



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 23<sup>rd</sup> day of June, 2022

**Joint Application of**

**DELTA AIR LINES, INC.  
LATAM AIRLINES GROUP S.A., D/B/A  
LATAM AIRLINES  
TAM-LINHAS AERES S.A., D/B/A LATAM  
AIRLINES BRASIL  
LAN PERU, S.A., D/B/A LATAM AIRLINES  
PERU  
TRANSPORTES AEREOS DEL MERSOSUR  
S.A., D/B/A TAM MERCOSUR  
AEROVIAS DE INTEGRACION  
REGIONAL, AIRES S.A., D/B/A LATAM  
AIRLINES COLOMBIA**

**Docket DOT-OST-2020-0105**

**Under 49 U.S.C. §§ 41308 and 41309 for  
Approval of and Antitrust Immunity for  
Alliance Agreements**

**ORDER TO SHOW CAUSE**

**I. SUMMARY AND OVERVIEW**

By this Order, the United States Department of Transportation (“the Department” or “DOT”) tentatively grants approval of, and antitrust immunity (“ATI”) for, alliance agreements between Delta Air Lines, Inc. (“Delta”) and LATAM Airlines (“LATAM”), subject to conditions as specified herein.<sup>1</sup> The Applicants (collectively, the “Applicants” or the “Joint Applicants”) seek to jointly plan, price, and share revenues and costs under a joint venture (JV) covering routes between the United States and Canada on one end with the South American Region<sup>2</sup> on

<sup>1</sup> The Department proposes, with this Show Cause Order, to tentatively grant ATI to immunize the Joint Applicants’ Trans-American Joint Venture Agreement (Joint Venture Agreement) between Delta and LATAM, dated May 7, 2020, and the subsequent implementing agreements as defined in the answer to question 2 in the Joint Response of Delta Air Lines, Inc. and LATAM to DOT Order 2021-5-15 Requesting Additional Information, dated August 2, 2021.

<sup>2</sup> South American Region is defined by the carriers as Brazil, Chile, Colombia, Paraguay, Peru, and Uruguay.

the other end. The Joint Applicants are seeking approval from the Department, and a grant of ATI, to implement these arrangements (the Application).

The Application contains a number of arguments supporting the Applicants' request, with the most salient points being: 1) the largely complementary nature of the two carriers' networks—with limited direct overlap; 2) the proposed JV attaining critical mass to compete more effectively against American Airlines and United Airlines, which has ATI with Panamanian carrier Copa; 3) capacity increases and commencement of new routes that are unlikely to happen otherwise; and 4) a combined U.S.-South American regional network that would allow for a more seamless customer experience with greater efficiencies than the current codeshare partnership.

The Department's analysis tentatively finds that a grant of ATI would likely *restrain* competition such that the JV, as proposed, would not be in the public interest. These concerns stem from the state of competition in the U.S.-South American market, the proposed alliance's potential for adverse effects in relevant markets, as well as provisions regarding the structure and future plans of the JV. The Department proposes the following critical remedies and conditions to address these issues: maintenance of current third-party interline agreements, the removal of exclusivity provisions (*i.e.*, provisions that could prohibit or limit one of the Joint Applicants from engaging in a business relationship with another carrier), 10-year expiration and re-assessment requirement, and the removal of a capacity constraint clause located in the Joint Venture Agreement, which artificially limits growth during the initial stages of the proposed relationship. With these conditions, we have tentatively determined that the alliance is likely to generate public benefits while the U.S.-South America market would remain sufficiently open to existing and new competition.

Based upon these tentative findings and conclusions, the Department proposes to approve the alliance agreements and grant ATI. We direct any interested parties to state why we should not adopt these findings and conclusions in a final order. Parties have 14 calendar days in which to file answers and seven (7) business days following the end of the answer period in which to submit replies.

## **II. BACKGROUND**

### **a. APPLICATION**

Delta and LATAM submitted their application for antitrust immunity on July 8, 2020. The Department issued a notice suspending the procedural schedule and granting interim access to confidential documents on July 15, 2020. The Joint Applicants then submitted supplemental documentation at various times up to April 22, 2021. The Department reviewed the entirety of these filings and determined that additional information was needed to complete our review. The Department then issued an Order Requesting Additional Information on May 25, 2021.<sup>3</sup> The Joint Applicants responded to the Department with a submission on August 2, 2021, followed by a second submission on August 11, 2021, and several additional submissions between September 14, 2021 and December 21, 2021. After reviewing the totality of evidence provided, we issued a

---

<sup>3</sup> Order Requesting Additional Information, Docket DOT-OST-2020-0105, [Order 2021-5-15](#) (May 25, 2021).

notice on December 21, 2021, declaring the record substantially complete and establishing the procedural schedule.<sup>4</sup> In response to docketed requests, the Department issued Order 2021-12-16 on December 29, 2021, that extended the initial comment period to January 25, 2022.<sup>5</sup>

The proposed JV is an incremental profit and loss-sharing alliance that provides for metal neutrality between the carriers and covers all nonstop flights between North America<sup>6</sup> and the South American Region, as well as flights connecting to the nonstop services that operate within the geographic scope of the proposed JV (e.g., Delta flies passengers from various U.S. airports to gateway airports such as Atlanta in the United States to connect with Delta or LATAM flights to and from the South American Region and LATAM will do the same at its various gateways). The JV Agreement is “evergreen;” with a minimum period of 15 years. The Joint Applicants maintain that the proposed JV will “be pro-competitive and pro-consumer...align Delta’s and LATAM’s incentives to provide more flights and lower fares between North America and the South American Region, enabling Delta and LATAM to offer the traveling public a more attractive and complete network than either carrier could offer on its own” by creating a seamless and metal-neutral joint venture that provides for sharing of incremental profits and losses.<sup>7</sup> The Joint Applicants expect that ATI will allow them to create a larger network with an enhanced product, improved consumer convenience and choice, increased operating efficiencies, and greater scale to compete with American, United, and their respective regional partners in South America. In addition, the Application asserts that the JV will incentivize Delta to grow its operations at Miami, the largest gateway for South American services, which will provide increased competition and options for consumers at a gateway where American has long had a large local traffic share. By combining their relatively small market shares, the Joint Applicants believe they will have the scale necessary to be a significant competitor in the North America-South America market. The Joint Applicants claim the JV will:<sup>8</sup>

- Cover 7,000 city-pair markets;
- Provide new or expanded service on at least 18 nonstop routes;
- Provide approximately \$460 million in estimated annual consumer benefits;
- Optimize connectivity between Delta’s and LATAM’s hub networks;
- Lower prices by jointly setting fares and managing seat inventory by up to \$56 million annually;
- Create an immunized network that provides critical mass to compete against the larger American Airlines and United Airlines networks in the region; and
- Use efficiencies of the combined operations to optimize aircraft utilization, enhance schedules, and lower costs, with a joint sales force to target key customers.

It should be noted that the Joint Applicants base all consumer benefits cited above and throughout this document on pre-pandemic 2019 traffic and fare levels. The carriers insist that

---

<sup>4</sup> Notice Establishing Procedural Schedule, Docket DOT-OST-2020-0105-0038 (December 21, 2021).

<sup>5</sup> On December 22, 2021, the Air Line Pilots Association Int’l, filed a Motion for an extension of time to submit Answers in Docket DOT-OST-2020-0105. Specifically, they requested an extension of time to file Answers from January 18 to January 25, 2022.

<sup>6</sup> North America is defined as the United States, inclusive of Puerto Rico but no other U.S. territory, and Canada

<sup>7</sup> Application, page 1-2.

<sup>8</sup> Application, page 11-12.

those demand conditions will return, that the proposed JV will enable them to deliver the benefits to the traveling public at the levels cited, and that refreshing their assumptions was unnecessary. At the very least, the Joint Applicants claim that the JV will allow them to restore capacity to pre-pandemic levels more quickly than without, and that the JV will allow them to quickly add new service as demand conditions warrant. With the JV in place, Delta and LATAM estimate they will attract 1,000,000 more annual U.S.-South America passengers that would have otherwise flown on competing carriers and they estimate capacity will increase more than 68 percent once demand conditions return to normal.<sup>9</sup>

The Joint Applicants argue that their networks are largely complementary, with LATAM having hubs in Sao Paulo, Brazil; Bogota, Colombia; Lima, Peru; and Santiago, Chile. The only route overlap exists on the New York City-Sao Paulo city-pair market. Their existing codeshare relationship, in place since 2020, is limited in future growth, as the two carriers “remain competitors with no incentive to divert traffic from their own flights.”<sup>10</sup>

New, reinstated, or expanded service is proposed on at least 18 routes. The carriers argue that what enables such potential growth is the fact that the relatively short distances between the U.S. and several South American markets enables the carriers to utilize narrowbody aircraft rather than the higher capacity widebody aircraft necessary for many transoceanic segments. The ability to use lower-capacity aircraft would enable the Joint Applicants to respond to new and growing market opportunities and quickly match supply with demand. Furthermore, the carriers state that immunized cooperation will allow them to use larger aircraft in several existing markets.<sup>11</sup> Larger aircraft on existing markets will enable greater connectivity over the two carriers’ hubs, with LATAM having increased access to North American markets over Delta’s Atlanta, Boston, Los Angeles, and New York City hubs, and with Delta having increased access to over 160 South American markets over LATAM’s hubs at Bogota, Lima, Santiago, and Sao Paulo. While their partnership, absent an immunized JV, is likely to continue at current levels, the Joint Applicants contend that they will be unable to unlock further benefits from their existing relationship unless they receive approval for ATI.

