



March 2019

# INTERNATIONAL AIR ALLIANCES

## Greater Transparency Needed on DOT's Efforts to Monitor the Effects of Antitrust Immunity

Accessible Version

# GAO Highlights

Highlights of [GAO-19-237](#), a report to congressional requesters

## Why GAO Did This Study

Each year, millions of passengers travel internationally by plane. Many of these passengers are served by U.S. and foreign air carriers that have formed alliances to coordinate and integrate their networks. With antitrust immunity provided by DOT, airline alliances pursue a wide range of cooperative activities as outlined in joint venture agreements between the airlines. While this cooperation is meant to provide consumers with better services, it could also affect the extent of airline competition.

GAO was asked to review consumer issues related to immunized international air alliances. This report (1) describes how DOT's review of antitrust immunity applications considers the potential effects on consumers and (2) evaluates how DOT monitors approved grants of antitrust immunity. GAO analyzed DOT's antitrust immunity proceedings, interviewed officials from DOT, the Department of Justice, as well as a nongeneralizable selection of 13 stakeholders, including consumer organizations and domestic air carriers with and without antitrust immunity.

## What GAO Recommends

GAO recommends that DOT externally report to policymakers and the public on the effects of antitrust immunity, based on DOT's monitoring activities. DOT agreed to provide public information on its monitoring, but not to report on the effects of antitrust immunity. GAO continues to believe its recommendation, in full, is valid as discussed further in the report.

View [GAO-19-237](#). For more information, contact Andrew Von Ah at (202) 512-2834 or [vonaha@gao.gov](mailto:vonaha@gao.gov).

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## What GAO Found

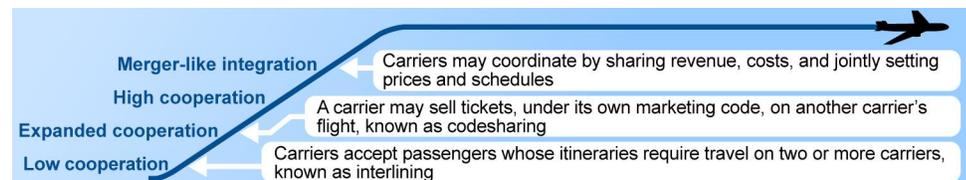
Potential effects on consumers are included in the analyses the Department of Transportation (DOT) conducts when reviewing international air carriers' requests for antitrust immunity. If granted, this immunity allows the airlines to engage in certain cooperative activities, such as coordinating prices and schedules, without risk of violating U.S. antitrust laws (see figure). DOT's analyses examine:

- The potential competitive effect of the proposed cooperative agreement in terms of relevant markets, on changes in the number of competitors and market shares, and on market entry.
- The potential for the close integration of carriers to create public benefits, such as lower consumer prices or expanded service offerings.

Such analyses involve DOT staff's reviewing an array of data, documents, and reports filed in a public docket by carriers and interested parties and, ultimately, making a decision based on their assessment of the application. DOT has premised its decisions to grant immunity on the expectation that consumer benefits flow from high levels of integration of critical business functions between carriers. To date, DOT has granted antitrust immunity 31 times, with 23 grants currently in effect, which cover agreements made among carriers in each of the three major international air alliances. DOT has rejected three applications due to concerns about potential anticompetitive harm or insufficient public benefits for consumers. Stakeholders GAO interviewed generally agreed that DOT's decisions were transparent, but some disagreed on the potential benefits of immunity for consumers.

DOT takes multiple steps to monitor alliances and understand the effects of immunity. Since 2009, DOT has required all transatlantic and transpacific partnerships to submit annual reports on the status of their immunized agreement. Additionally, DOT recently commissioned an empirical evaluation of immunities' effects and is currently reviewing the findings. However, DOT does not externally report information on the effects of granted immunities to Congress, industry stakeholders, and the public. As a result, these external entities are unable to determine what, if any, steps DOT is taking to ensure that grants of antitrust immunity remain in the public interest. Further, without additional transparency and information on DOT's findings on the effects of immunities, external entities do not know if immunized alliances have delivered the expected consumer benefits that DOT used as a basis to approve the carriers' request for antitrust immunity.

#### International Air Carriers May Cooperate to Varying Degrees



Source: GAO analysis of Department of Transportation information. | [GAO-19-237](#)

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**Abbreviations**

APA Administrative Procedure Act  
DOT U.S. Department of Transportation

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March 20, 2019

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Richard Blumenthal  
United States Senate

The Honorable Patrick Leahy  
United States Senate

International air travel connects the United States to the world, enabling commerce, tourism, and more. In 2017, U.S. air carriers served over 200-million passengers traveling to or from the United States, earning revenues of nearly \$62 billion.<sup>1</sup> U.S. and foreign air carriers often cooperate with one another to carry these passengers across their respective networks. Three of the largest U.S. carriers offering international service—American Airlines, Delta Air Lines and United Airlines—have formalized this cooperation in many markets by forming alliances with groups of foreign carriers. Alliance partners may apply for a grant of antitrust immunity from the U.S. Department of Transportation (DOT). A grant of immunity enables partners to coordinate on fares, schedules, and shared-network expansion in ways that might otherwise violate U.S. antitrust laws. DOT has authority to grant antitrust immunity to international airline alliances, provided DOT determines that immunizing the alliance is required by the public interest.<sup>2</sup> Since DOT granted antitrust immunity to the first alliance agreement in 1993, American, Delta, and United have entered into various immunized cooperative agreements with their major alliance partners. This immunity can provide benefits to consumers in certain ways, but alliances may also affect the extent of airline competition.

You asked us to review issues related to international airline alliances and any effects on consumers of antitrust immunity. This report (1) describes

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<sup>1</sup>Bureau of Transportation Statistics, T-100 database.

<sup>2</sup>49 U.S.C. §§ 41308, 41309.

how DOT's review of antitrust immunity applications considers the potential effects on consumers, and (2) evaluates how DOT monitors the effects of approved grants of immunity.

To describe how DOT's review process for antitrust immunity applications considers the potential effects on consumers, we reviewed the federal law that authorizes DOT to grant antitrust immunity, analyzed DOT documents, and interviewed DOT officials, industry stakeholders, and others. We reviewed other relevant federal laws and procedural requirements to identify and understand the standards for DOT to approve a proposed cooperative agreement and grant antitrust immunity. We reviewed publicly available documentation related to each of the antitrust proceedings that DOT has adjudicated. This documentation included DOT orders, carrier applications, and public comments, and other filings from interested parties, published on regulations.gov, the web site on which the federal government publishes materials related to the development of federal regulations. We also examined documents, which are not publicly available, from DOT's internal deliberations. This documentation included, for example, an analytic memo by DOT that assessed applications for immunity. Based on these documents, we described how DOT's process, specifically its competitive and public-interest analyses, conceptualizes and analyzes possible effects on consumers of antitrust immunity. Our description does not summarize every consideration or sequencing of analyses within DOT's processes, because, in part, each proceeding may vary based on individual circumstances and these processes have changed over several decades of DOT's application of its statutory authority.

We also reviewed economic literature on antitrust immunity cited in DOT orders and recommended by DOT officials for insights on some of the bases for DOT decision-making. This literature included reports by economic consultants and scholars published in academic and professional journals. We also conducted a range of interviews with federal officials and stakeholders. We interviewed officials from DOT's Office of Aviation Analysis, the office responsible for antitrust issues in the department and from the Department of Justice's Antitrust Division. We also interviewed representatives from the three U.S. airlines that are part of immunized alliances and a nongeneralizable selection of three non-immunized airlines (selected because of their participation in markets affected by immunities). Finally, we interviewed three consumer organizations, three aviation organizations, and an academic who had some experience and relevance to antitrust and airline competition issues.

