

RESHAPING COMPETITION POLICY FOR THE U.S. AIRLINE INDUSTRY



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RESHAPING COMPETITION POLICY FOR THE U.S. AIRLINE INDUSTRY

By Diana L. Moss



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By Qi Ge, Myongjin Kim & Nicholas G. Rupp



COMPETITION IN U.S. AIRLINE MARKETS: MAJOR DEVELOPMENTS AND ECONOMIC INSIGHTS

By Germán Bet



EU MERGER CONTROL IN AVIATION: THE LUFTHANSA/ITA CASE AND THE EU'S BALANCING ACT IN ANTITRUST ENFORCEMENT

By Simon H. Baier



AN EVALUATION OF DEVELOPMENTS IN THE AIRLINE INDUSTRY SINCE 2000

By Jan K. Brueckner



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The U.S. passenger air service industry has been deregulated for 45 years. Since then, the air transportation supply chain and structures of domestic and international markets have been reshaped through consolidation, technology, and globalization. This article suggests that we are at a turning point in domestic competition policy for airlines. The U.S. market has a vital need for multiple airline network and pricing models to support geographic and economic diversity across U.S. consumers. As a result, competition policy should focus on promoting entry and market footholds for smaller airlines, reforming policy around grants of antitrust immunity for the large global alliances that affect U.S. consumers, and improving coordination between the U.S. Department of Justice and U.S. Department of Transportation to ensure that enforcement action and policy do not undermine competition.

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I. INTRODUCTION

The U.S. passenger air service industry has been deregulated for 45 years. As consolidation, business models, and technology have shaped and reshaped the industry over time, the competitive dynamics in passenger service markets have deepened. A number of realities are drawing new attention to competition in passenger service markets.

First, disruption in markets that are upstream of passenger service, such as safety problems with the Boeing 737 Max aircraft, affects the stability and reliability of the air transportation system.² Second, it is critical that consumers have access to multiple distribution channels to facilitate transparent airfare price comparisons that spur competition. Third, while antitrust enforcement in airlines has historically focused primarily on keeping airfares low by enforcing harmful mergers, newer priorities should focus also on promoting consumer access and choice.

This article focuses on the last of these issues, for a simple reason. The U.S. is home to both a geographically and economically diverse population. Airline mergers between 2005-2015 “de-hubbed” major cities in the Midwest that were part of the U.S. legacy carriers’ hub-and-spoke networks. De-hubbing has had reduced access for consumers, despite smaller carriers stepping into the void, in limited cases, to restore service.³

The de-hubbing of key U.S. airports elevates the importance of a U.S. system that supports multiple passenger airline business models — full service legacy carriers, regional carriers, and ultra low-cost carriers (“ULCCs”) — and both hub-and-spoke and point-to-point networks. These models provide vital choice to a broad range of flying consumers, including those that do not live near major airports, in cities without a choice of airports, and with limited budgets for air travel.

Framing policy that supports consumer access to, and a choice of convenient and competitively priced airfares, will require significantly better or different coordination between the U.S. Department of Justice (“DOJ”) and U.S. Department of Transportation (“DOT”).⁴ This means holding the line on further consolidation and concentration in domestic passenger service markets. But competition policy in airlines also requires a focus on lowering barriers to entry for smaller, ULCC, and regional carriers. Moreover, policymakers should widen their lens to consider how DOT’s liberal policy of granting antitrust immunity (“ATI”) for some international alliance routes can adversely affect consumers that are “behind” and “beyond” major U.S. gateway hubs. Finally, recent events elevate the urgency around improving inter-agency coordination between DOJ and DOT so that disparate enforcement actions and policies do not undermine competition.

II. CONSOLIDATION AND ENTRY IN U.S. PASSENGER MARKETS

U.S. passenger markets were transformed in the wake of deregulation in the late 1970s. There was significant entry of smaller airlines in the U.S. between 1979-1999, as shown in the figure below.⁵ Between 2001-2024, however, a series of mergers reduced the number of operating U.S. carriers by 50 percent.⁶ Between 2008-2011, the number of ULCCs fell from four to two.⁷ Greenfield entry of smaller carriers slowed significantly after the mergers of major U.S. legacy carriers in the mid-2000s, likely as a result of higher concentration and barriers to market entry.