The Joint Applicants expect that their JV will enable them to share best practices regarding environmental sustainability. Though they have not committed to any specific goals, they claim that their JV would, among other things, incentivize them to co-invest in carbon offset projects in the Amazon rainforest, facilitate opportunities to collaborate on Sustainable Aviation Fuel (SAF) supply in the United States and South America, and share best practices from each other’s already defined sustainability practices.<sup>12</sup> The Joint Applicants convened a meeting in March 2021 in anticipation of JV cooperation in order to share sustainability goals and discuss areas of collaboration enabled by the JV.

## **b. FILINGS**

---

<sup>9</sup> Application page 40-41.

<sup>10</sup> Application, page 12.

<sup>11</sup> Application page 44.

<sup>12</sup> Joint Response of Delta Air Lines, Inc. and LATAM to DOT Order 2021-5-15 Requesting Additional Information at 79.

Answers were submitted by two parties.<sup>13</sup> The Delta Master Executive Council of the Air Line Pilots Association, International (Delta MEC) submitted comments on January 25, 2022. In their comments, the Delta MEC states that while immunized alliances, such as the proposed JV, have the potential to grow both U.S.-carrier capacity and aviation jobs, they can also be used to effectively outsource U.S.-carrier flying to foreign carriers. The Delta MEC argues that such outsourcing is fundamentally inconsistent with the Department's statutory guidance under 49 U.S.C. § 40101. The Delta MEC specifically requests that the Department impose reporting conditions similar to those in Order 2019-11-14 approving Delta's "Blue Skies" JV with Air France/KLM and Virgin Atlantic, whereby the Blue Skies partners are required to provide both annual reports on JV implementation and a detailed self-assessment at the JV's five-year anniversary.<sup>14</sup> Here, the Delta MEC requests that the JV partners report specifically on how their coordinated operations are impacting the balance of flying, growth, and U.S. aviation jobs within the transborder market. In addition, the MEC asks that the Department require ongoing reporting regarding changes in agreements such as the JV, prorate, finance or purchase agreements; changes in Delta's equity ownership in LATAM; new or amended agreements between LATAM and other foreign carriers in which Delta has an ownership stake; merger/ restructuring activity; and Delta-related furloughs or reductions in force. The Delta MEC further requests that these annual report submissions be made available to interested parties, including labor interests, subject to the Department's confidentiality protections established under 14 C.F.R. § 302.12 (Rule 12).

JetBlue Airways (JetBlue) submitted an Answer on January 25, 2022, making two requests. First, JetBlue asks the Department to continually monitor the ability for unaligned carriers to access slot-controlled airports in the region. It cites as the reason for its concern its experience at London Heathrow Airport, where it says that anti-competitive access concerns have occurred years after the 2010 grant of ATI to American Airlines and British Airways in that market. JetBlue asks the Department to ensure that competing carriers continue to have access to airports as market conditions and immunized relationships between carriers change. Second, JetBlue discusses that it has had an interline agreement with LATAM since 2011. JetBlue asserts that this agreement has provided customers a variety of options for travel to and from South America at various price points and various time channels. JetBlue cautions that LATAM could terminate this agreement as a result of a potential ATI grant with Delta, risking several consumer benefits in the market. As a result, JetBlue asks that, should the Department grant ATI to Delta and LATAM, the Department include a condition requiring LATAM to maintain its relationship with JetBlue.

In their reply on February 3, 2022, the Joint Applicants note that neither JetBlue nor ALPA oppose approval of their JV, and therefore they ask the Department to promptly approve their grant of ATI so that they can begin delivering their promised consumer benefits. The Joint Applicants also argue that none of the objectors have shown the proposed JV would harm or reduce competition on any route or in any relevant market, nor has evidence been submitted

---

<sup>13</sup> The Department also received a late filing from Exhaustless, a software provider on February 7, 2022. This filing did not discuss the merits of the case and will not be considered in this filing. DOT-OST-2020-0105-0045.

<sup>14</sup> See Virgin Atlantic Airways, Ltd., Delta Air Lines Inc., Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. and Alitalia Compagnia Aerea Italiana S.p.A. – Approval of and Antitrust Immunity for Alliance Agreements (Blue Skies Case), Docket [DOT-OST-2013-0068](#).

indicating competitive harm. Finally, they note that their proposed alliance has been cleared by all relevant competition authorities in the South American Region, and that the DOT represents the last approval needed for them to implement what they deem a “...pro-consumer, pro-competitive joint venture.”

With regard to the Delta MEC comments, the Joint Applicants thank them for their support and reaffirm their commitment that the proposed JV will inure benefits to the employees of both carriers through the introduction of additional flying opportunities on new and existing routes between the U.S. and the South American Region. The Joint Applicants affirm their support of Delta/ALPA’s request for the inclusion of balance of flying and pilot employment information in their annual reporting to the DOT. At the same time, they reject, as the Department did in the Delta/WestJet case, the proposal that this reporting be made available under Rule 12 conditions for the confidentiality and privacy-related reasons that the Department cited in its Delta/WestJet decision.<sup>15</sup> The Joint Applicants urge the Department to maintain the confidentiality of this reporting.

With regard to JetBlue’s comments, the Joint Applicants note that JetBlue does not oppose the application. The Joint Applicants also note that most of JetBlue’s comments are regarding topics unrelated to this specific grant of ATI and better suited to other fora. With regard to JetBlue’s concerns on carrier interlining, the Joint Applicants note that their agreement permits third carrier interlining while pointing out that JetBlue has extensive codeshare and interlining arrangements with partner carrier American Airlines in South America. The Joint Applicants also note that while LATAM has no current plan to suspend its interline relationship with JetBlue, they view JetBlue’s request that the Department require this relationship to continue as a condition for approval as “unnecessary and unjustified in this case.”

The Delta MEC filed a sur-reply along with a motion for leave to file on February 14, 2022. The Delta MEC states that monitoring of joint ventures by interested parties is essential and there is no principled basis for withholding Rule 12 access to annual progress reports as the information is identical in nature to the confidential information the applicants have already produced as part of the Application. The Delta MEC argues that, given their concerns about the JV’s implementation and impacts on labor, access to these annual reports would allow them to provide timely and relevant feedback to the carriers and the Department. The Delta MEC further argues that the current Administration’s Executive Order on Worker Organization and Empowerment (April 25, 2021) tacitly supports granting labor parties Rule 12 access to the annual ATI reports. Finally, the MEC states that Delta’s expected 10 percent equity stake in LATAM makes the ability to review reports and implementing agreements regarding employee level impact before they become “intractable” crucial.

In a letter dated February 15, 2022, Delta reemphasizes the position it stated in its February 3, 2022 regarding the MEC request for Rule 12 access to Annual Reporting. Delta further asks the Department to disregard the MEC’s February 14, 2022 sur-reply for being “unauthorized” and for merely “rehashing” the arguments it had already made in its February 3, 2022 Answer.

The Department received letters in support of the proposed JV from several U.S.

---

<sup>15</sup> Order to Show Cause, Docket DOT-OST-2018-0154, Order 2020-10-13 at 33.

Representatives and Senators, city mayors, and various businesses such as travel agencies. The letters highlighted consumer and economic benefits that the applicants' combined network could provide.

### III. DECISIONAL STANDARDS

As part of its review under applicable statutes, the Department engages in a two-step analysis of joint venture agreements that are submitted with a request for approval and a grant of antitrust immunity. Under 49 U.S.C. § 41309(b), the first step involves determining whether the agreements are “not adverse to the public interest,” based on competitive factors (competitive effects analysis). If the Secretary finds that the agreements are consistent with the public interest, he shall approve them; if, on the other hand, the Secretary finds that the agreements substantially reduce or eliminate competition, he shall disapprove them unless they are necessary to meet a serious transportation need or to achieve important public benefits.<sup>16</sup> A party seeking approval of the agreement or request must establish the transportation need or public benefits; a party opposing the agreement has the burden of establishing that the agreement substantially reduces competition and that less anticompetitive alternatives are available.<sup>17</sup>

The second step of the analysis concerns a grant of antitrust immunity under 49 U.S.C. § 41308, thereby exempting the agreements from application of U.S. antitrust laws. If DOT has found that the agreements are not adverse to the public interest under section 41309, and the Secretary decides, that it is “required by the public interest” he *may*, at his discretion, exempt the parties to the agreements from the antitrust laws, but only to the extent necessary to allow those parties to proceed with the transaction.<sup>18</sup> The Department normally conducts a detailed examination of public benefits (public benefits analysis) in each case to determine whether a grant of antitrust immunity is required by the public interest. If, however, we have found that the agreements substantially reduce competition under section 41309, but countervailing needs and benefits warrant their approval, the statute requires the Secretary to grant ATI to the extent necessary to allow them to proceed with the transaction.<sup>19</sup> Finally, if the Secretary determines that neither circumstance applies—that is, the agreements are adverse to the public interest with insufficient countervailing benefits—no grant of immunity is possible.

