all such communications among themselves regarding the Marketing Agreement and shall retain them until one year after the Marketing Agreement's termination.

2. The following condition is intended to implement the Alliance Carriers' agreement to release "Surplus Gates" and reduce the possibility that the Marketing Agreement will impede competition due to "hoarding" underutilized facilities at certain congested airports:

Airport Facilities: The Alliance Carriers agree that due to co-location the following gates, along with related facilities (including overnight positions), shall be released to the airport sponsor upon its request for lease to domestic non-Alliance Carriers or for common use: (a) Four gates at IAH, (b) two gates at DTW, (c) five gates at CVG, and (d) two gates at DFW. Additionally, if the Alliance Carriers choose to implement any provision of the Marketing Agreement at any of the hub airports⁵ of any Alliance Carrier

or Boston (BOS), each Alliance Carrier agrees to maintain records of daily gate usage at those airports and to retain those records until one year after the termination of the Marketing Agreement. Notwithstanding any lease provision to the contrary, the Alliance Carriers further agree to release, within sixty (60) days of request by an airport sponsor at an airport that does not have a gate available for use on reasonable and competitive terms, any underutilized leased gate, along with related facilities (including overnight positions) but excluding gates used only for international flights, for use by a domestic non-Alliance Carrier or for common-use. A gate is underutilized if it is used less than an average of six turns per day during any two consecutive calendar months. Subleases to non-Alliance Carriers shall not be cancelled to release gates under this condition. No Alliance Carrier shall be required to release an underutilized leased gate pursuant to this condition if it will be required to continue to pay rentals or charges to the airport sponsor for the gate. This condition shall not apply if a gate is underutilized due to an event of force majeure.⁶

3. The following condition is intended to ensure that the Alliance Carriers implement their representations of consumer benefits due to on-line service expansion:

Codesharing: As referenced in the Marketing Agreement, Domestic, Canadian, and Caribbean codesharing shall be limited to six hundred fifty (650) flights per two-carrier combination for a total of twenty-six hundred (2,600) flights. Not less than twenty-five percent (25%) of each marketing carrier's new codeshare flights must be to or from airports the carrier and its regional affiliates either did not directly serve or served with no more than three daily roundtrip flights as of August 2002. An additional thirty-five percent (35%) of each marketing carrier's new codeshare flights must either meet the above requirement or be to or from small hub and non-hub airports.⁷ Beginning one year after the commencement of codeshare operations, any Alliance Carrier may request review of this condition. The Department will exercise its best efforts to complete the

Detroit (DTW), Houston (IAH), Memphis (MEM), Minneapolis/St. Paul (MSP), Newark (EWR), and Salt Lake City (SLC).

⁶ For the purposes of this agreement, an "event of force majeure" is defined as follows: Acts of God; fire; damage to or destruction of aircraft or other flight equipment; riots or civil commotion; strikes, lockouts or labor disputes (whether resulting from disputes between the carrier and its employees or between other parties); U.S. military or airlift emergency or substantially expanded U.S. military airlift requirements as determined by the U.S. government; activation of the U.S. Civil Reserve Air Fleet; war or hazards or dangers incident to a state of war; acts of terrorism; or any other acts, matters or things, whether or not of a similar nature, which are beyond the control of the carrier and which shall directly or indirectly, prevent, delay, interrupt, or otherwise adversely affect the furnishing, operation or performance of a carrier; provided, however, that the carrier so affected shall take all commercially reasonable steps to cure such nonperformance or delay.

⁷ For the purposes of this notice, "small hub" and "non-hub" airports are defined by the Airport Activity Statistics published by the Department of Transportation, Bureau of Transportation Statistics.

review within sixty (60) days following receipt from the Alliance Carriers of the information necessary to complete its review. Any request for modification shall not constitute a new agreement for the purposes of 49 U.S.C. 41720.

4. The following condition is intended to encourage continued independent competition and reduce the possibility of joint marketing arrangements that reduce competition:

Joint Corporate and Travel Agency Contracts: If the Alliance Carriers wish to offer joint bids to corporations or travel agencies, the corporation or travel agency shall be given the option of dealing with each Alliance Carrier separately or of receiving a joint bid from two or more of the Alliance Carriers. Only after the corporation or travel agency has requested a joint bid in writing shall such a bid be developed and submitted. In addition, the Alliance Carriers shall not offer a joint bid to any corporation or travel agency that has a principal place of business or headquarters in a city⁸ where all three carriers (themselves or through regional affiliates) operate scheduled service and their combined market share⁹ exceeds fifty percent as of the August prior to the offering of the joint bid. In any joint bid, the Alliance Carriers shall not make the contractual discounted fares or commissions dependent on satisfaction of minimum purchase or booking requirements, whether based on threshold or percentage, for specific domestic markets or for domestic services offered by one of the Alliance Carriers. This condition shall not apply to joint bids involving only Northwest and Continental.

5. The following condition is designed to limit the potential anti-competitive effects of multiple listings of one service under different codes, *i.e.* CRS "screen clutter," while that issue is under active review in the Department's CRS rulemaking proceeding. At the conclusion of the proceeding, the same CRS rules applicable to all other codeshare arrangements would be applicable to this codeshare agreement as well:

CRS Displays: In the current CRS rulemaking the Department is soliciting comments on whether it should limit the number of times that codeshare services are displayed (67 FR 69396-97). The European Union CRS rules limit the number of codes displayed on a flight and CRSs operating in EU member states must comply with that limit. The Alliance Carriers shall make a good faith request in writing to each CRS that the CRS, during the pendency of the CRS rulemaking, not display an Alliance Carrier's service under more than two codes in any integrated display offered by the CRS. The requests and any responses thereto shall be submitted to the Department by the Alliance Carriers.

6. The following condition is intended to limit the duration of the potential anti-competitive effects of the exclusivity clauses of the Marketing Agreement to its proposed term:

⁸ For the purposes of this agreement, "city" is defined as a primary metropolitan statistical area.

⁹ For the purposes of this agreement, "market share" is determined by scheduled departing seats on domestic flights.

⁴ For the purposes of these conditions, the term "Marketing Agreement" includes all of the exhibits to the Marketing Agreement.

⁵ For the purposes of this condition, "hub airports" are defined as Atlanta (ATL), Cincinnati (CVG), Cleveland (CLE), Dallas/Ft. Worth (DFW),