2 U.S. Federal Aviation Administration, Updates on Boeing 737-9 MAX Aircraft (Dec. 5, 2024), <https://www.faa.gov/newsroom/updates-boeing-737-9-max-aircraft>.

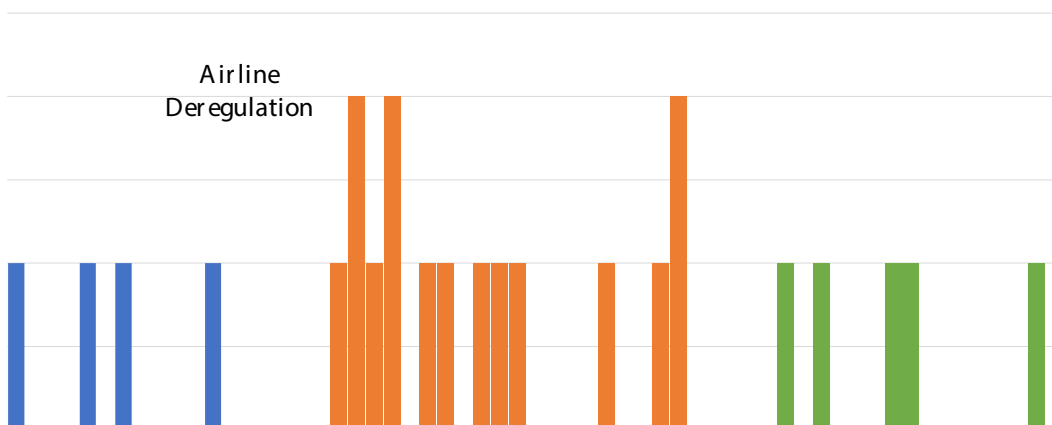
3 Robert Silk, Filling the void: Secondary markets cope with dehubbing by airlines, Travel Weekly (Mar. 29, 2017), <https://www.travelweekly.com/Travel-News/Airline-News/Secondary-markets-cope-with-dehubbing-by-airlines>.

4 Nancy Scola, “‘I Didn’t Do an About-Face on Pete Buttigieg. Buttigieg Did an About-Face on Me,’” Politico (Nov. 3, 2024), <https://www.politico.com/news/magazine/2024/11/03/pete-buttigieg-tough-on-airlines-00181436>.

5 See Diana L. Moss, Consumer Choice And Antitrust Pragmatism: Unpacking The JetBlue-Spirit Merger, Progressive Policy Institute (Nov. 21, 2023), <https://www.progressivepolicy.org/consumer-choice-and-antitrust-pragmatism-unpacking-the-jetblue-spirit-merger/>.

6 Data & Statistics: U.S. Airline Mergers and Acquisitions, Airlines.org (Sep. 18, 2024), <https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/>.

7 *Ibid.*



The unprecedented wave of U.S. airline consolidation between 2005-2015 left four major airlines — American, United, Delta, and Southwest — with outsized control of U.S. national and route-level markets. After the last major legacy carrier merger of American and U.S. Airways in 2013, the top four carriers accounted for about 60 percent of passenger miles flown in the U.S.⁸ In 2024, the four largest legacy carriers controlled almost 70 percent of the national market.⁹ In city-pair route markets where not all major carriers compete, concentration levels are much higher.

