

**aa**  
The American  
Antitrust Institute

September 10, 2002

Randall Bennett, Director  
Office of Aviation Analysis, Room 6401  
U.S. Department of Transportation  
400 7<sup>th</sup> Street, SW  
Washington, DC 20590

Re: Review Under 49 U.S.C. 41720 of Delta/Northwest/Continental Agreements

Dear Mr. Bennett:

The American Antitrust Institute is an independent research, education, and advocacy organization that supports a leading role for competition, as enforced by our antitrust laws, within the national and international economy. Background on the AAI may be found at [www.antitrustinstitute.org](http://www.antitrustinstitute.org), including participation in other matters involving the air transportation industry. We would like to be able to provide comments on the two air alliances that are currently under consideration by the Department of Transportation, but it simply will not be possible by the September 10 deadline. For this reason, we request the Department to postpone the deadline for public comment.

The proposals for two alliances (United and USAirways on the one hand; Delta, Northwest, and Continental on the other) will generate a revolutionary restructuring of air transportation. Together, the alliances will control approximately sixty percent of the market, and in many major markets their share will exceed ninety percent. Whether this will serve the public interest is a complex question and deserves serious evaluation. Generally, mergers in a relatively concentrated industry like domestic air transport will be carefully scrutinized under the Clayton Act to compare any potential positive value against the negative value of reduced competition. This was the case when the Justice Department recently held firm against a merger between United and USAirways, and it would still be the case in the economic aftermath of September 11, 2001. (See the Department of Justice comments opposing antitrust immunity for the capacity-reducing agreement of Aloha and Hawaiian Airlines, USDOT Docket No. OST-2002-13002, at <http://www.usdoj.gov/atr/public/comments/11800.htm>.)

A joint venture or alliance is something less than a complete merger, but it too reduces competition within the realm that the parties have agreed upon. It, too, must be analyzed in terms of the efficiencies versus the loss of competition. The more closely an alliance resembles a merger, the greater the potential concern. These alliances come pretty close to being complete mergers. The alliance partners can coordinate schedules, airport facilities, marketing and some pricing actions. Unfortunately, they have not provided detailed descriptions of the exact agreements. We do not have the details. The Department of Transportation can and should provide the public adequate information upon which a reasoned commentary can be offered.

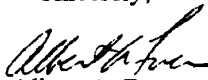
2919 ELLICOTT ST, NW • WASHINGTON, DC 20008  
PHONE: 202-244-9800 • FAX: 202-966-8711 • E-MAIL: [BFOER@AOL.COM](mailto:BFOER@AOL.COM)  
[www.antitrustinstitute.org](http://www.antitrustinstitute.org)

It is black letter law that "Because a [joint] venture involves cooperation and may cause harm, Section 1 of the Sherman Act may apply." (Sullivan & Grimes, *The Law of Antitrust*, 649.) A horizontal joint venture such as either proposed alliance has the potential of facilitating collusion among competitors through managerial intimacy and information sharing. Also, it can reduce the incentive for and the intensity of competition and encourage collusion by increasing market concentration, or reducing potential competition.

Recognizing that in a formal sense the number of airlines will not be reduced by either alliance, what needs to be determined is the extent to which these alliances are likely to have the de facto effect of reducing the number of independent competitors or the intensity of their competition against one another. While each alliance must be evaluated individually, it is also appropriate to look at the two together rather than in isolation, just as when the FTC and the District Court enjoined two concurrent drug wholesale mergers, considering them within a single context. (See *FTC v. Cardinal Health et. al.*, July 1998, available at <http://www.ftc.gov/os/1998/9807/98cv0595.htm>). It is not only the impact of each alliance separately, but their cumulative impact that will determine the future of air transportation, and so the analysis can best proceed under umbrella of a unified review.

Because of the likely importance of the decisions at hand, the analysis must not be rushed. The necessary time must be taken for the DOT, DOJ, and the interested public to inspect the details of the proposed alliances and to evaluate their implications.

Sincerely,

  
Albert A. Foer  
President

Ms. Read Van de Water  
Assistant Secretary for Aviation  
& International Affairs  
U.S. Department of Transportation  
400 Seventh Street, SW, Room 10232  
Washington, DC 20590

The Honorable Michael Jackson  
Deputy Secretary  
Department of Transportation  
400 Seventh Street, SW, Room 10200  
Washington, DC 20590-0001

The Honorable R. Hewitt Pate  
Deputy Assistant Attorney General for Antitrust  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530