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June 17, 2015

William J. Baer  
Assistant Attorney General  
U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Dear Assistant Attorney General Baer:

Recently, the International Air Transport Association (IATA) brought together the top executives of the world's largest airlines at its annual meeting in Miami, Florida. The *New York Times* reported that at this meeting many of these competitors publicly discussed their strategies to remain "disciplined" in their decisions to manage capacity across their flight routes.<sup>1</sup> As you know from the Department of Justice's (DOJ's) investigation into US Airways' merger with American Airlines in 2013, most airlines have traditionally viewed capacity reductions as a highly valuable way to artificially raise fares and boost profit margins. In light of the recent unprecedented level of consolidation in the airline industry, this public display of strategic coordination is highly troubling.

Therefore, I urge the Justice Department to investigate this apparent anti-competitive conduct potentially reflecting a misuse of market power, and excessive consolidation in the airline industry. DOJ itself played a part in this consolidation by approving several mergers and now consumers are paying sky-high fares as airlines engage in market conduct designed to keep capacity artificially low.

Delta Air Lines' President was quoted at the IATA conference stating that, "[Delta is] continuing with the discipline that the marketplace is expecting." Air Canada's CEO made a parallel comment: "People were undisciplined in the past, but they will be more disciplined this time." Finally, American Airlines' CEO remarked that airlines had learned their lesson from past price wars set off by competition and that, "I think everybody in the industry understands that." At best, these remarks reflect participants in an overly consolidated market aligning supracompetitive fares. At worst, they may be a strategic attempt to coordinate behavior –

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<sup>1</sup> James B. Stewart, 'Discipline' for Airlines, Pain for Fliers, *New York Times*, June 11, 2015, available at <http://nyti.ms/1Gfz94F>.

specifically designed to encourage Wall Street to punish smaller rival airlines that have announced plans to expand capacity and cut prices.

Last month, the CEO of Southwest Airlines declared plans to expand capacity by as much as eight percent, which many in the industry viewed as a preface to cutting fares. However, as reported in the *Times*, “after coming under fire at this week’s conference, Southwest quickly moved to reassure investors it isn’t going rogue. ‘We have taken steps this week to begin pulling down our second half 2015 to manage our 2015 capacity growth...,’ [Southwest’s CEO] said.” The conclusion seems inescapable that the remarks made at the IATA conference were targeted at Southwest, and that its capitulation was the result of the “fire” aimed at the company. Given the history of collusive behavior the Antitrust Division uncovered in its review of the proposed US Airways / American Airlines merger, these coordinated comments and their ultimate result necessitate your immediate attention.

In August 2013, the Justice Department filed an antitrust lawsuit to block the proposed merger between US Airways and American Airlines.<sup>2</sup> A few months later, DOJ settled that case and allowed the merger to proceed subject to a number of gate divestitures. As a result of that merger, just four major airlines now account for eighty percent of all domestic air travel.

DOJ’s original complaint painted a stark picture of an extremely consolidated market, in which a few firms wield enormous market power to the detriment of consumers and competition – and in which high-level executive believe there is an unmistakable link between fluctuations in capacity and fares hikes. During the course of the Antitrust Division’s review of the American Airlines / US Airways merger, your staff studied the internal analyses and the planning documents put together by both companies in considering the likely effects of the merger. During DOJ’s original announcement rejecting the merger you stated, “High level executives at US Airways have talked about how consolidation allows for capacity reductions that “enable” fare increases.”<sup>3</sup>

In particular, DOJ’s complaint provided evidence of past behavior by US Airways to punish a rival for its reducing fares; it also alleged that the merger would reduce capacity and growth across the industry; and result in increased coordinated interaction among the remaining legacy airlines.

The Complaint specifically documented the troubling history of US Airways communicating directly to a rival airline that it was upset by that airline’s efforts to compete more aggressively. In 2010, senior executives at US Airways complained that competition from the rival airline was “hurting profitability” in the industry. DOJ wrote: “[S]enior management

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<sup>2</sup> *United States v. US Airways Group*, No. 13-cv-01236 (D.D.C. 2013).

<sup>3</sup> Assistant Attorney General Bill Baer. *Remarks as Prepared for Delivery at the Conference Call Regarding the Justice Department’s Lawsuit Challenging Us Airways’ Proposed Merger with American Airlines*. August 13, 2013, Washington, D.C., available at <http://1.usa.gov/1GfANmR>.



debated over email about how best to get the rival airline's attention and bring it back in line with the rest of industry...[The CEO] urged the other executives to, 'portray these guys as idiots to Wall Street and anyone who'll listen.'"<sup>4</sup>

The Justice Department also correctly predicted that this kind of behavior would continue should the merger be allowed to proceed – as it ultimately was. In the original complaint, DOJ wrote, "The structure of the airline industry is already conducive to coordinated behavior...the legacy airlines closely watch the pricing moves of their competitors. When one airline 'leads' a price increase, other airlines frequently respond by following with price increases of their own."<sup>5</sup>

To bring home the point, the Complaint follows, "Coordination becomes easier as the number of major airlines dwindles and their business models converge."<sup>6</sup>

I agree. I therefore urge the Antitrust Division to conduct a full and thorough investigation of anticompetitive, anti-consumer conduct and misuse of market power in the airline industry, evidenced by recent pricing patterns as well as remarks made at the IATA conference. Consumers are paying sky-high fares and are trapped in an uncompetitive market with a history of collusive behavior. If you find that these comments were coordinated to punish Southwest Airlines' announcement of capacity increases, I urge you to use all the tools at your disposal to punish this anti-competitive and anti-consumer behavior.

I know you share my passion for protecting consumers and enforcing our nation's antitrust laws, and I hope you take action to prevent the recent series of airline mergers from fostering a toxic environment for competition and consumers. Thank you for your prompt attention to this matter.

Sincerely,



Richard Blumenthal  
United States Senate

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<sup>4</sup> *United States v. US Airways Group, supra*, Compl. ¶ 45.

<sup>5</sup> *Id.* at ¶ 41.

<sup>6</sup> *Id.* at ¶ 46.