To evaluate how DOT monitors the effects of grants of antitrust immunity, we reviewed DOT documentation and interviewed DOT officials, industry stakeholders, and air carriers, as described above. We also examined 2017 annual reports, the most recent available, and supporting documentation that immunized carriers are required to provide DOT and DOT analyses of these materials. Based on these materials, we described the monitoring approach and activities DOT undertakes for active grants of immunity. We compared DOT's monitoring process to relevant principles in *Standards for Internal Control in the Federal Government*.<sup>3</sup>

We conducted this performance audit from October 2017 to March 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

U.S. and foreign air carriers have cooperated in a variety of ways to expand their international reach and service offerings. Legal requirements in the United States and other countries prevent mergers between U.S.-owned airlines and foreign owned airlines and also place restrictions on carriers providing end-to-end service between locations within other countries as well as between third countries.<sup>4</sup> Air carriers may cooperate with each other to provide a wider range of services, more seamlessly, despite these restrictions. Simple forms of cooperation include, for example, "interlining," which are voluntary commercial agreements to carry passengers across two or more carriers on the same itinerary, and "codesharing," an agreement whereby carriers place their marketing code on a flight operated by another carrier. This practice allows consumers to book a single ticket for an itinerary involving two separate airlines, with

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<sup>3</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

<sup>4</sup>49 U.S.C. § 40102 (a)(15) defines airline ownership and control rules for American flag airlines. Another restriction, enacted in the United States and other countries, generally prohibits "cabotage," which is when air carriers transport passengers to and from points within countries in which the carrier is not domiciled. 49 U.S.C. § 41703(c).

one airline selling tickets under its own code for travel on the other carrier's flight. These cooperative activities allow carriers to access each other's network with varying degrees of cooperation.

As part of their cooperative efforts, some carriers have formed global alliances. An alliance is an agreement between two or more airlines to link each of the airlines' route networks and coordinate on specified activities, such as marketing and sales; coordination of airport operations (e.g., sharing gates or baggage facilities); and frequent flyer program accrual and redemptions.<sup>5</sup> Alliances represent more involved coordination than interline or codeshare relationships. This expanded cooperation, according to DOT, allows participating carriers to further expand the geographic reach of their respective networks that the carriers would not be able to do on their own, because of the aforementioned legal restrictions and due to the economic and operational difficulties a single carrier would face implementing such an expansion in foreign markets.<sup>6</sup> As of January 2019, there were three global airline alliances, each with a major U.S. member airline and multiple foreign partners: Oneworld (American Airlines); SkyTeam (Delta Air Lines); and the Star Alliance (United Airlines). These three airline alliances have 61 airline members: 13 for Oneworld, 20 for SkyTeam, and 28 for the Star Alliance.<sup>7</sup>

Many of the carriers within each of these alliances, as well as other carriers, have pursued antitrust immunity from DOT to cooperate more closely on key economic elements of their businesses that U.S. antitrust laws might prohibit. The specific activities are delineated in cooperative agreements and carriers have the option to implement such agreements without antitrust immunity from DOT. Carriers are more likely to pursue immunity when the proposed cooperation—and risk of antitrust violations—involves increasingly integrated business functions, according to DOT. However, once carriers that are party to such an agreement are immunized, carriers can cooperate more comprehensively than through

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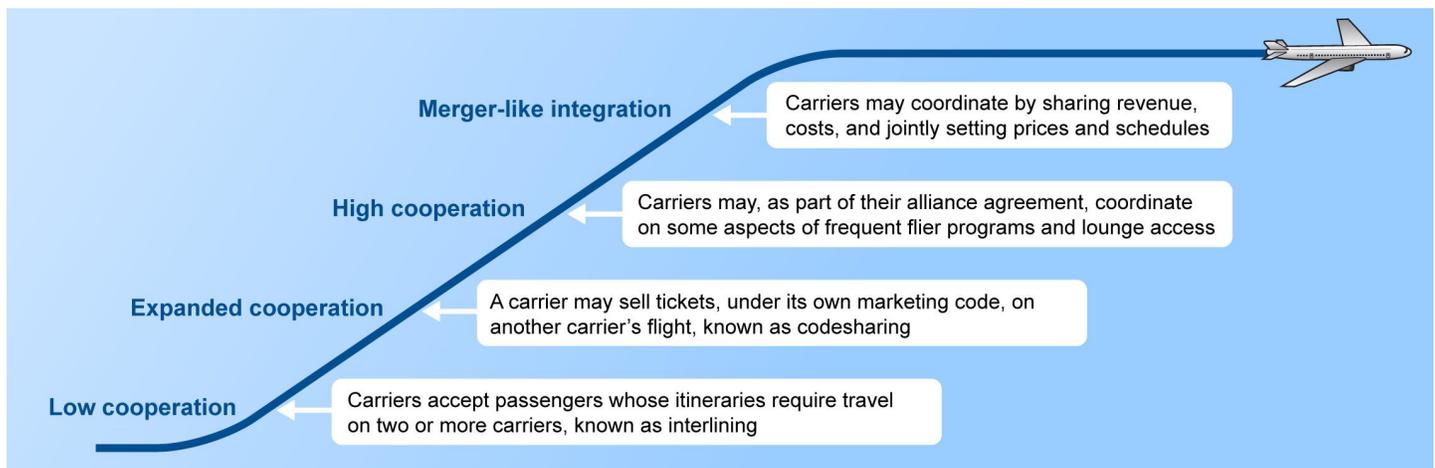
<sup>5</sup>According to a 2011 paper written by two Department of Justice economists, airline alliances are marketing joint ventures that are traditionally implemented to enable an airline to sell tickets in new routes without having to operate additional aircraft.

<sup>6</sup>Department of Transportation, *International Aviation Developments: Global Deregulation Takes Off (First Report)*, (Washington, D.C., December 1999).

<sup>7</sup>According to DOT, these alliances are primarily marketing associations, with subsets of alliance members forming more integrated ties through immunized relationships.

interlining and codesharing arrangements (see fig. 1).<sup>8</sup> For example, these agreements may stipulate that carriers share revenues across their flights, regardless of which carrier operates the flight, and jointly coordinate on schedules, prices, and sales.<sup>9</sup>

**Figure 1: Examples of Cooperative Activities between International Air Carriers**



Source: GAO analysis of Department of Transportation information. | GAO-19-237

Since 1993, when DOT immunized the first cooperative agreement, between Northwest Airlines and KLM Royal Dutch Airlines, DOT has adjudicated 38 cases which involved one or more U.S. carriers and foreign carriers.<sup>10</sup> Currently, United, Delta, and American—and their major foreign airline partners—are each members of multiple immunized cooperative agreements with their foreign airline partners. As a result, immunized carriers now provide air service across the globe. For example, in 2017, immunized carriers across these three alliances provided approximately 75 percent of the available seats on trans-Atlantic flights between the United States and Europe, and also provided on

<sup>8</sup>International Air Transport Association, *IATA Economics Briefing: The Economic Benefits Generated by Alliances and Joint Ventures*, (Montreal, Canada: Nov. 28, 2011).

<sup>9</sup>European Commission and the U.S. Department of Transportation, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, (Nov. 16, 2010).