Antitrust enforcement involving the domestic legacy mergers that created the four largest carriers in the U.S. has been relatively limited. The DOJ noted in its closing statement in the merger of Delta-Northwest (2008) that the combination was: “...likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition.”¹⁰ In the United-Continental merger, DOJ accepted the merging airlines’ proposal to transfer takeoff and landing slots to Southwest to ease entry at Newark, a then Level 3 congested airport.¹¹ In American-U.S. Airways, DOJ required slot and gate divestitures to promote system-wide competition and entry by smaller carriers.¹²

The record of antitrust remedies in large airline mergers illustrates the inherent tension in DOJ’s approach. That is, namely, reconciling what are presumptively anticompetitive increases in concentration in (an often-large number of) route-level markets with “out-of-market” benefits from combining networks. As retrospective studies on past mergers have come available, however, there is more insight into DOJ’s implicit balancing of costs and benefits in past mergers.

For example, research shows that some airlines have had difficulty delivering on the cost savings and consumer benefits that were promised in past mergers.¹³ Cost reductions include right-sizing aircraft to routes, improving gate and hangar utilization, and consolidating operations. But airlines have frequently encountered problems in realizing cost savings, including around integrating IT systems, frequent flier programs, and unionized workforces.¹⁴ In 2011, one airline expert famously noted of past airline mergers: “There is no evidence that [they] deliver more cost-efficiency.”¹⁵

8 Carrier Snapshots, Transtats Database, U.S. Dept. of Trans, Bureau of Trans. Statistics, queried for Sept. 2014. <https://transtats.bts.gov/>.

9 *Ibid.*, queried for Sept. 2024.

10 Press Release: Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation, U.S. Dept. Justice (Oct. 29, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-at-963.html>.

11 Press Release: United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice’s Antitrust Concerns, U.S. Dept. of Justice (Aug. 27, 2010), <https://www.justice.gov/archives/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response>.

12 Press Release, Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge, U.S. Dept. of Justice (Nov. 12, 2013), <https://www.justice.gov/archives/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key>.

13 Diana L. Moss, Delivering the Benefits? Efficiencies and Airline Mergers, Am. Antitrust Inst. (Nov. 21, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547673.

14 *Ibid.*

15 See Paul Stephen Dempsey, Airline Alliances, Inst. of Air & Space Law (2011), <https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf>.

Consumer benefits promised in previous mergers were also often overestimated.¹⁶ These include better capacity management and enhanced “connectivity” in the combined network (e.g. more destinations and round-trip options and converting interline to single-line service). Retrospective analysis of the Delta-Northwest, United-Continental, and Southwest-AirTran mergers shows, however, that enhanced connectivity was elusive. For example, between 2007-2012, merged airlines generally cut routes on airport pairs served before a merger, or that were added as a result of the merger.¹⁷ This is not surprising. No business, especially an airline with the advantage of fungible capacity, would remain in an unprofitable market.

The lessons from previous airline mergers are important. If the “Big 4” remains a fixture in the domestic market, then competition policy should continue to focus on the ability of smaller carriers to enter and get a foothold in markets. Indeed, the fringe of smaller, ULCC, and regional carriers currently account for a small portion of the national market. But they are, by in large, a success story. For example, between 2016 and 2024, the large legacy airlines expanded only marginally in route-level markets.¹⁸ In contrast, Frontier, Spirit, JetBlue, Alaska, and SkyWest increased the number of markets in which they operate by 25-80 percent.¹⁹

These trends confirm that smaller airlines inject important competition in domestic passenger service markets. Smaller and ULCC carriers also offer different business models, such as the unbundled ULCC “fare + fee” model. This provides an important alternative for budget and leisure travelers to the pricing model of the full-service carriers.²⁰ Policies that keep barriers to entry low and ensure a level playing field are, therefore, essential for promoting entry by smaller carriers.

III. ANTITRUST IMMUNITY AND INTERNATIONAL AIRLINE ALLIANCES

International issues have worked their way onto the domestic airline competition radar screen in the last several years. After the wave of major domestic mergers between 2005-2015, major U.S. carriers play a much larger role in the three global airline alliances. This brings into sharper focus DOT’s liberal policy for granting immunity from the U.S. antitrust laws for coordination between alliance carriers.²¹ ATI allows competing carriers in an international alliance to coordinate pricing and scheduling on routes served by both carriers. Grants of ATI under DOT’s authority, therefore, shields carriers from harmful coordination on pricing and scheduling that would otherwise violate the U.S. antitrust laws.²²

ATI has long been justified by benefits to consumers in the larger alliance network, such as expanded capacity at alliance hubs, integrated itineraries on connecting routes, service to more city-pair markets, and competition for cities behind and beyond gateways and other alliances.²³ Earlier DOT grants of ATI were supported by economic research in the 1990s that showed net positive effects. The DOJ, however, took a different view.