Immunized alliances allow two or more carriers to achieve merger-like efficiencies in covered markets. Because approval of the JV would have intended commercial effects similar to those resulting from a merger, the Department examines the Application under the Clayton Act test. The Clayton Act test is used to predict the competitive effects of a proposed merger and requires us to consider whether a grant of ATI is likely to substantially reduce competition and facilitate the exercise of market power. The Department applies the Clayton Act test to determine whether approval of the Application would allow the applicants to profitably charge supra-competitive prices or reduce service or product quality below competitive levels in any relevant market. In examining whether an alliance is likely to create or enhance market power, we examine: (1) whether the alliance would significantly increase market concentration; (2) whether the alliance would cause potential competitive harm; and (3) whether new entry into the

---

<sup>16</sup> 49 U.S.C. § 41309(b).

<sup>17</sup> 49 U.S.C. § 41309(c).

<sup>18</sup> 49 U.S.C. § 41308(b).

<sup>19</sup> 49 U.S.C. § 41308(c).

market would be timely, likely, and sufficient either to deter or to discipline the potential competitive harm.

Remedies may be necessary to address potential harm resulting from the alliance which market forces may not adequately address in light of the proposed alliance. Examples of where remedies are appropriate include where new entry would not otherwise be sufficient to address competitive harm, or where there are external factors, such as infrastructure constraints in the marketplace, that exacerbate competitive harm.

#### **IV. COMPETITIVE EFFECTS ANALYSIS**

The Department has assessed the impacts on competition resulting from the proposed JV first by thoroughly reviewing the overall North America-South America market dynamics, and second by undertaking three levels of analysis of relevant markets: (1) at a broad regional level; (2) at a country and market-pair level; and (3) at a city-pair level. The analysis also considers the potential competitive effects related exclusionary effects stemming from the alliance, geographical considerations, and structural issues in the JV Agreements.

##### **a. MARKET ANALYSIS**

Worldwide air travel has gone through an extraordinary downturn following the COVID-19 outbreak. Recognizing that our proposed grant of ATI is likely to outlast the current market environment, we believe it appropriate to conduct our analysis using market data prior to the onset of COVID-19, as that serves as the best proxy for the long-term state of competition.

This analysis considers the North America-South America market in its entirety, while recognizing significant differences across regions and sectors of the airline industry. Though the scope of the proposed JV includes only those countries in the South American Region, all countries in South America are included, given the nature of the market and LATAM's extensive network within the continent.

Overall nonstop capacity between the U.S. and South America has declined during the COVID-19 pandemic, as outlined in Table 1. While the majority of this analysis is based on 2019 traffic patterns, this snapshot chart demonstrates the environment in which the Department proposes to grant ATI. Due to consistent month-to-month schedule changes, we present this

chart to highlight changes in capacity share per alliance grouping that have occurred during the pandemic.

Table 1

**North America– South America Nonstop Capacity Trends and Share**

Airline		Calendar 2019			January 2022		
Airline	Code	Seats (000)	Seat Share	Alliance Capacity Share	Seats (000)	Seat Share	Alliance Capacity Share
American	AA	4,972	26.8%	26.8%	502	33.9%	33.9%
LATAM*	LATAM	3,671	19.8%	27.8%	204	13.8%	23.7%
Delta	DL	1,489	8.0%		146	9.9%	
Avianca	AV	2,331	12.6%	12.6%	152	10.3%	10.3%
United	UA	1,968	10.6%	10.6%	110	7.4%	7.4%
Other	--	4,110	22.2%	22.2%	368	24.8%	24.8%
<i>Total</i>		<i>18,541</i>	<i>100.0%</i>	<i>100.0%</i>	<i>1,482</i>	<i>100.0%</i>	<i>100.0%</i>

OAG Schedule Data

\*LATAM includes the parent carrier LATAM and affiliates in Brazil, Ecuador, and Argentina.

Key market developments over the course of the pandemic include:

- The Joint Applicants’ share of the nonstop market has declined over the course of the pandemic, while the share of the largest carrier, American, has increased.
- The share of Avianca, a key Colombian airline offering nonstop flights from multiple cities in Colombia to multiple U.S. and Canadian destinations, has also declined. This carrier, though, has announced a number of new destinations and flights to be implemented between Colombia and the United States throughout 2022, indicating that it expects demand to return. Avianca can provide competitive discipline to both market leader American as well as to the Joint Applicants.
- “Other” carriers are growing their share of the nonstop market. Chief among them is low-cost carrier Viva Colombia, which is expanding in the market and provides lower fares and competitive discipline to larger carriers in the market. In addition, JetBlue and Spirit both have expanded their presence in the region, providing additional service in close-in markets in Colombia, Ecuador, and Peru.

We now analyze the market through distinct lenses: regional, country and market, and city-pair.

**1. Regional Level**

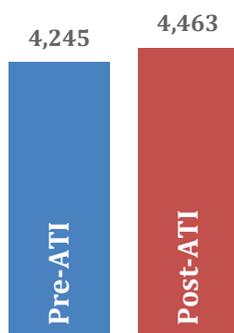
With most ATI cases, such as those over the Atlantic or Pacific, the Department identified relevant regional markets to include regions beyond the European or Asian hub(s) – such as the United States to Africa, South Asia, Southeast Asia, and so forth. This case, however, resembles the transborder-Mexico Delta-Aeromexico JV in that relevant regional markets outside the transborder geography (i.e., U.S.-Australasia or U.S.-Africa connecting over South American Region countries such as Brazil) are not included in the scope of the JV Agreement; such markets also constitute a small portion of U.S.-South America traffic. The scope of the Joint Applicants’ JV limits their revenue sharing to flights between the North

American and South American Region countries. Competitive benefits are largely restricted to these markets.

When assessing competitive effects the transaction will have on the broader North America-South American Region markets, the level of market concentration (before and after) is a key indicator as to whether the Joint Applicants will be able to exert market power. The Herfindahl-Hirschman Index (HHI) value is a standard measure of market concentration, with index values above 2500 considered highly concentrated markets per the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.<sup>20</sup> According to the guidance, in highly concentrated markets, “transactions that increase the HHI by more than 200 points are presumed likely to enhance market power.”<sup>21</sup>

Figure 1

#### HHI – U.S./Canada - South America



MIDT Adjusted T100 – YE 2019Q4

The North America-South America market has an HHI of 4,245 prior to ATI – well above the 2,500-determinative threshold for highly concentrated markets. The change in concentration resulting from the JV is 218 – slightly above the 200 value which triggers significant competitive concerns and increased scrutiny.

The HHI figures for North America–South America are constructed treating United and Copa Airlines and Delta and Aeromexico each as a single entity, based on the longstanding immunity the two carriers have. However, Delta and LATAM, in response to Department questions, have specifically said that they do not intend to work with Aeromexico in the U.S./Canada-South American Region markets, and Aeromexico has been specifically omitted from inclusion in the Delta/LATAM Joint Venture Agreement. While there are still some markets of concern, this HHI analysis suggests an overall moderate risk to consumers in the region should the Department grant ATI to the Joint Applicants.

The competitive reality reflects the different geographies mentioned above along with the substantial opportunity for connecting competition in Central America. The market is more competitive in closer-in markets where barriers to entry are lower, and more concentrated in longer haul destinations that require more resources and where barriers to entry are higher. With this understanding, there is some concern that the proposed JV could increase concentration in

<sup>20</sup> See U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.3 (2010).

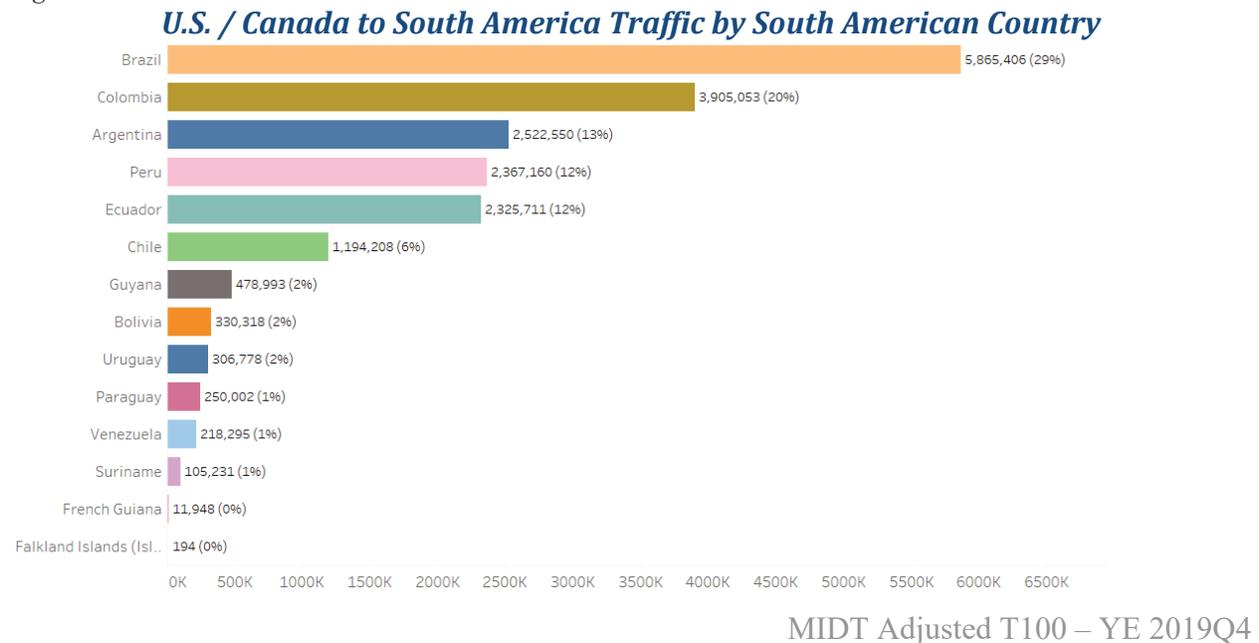
<sup>21</sup> See <https://www.justice.gov/atr/herfindahl-hirschman-index>, accessed February 10, 2020.