<sup>10</sup>We excluded four proceedings from our analysis: one involved the International Air Transport Association activities on tariff conferences; one did not involve a U.S. carrier, one did not involve a foreign carrier, and one did not include a request for antitrust immunity.

trans-Pacific service to Asia, and Australia, as well as service to South America.<sup>11</sup>

DOT's process for reviewing each application for antitrust immunity includes two analytic steps. First, DOT must decide whether to approve a proposed cooperative agreement.<sup>12</sup> In this step, by statute, DOT is directed to approve cooperative agreements deemed "not adverse" to the public interest. DOT conducts a competitive analysis to make this determination. Second, DOT decides whether to grant antitrust immunity to the agreement's partners for activities undertaken pursuant to the approved agreement. DOT's statutory authority provides for such a grant of immunity only to the extent necessary for the parties of the agreement to go forward with the transaction and only if the immunity is "required by the public interest," vis-a-vis the creation of consumer, commercial, or other public benefits that would not otherwise occur.<sup>13</sup> These steps will be discussed in detail in the following section. The statute does not detail specific competitive metrics or public benefits that DOT must consider in its evaluation but rather provides DOT leeway in making such determinations. The Department of Justice, which is responsible for reviewing and approving domestic mergers, may provide DOT with input during deliberations.<sup>14</sup> DOT may also consult with relevant authorities in the foreign partner's country. In granting antitrust immunity, DOT may require carriers to comply with specific conditions and, for grants of antitrust immunity approved since 2009, reporting requirements.

DOT's process to consider requests for immunity follows procedural steps delineated in the Administrative Procedure Act (APA). The APA provides

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<sup>11</sup>There are additional immunized seats offered by carriers that are not part of these alliances. These seats account for approximately 7 percent of seats on trans-Atlantic flights between the United States and Europe. We calculated these figures using the T-100 database, which includes nonstop service between the U.S. and Europe. We calculated the percentage of immunized seats based on whether the carrier was party to a grant of antitrust immunity.

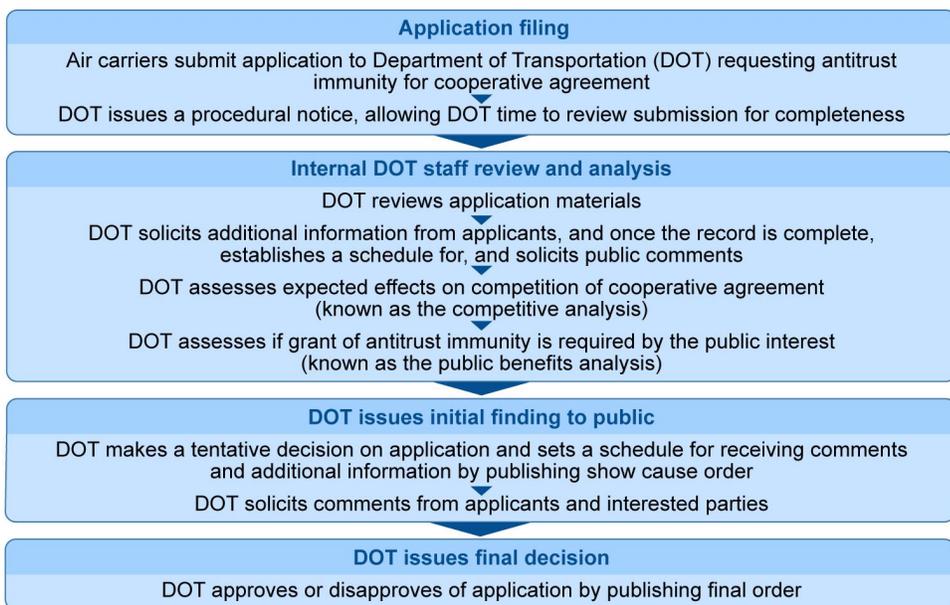
<sup>12</sup>49 U.S.C. § 41309.

<sup>13</sup>49 U.S.C. § 41308.

<sup>14</sup>While the Department of Justice and Federal Trade Commission are responsible for enforcing the antitrust laws, including in the airline industry, DOT has the authority to make limited grants of antitrust immunity from those laws for U.S. and foreign airlines to operate international services. Legal limitations on airline ownership and control preclude international airline mergers. This requires that U.S. and foreign airlines seek antitrust immunity from DOT to coordinate pricing and services for international operations, to the extent that such coordinated activities would otherwise violate the antitrust laws.

for public notice and comment. At the beginning of the proceeding, carriers applying for immunity place information about the proposed cooperative agreement in a public docket. DOT staff then review this material, may request additional information to address any questions raised by their review, and will solicit comments from the public. The APA, in contrast to Department of Justice merger review procedures, specifies steps that afford public involvement and requires agencies to respond to the public comments. In DOT's proceedings, the Department typically issues "show cause" orders that articulate the tentative approval or disapproval of the application. After publishing this show-cause order, DOT solicits additional public comments for review prior to issuing a final decision. See figure 2 for a summary of this process.

**Figure 2: Department of Transportation's (DOT) Process for Considering Requests for Antitrust Immunity**



Source: GAO analysis of DOT information. | GAO-19-237

DOT's statutory authority indicates that DOT may conduct "periodic reviews," but the statute does not include a definition of the nature or frequency of these reviews. All of DOT's orders granting antitrust immunity state DOT may amend or revoke a grant of immunity at any time. Further, after DOT issues a final order that approves a request for antitrust immunity, the public docket remains open and provides a forum for ongoing public comments that DOT is obligated to respond to.

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## Potential Effects on Consumers Are Included in DOT's Assessment of Applications for Antitrust Immunity

DOT analyzes competitive and public benefit effects, taking into consideration the potential effects on consumers, when deciding whether to approve cooperation agreements and grant carriers antitrust immunity, based on our review of DOT's processes. In competitive and public benefit analyses, DOT uses the professional experience and expertise of staff to identify and assess relevant market factors, the terms of proposed cooperative agreements,<sup>15</sup> supporting documents, and other information in light of the facts and circumstances specific to each case. DOT's competitive analysis focuses on the likely effect of the cooperative agreement on competition in key airline markets, while the public benefits analysis focuses on the likelihood of carrier integration yielding consumer benefits. As discussed earlier, DOT's process includes opportunities for stakeholders' participation. Stakeholders we interviewed considered the overall review process transparent, though some had criticisms of the underlying economic evidence DOT uses to predict if, and how, consumer benefits might arise.

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### DOT's Competitive Analysis of Proposed Cooperative Agreements Examines Potential Consumer Effect

The potential effects of proposed cooperative agreements on competition, and thus consumers, are central to DOT's analysis. Specifically, DOT looks to see how the agreement may affect competition across routes affected by the alliance agreement. To make this assessment, according to DOT documentation that we reviewed and officials whom we interviewed, DOT focuses on three key elements of the proposed agreement. Specifically, DOT identifies (1) the geographic scope of the proposed alliance and which markets that the agreement would affect; (2) the number of competitors in each market, their market shares, and the level of market concentration; and (3) the feasibility and likelihood of market entry by new competitors into markets that might be adversely

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<sup>15</sup>Cooperation between the airlines is carried out through a series of coordinated contractual arrangements covering network development, pricing, and governance that are collectively referred to as a joint venture agreement, or joint venture.

affected by the agreement as well as the ability of existing carriers to compete in such markets (see table 1).<sup>16</sup> DOT’s assessment is based on an array of information provided by applicants and third parties. This information may include competitive analyses or other studies conducted by consulting economists for the applicants, and business plans and data, among other things. DOT may also independently use departmental databases to conduct its own analysis, including those data DOT collects from foreign carriers pursuant to data-reporting requirements in existing grants of antitrust immunity.