For example, the agency warned of the anticompetitive effects of ATI, including in Aloha-Hawaiian (2002) and in American-British Airways (2009).²⁴ The DOJ has recommended remedies when ATI harms competition, including route “carve-outs” in the 1990s and slot divestitures in the oneworld (2008) and Delta-Aero Mexico (2016) cases.²⁵ With pressure from DOJ, DOT has more recently — or at least initially — denied

¹⁶ Moss, *Delivering the Benefits?* *supra* note 13.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Moss, *Antitrust Pragmatism*, *supra* note 5.

²¹ Dempsey, *Airline Alliances*, *supra* note 15. Coordination arrangements range from interlining with carrier partners to joint-venture revenue and profit-sharing. There are currently 23 active immunized alliances. List of Active Antitrust Immunized Alliances (Updated 10/19/2022), U.S. Dept. of Trans., https://www.transportation.gov/sites/dot.gov/files/2022-10/Active-ATI-cases-list-2022_Oct_f1.pdf.

²² 49 U.S. Code §§ 41,308-309. The U.S. DOT grants ATI in order to approve an otherwise anticompetitive agreement that meets the statutory public benefit test.

²³ See e.g. Joint Application of Virgin Atlantic Airways, Ltd., Docket No. OST-2013-0068, Dept. of Trans. (Apr. 8, 2013), <https://www.regulations.gov/document?D=DOT-OST-2013-0068-0001>. See also Terry Maxon, DOT approves antitrust immunity for Continental, Star Alliance partners, Dallas News (Jul. 10, 2009), <https://www.dallasnews.com/business/airlines/2009/07/10/dot-approves-antitrust-immunit>.

²⁴ Order Approving Agreement and Granting Antitrust Immunity, Docket No. OST-2002-13002, Dept. of Trans. (Sep. 30, 2002), <https://www.regulations.gov/document?D=DOT-OST-2002-13002-0014>. See also, Joint Application of American Airlines, Inc., Docket No. OST-2008-0252, Dept. of Trans. (Dec. 21, 2009), <https://www.regulations.gov/document?D=DOT-OST-2008-0252-3374>.

²⁵ Joint Application of Delta Air Lines, Inc., Docket No. OST-2015-0070, Dept. of Trans. (Nov. 4, 2016), <https://www.regulations.gov/document?D=DOT-OST-2015-0070-0074>. *Ibid.* at 17-18.

ATI, including in Air France-KLM (2013) and American- Qantas (2016).²⁶ In these cases, DOT cited various reasons for denying immunity, ranging from a reduction in number of competitors, to enhanced incentives to restrict capacity on a key route, and flawed public benefits claims.

The DOT's growing skepticism of ATI was slow to acknowledge economic research in the 2000s showing that, as part of a public interest finding, the benefits of ATI are outweighed by its costs.²⁷ Among those costs are the loss of head-to-head competition on international routes; reduced access by non-alliance carriers to interlining with alliance carriers at gateways; and fewer services elsewhere in the alliance network.²⁸

The adverse effects of ATI are particularly important for U.S. consumers. Entry by smaller, non-allied carriers is the only way to inject competition on concentrated immunized alliance routes and at U.S. gateway hubs. But entry remains difficult. Between 2007-2016, for example, U.S. gateways became more concentrated as a result of domestic consolidation.²⁹ This works to discourage new entry on routes and increases the risk that smaller, non-allied carriers will be foreclosed from interlining at alliance hubs. ATI policy that looks skeptically at the benefits of immunity and assesses adverse effects on consumers behind and beyond U.S. gateways is, therefore, long over-due.