several markets and enhance the Joint Applicants’ ability to exert market power and thwart potential competition. Our analysis below of markets of significant concern reveals that the greatest threat to competition lies in smaller, more distant markets where there already is less competition. We are therefore tentatively recommending remedies that aim to limit competitive impacts and prevent further barriers to entry in these markets.

## 2. Country and Market Level

The analysis next examines travel between the United States and various South American countries and cities to delineate traffic flows, competitive dynamics, and fare levels.

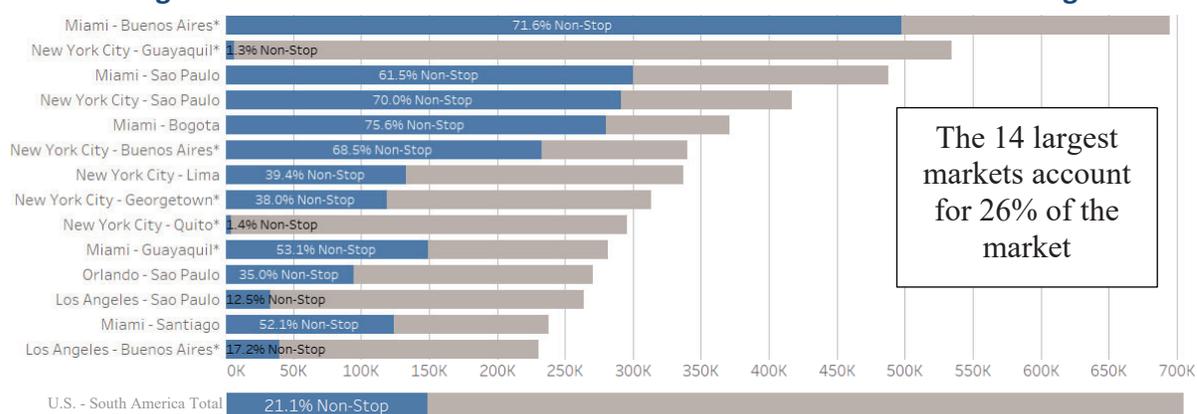
Figure 2



First, we review traffic by country. As outlined in Figure 2, out of the total North America to South America market, the in-scope South American Region country markets account for 70 percent of the market. Argentina and Ecuador, two of the largest country markets, account for a combined 25 percent of the overall market, but are not included in the scope of the JV. The six largest country markets – Brazil, Colombia, Argentina, Peru, Ecuador, and Chile – account for 92 percent of the market, and are the countries that account for the majority of the nonstop flying and traffic to North America. Traffic from the United States and Canada to Bolivia, Uruguay, Paraguay, and Suriname consists mostly of connections via regional hubs.

Figure 3

### 14 Largest North America– South America Markets with Percent Connecting

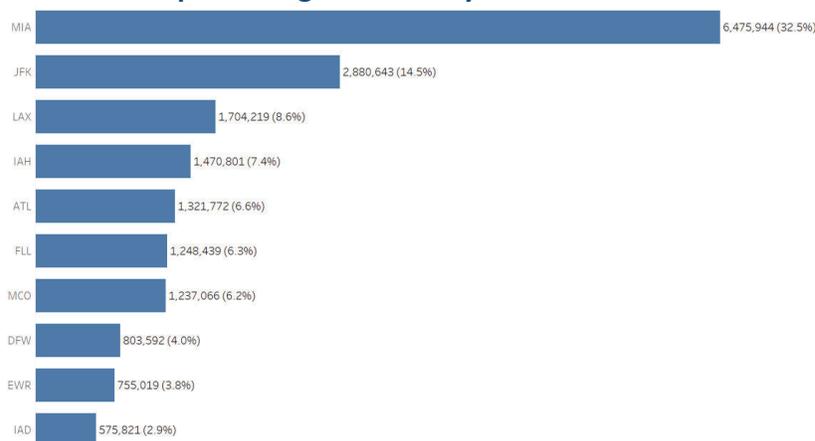


\* Indicates a market outside the scope of the JV  
 MIDT Adjusted T100 – YE 2019Q4

We next look at individual origination and destination (O&D) markets. The 14-largest markets in the North America to South America market, as depicted in Figure 3, account for a quarter of traffic and are served largely on a nonstop basis. Out of these largest markets, 45 percent of passengers fly nonstop. With ample nonstop service between the largest cities, few passengers connect to travel between the largest North America–South America markets. This contrasts with the overall market, where 21 percent of travelers between North America and South America travel nonstop. Nearly three quarters of the market consists of smaller markets served via connections over intermediate hubs such as Panama City and Mexico City. The overall connecting nature of the market produces ample opportunities for immunized parties to lower fares through the reduction of double marginalization as well as to provide alternative paths of travel that can serve as competitive alternatives.

Figure 4

### Top Ten Largest Gateway Markets – North America to South America

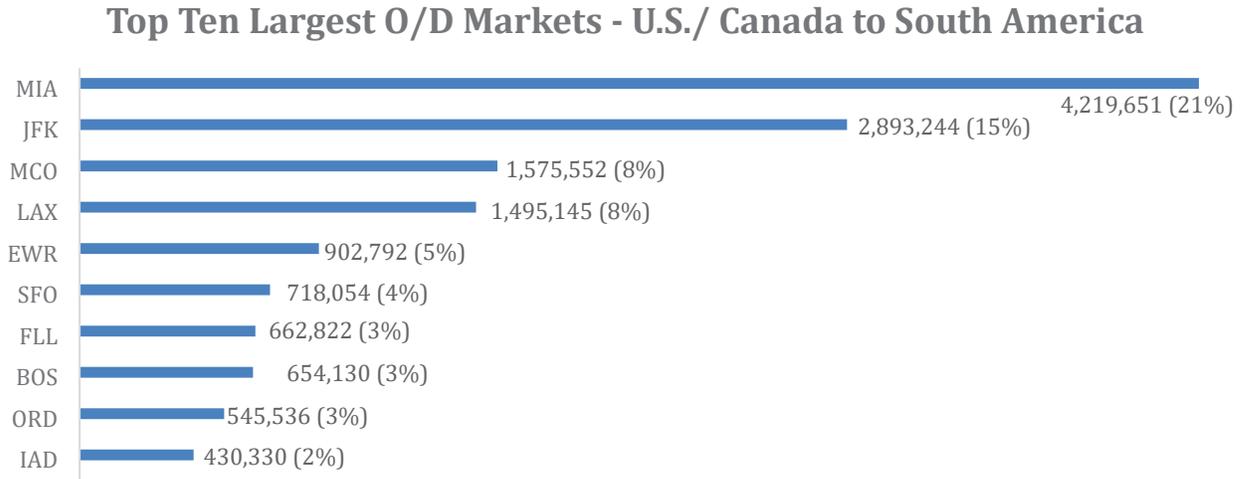


Adjusted MIDT YE 2019Q4

The North America to South America market is marked by the high level of traffic at major gateways to/from the region. Per Figure 4, two gateways – Miami and New York JFK –

account for nearly 50 percent of all traffic to/from the region. These two, and the remaining top 10 airports, account for 92 percent of traffic to/from South America.

