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**Office of the Attorney  
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November 3, 2021

The Honorable Pete Buttigieg  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Ave., S.E.  
Washington, D.C., 20590-0001

**RE: Airline Accountability and Consumer Protections for Airline  
Customers**

Dear Secretary Buttigieg:

As noted in the comments submitted in the proposed rulemaking “Refunding Fees for Delayed Checked Bags and Ancillary Services that are not Provided,” the Colorado Department of Law (“Department”) appreciates the efforts of the U.S. Department of Transportation (“USDOT”) to provide greater airline accountability and consumer protections for airline customers. I am now writing to underscore various additional issues that the Department believes are critical for the USDOT to address.

In President Biden’s Executive Order (“EO”) on Promoting Competition in the American Economy, the President emphasized the importance of a fair, open, and competitive marketplace and called on federal agencies to do their part to promote competition and protect consumers. In particular, the EO included several provisions that direct the USDOT to take critical actions that would spur additional competition in the airline industry.<sup>1</sup> Such steps are necessary because, as I explained in my testimony to Congress last winter, this industry is highly concentrated and provides too limited competition to spur lower prices, higher quality services, and more

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<sup>1</sup>Ex. Order No. 14036, 86 FR 36987 (2021).

consumer choices.<sup>2</sup> To address those failings, the Executive Order directed the USDOT to investigate slot allocation practices at congested airports,<sup>3</sup> noting that current slot allocation practices often fail to “extend opportunities for competition and market entry as the [airline] industry evolves.”<sup>4</sup> At slot-constrained airports, carriers interested in entering or expanding services are unable to do so because slot allocation or gate access practices protect incumbent providers, resulting in decreased competition and price increases for consumers.

For an example of how slot management practices can restrict competition, consider the recent Northeastern Alliance (“NEA”) formed between American Airlines (“American”) and Jet Blue Airways (“JetBlue”). As a result of the recent alliance, American and JetBlue now together control approximately 50 percent of slots at airports with NEA code-share flights.<sup>5</sup> This arrangement boxes out other airlines, particularly low-fare carriers, from entering these airports. For example, in its comments opposing the NEA, Southwest Airlines Co.’s noted that they would be willing, and presumably have been unable to, obtain additional slots at slot-allocated airports.<sup>6</sup> Joint ventures like the NEA, while falling short of a full merger, eliminate the incentive for parties to compete against one another and pass on the benefits to the consumer.<sup>7</sup> To protect consumers and catalyze competition, USDOT should carefully evaluate airline partnership practices, specifically those which promote the consolidation of slots to a small handful of airlines.

A second issue that calls for more careful USDOT oversight is the use of code-sharing arrangements. Such arrangements enable one airline to sell seats on a flight operated by another airline. While in some cases, such as with international travel, these arrangements can be pro-competitive because they facilitate entry into markets that U.S. carriers could not normally reasonably access, this practice can often result in the same impact as a merger between firms. Thus, in markets where two firms

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<sup>2</sup>*Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law*, 117<sup>th</sup> Cong. 2-3 (2021) (statement of Phil Weiser, Attorney General, State of Colorado).

<sup>3</sup>*Id.* Sec. 5 (m)(ii)(C).

<sup>4</sup> *See id.* Sec. 5 (m)(i)(F)(ii).

<sup>5</sup> *See Consolidated Reply of Spirit Airlines to Responses of American Airlines and JetBlue Airways* (July 2, 2021), Docket DOT-OST-2021-0001 at 5.

<sup>6</sup> *Southwest Airlines Co. (Letter of Support)* (Jan. 11, 2021), Docket DOT-OST-2021-0003 at 4. (“[Southwest] . . . would be interested in acquiring any DCA or LGA slots that the partnership carriers may be ordered to divest. . . . [Southwest] would welcome the opportunity to expand its low-fare competition at the slot-controlled airports, and would provide substantial additional public benefits while doing so).

<sup>7</sup> *See*, Diana L. Moss, *Airline Joint Ventures in the Era of Oligopoly: Realigning Regulatory Policy with Tougher Antitrust Enforcement*, AMERICAN ANTITRUST INST. (Oct. 13, 2021), <https://www.antitrustinstitute.org/work-product/aai-says-joint-ventures-reinforce-market-power-in-the-domestic-airline-oligopoly-commends-doj-for-challenging-the-northeast-alliance-and-urges-dot-to-overhaul-regulatory-policy/> at 1.

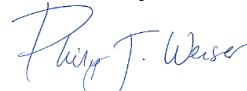
are competing against one another, the USDOT should be very skeptical as to whether code sharing arrangements benefit consumers. In general, the USDOT and the U.S. Department of Justice (“DOJ”) should treat such arrangements as tantamount to a merger. In the NEA agreement noted above, the DOJ—joined by several states—called for just that approach.<sup>8</sup>

The USDOT is tasked with protecting the public interest.<sup>9</sup> Unfortunately, current airline consolidation and partnership practices do not adequately serve the public and the greater marketplace. In particular, the restrictions on access to slots and the current tolerance for code sharing arrangements between airlines result in decreased competition, resulting in poorer outcomes for consumers, compromised working conditions for airport workers,<sup>10</sup> higher airfare prices, and insufficient customer service.<sup>11</sup>

We strongly urge the USDOT to develop a new model addressing slot allocation, governing code sharing, and lowering barriers to entry in the airline industry. This new model should focus on increasing competition within the airline industry and improving consumer protection,<sup>12</sup> thereby furthering the public interest. Consistent with this commitment, the USDOT should perform a thorough investigation into how current airline practices impact airline customers, employees, and the general public.

Thank you for your consideration of these comments. Should your staff have questions, please feel free to contact Shalyn Kettering or Kurt Morrison with the Colorado Department of Law at (720) 508-6547.

Sincerely,



Phil Weiser  
Attorney General

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<sup>8</sup> See *United States v. Am. Airlines Group, Inc.*, (D. Mass. filed Sept. 21, 2021).

<sup>9</sup> See *Am. Airlines, Inc. v. N. Am. Airlines*, 351 U.S. 79, 83 (1956).

<sup>10</sup> See *generally Supplemental Comment Re: Service Employees International Union* (September 10, 2021), Docket DOT-OST-2021-0001.

<sup>11</sup> See, e.g., Oversight of U.S. Airlines Customer Service: Hearing Before The House Committee On Transportation And Infrastructure, 115th Cong. (2017) (Testimony of William J. McGee).

<sup>12</sup> Colorado has raised concerns regarding consumer protection failures in the airline industry to the USDOT before and believes increased competition in the sector would help combat these abuses. See Letter from Colorado Attorney General Phil Weiser to U.S. Secretary of Transportation Elaine L. Chao (Sept. 1, 2020), available at <https://coag.gov/app/uploads/2020/09/Colorado-AG-letter-to-USDOT-re-Frontier-9.1.2020-final.pdf>; Letter from Colorado Attorney General Phil Weiser to U.S. Secretary of Transportation Pete Buttigieg (Feb. 4, 2021),