**Table 1: Key Elements of the Department of Transportation’s (DOT) Competitive Analysis**

Competitive Analysis Elements	DOT application
Delineation of relevant markets	<ul style="list-style-type: none"> <li>• DOT delineates three geographic market levels for its analysis: regional (i.e., United States to a world region such as East Asia, Europe), country pair, and city-pair. Much of the analysis focuses on city-pair markets affected by the proposed agreement. DOT creates a data set from multiple existing DOT and applicant-submitted sources, which represents the full universe of market participants, according to DOT officials.</li> <li>• DOT may consider connecting service as competitive to nonstop city-pair service. In some cases, however, DOT considers nonstop service to be a distinct competitive market.</li> </ul>
Analysis of market competition and related consumer effects	<ul style="list-style-type: none"> <li>• DOT assesses whether the agreement could substantially reduce competition, looking at three levels of geography, by counting and comparing the expected number of competitors in markets before and after the proposed agreement, as well as the shift in market shares, pre- and post-agreement implementation. DOT assesses the market concentration of the relevant markets as well to fully understand the competitive implications arising from combining carriers. Specifically, an agreement could result in, among other negative effects:               <ul style="list-style-type: none"> <li>• Markets losing one or more competitors, because the applicant carriers are counted as one competitor if the agreement is implemented.</li> <li>• Carriers in the agreement having too large of a combined market share (irrespective of the number of competitors), in certain markets based on what DOT determines constitutes a highly concentrated market.</li> <li>• Fare increases in certain markets related to market structure changes that could decrease competition, according to DOT officials.</li> </ul> </li> <li>• DOT also assess if the agreement could result in pro-competitive effects.               <ul style="list-style-type: none"> <li>• DOT identifies markets that could gain an effective competitor due to the proposed agreement.</li> <li>• DOT also assesses whether the flow of passengers across the carriers’ networks will yield efficiencies that benefit consumers.</li> </ul> </li> </ul>

<sup>16</sup>According to DOT orders, DOT 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. Further, at times, DOT has referenced using DOJ’s *Horizontal Merger Guidelines* to inform its competitive analyses.

Competitive Analysis Elements	DOT application
Consideration of market entry	<ul style="list-style-type: none"> <li>• DOT examines whether there are infrastructure (or other) constraints that would impede market entry by other competitors and thereby constrain competition. For example, DOT might examine the ability and likelihood of low cost carriers to gain resources at an airport to initiate service.</li> <li>• DOT assesses the potential for the applicants to engage in exclusionary conduct that could foreclose competitors from entering or expanding in relevant markets.</li> <li>• DOT examines whether such new entry into the market would be timely, likely, and sufficient either to deter or to counteract any potential competitive harm from the immunity.</li> </ul>

Source: GAO summary of DOT documents and interviews. | GAO-19-237

DOT looks at competitive issues at the region-to-region (e.g., United States to Europe), country-to-country (United States to France), and city-to-city levels (e.g., New York-to-Paris city pair market), or airport-to-airport pairs (Chicago O’Hare-to-London Heathrow). The analysis focuses largely on city- or airport-pairs because the sale of air transportation between cities/airports is the product being sold by airlines and purchased by the consumer, according to DOT officials. Consequently, DOT looks most closely at those city-pair markets where the number of competitors is expected to decline, such as from 3 to 2 or 2 to 1, when the applicants are counted as a single competitor. According to DOT officials, this approach to competitive analysis is consistent with legal and economic practice and in the application of antitrust laws and principles used by other competition authorities, such as the Department of Justice.<sup>17</sup> Officials then recommend determinations as to whether such a reduction in competitors in these markets is likely to be harmful to competition and, in turn, to consumers. According to DOT officials, the department has no predetermined threshold for defining substantive competitive harm because it would not be appropriate to pre-define what constitutes a “substantial reduction in competition” that would necessitate disapproval of an application. Instead, the Department looks at the characteristics of discrete markets where there is a reduction.

In addition to looking for potential competitive harms in the city-pair analysis, DOT’s competitive analysis also assesses if the agreement

<sup>17</sup>Specifically, according to DOT officials, DOT’s competitive analysis constitutes their application of the Clayton Act test because it identifies the intended commercial effects of the transaction, defines and measures the relevant markets affected by the combination of the applicants’ services, and assesses changes in concentration and their likely effects.

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could enhance competition in some markets.<sup>18</sup> In particular, DOT may find that certain markets will have an increase of an effective competitor due to the agreement. Specifically, based on applicants' filings, DOT may expect the cooperating carriers to enter new routes that neither had previously served. For example, DOT approved a grant of immunity in 2010 based on expectations that the applicants would have increased opportunities for new or expanded transpacific routes and service and enhanced connecting options, among other benefits.<sup>19</sup> Additionally, if two carriers each served a market with a market share under 5 percent—the threshold DOT uses for deeming a carrier as providing competitive service on the route—the agreement may push that market share above the 5-percent threshold and effectively result in a new competitor on the route. Also, according to DOT, the carriers' agreement could result in connecting flights across two carriers to become effectively "online" (as opposed to "interline") for some city-pair markets due to the agreement. This could potentially offer consumers competing options among airlines that provide direct flights on a given route. We reviewed DOT documentation in which its analyses had projected these improved competitive outcomes across thousands of city-pair markets based on an application for a cooperative agreement. Finally, according to DOT orders, carrier agreements can promote competition in various markets, if the agreements strengthen inter-alliance network competition. For example, DOT approved and immunized the cooperative agreement between the major partners of the Oneworld alliance, in part, based on the finding that a third immunized global network could better discipline the fares and services offered by the Star and SkyTeam alliances. Specifically, in approving the immunity application, DOT noted consumer benefits stating that "enhanced inter-alliance competition is beneficial for consumers across many markets, in particular the hundreds of transatlantic markets in which the applicants become more competitive as a direct result of the alliance. Travelers in those markets gain new competitive options."<sup>20</sup>

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<sup>18</sup>These pro-competitive effects identified as part of DOT's competitive analysis in considering whether to approve a proposed cooperative agreement are also a part of the public benefits analysis, which are discussed later in this report and which DOT uses to determine whether to grant antitrust immunity to approved agreements.

<sup>19</sup>DOT, Order 2010-11-10, (Nov. 10, 2010).

<sup>20</sup>DOT, Order 2010-7-8, (July 20, 2010).

Though DOT may find prospective competitive harm from the agreement, such as a reduction in the number of competitors in certain markets, DOT does not necessarily reject the application if a DOT-stipulated remedy can potentially mitigate those harms, according to department officials. DOT has used different potential remedies over the years, including carving out specified city-pairs from a grant of immunity and requiring carriers to divest from slots at specific airports (see table 2).<sup>21</sup> DOT officials indicated carve-outs are less favored now than in the past because carve-outs on specific routes can, in DOT’s view, diminish broader public benefits of the alliance by limiting the degree carriers can merge their operations.<sup>22</sup> DOT currently has 11 active carve-outs in three alliances, with the last carve-out issued in 2009. More recently, DOT officials indicated mitigations based on slot divestitures have the potential to better target competitive harms on specific routes by enabling new entrants to these cities with slot-constrained airports. DOT required slot-based remedies in two grants of immunity, one in 2010 and one in 2016. In the 2010 immunity grant, DOT required applicants to relinquish slots at London’s Heathrow airport and specified that two slots must be for Boston-Heathrow services and two for services between any U.S. location and Heathrow.<sup>23</sup> DOT expected these remedies, once implemented, to enable other carriers to start new services to compete with the newly immunized alliance, thereby ensuring adequate competition remains in the affect market. Whether and what mitigation strategies are pursued can be a contested aspect of the proceeding, in which DOT, the applicants, and third-parties debate the competitive implications of the agreement and the mitigations based on the facts and circumstances of each situation.<sup>24</sup>

**Table 2: Examples of Mitigation Strategies for Potential Competitive Harm Stipulated by Department of Transportation (DOT)**

Mitigation Strategy	Description
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<sup>21</sup>Slots allow carriers to operate at designated times at some constrained airports.

<sup>22</sup>DOT, Order 2009-7-10, (July 10, 2009).

<sup>23</sup>DOT, Order 2010-7-8, (July 20, 2010)

<sup>24</sup>Furthermore, DOT imposed remedies may be challenged in federal court, as occurred in relation to DOT’s 2016 grant of immunity. *ABC Aerolineas, S.A DE C.V., D/B/A Interjet vs. U.S. DOT*, No. 17-1056, (D.C. Cir. 2018).