Figure 5

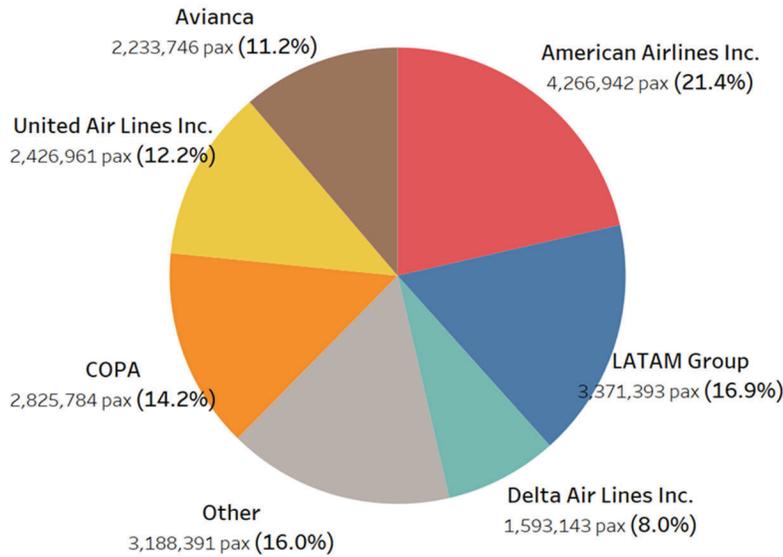


Adjusted MIDT YE 2019Q4

Origin and destination, or markets where people are actually traveling to/from and not merely transiting, follow this same pattern. As shown in Figure 5, the top 10 markets account for 71 percent of all U.S./ Canada – South America traffic, with airports in the Miami, Florida area (MIA and FLL) and New York City area accounting for 44 percent of all traffic. Overall, the market is largely concentrated at 10 airports in eight U.S. cities.

Figure 6

### North America-South America Traffic Shares by Carrier



Adjusted MIDT YE 2019Q4

As highlighted in Figure 6, in the North America-South America market, traffic share is more fragmented than nonstop capacity share would otherwise suggest. Although overall traffic share percentages reflect capacity shares, there is viable competition via third country connections that currently capture significant market share. American is the largest carrier, with 21.4 percent of share; however, many other carriers also compete for traffic and also capture significant share. The market is fragmented with many carriers competing for traffic. Upwards of 22 percent of the market connects via Central American countries to reach South America. As shown in the above chart, Panamanian-based Copa Airlines captures 14 percent of the traffic, despite not having any nonstop flights between North and South America. Panama's geography allows it to naturally connect traffic in this market. In addition, Mexican and Central American carriers in the "Other" category also attract traffic, providing meaningful price and schedule competition. The primary carriers offering these services – Copa, Avianca, and Aeromexico – are aligned with U.S. carriers such as United (Copa and Avianca) and Delta (Aeromexico).

#### **Fares**

Analysis of passenger fares in Figure 7 between North America and South America reveals, in general, that those carriers that operate a longer average stage length receive a higher average fare. For example, while United has a presence in some Northern South American countries such as Colombia, it has more flights to Southern South American countries such as Brazil, Chile, and Argentina. As a result, it has a higher average distance and fare as noted below. Delta receives an average fare 1.3 times that of LATAM while having a distance only

slightly higher. This difference reflects the mix of traffic that Delta carries as well as the product onboard its airplanes, with a higher percentage of premium seats than similar LATAM airplanes.

Figure 7 includes other carriers’ combinations of distance and fare, including Copa, which, despite not having any nonstop flights between North America and South America, captures a significant share of the market thanks to its geographic location and hub dynamics. Copa functions as a low-fare carrier despite being in an immunized relationship with United that dates back to the days of its joint venture with Continental. Avianca, which is growing in the market, also has a lower average fare and a smaller average distance traveled though it primarily serves nonstop traffic flows going to Colombia. These carriers discipline segments of the market in which they participate and provide lower fare competition to the potential Delta/LATAM alliance.

Figure 7

### North America–South America Average One-way Total Fares & Distance



Note: Carriers above account for 5% or more passenger share  
SABRE MI – YE Dec 2019

### 3. City-Pair Level

When conducting analysis of relevant city-pair markets, there are two areas of focus. First, the Department identifies nonstop overlap routes where the proposed JV carriers both operate services and assesses the competitive consequences in such markets. The second area of focus is city-pair markets, on a connecting and nonstop basis, where there is potential for a significant reduction in competition – referred to as share-shift analysis.

#### Nonstop Overlap Routes

In airline antitrust analysis, the overlap routes between the Joint Applicants are the most significant area for potential competitive harm as the combination would effectively result in the loss of a competitor on such a route. Delta and LATAM offer largely complementary networks with the only nonstop city-pair overlap being New York City-Sao Paulo (NYC-GRU). Both Delta and LATAM operate New York JFK-Sao Paulo nonstop service on a daily basis. In addition, American and United also offer daily service from NYC to Sao Paulo, with American flying from JFK Airport and United flying from Newark. HHI measurements show that under a proposed JV, HHI will increase by 686 points from 2,177 to 2,863 and Delta and LATAM will control 49.4 percent of the market. While this combination will concentrate some measure of control with the Joint Applicants, American and United are still expected to provide robust nonstop competition, and other airlines offering one stop itineraries will continue to serve the market.

### Share-shift Analysis

To assess the proposed JV’s competitive implications in all city-pair markets, including connecting and nonstop traffic, we conduct a share-shift analysis. As part of this process, all North America-South America O&D city pairs are stratified based on passenger density (e.g., number of O&D passengers per day), stage length (route distance), and the number of carriers that compete on that route.<sup>22</sup> Delta and LATAM are then combined to reflect a single operating entity and comparisons are made between the pre- and post-ATI number of competing carriers to identify markets that will be significantly affected.

Markets that go from three to two competitors or two to one competitor in the share-shift analysis are determined to pose a significant competitive concern and are highlighted in yellow in the table below. Orange represents markets that go from four to three carriers which warrant some caution, particularly in large markets and those where the Joint Applicants have a high degree of concentration on such routes. Green indicates markets that go from five to four competitors where, despite a reduction in competition, we generally believe adequate competition remains. The table also indicates markets where the number of competitors increased post-ATI – this is because Delta and LATAM are below the five-percent threshold to be counted as a competitor pre-ATI, however, their market shares are above five percent once combined.

Table 2

#### Share-shift Analysis Summary

Competitors <i>Pre-ATI</i>	Competitors <i>Post-ATI</i>	Markets	Bi-directional Passengers	Percent of Total Passengers
3	2	44	72,780	0.4%
4	3	298	3,181,569	17.3%
5	4	139	3,010,814	16.4%
1	2	6	4,455	0.02%
2	3	28	95,089	0.5%
3	4	15	20,284	0.1%
4	5	1	379	0.002%
7	6	1	217,615	1.2%
6	5	17	926,814	5.0%
No Change		1,419	10,856,155	59.0%
<i>Total</i>		<i>1,968</i>	<i>18,385,954</i>	<i>100%</i>

Note: this table excludes all markets with pax / day of 1  
MIDT Adjusted T100 – YE 2019Q4

Overall, the share-shift analysis reveals minimal risk to competition in the identified markets. In markets accounting for 66 percent of the passengers, the proposed JV will not significantly decrease the number of competing carriers. The remaining 33 percent, approximately 6.8 million annual passengers, will see some reduction in competition, with 0.4 percent seeing a significant reduction in competition (yellow highlight). Of the 72,780 passengers facing a substantial reduction in competition, these 44 markets are geographically

<sup>22</sup> A competitor is defined as having greater than five percent market share.

dispersed in both the United States and South America. These are all small markets that generate 15 passengers or less per day each way. At the same time, many of these markets are highly concentrated as revealed in Table 3, having HHI values over 4,000 with a change in HHI of 500 or greater, and have not seen new capacity providing additional competition. With these considerations in mind, it is even more important that the proposed JV deliver the promised reduction in double marginalization in these markets so as to offset the potential reduction in competition.

Table 3

**Identified Markets of Significant Concern**

O&D Market	Change in Competitors	Annual Passengers	HHI post-ATI	HHI Change
Miami, Florida - Iguacu Falls, Brazil	From 3 to 2	11,003	4,986	+1,772
Los Angeles, California - Tucuman, Argentina	From 3 to 2	6,379	8,438	+1,130
Los Angeles, California - Iguacu Falls, Brazil	From 3 to 2	5,235	7,324	+1,009
Anchorage, Alaska - Lima, Peru	From 3 to 2	5,130	7,711	+1,065
Boston, Massachusetts - Londrina, Brazil	From 3 to 2	4,827	6,040	+758
Orlando, Florida - Campo Grande, Brazil	From 3 to 2	4,248	4,245	+716
Spokane, Washington - Lima, Peru	From 3 to 2	3,846	6,609	+1,342
Atlanta, Georgia - Cusco, Peru	From 3 to 2	3,328	5,695	+2,603
Orlando, Florida - Neuquen, Argentina	From 3 to 2	2,717	7,794	+3,183
Miami, Florida - Tacna, Peru	From 3 to 2	1,647	5,217	+1,356
Rochester, New York - Sao Paulo, Brazil	From 3 to 2	1,560	5,053	+446
Los Angeles, California - Londrina, Brazil	From 3 to 2	1,425	4,641	+706
Atlanta, Georgia - Vitoria, Brazil	From 3 to 2	1,425	4,343	+644
Chicago, Illinois - Iquitos, Peru	From 3 to 2	1,288	4,712	+951
Chicago, Illinois - Vitoria, Brazil	From 3 to 2	1,260	5,855	+182
Minneapolis/St. Paul, Minnesota - Montevideo, Uruguay	From 3 to 2	1,195	6,006	+253