IV. INTER-AGENCY COORDINATION ON AIRLINE COMPETITION ISSUES

Much like other regulated industries, competition enforcement in U.S. passenger service markets is overseen by two agencies: an antitrust enforcer and a sector regulator. The DOJ and DOT apply significantly different statutory mandates, standards of review, and remedies for restoring competition in airline matters. The antitrust “no harm” to competition standard is far narrower than the regulatory “public interest” standard. The DOT's broader standard allows for more balancing of costs and benefits from consolidation and business practices that lead to harmful anticompetitive effects.

Despite a priority on inter-agency coordination under the Biden administration's “whole of government” approach, the strong tension between antitrust and regulatory approaches to airline competition remains.³⁰ For example, the Biden DOJ took a proactive role in protecting competition in domestic airline markets. Enforcement actions under Section 7 of the Clayton Act include successful injunctions against the Northeast Alliance (“NEA”) codeshare agreement between American Airlines and JetBlue Airways and the proposed merger of JetBlue and ULCC carrier Spirit.³¹ District court opinions supported the government's challenges, concluding that the transactions substantially lessened competition in city-pair markets, threatening higher fares and less choice for consumers.³²

In contrast, DOT has been active in airline consumer protection but relatively inactive in enforcing its authority over unfair methods of competition.³³ For example, in March 2023, DOT took no independent agency action on the JetBlue-Spirit merger, issuing a short statement supporting DOJ's case to enjoin it.³⁴ In the NEA matter, DOT allowed the joint venture to proceed in January 2021, at the tail end of the first

26 Order to Show Cause, Joint Application of Air Tahiti Nui, Docket No. OST-2013-0077, Dept. of Trans. (Mar. 28, 2014), <https://www.regulations.gov/document?D=DOT-OST-2013-0077-0014>. See also, Order to Show Cause, Joint Application of American Airlines, Inc, Docket No. OST-2015-0129, Dept. of Trans. (Nov. 18, 2016), <https://www.regulations.gov/document?D=DOT-OST-2015-0129-0031>.

27 See e.g. William Gillespie & Oliver M. Richard, Antitrust Immunity Grants to Joint Venture Agreements: Evidence from International Airline Alliances, U.S. Dept. of Justice, Antitrust Division, Economic Analysis Group Discussion Paper, EAG 11-1 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1764083.

28 See e.g. James Reitzes & Diana Moss, *Airline Alliances and Systems Competition*, 45 Houston Law Rev. (2008); W. Tom Whalen, A Panel Data Analysis of Code-Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets, 30 Rev. of Industrial Organization (2007); and Volodymyr Bilotkach & Kai Hüschelrath, Balancing Competition and Cooperation: Evidence from Transatlantic Airline Markets (Discussion Paper No. 15-059 (Aug. 2015), <http://ftp.zew.de/pub/zew-docs/dp/dp15059.pdf>.

29 Diana L. Moss, Alliances and Antitrust Immunity: Why Domestic Airline Competition Matters, American Bar Association, Air & Space Law (Spr. 2019), https://www.americanbar.org/content/dam/aba/publications/air_space_lawyer/Spring2019/asl_moss.pdf.

30 Executive Order on Promoting Competition in the American Economy, White House (Jul. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

31 15 U.S. Code §18.

32 *US v. American Airlines Group Inc.*, No. 23-1802 (1st Cir. 2024) and *U.S., et al. v. JetBlue Airways Corp. and Spirit Airlines Inc.*, Case 1:23-cv-10511-WGY (D. Mass., Jan. 1, 2024).

33 49 U.S. Code §41712.

34 US DOT Statement on the Justice Department's Lawsuit to Block Proposed JetBlue-Spirit Merger, U.S. Dept. of Trans. (Mar. 7, 2023), <https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger>.