Mitigation Strategy	Description
Route “carve-outs”	DOT may exclude specific city pairs from the grant of immunity provided to an approved cooperative agreement, effectively disallowing carriers to engage in the coordination of sales and other activities on these routes. For example, in 2001, DOT approved and immunized the proposed cooperative agreement between United and Air New Zealand with the requirement that the carriers carve out Los Angeles-Auckland and Los Angeles-Sydney routes, due to the number of competitors falling from 3 to 2 in these city pair markets.
Airport slot divestitures	DOT may require carriers to give up some of their slots—which provide the carrier rights to operate at specified times at an airport—at certain slot-controlled airports. For example, in 2010, DOT required Oneworld joint applicants to give up four slots at London Heathrow airport as a condition for receiving antitrust immunity. Heathrow, one of the world’s busiest airports, has limited slots available and the slot divestiture was aimed to facilitate entry by rival carriers. Comments filed by the Department of Justice, among other parties, had cited concerns about reduced competition.

Source: GAO Analysis of DOT information. | GAO-19-237

In a 2016 case involving Delta and Aeromexico, DOT included two new or rarely used conditions in the grant of antitrust immunity. Specifically, to address competitive concerns specific to this case, DOT made its approval conditional upon the removal of exclusivity clauses in the joint venture agreement that precluded specified types of cooperation with other carriers.<sup>25</sup> Though the carriers argued that such clauses were necessary to encourage long-term investment in their cooperative products and services, DOT took into account the perspectives from stakeholders’ docketed comments, concluding that such clauses could give the carriers an undue ability or incentive to foreclose actual or potential competition.<sup>26</sup> Additionally, DOT placed a 5-year sunset provision on its grant of antitrust immunity to Delta and Aeromexico to allow DOT a defined opportunity to revisit whether specific slot constraints identified at the Mexico City airport had been resolved. Prior grants of immunity regularly included requirements for carriers to resubmit their cooperative agreements to DOT after 5 years as part of DOT’s subsequent monitoring (discussed below), but the immunity was not time limited. DOT officials explained the inclusion of the sunset provision was to address concerns specific to this case, rather than a new departmental policy.

Once the competitive analysis and any decisions on mitigations are complete, DOT determines whether, on balance, the proposed agreement would likely have an overall positive, neutral, or negative competitive

<sup>25</sup>DOT subsequently prohibited exclusivity arrangements in other cases, such as Delta’s and Korean Airlines’ cooperative agreement resubmission in 2017.

<sup>26</sup>DOT, Order 2016-11-2 (Nov. 4, 2016) and DOT, Order 2016-12-13 (Dec. 14, 2016).

effect and decides whether to approve the agreement.<sup>27</sup> In all cases where DOT has granted antitrust immunity, DOT found the proposed cooperative agreements, on balance or with any specified remedy in place, to be either neutral or pro-competitive.<sup>28</sup> However, DOT has denied approval of a proposed agreement, citing that the carriers' combined market share on routes where they both operate service would be so dominant they could, for example, raise prices to the detriment of consumers.<sup>29</sup>

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### DOT's Evaluation of Potential Public Benefits Depends on Whether Proposed Cooperation Is Sufficient to Yield Pro-Consumer Effects

DOT conducts public benefits analyses to determine if there are benefits of proposed cooperative agreements for consumers. Based on our review of applications, carriers typically point to varied benefits such as the potential for lower fares on certain routes, improved connectivity, and reciprocal frequent flier benefits for consumers. In considering the public benefits claims made by applicants as well as any potential benefits of the proposed agreement identified by DOT, the department assesses whether (1) the public benefits identified are significant and likely to be realized in a timely fashion and (2) if a grant of immunity is necessary for the carriers to go forward with the agreement such that benefits will be achieved.<sup>30</sup>

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<sup>27</sup>By statute, DOT must approve proposed cooperative agreements if DOT finds no substantive competitive harm. DOT may approve agreements it finds to have substantive competitive harms, but only if the cooperative agreement would meet a serious transportation need or other public benefit that could be achieved through a less anticompetitive way. DOT must approve a cooperative agreement before it can grant antitrust immunity.

<sup>28</sup>That is, in these cases, DOT found that the proposed cooperative agreements were not adverse to the public interest, essentially, that it has no substantive anticompetitive effects. 49 U.S.C. § 41309.

<sup>29</sup>DOT's decision was to "disapprove the alliance agreements and withhold" antitrust immunity, as communicated in its show cause order. Subsequently, DOT dismissed the application, granting the applicants' request to withdraw the application. DOT, Order 2016-11-16 (Nov. 18, 2016) and DOT Order 2016-12-15 (Dec. 16, 2016).

<sup>30</sup>Both must be established for DOT to grant antitrust immunity, per 49 U.S.C. §§ 41308 and 41309.

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DOT officials emphasized that this assessment focuses on the carriers' anticipated level of integration. The officials said higher levels of cooperation in a proposed agreement, given the nature of the airline industry and depending on the economic incentives employed, can lead to lower fares, especially for connecting itineraries. Though DOT officials acknowledged that the flow of consumer benefits due to high levels of carrier cooperation is not absolute or certain, they said DOT's analysis has consistently supported the notion that connecting passengers who traverse carriers on a given itinerary pay less as cooperation between alliance carriers increases. DOT has applied this policy in each of the proceedings involving grants of antitrust immunity to the three major air alliances—SkyTeam (2008), Star Alliance (2008), and Oneworld (2010)—as well as subsequent cases.<sup>31</sup> For example, DOT approved immunity within the Star Alliance based on its expectation that fares for connecting itineraries for Star's transatlantic routes would decrease, benefiting the majority of its transatlantic passengers.<sup>32</sup> DOT further noted that this connecting service would "discipline fares on non-stop routes," as well. The practical consequence of this policy, according to DOT officials, is that DOT expects applicants to present detailed cooperation agreements, which show integrative efficiencies and processes, at the time the requests for antitrust immunity are made. In other words, DOT expects antitrust immunity, when provided, will provide consumers with an array of benefits—lower connecting fares, new route offerings, among others—that follow from these business efficiencies.

DOT's public benefits analysis considers the specific provisions of each proposed agreement to assess how the applicants plan to coordinate a wide range of business functions. These can include network and capacity planning, scheduling, pricing, sales, revenue management, and customer service, among other considerations. DOT officials told us that they examine the carriers' revenue-sharing plans, corporate strategic

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<sup>31</sup>See, respectively, DOT, Order 2008-4-17 (April 9, 2008); DOT, Order 2009-4-5 (April 7, 2009); and DOT, Order 2010-2-8 (February 13, 2010). For example, in the SkyTeam II proceeding, DOT supported its decision to grant immunity based on a finding that the applicants' proposed agreement integrated operations to enable "seamless travel across one joint network" and that the joint venture would "create operating efficiencies and cost reductions on a larger scale" and therefore, antitrust immunity was well suited to enable the carriers to achieve merger-like efficiencies and deliver benefits that would not otherwise be possible.

<sup>32</sup>DOT, Order 2009-7-10, (July 10, 2009).

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documents, and other relevant documentation. For example, DOT may look to see if carriers plan to:

- Share revenue in a manner to provide incentives to carriers to coordinate the management and selling of their combined networks to make more seats and more frequencies on routes linking their respective networks available, substantially increasing connectivity and time-of-day schedule options and improving customer service by treating their partner's customers just as they would their own.
- Align their different ticket fare and availability classes and procedures such that their revenue management systems make seats available on domestic flights for passengers connecting from the foreign partner's flights at the same levels and on the same terms as if customers were connecting online from their own international flights.
- Coordinate marketing and incentivize sales staff to promote the carriers' combined, rather than individual networks, and thereby creating more options for consumers.
- Align products for a consistent, seamless passenger experience (e.g., baggage fees, upgrade policies, frequent flyer program rules).