Markets with greater than 1,000 annual passengers

**b. POTENTIAL EXCLUSIONARY EFFECTS**

The Joint Applicants plan to limit each carrier’s ability to work with third party carriers seeking to partner with one or both of the carriers for traffic feed. This raises questions of vertical foreclosure. Though the Joint Venture Agreement contains provisions for current third-party carrier access, it requires consensus decision making for any new partner. These provisions equate to exclusivity provisions/clauses, which in the past the Department has prohibited to preserve market access for new entrants. The Joint Applicants argue that a JV requires substantial common investments to bring about greater revenues as well as consumer benefits; by vetting and potentially restricting third-party carriers, they can prevent the risk of “free riders” that could leech from the established JV.<sup>23</sup> As the carriers have argued that only a metal-neutral and immunized alliance can unlock the full array of benefits—including financial

<sup>23</sup> Joint Applicants’ Response to Order Requesting Additional Information, pages 47-48.

benefits—it remains doubtful that a third-party carrier, operating on an arms-length basis, would likely capture a similar degree of financial benefits as the joint venture partners and thus free ride in a way that would fundamentally undermine the joint venture. With LATAM’s vast international, regional, and domestic services throughout most South American countries, Delta could rely exclusively on LATAM for feed to support its services to the region, with the reverse being true for LATAM in the U.S. and Canada. The consensus-decision requirements would enable one partner to block the other from working with a new entrant carrier needing feed to support its services. With continued consolidation in both South American and North American domestic markets, there are fewer unaligned airlines in either region that could potentially work with new entrant carriers to feed them traffic, a situation that could accelerate should other carriers in the region seek ATI for their relationships in the future. With these competitive concerns in mind, the Department must consider both current and future threats to the viability of competitive services in a quickly consolidating and evolving market.

### **c. GEOGRAPHICAL CONSIDERATIONS**

The geography where this proposed JV is to take place is unique in that third country connecting competition currently provides competitive discipline to the airlines offering nonstop flights to destinations in the region. Currently, nearly a quarter of traffic between North America and South America connects via countries in Central America.<sup>24</sup> Of this amount, Panama, with 68 percent, is the largest Central American connecting point, followed by Mexico and El Salvador. Panama’s share is directly related to the growth of Copa Airlines, whose network connects North American cities to over 30 cities in Central and South America. The Department will need to monitor the competitive effects of this alliance depending on how the market develops and competitors respond to a combined Delta/LATAM.

### **d. STRUCTURAL ISSUES - AGREEMENT**

The Joint Applicants have agreed to balance their growth under the JV, and have provisions in place – notably Section 5.3 of the Joint Venture Agreement – to enforce that. Given the uncertain recovery from the COVID-19 pandemic and the fact that LATAM had more capacity in the region prior to COVID, the Department is concerned that this provision of the Joint Venture Agreement could prevent full restoration of all LATAM capacity, thereby enabling the Joint Applicants to charge supra-competitive fares. The Joint Applicants, in their response to our evidence request, stated that the various provisions of the Joint Venture Agreement will be pro-growth as demand returns; however, the response did not adequately address the concerns in the view of the Department based upon the plain language of the Joint Venture Agreement. LATAM is historically much larger than Delta in the U.S.-South America market, and has drastically reduced capacity as a result of COVID and possibly due to its bankruptcy reorganization. This provision of the agreement is likely to require LATAM to restore its capacity to pre-COVID levels more slowly than it otherwise would and we tentatively determine that it is therefore likely to reduce competition if not removed.

### **e. TENTATIVE FINDINGS FROM THE COMPETITIVE ANALYSIS**

Having reviewed the impact of the proposed alliance on competition in the U.S.-South America market, and at relevant market levels, the Department tentatively finds that the joint

---

<sup>24</sup> Adjusted 2019 Q4 MIDT data.

venture could reduce competition. We propose several remedies to address the competitive concerns that we have identified. The Department tentatively approves the alliance agreements under 49 U.S.C. § 41309, provided the Joint Applicants adopt the proposed remedies.

## V. PUBLIC BENEFITS ANALYSIS

Under 49 U.S.C. § 41308, if the Secretary of Transportation determines it is required by the public interest, he may grant ATI to the extent necessary to allow the carriers to proceed with the transaction. The Department analyzed the record, including: the Joint Applicants' original submission, subsequent evidence requested by the Department for clarifications to that original application, and various data sources including schedules, Sabre GDD data, O&D survey data, and MIDT data. This analysis allowed the Department to identify and assess the potential public benefits arising from a grant of ATI. The competitive effects and public benefits analyses are undertaken to ensure that the Joint Applicants' agreements are not anti-competitive and allow for an open market with free competition *that promotes consumer welfare*. The latter part is the focus of this section, which aims to assess the likelihood of benefits that would arise from granting the Joint Applicants antitrust immunity. In a traditional JV arrangement, there are several avenues to produce benefits that are in the net interest of consumers. These include:

- *Reduction in double marginalization* – where itineraries that previously involved interline connections were subject to a markup by each carrier, a JV allows the carriers to price jointly with a single markup.
- *Cost and operational efficiencies* – the larger entity can take advantage of economies of scale with benefits passed to consumers in fare reduction and/or better service.
- *Broader network coverage* – allows for more ways to travel across the network, including more points served which can also reduce fares.
- *Network and capacity coordination* – enables the JV carriers to better respond to market conditions and align schedules to minimize travel times.
- *Increased capacity* – with the increased demand for their services resulting from lower fares, better schedules, a broader network and improved service quality, the JV carriers would be incentivized to offer more services, and other market competitors may also respond with more capacity and improved service quality.
- *Frequent flyer benefits* – more opportunities to earn frequent flyer miles through joint promotions, alignment of accrual and redemption amounts and increased opportunities to redeem miles over a larger network.

Many of these traditional benefits are hallmarks of grants of immunized JVs that encompass long-haul trans-oceanic routes between distant hubs. The North America-South America market, though, represents a combination of short-haul and long-haul markets. Closer-in markets, such as those in Colombia, are analogous to a domestic market with a high degree of point-to-point travel, which limits some of these conventional benefits, such as: reduction in double marginalization, broader network coverage, and increased capacity. At the same time, the longer-haul sectors to countries such as Chile and Brazil are more analogous to traditional trans-oceanic routes, with flight times from the U.S. of eight hours or more. It is in these longer-haul markets that more traditional benefits such as those mentioned above would be more likely

to occur. Historically, approximately 32 percent of LATAM and Delta passengers to LATAM hubs connect onwards.

The Joint Applicants cite several operational efficiencies that ATI will enable, such as airport co-location, as well as identifying routes where they expect to cross-utilize each other's fleets based on aircraft efficiencies and seasonal variations in demand. By utilizing a broader network and flowing traffic over partner hubs, the carriers would, in many instances, be able to offer joint itineraries with reduced travel times. Such increases in efficiencies, lowering of costs, reduction of double marginalization, improved efficiency in pricing itineraries, enhanced brand presence across the border, and broader network are net positives to consumers.

While these public benefits are material, they are, by themselves, likely not worth the competitive risks to the market that would come from approving immunity. There are two notable benefits, however, which change the calculus: 1) the proposed JV will increase capacity and add new or expanded service in up to 18 markets; and, 2) the proposed JV will provide scale and synergies that will enable the JV to compete against American and its partners, and provide additional competition at Miami, the largest gateway to South America.

In sum, the Department believes that many, but not all, of the proposed new routes and Delta's proposed growth at Miami would not occur absent the JV. There is some uncertainty as to the likelihood of some of the key benefits, and there are identifiable competitive concerns, as outlined in the previous section. The uncertainty arises from: the extensive LATAM bankruptcy process in 2021-22; traffic resumption and growth during and post-COVID; and questions regarding continued consolidation of carriers in South America. Furthermore, since the time of the Application, several carriers have announced significant expansions in their Miami presence, including Frontier, JetBlue, Spirit, and Southwest, potentially complicating Delta's plans for a Miami hub. Finally, structural issues in the Joint Venture Agreement could limit LATAM's ability to return capacity as demand returns to the market, potentially enabling the Joint Applicants to exercise market constraining influence.

#### **a. TENTATIVE FINDINGS FROM THE PUBLIC BENEFITS ANALYSIS**

The Department tentatively finds that the potential benefits identified in the Application are substantial and unlikely to occur absent immunity.

We therefore propose that the Joint Applicants should be granted antitrust immunity subject to conditions to address the competitive concerns outlined above, including that the grant of immunity should expire after ten years. Additionally, a detailed self-assessment after nine years would allow the Department to determine if benefits have accrued, the state of competition in the market, whether the enhanced positioning of the JV has negatively impacted competition, and if the carriers are allowing interline access to their network or engaging in any exclusionary conduct. Under the ten-year proposal, the Joint Applicants' immunity would expire, but the Joint Applicants could apply for a temporary extension of immunity during the self-assessment and motion process described below.

In view of the discussion above, the Department tentatively finds that the proposed alliance, as conditioned and remedied, is likely to generate material public benefits that could not otherwise be achieved and will generate those benefits soon after a grant of antitrust immunity. We therefore tentatively conclude that a grant of antitrust immunity is required by the public interest under Section 41308.

## **VI. PROPOSED REMEDIES**

In light of the issues raised in the above analyses, the Department assesses that the proposed alliance would not meet the statutory standards for approval or a grant of antitrust immunity without the remedies described below.