Trump administration.³⁵ DOT's approval was subject to divestitures of takeoff and landing slot pairs, hard-to-enforce bans on anticompetitive information-sharing, and hard-to-monitor carrier reporting requirements. By September 2021, however, DOT was forced to "clarify" its position on the NEA and terminate its review in the wake of DOJ's antitrust suit to enjoin the agreement.³⁶

Finally, DOJ took no enforcement action in the merger of Alaska and Hawaiian. In an apparent "punt" to DOT, the agency issued a rare order conditioning the merger on a number of requirements.³⁷ The order acknowledged that the merger created routes where a merged Alaska-Hawaiian was the only remaining nonstop competitor, or one of two remaining competitors. Yet the agency imposed consumer protection-type requirements involving rewards programs, seating, and compensation for delays. The DOT conditions that were geared toward preserving competition largely focused maintaining airport access, route capacity, and interlining agreements.

The DOT's "competition lite" conditions in the Alaska-Hawaiian merger would rarely, if ever, be considered by DOJ as effective in restoring competition lost by a merger. As a result, DOT's conditions establish poor precedent for the agency's first substantive intervention in an airline competition matter and could even come back to haunt the agency, to the detriment of consumers. In sum, there is a continued lack of effective coordination between DOJ and DOT on airline competition that will require a significant rethinking of how the agencies can mutually reinforce strong airline competition policy.

V. MOVING FORWARD

Changes in the structure of U.S. airline markets over the last decade highlight the importance of holding the line on further increases in market concentration and fostering market entry and footholds for smaller carriers. This will require widening the traditional "lens" of competition enforcement to consider how both domestic consolidation and international policy around ATI affect U.S. consumers. Moreover, antitrust and regulatory policy should be mutually reinforcing, not conflicting, such that the goal of preserving competition is achieved through coordinated inter-agency actions and remedies. In light of these developments, there are a number of important policy goals that could usefully shape a competition agenda for the domestic airline industry moving forward.

- Policy should focus on maintaining competition in the ULCC segment of the market. This means antitrust enforcement that opposes consolidation that eliminates ULCCs and smaller carriers. It also means, importantly, avoiding sweeping junk fee policies that may inadvertently imperil the unbundled "fare + fee" model that budget and leisure travelers rely on for their flying needs.
- The DOT and DOJ should initiate efforts to develop a new and more efficient market design for takeoff and landing slot allocation at congested airports. Smaller carriers require slots to enter and compete in markets but the current system is outdated and inefficient. The agencies should also engage with airport authorities and carriers on common use gate policy that can increase access by smaller rivals.
- The agencies should avoid the lack of coordination that was apparent in the Alaska-Hawaiian and NEA matters. The DOJ's and DOT's handling of the merger creates poor precedent for competition remedies and confusion around the use of consumer protection remedies to fix competition problems. The DOT's approval of the anticompetitive NEA agreement, while DOJ moved to enjoin it, put competition and the flying public at unacceptable risk.
- It is time for the agencies to recognize that policy around ATI can have direct and harmful effects on U.S. consumers. The agencies should revisit the methods and scope of analysis for grants of immunity involving U.S. carriers that dominate the three alliances. This should include a focus on the effects of immunity on U.S. consumers that are behind or beyond the U.S. alliance gateways and on discouraging entry by smaller carriers. Finally, the agencies should commission a current study of the costs and benefits of ATI to provide a sound basis for DOT policy moving forward.

³⁵ Agreement with U.S. Dept. of Trans. Regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways, Corp. (Jan. 10, 20212), <https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf>.

³⁶ Clarification of Departmental Position on American Airlines – JetBlue Airways Northeast Alliance Joint Venture, U.S. Dept. Trans., Office of the Secretary (Sep. 21, 2021), <https://www.transportation.gov/sites/dot.gov/files/2021-09/NEA%20Notice%20Sept%2021%202021.pdf>.

³⁷ U.S. Dept. of Trans., Agreement Regarding Merger Between Alaska Air Group, Inc. and Hawaiian Holdings, Inc. (Sept. 15, 2024), <https://www.regulations.gov/document/DOT-OST-2024-0084-0006>.

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