According to DOT, the agency further reviews governance and revenue-sharing provisions to ensure that sufficient economic incentives exist to substantially increase the number of passengers flowing through the combined networks and to significantly increase capacity (particularly on hub-to-hub routes and home country hub-to-beyond foreign hub routes). Further, DOT has sought detailed information from applicants on their plans to increase capacity beyond what they would do in the counterfactual scenario in which DOT did not grant immunity. These officials said that DOT places particular emphasis on the quantity, likelihood, and viability of additional capacity when determining whether the application will produce substantial benefits that might not occur if applicants choose not to go forward with the agreement in the absence of a grant of immunity.<sup>33</sup>

DOT also considers filings from other parties that support or cast doubt on the applicants' claims. For example, in 2005, DOT denied an application from six carriers seeking immunity for the SkyTeam Alliance.

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<sup>33</sup>According to DOT, in one case, DOT required capacity commitments to ensure that the additional capacity planned as a result of the joint venture would, in fact, be realized. Furthermore, DOT officials said that they track the capacity (seats and frequencies) as part of ongoing monitoring efforts.

According to DOT officials, based on the case record and competitive circumstances at the time, DOT found that immunizing the proposed agreement would not provide sufficient public benefits. This finding comported with arguments from objecting parties that immunity was not required to produce benefits because there was a high likelihood that SkyTeam members would continue integrating their management and operations, in order to maintain and maximize the profitability of their existing relationships.<sup>34</sup>

As with the competitive analysis, DOT officials use their professional experience and expertise, as well as the case record of each application, to determine the likelihood of benefits, and the necessity of antitrust immunity for carriers to implement their proposed plan quickly. As a general practice, DOT does not attempt to replicate the benefits analyses that carriers may provide as part of their application, according to DOT officials. DOT officials explained that they use their knowledge of the industry to verify and validate the applicants' benefit claims by qualitatively assessing the reasonableness of the market and broad economic assumptions underlying these claims. Based on this assessment, DOT may condition a grant of immunity on carriers' first demonstrating a readiness and ability to implement the agreement. For example, in one case, the department did not initially grant antitrust immunity to the partners of a cooperative agreement because DOT determined that incompatibilities in the carriers' information technology systems would prevent the partnership from yielding consumer benefits.<sup>35</sup> Consequently, DOT officials said they advised the applicants to reconcile these shortcomings, or risk DOT finding the benefits of the proposed cooperative agreement implausible and, in turn, antitrust immunity unwarranted. Similarly, DOT has also conditioned several grants of antitrust immunity on the carriers' expeditious implementation of the proposed cooperative agreement.

Based on our analysis of DOT's antitrust immunity proceedings, DOT has ultimately approved most of the requests for antitrust immunity that it has received, with some stipulating competitive remedies. Specifically, DOT has adjudicated 38 applications involving a U.S. and foreign carrier(s) since 1993, granting antitrust immunity 31 times, according to our

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<sup>34</sup>DOT, Order 2005-12-12 (Dec. 22, 2005).

<sup>35</sup>DOT, Order 2010-9-4 (Sept. 8, 2010). DOT granted the applicants antitrust immunity after these issues were sufficiently addressed. DOT, Order 2011-6-9 (June 10, 2011).

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analysis. Twenty-three of these grants remain in effect across 13 different carrier agreements.<sup>36</sup> See appendix I for information on adjudicated immunity proceedings involving U.S. and foreign carriers. In two proceedings, DOT denied antitrust immunity based on findings from its public benefits analysis.<sup>37</sup> Specifically, in one proceeding, DOT found that the overall level of public benefit was small because the proposed alliance focused on a single route and was not likely to create new routes or a significant number of new travel options for consumers.<sup>38</sup> In the other proceeding, DOT noted that code sharing or other less-involved forms of collaboration could produce similar benefits, namely new and expanded service additions, suggested by the carriers.<sup>39</sup> Consequently, DOT denied these applicants' requests for antitrust immunity.<sup>40</sup>

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### Stakeholders We Interviewed Generally Agreed That DOT's Process Was Transparent, but Disagreed on Extent That Immunity Is Beneficial to Consumers

Most stakeholders, in particular representatives from major carriers, we interviewed considered DOT's final decisions and application review process to be largely transparent, but lengthy. DOT officials and some stakeholders we interviewed underscored that there are opportunities for interested parties, including competing airlines, to examine all submitted application materials—including confidential and proprietary information—

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<sup>36</sup>In recent years, the airline industry has undergone a series of bankruptcies, mergers, and joint venture expansions. As a result, of these events, DOT has revoked some grants of antitrust immunity, in whole or part, due to one or more carriers no longer participating in the agreement. Additionally, carriers may submit new applications to expand or modify cooperative agreements that have been previously granted antitrust immunity, which can entail DOT's initiating an entirely new proceeding. Therefore, some carrier agreements that currently have antitrust immunity encompass multiple applications and proceedings.

<sup>37</sup>In both these proceedings, DOT opted to not conduct a competitive analysis, DOT Order 2014-4-31 (Apr. 29, 2014) and DOT Order 2005-12-12 (Dec. 22, 2005).

<sup>38</sup>DOT, Order 2014-3-17 (Mar. 28, 2014).

<sup>39</sup>DOT, Order 2005-12-12 (Dec. 22, 2005).

<sup>40</sup>DOT, Order 2014-4-31 (Apr. 29, 2014) and DOT, Order 2006-2-1 (Feb. 6, 2006). A small number of other proceedings were closed or dismissed without a final decision from DOT. For example, DOT dismissed the application in proceeding DOT-OST-2007-28845 after applicants did not fulfill DOT's request for additional information, which effectively left the record incomplete. See DOT, Order 2008-6-18 (June 16, 2008).

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and to provide substantive comments.<sup>41</sup> DOT officials emphasized the importance of a complete record of information on the official docket as the basis for their decisions. DOT is required to make a final decision within 6 months from the date of an application but may issue a notice to suspend the procedural schedule in order to establish a complete record.<sup>42</sup> Some carriers we interviewed said that DOT's review and efforts to establish a complete record can cause a proceeding to be lengthy. For example, the most recently completed proceeding to date was over 18 months from when the application was filed until DOT issued a decision. This proceeding involved a number of filings that pointed to the likely harm to present and future competition from independent carriers in specific markets due to the potential for exclusionary behavior by the applicant carriers.<sup>43</sup>

Our documentation review affirms DOT's and stakeholders' view that available proceedings' records include DOT's analyses and findings. With the exception of confidential or proprietary information, all applications, notices, DOT orders, and other documentation related to an application can typically be found on the public docket. Our review of all the proceedings found that each DOT order providing a grant of immunity included discussion of DOT's findings from its competitive and public benefits analyses, as well as discussion of why and how DOT arrived at stipulated remedies, if any. For example, as previously discussed, in the 2010 Oneworld order, DOT described the potential competitive harm at specific airports that the department identified in its analysis and rationale for requiring a divestiture of slots at those airports as a remedy for those potential harms.<sup>44</sup>

Though we found consensus among stakeholders that DOT's process is transparent, there is disagreement among the stakeholders we interviewed about the potential benefits of immunity for consumers. Specifically, two third-party stakeholders and representatives of all non-

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<sup>41</sup>DOT protocols include opportunities for counsel and outside consultants for interested parties to access all confidential documents. Applicants may file a motion requesting confidential treatment for information they deem to be competitive in nature per 14 C.F.R. § 302.12.