### **a. TEN-YEAR EXPIRATION AND ASSESSMENT**

The Department tentatively proposes to approve these alliance agreements and grant ATI for a period of ten years from the date of a final order. In addition to underlying changes in the competitive landscape of the airline industry that require a time-limited grant of immunity, the following concerns also necessitate a 10-year limited grant of immunity: structural concerns raised in this Order concerning U.S.-South America consolidation, competition concerns in the U.S.-South America air travel market, and COVID-19 impacts, which could affect the ability of the Joint Applicants to realize the claimed benefits. The 10-year grant will give the Joint Applicants sufficient time to invest in the infrastructure necessary to develop new markets and deliver the stated consumer benefits while allowing the Department an opportunity to gauge the impact this JV has on the marketplace.

The Department also proposes to require the Joint Applicants to submit a self-assessment no earlier than twelve months prior to the expiration of ATI. This self-assessment requirement will, during the period in which the antitrust immunity is effective, focus the Joint Applicants on developing, measuring, and producing the greatest potential public benefits from the alliance. The self-assessment process would work as follows: no sooner than one year prior to the expiration, the Joint Applicants must submit to the Department a confidential self-assessment that measures the extent to which their immunized JV has delivered the consumer benefits as delineated in the application initially submitted to DOT. The Joint Applicants should consult with DOT prior to completing the self-assessment for more specific guidance, but it should include, at a minimum, a complete and detailed quantification of the consumer benefits, the fare savings, the number of incremental passengers carried, the number of new markets added, the number of incremental seats added, and the number of new frequencies added in existing markets since the final order approving the alliance, on an annualized basis. Incremental and new metrics should be relative to a baseline of calendar year 2019. The self-assessment should include a description of changes in the competitive landscape of the U.S.-South America market and an overall assessment of the current competitive structure of the market, looking in detail at market share changes over time in the key markets as well as the impact of new entry or exit. Additionally, the self-assessment should discuss infrastructure constraints in slots, gates, air traffic control, or other related factors, providing a data-driven assessment of access to the affected airports and whether there are constraints for competitors or new entrants (this may require working with regulatory authorities or independent coordinators in advance of filing the self-assessment). To the extent that the benefits achieved vary from the claims on which the application was based, the Joint Applicants should explain the variances and their plans to achieve any unrealized goals. The self-assessment should also include a benchmark of customer service metrics across the alliance carriers, documenting the extent to which the alliance has harmonized customer service standards in developing more seamless products and services.

Should the Joint Applicants desire to extend the terms of the initial approval and grant past its expiration, they must file a motion in the docket to change the expiration condition of the initial approval and grant. Such a motion will not be entertained prior to submission of the confidential self-assessment. Simultaneously with the filing of this motion, the Joint Applicants must submit a public version of the self-assessment to the docket. The public version of the self-assessment should contain the same information as in the confidential self-assessment but can exclude business-confidential information. The goal of the public assessment is to demonstrate to the public the extent to which the Joint Applicants have delivered on the promises of the JV to-date and what, if any, work remains. Both the motion and the public version of the self-assessment will then be open to public comment according to the Department's rules of procedure. Once the Joint Applicants have filed both the motion and the self-assessment, the Department may decide, as necessary, to grant the Joint Applicants interim relief and extend the period of their initial approval of agreements and grant of ATI while the motion is adjudicated if the interim relief is justified on procedural and substantive grounds. Should the Department find that the grant of ATI has delivered public benefits not otherwise attainable, and that continued immunity is likely to produce further benefits without adversely impacting competition, the Department may issue a Show Cause and a Final Order altering the expiration condition.

#### **b. EXCLUSIVITY CLAUSES**

The competitive analysis above identifies the potential for the joint venture to engage in exclusionary conduct. The "consensus decision-making" requirement for new third-party relationships, while labeled differently, is an exclusivity provision of the type which the Department has rejected in past ATI cases.<sup>25</sup> We have tentatively determined that the Joint Applicants should strike section 5.4 of the Joint Venture Agreement, remove all requirements in any cooperative agreement between the Joint Applicants for consensus decision-making with respect to third-party relationships, and make conforming changes in all other agreements that relate to the Joint Applicants' alliance. In addition, the Department intends to monitor competitive developments in interline and codeshare access for unaligned carriers not part of a U.S.-South American Region alliance as part of our regular monitoring of immunized alliances and as part of our proposed ten-year review.

#### **c. INTERLINE REMEDY**

As identified in the competitive analysis above, an interline remedy will help preserve current competition and foster new competition. Without such a remedy, there is risk that future new entry in the market will not be possible as ATI would enable a more concentrated North America-South America market. Under such circumstances, immunized carriers would be in an amplified position to thwart new entry by foreclosing connecting feed that a new-entrant carrier would require to sustain flights.

- Under the remedy, LATAM, if requested by a U.S. carrier not part of an immunized alliance, would provide interline access under the same commercial terms and availability it currently offers to other interline partners outside of the proposed JV. LATAM would

---

<sup>25</sup> See, e.g., Delta/Aeromexico Case Final Order (December 14, 2016), page 28; Show Cause Order, American Airlines, Inc., British Airways Plc, Finnair Oyj, Iberia Lineas Aereas de Espana, S.A. and Royal Jordanian Airlines – Approval of and Antitrust Immunity for Alliance Agreements (Oneworld Case) Docket DOT-OST-2008-0252, Order 2010-2-8 at Confidential Appendix B (February 13, 2010).

only have to provide access to flights within the South American Region; access to LATAM routes to/from North American destinations would not be required. The financial terms that govern the interline agreement must be no less favorable than prorate agreement(s) in effect for non-immunized code-share partners at the time.

- Similarly, under the remedy, Delta, if requested by a South American Region carrier not part of an immunized alliance, would provide interline access under the same commercial terms and availability it currently offers to other interline partners outside of the proposed JV. Delta would only have to provide access to its flights within North America; access to Delta routes to/from the South American region would not be required. The financial terms that govern the interline agreement must be no less favorable than prorate agreement(s) in effect for non-immunized code-share partners at the time.

**d. GRANDFATHERED INTERLINE ACCESS**

The Department is concerned that current interline agreements between the Joint Applicants and carriers in both the United States and South America could be withdrawn or diluted should the Joint Applicants receive ATI, thereby potentially reducing fare and itinerary options in the market. We tentatively conclude that both Delta and LATAM must maintain all existing interline agreements with all carriers in both the U.S. and South American markets where existing interline arrangements have supported traffic on U.S.-South American itineraries. Interline access, including available inventory, shall be under similar commercial terms and availability that either carrier currently offers to codeshare partners outside of the proposed JV. The financial terms that govern the interline agreement must be no less favorable than prorate agreement(s) in effect for non-immunized code-share partners at the time.

**e. REMOVAL OF SECTION 5.3 OF JOINT VENTURE AGREEMENT**

As noted in the competitive and public benefits analyses above, the ability of the proposed joint venture to deliver significant incremental capacity is critical for competition and public interest benefits. Although the proposed joint venture aims to deliver such benefits, the Department is concerned that Section 5.3 of the Joint Venture Agreement limits LATAM, which pre-COVID had a much larger and robust schedule of flights in the region than Delta, from restoring capacity to the region from the United States and Canada.

We have tentatively decided that the Joint Applicants should strike section 5.3 of the Joint Venture Agreement. The Department intends to monitor capacity restoration and promised growth in the U.S.-South American Region network as part of our regular monitoring of immunized alliances.

**f. REMEDIES NOT INCLUDED**

After careful consideration, we have tentatively decided not to adopt the following remedies proposed by interested parties.

- JetBlue's specific request that LATAM be required to continue its interline agreement with JetBlue. While this would be helpful in promoting competition and would help in ensuring that JetBlue remains a viable competitor, the Department believes that requiring the maintenance of a particular interline agreement is overly prescriptive. Instead of

specifically calling for the maintenance of an interline agreement with JetBlue, the Department has tentatively proposed the aforementioned requirement that all existing interline relationships be maintained in order to maintain the competitiveness of unaligned carriers and promote maximum consumer benefits.

- The Delta MEC requests that the Joint Applicants' confidential annual reports be made available to interested third parties. We do not believe annual reports should be made available to interested parties, as such reports contain highly confidential, commercially sensitive and proprietary information, with some of the information provided at the discretion of the reporting carriers. This information would be detrimental to competition and consumers should it become known by competitors. Additionally, if the reports are not protected, the Joint Applicants are not likely to provide candid information that is essential to the Department's ongoing oversight of immunized alliances.<sup>26</sup>

#### **g. CONDITIONS**

The following conditions are standard provisions that the Department has required in its ATI grants and is proposing to require in this case.

##### **1. Annual Reporting**

The Department is cognizant of the disruptions caused by the COVID-19 pandemic and intends to monitor the competitive situation as the industry recovers in the coming years. We tentatively find that it is necessary for the applicants to report to the Department concerning commercial developments in the alliance and the degree to which the public benefits envisioned in the Application are being realized. As in all recent cases where DOT has granted ATI, we are proposing an annual reporting requirement.<sup>27</sup> The reports should focus on progress made toward implementing the remedies and facilitating new entry, progress made toward achieving the alliance's stated goals, specific actions taken to implement alliance agreements, present or future planned cooperation among the alliance partners in all core airline functions, new routes and capacity introduced as well as removed, and a discussion of the public benefits that are being realized.