<sup>42</sup>49 U.S.C. § 41710.

<sup>43</sup>DOT Order 2016-11-16 (November 18, 2016) and DOT Order 2016-12-15 (December 16, 2016).

<sup>44</sup>DOT Order 2010-7-8 (July 10, 2010).

immunized carriers we interviewed suggested that carriers do not need antitrust immunity to cooperate in ways that benefit consumers, such as through codeshare and interlining agreements. Some of these stakeholders noted that immunized carriers, through their cooperative agreement, could have access to better market data than non-immunized carriers or leverage their increased network size to gain unfair competitive advantages. Representatives for all three U.S. carriers with approved immunized agreements indicated these immunities were, and continue to be, essential to their ability to provide high-quality service to their customers. Moreover, these carriers believed that changes to DOT's process should be focused on expediting the process so that public benefits achievable only through grants of antitrust immunity could be realized more quickly. DOT officials indicated they are aware of the controversial nature of grants of antitrust immunity and noted that it takes time for DOT to gather and assess the evidence in each proceeding. These officials indicated that the department considers different views when considering applications, monitors academic and other literature on the topic, and applies these ideas as the officials deem appropriate in their decision-making.

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## DOT Monitors Immunized Cooperative Agreements in Various Ways but Does Not Report on the Effects of Granted Immunities

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### DOT Undertakes Multiple Activities to Monitor the Implementation and Effects of Immunized Cooperative Agreements

DOT conducts a number of activities to oversee and monitor individual immunized cooperative agreements and to understand how broad trends in international air competition affect immunized agreements. For example, DOT officials responsible for the program explained that they analyze a variety of international and domestic airline-competition issues including, but not limited to, airline alliances and, accordingly, keep track of market developments, such as new carriers entering markets and changes in market shares of established carriers. By monitoring these broad trends, DOT is able to better understand industry dynamics, according to officials we interviewed.

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For specific grants of immunity, DOT officials emphasized that they may tailor some monitoring activities to the nature of the agreement and the specific requirements set forth in DOT's grant of immunity. For example, DOT officials explained they track compliance with the required slot divestitures in one grant of immunity through a designated trustee or, for immunities that require carriers to maintain capacity on certain routes, by DOT officials' own review of existing flight schedule databases. DOT officials noted that the department's specific monitoring activities are undertaken to track the implementation of cooperative agreements and to assure carriers comply with the terms of immunity grants (see table 3).

**Table 3: Department of Transportation’s (DOT) Activities to Monitor Immunized Cooperative Agreements**

Activity	Description
<p>Reviewing annual reports: Antitrust immunities granted since 2009 require carriers to provide DOT with annual reports on joint ventures’ implementation and public benefits</p>	<ul style="list-style-type: none"> <li>• Reports must include information on topics stipulated each year by DOT and include summaries of customer service policies that should be comparable across partners (e.g., baggage and frequent flyer program rules). These reports and supplemental materials can be hundreds of pages and include internal, business-sensitive materials, according to carriers and DOT officials.</li> <li>• DOT analysts are to review these reports to check for completeness, to validate that carriers are coordinating and implementing the agreement as described in their respective applications, and to develop summary memos for internal use by DOT managers. DOT officials explained they may follow-up with carriers, as needed, for additional clarification and information.</li> </ul>
<p>Tracking specific requirements: Individual grants of immunity can include specific requirements of carriers</p>	<ul style="list-style-type: none"> <li>• DOT staff track carrier activities and compliance with specific requirements in an immunity order, according to DOT officials we interviewed. For example, all of DOT’s grants of immunity require foreign carriers to submit origin and destination data that would not otherwise be required. According to DOT officials, in one instance, upon identifying an immunized foreign carrier that was not submitting flight data as required by DOT’s order, DOT took steps to bring this carrier into compliance and provide data.</li> <li>• DOT officials indicated that carriers are generally diligent in complying with such requirements because non-compliance would be readily identified by DOT or industry observers and put the immunity at risk.</li> </ul>
<p>Reviewing resubmissions of alliance agreements: All active grants of immunity require carriers periodically resubmit cooperative agreements to DOT</p>	<ul style="list-style-type: none"> <li>• According to DOT officials, this periodic resubmission, typically every 5 years, provides DOT with an opportunity to review the ongoing benefits of the alliance and that continued antitrust immunity is appropriate.</li> </ul>
<p>Observing market conditions: DOT staff track overall developments in the competitive landscape</p>	<ul style="list-style-type: none"> <li>• DOT staff follow broad market developments, as reported in trade press and routine carrier data submissions to DOT, among other mechanisms, to ensure staff have an understanding of changes in the markets in which immunized carriers operate to understand whether the expected benefits of immunities appear to have occurred, according to DOT officials. For example, DOT staff follow carriers’ actions, such as adding or dropping routes and ticket price trends, to observe if competition in specific markets or routes reflect the expected effects of immunities or if other factors might be affecting a market.</li> <li>• DOT officials indicated the additional data submissions required of foreign carriers are essential to the Department’s ability to monitor alliance development and competitive effects. Additionally, DOT officials indicated they regularly meet with airline representatives to discuss a range of industry topics that may have implications for alliances.</li> </ul>
<p>Considering new antitrust immunity applications: New applications provide DOT an opportunity to examine the effects of existing immunities on markets</p>	<ul style="list-style-type: none"> <li>• As carriers made changes in alliances agreements and sought new antitrust immunities to replace existing approvals, DOT has used these new proceedings to update the terms of older immunities. For example, according to DOT officials, DOT added an annual reporting requirement when Delta and Korean Air submitted a joint venture agreement that did not require a new docket proceeding.</li> <li>• Further, during analytic and public comment proceedings, DOT and stakeholders can identify evolving commercial forces and how existing alliances have affected market competition.</li> </ul>
<p>Undertaking specialized studies: DOT may examine an issue in-depth on an ad hoc basis</p>	<ul style="list-style-type: none"> <li>• Intermittently, DOT has collaborated with international regulatory peers, such as the European Commission, and academics to evaluate different aspects of international air competition and the effect of immunities.</li> </ul>

Source: GAO analysis of DOT information. | GAO-19-237

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In recent years, DOT's monitoring activities have focused on the status of cooperation under immunized agreements and whether that cooperation is leading to merger-like efficiencies. To that end, according to DOT officials, all seven grants of immunity approved since 2009 require carriers to submit confidential annual reports to DOT.<sup>45</sup> These reports cover topics including the public benefits of the agreement and commercial developments between the partners. Each year, DOT develops a template for these reports that delineates what information must be included on operational aspects of the implemented agreement (e.g., integration of routes and service planning) and the extent that partnered carriers have aligned their customer service policies to provide customers with a consistent experience across partners, among other topics. These reports, and DOT's associated reviews, are the core of DOT's current monitoring efforts, according to DOT officials and, according to representatives of the carriers submitting these reports, provide DOT with extensive information on the implementation status of the immunized agreement. Our examination of the most recent of these reports, for 2017, affirms they include considerable information on the implementation of the agreement and status of the alliance.

DOT's monitoring activities also include some review of empirical information on the effects of individual immunities. Specifically, as discussed above, carriers seeking immunity routinely identify anticipated consumer benefits, such as lower fares and greater frequency of service, and DOT has predicated grants of immunity on these expected benefits. According to DOT officials, they monitor available schedule, pricing, and other data to check whether observed outcomes are consistent with expectations, and if not, whether other factors, such as fuel prices or other market changes, provide a qualitative explanation of observed trends. The 2017 annual reports that carriers submitted to DOT also included information on these trends, based on our review of these documents. Likewise, according to DOT officials, DOT takes steps to track the status of remedies—such as whether airport slots were, in fact, divested and market entry occurred as was expected. DOT's specific steps to do so vary depending on the nature of the remedy and the availability of relevant information. Furthermore, DOT officials commented that third parties, such as other air carriers, have incentives to alert DOT

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<sup>45</sup>Including a 2009 modification made to the grant of antitrust immunity to SkyTeam, all transatlantic and transpacific partnerships within the three major international air alliances are required to submit annual reports.