The Delta MEC requests that the Joint Applicants' confidential annual reports include information on the impact of the proposed JV on aviation jobs as well as balance of flying between the carriers. The Joint Applicants are amenable to this stipulation, and we see no reason to disagree. The Department tentatively concludes that the Joint Applicants' annual reports should include information and data on the proposed JV's impacts on aviation jobs and the relative amount of flying undertaken by each party to the alliance.

---

<sup>26</sup> See, e.g. Order to Show Cause, Joint Application of Delta Air Lines, Inc. and WestJet, Docket DOT-OST-2018-0154, Order 2020-10-13, at 33 (October 23, 2020).

<sup>27</sup> See, e.g., Final Order, Continental Airlines, Inc. and Members of the Star Alliance - Approve and Confer Antitrust Immunity on Certain Alliance Agreements (Star Case) Docket DOT-OST-2008-0234, [Order 2009-7-10](#) at 26 (July 10, 2009); Final Order, Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc. and Societe Air France - Approval of and Antitrust Immunity for Alliance Agreements (SkyTeam II Case) DOT-OST-2007-28644, [Order 2009-6-26](#) at 2 (June 26, 2009).

## 2. O&D Survey Reporting

Consistent with its past practice of granting ATI, the Department has tentatively decided to require LATAM to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (“O&D Survey”) information for all passenger itineraries that contain a United States point. The duty encompasses all traffic to third countries in which the itinerary includes a U.S. point. Without this data, we would be severely limited in monitoring the competitive effects of the proposed alliance as we receive no detailed market information for passengers traveling to or from the United States when their entire trip is on the foreign carrier, except for T-100 data for nonstop and a handful of single-plane markets.

Our basis for proposing this condition is the same as in previous cases, as are the terms, conditions, and limitations that DOT proposes for its use of the data.<sup>28</sup> To prevent this reporting requirement from unfairly harming LATAM’s competitive position, we tentatively decide to grant confidentiality to LATAM’s O&D Survey reports and special reports on codeshare passengers. Foreign carriers are not provided access to O&D Survey reports submitted by U.S. carriers. It would place LATAM at a competitive disadvantage to allow LATAM’s rivals to see its information on an unreciprocated basis.

## 3. CRS and GDS Issues

Consistent with recent cases, we are not proposing any conditions regarding the management of Computer Reservations System (CRS) or Global Distribution System (GDS) interests.<sup>29</sup> Any coordination between the applicants concerning the operation of separate businesses, such as CRSs, would not be transactions specifically approved or necessarily contemplated by our orders in this proceeding. While the Joint Applicants, individually or collectively, may maintain an interest in a CRS, the grant of immunity in this Order thus would not extend to their management of those interests. On the other hand, the applicants’ alliance relationships will likely require the coordination of the presentation and sale of the airlines’ own services in GDSs and each airline’s operation of its internal reservations systems. Those activities will necessarily be covered by a grant of antitrust immunity.

## 4. IATA Tariff Activities

As we have found in earlier decisions, it is contrary to the public interest to permit immunized air carriers to participate in certain price-related coordination that is already immunized within International Air Transport Association (IATA) tariff coordination. We therefore tentatively decide to condition our grant of antitrust immunity by requiring the Joint Applicants to withdraw, or to remain withdrawn, from participation in any IATA tariff activities that affect or discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airline(s) have been or are subsequently granted antitrust immunity by the Department for participation in similar alliances. Such countries include the homelands of the applicants. We tentatively find that this condition is in the public interest for the same reasons stated in DOT Order 2010-7-8.

---

<sup>28</sup> See, e.g., Delta/Aeromexico Case Order to Show Cause (November 16, 2016), page 31.

<sup>29</sup> See, e.g., Final Order, SkyTeam II Case, [Order 2008-5-32](#) (May 22, 2008).

## 5. Common Name

We tentatively decide to require the Joint Applicants to seek approval from the Department in order to operate under a common name, use a common brand, or a single airline designator code. Undertaking such activities can raise important consumer issues as well as questions pertaining to which carrier is actually operating the service. Allowing for Department review will ensure adequate protection for consumers.

### ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions discussed herein. Objections or comments to our tentative findings and conclusions shall be due no later than 14 calendar days from the service date of this Order, and answers to objections shall be due no later than seven (7) business days thereafter. In the event that no objections are filed, all further procedural steps shall be deemed waived, and we may enter an order making final our tentative findings and conclusions;
2. We tentatively propose to approve and grant antitrust immunity for the Joint Venture Agreement between Delta Air Lines, Inc. and LATAM (along with their included affiliates) as well as implementing agreements submitted in this proceeding in-so-far as such agreements relate to foreign air transportation, subject to the conditions in Ordering Paragraphs 3 through 10, and provided that the Joint Applicants:
  - a. Submit to the Director of the Office of Aviation Analysis for prior approval subsequent subsidiary agreements;<sup>30</sup>
  - b. Obtain prior approval if they choose to hold out service under a common name or use common brands; and
  - c. Provide the Department verified statements by Delta Air Lines, Inc. and LATAM attesting that the Joint Venture Agreement has been implemented pursuant to the terms described in the Joint Application, and a complete and unredacted copy of the most recent Joint Venture Agreement and any appendices;
3. We tentatively direct the Joint Applicants to amend and resubmit the Joint Venture Agreement to the Department by the Answer date of this Order. The amendments shall reflect the following:
  - a. Strike from the Joint Venture Agreement sections 5.3 and 5.4, and make conforming changes in all implementing and alliance agreements; and

---

<sup>30</sup> Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all unredacted contractual instruments that implement or materially alter, modify, or amend the cooperation agreements, joint ventures, or confidentiality/antitrust guidelines. Any appropriate documents shall be submitted to the Director of the Office of Aviation Analysis.

- b. Remove from all cooperative agreements between the Joint Applicants any prohibitions or requirements for consensus decision-making to engage in third-party commercial relationships.
4. We tentatively conclude that a grant of antitrust immunity conferred by a final order in this matter will expire 10 years from the issue-date of that order. The Joint Applicants must submit a self-assessment, as described in the body of this order, no sooner than 12 months before the expiration of the immunity. The Joint Applicants may then submit a motion to change the expiration period of the grant, along with a public version of the self-assessment, to the docket. The Department will evaluate the self-assessment and the motion to determine by public process whether to extend the approval of agreements and the grant of ATI to the alliance.
5. We tentatively direct LATAM, upon written request by a U.S.-carrier not part of an immunized alliance with a South American carrier and operating its own aircraft (or marketing services through a capacity purchase agreement) between the United States and the South American Region, to provide the requesting carrier with interline access to its network. LATAM shall enter into an interline agreement with the requesting carrier and shall provide inventory access on terms that are comparable to those offered to LATAM's non-immunized partners, including non-immunized codeshare partners. The financial terms of the interline agreement must be no less favorable than IATA prorate agreement(s) in effect for non-immunized partners at the time;
6. We tentatively direct Delta, upon written request by a South American carrier not part of an immunized alliance with a U.S. carrier and operating its own aircraft (or marketing services through a capacity purchase agreement) between the United States and the South American Region, to provide the requesting carrier with interline access to its network. Delta shall enter into an interline agreement with the requesting carrier and shall provide inventory access on terms that are comparable to those offered to Delta's non-immunized partners, including non-immunized codeshare partners. The financial terms of the interline agreement must be no less favorable than IATA prorate agreement(s) in effect for non-immunized partners at the time;
7. We tentatively direct both Delta and LATAM to maintain any and all existing interline agreements with current partners in both the South American Region and North America, respectively;
8. We tentatively direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the effective date of ATI, and continuing each year thereafter while the alliance agreements are effective.<sup>31</sup> The annual report should include information on the impact of the alliance on aviation jobs and balance of flying between alliance carriers;

---

<sup>31</sup> We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If that date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

9. We tentatively direct LATAM to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;<sup>32</sup>
10. We tentatively direct Delta Air Lines, Inc. and LATAM to withdraw, or remain withdrawn, from participation in any International Air Transportation Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal of, to participate in similar alliance activities with a U.S. airline(s). We tentatively delegate to the Director of the Office of International Aviation the authority to determine the applicability of the directive set forth in this paragraph as to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;
11. We tentatively determine that we may amend, modify, or revoke this authority at any time, without hearing;
12. We grant all motions for leave to file submitted to date; and
13. We will serve this Order on all parties on the service list in this docket.

By:

**Carol “Annie” Petsonk**  
Assistant Secretary  
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available at*  
<https://www.regulations.gov>

---

<sup>32</sup> We expect foreign-carrier applicants to report the O&D Survey data beginning with the first full quarter following the date of the issuance of a final order. Detailed instructions are available from the Department’s Office of Airline Information at the Bureau of Transportation Statistics. We treat the foreign airlines’ O&D data as confidential, do not allow U.S. airlines any access to the data, and do not allow foreign airlines any access to U.S. airline O&D Survey data. We use these data only for internal analytical purposes.