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to concerns about violations of exclusivity prohibitions that help DOT verify and enforce this condition of some immunity grants.

DOT's monitoring activities do not typically include independent econometric analysis to examine the effects of the immunities it has granted, according to DOT officials, but the department tracks economic literature on these effects and has recently commissioned its own study. As we have noted, DOT looks for substantial integration among carriers requesting immunity as an indication that pricing efficiencies will be attained and benefit consumers. For a connecting airline route where one carrier serves one leg of the route and a different carrier serves the other leg, it is broadly recognized by economists that joint price-setting by the carriers will generally result in a lower airline fare. However, in cases where two airlines are competing on the same route—as could be the case on nonstop routes between the U.S. and another country—carrier coordination could reduce the extent of effective competition and lead to higher fares. Additionally, lesser forms of coordination that do not rely on a grant of immunity may also address the “double pricing” inefficiencies on connecting routes.

Academic literature that uses statistical modeling to examine the effect of antitrust immunity has come to differing conclusions on the effect of immunity on fares for airline passengers. For example, one study found that connecting routes served by carriers with immunized cooperative agreements had lower prices compared to connecting routes served by carriers with other forms of cooperating agreements that were not immunized, and this study also found that immunities did not lead to higher fares on nonstop routes.<sup>46</sup> However, another study found that antitrust immunity reduced competition and, thus, caused higher prices on nonstop routes; this study also found that pricing efficiencies on connecting routes did not require antitrust immunity.<sup>47</sup>

Recognizing the varying findings of the available literature, DOT commissioned a specialized study in 2016 to improve its understanding of the effect of immunities and airline joint ventures on consumer prices.

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<sup>46</sup>Robert J. Calzaretta, Jr., Yair Eilat, and Mark A. Israel, “Competitive Effects of International Airline Cooperation,” *Journal of Competition Law and Economics*, 13(3), 501-548, October 2017.

<sup>47</sup>William Gillespie and Oliver M. Richard, “Antitrust Immunity Grants to Joint Venture Agreements: Evidence from International Airline Alliances,” *Antitrust Law Journal*; Chicago, Vol 78, Iss. 2, (2012): 443-469.

According to DOT, the department provided guidance, data, and other input to support this work, but did not assist in the analysis or guide its conclusions. The report was provided to DOT in the summer of 2018, and according to DOT officials, as of December 2018, the department was reviewing the study's findings, and considering how, if at all, it might apply the methodologies used in the study to DOT's own monitoring activities in the future.<sup>48</sup> DOT officials also indicated they have not made any final determinations about what, if any, adjustments may be appropriate to existing grants of immunity or to DOT's process for considering future immunity applications based on the study's findings.

Based on our review of antitrust immunity proceedings, DOT has rarely amended or modified, and has seldom revoked immunity of an approved cooperative agreement. However, DOT has changed some terms of approval when carriers have sought immunity for updated agreements that, for example, added other carriers to an existing agreement. DOT officials explained that initiating a change in an existing immunity grant is a time-consuming and technically difficult process because it would involve the same administrative steps as in the initial approval process. Further, DOT officials indicated that carriers have been generally responsive to the requirements laid out in DOT's grants of immunity, and as a result, DOT has not needed to pursue many corrective actions. Moreover, these officials explained that they are well aware of carriers' plans to pursue new immunized agreements, and as a result, DOT officials are able to await those proceedings to make incremental changes to the terms of DOT's original approval. For example, DOT's early grants of immunity did not include annual-reporting requirements, but as carriers updated their agreements and sought new immunities, DOT used these new proceedings as an opportunity to add this requirement.

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### DOT Does Not Report on Monitoring Activities or on Whether Immunities Have Produced Anticipated Benefits

There is generally little, if any, information from DOT available to external stakeholders and the public regarding DOT's monitoring efforts and its findings on the effects of granted antitrust immunities. DOT publishes one summary document on its website that lists every active and inactive

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<sup>48</sup>DOT has not decided whether this report will be made public.

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immunized cooperative agreement.<sup>49</sup> This document, which according to officials, DOT updates periodically with each new grant of immunity, includes web links to the dockets of formal proceedings associated with each immunity application and grant. This document provides a single portal for anyone to access materials related to antitrust immunities that are spread across multiple dockets. Each docket remains open for public comment as long as DOT's grant of immunity remains active. For example, in 2017, stakeholders submitted public docket comments critical of the market effects of a cooperative agreement awarded antitrust immunity 15 years earlier. In this case, DOT provided a formal, public response, as required, on the issues raised.<sup>50</sup>

DOT does not report information on its own voluntary monitoring activities in public dockets or elsewhere. For example, DOT does not post information on whether immunized carriers have submitted required annual reports or, as periodically required, resubmitted their cooperative agreements to DOT. Moreover, DOT does not release its assessments of these materials nor does DOT make any public statements on whether a grant of immunity yielded, in actuality, the types of carrier cooperation expected, whether DOT-imposed remedies were implemented and had the expected results, or whether the immunity generated the public benefits as expected when approved. As described previously, DOT has approved grants of immunity based on the expectation of various public benefits. These potential benefits include, for example, lower consumer prices for connecting flights, expanded route and schedule offerings, and increased market entry and competition. DOT provides no reports to the public or Congress related to whether these expectations were met.

Internal controls help program managers achieve desired results and adapt to shifting environments, evolving demands, changing risks, and new priorities.<sup>51</sup> As part of an internal control system, management should externally communicate quality information. Attributes of this principle call on federal program managers to communicate quality information

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<sup>49</sup>Department of Transportation, *Airline Alliances Operating With Active Antitrust Immunity*, accessed Oct. 25, 2018, <https://www.transportation.gov/office-policy/aviation-policy/airline-alliances-operating-active-antitrust-immunity>.

<sup>50</sup>DOT is required to respond to public comments in the public docket pursuant to the requirements of the Administrative Procedure Act.

<sup>51</sup>GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 2014).

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externally so that external parties can help the government achieve its objectives and address related risks. Generally, according to this internal control standard, government reporting is intended for the executive branch's decision makers and Congress as well as the general public. Management may select appropriate methods for external reporting. Accordingly, program managers should consider what methods are appropriate for such a broad audience, considering factors such as the nature of information and cost. In the context of grants of antitrust immunity, relevant parties include Congress, industry stakeholders, and the general public.<sup>52</sup> Each of these groups may have distinct needs and abilities to access, understand, and act upon information about the effects of antitrust immunities in the marketplace.

DOT officials cited several reasons for not reporting on their monitoring activities and related findings. DOT officials underscored that much of the information gathered in its voluntary monitoring efforts—annual reports, in particular—are proprietary and, therefore, not information DOT could publicly disclose.<sup>53</sup> Representatives from immunized carriers we interviewed also stressed that public disclosure of the business plans and alliance status assessments provided to DOT would be damaging to their business if made public. DOT officials also expressed concern that commentary from the department about the effects of immunities could be construed as departmental promotion of a specific alliance, or “prejudgment” of an issue that could come before the department in a future proceeding. DOT officials also said competition authorities, such as the Department of Justice, do not typically address the results of a case (e.g., post-merger analyses) and are only involved with the process and guidelines associated with reviewing and adjudicating a case.

While there are valid concerns about the publication of proprietary information and statutory prohibitions on doing so, there are available avenues for DOT to report on the findings of its monitoring activities and assessments of the consumer effects of antitrust immunities broadly. Further, many of the expected benefits of grants of immunity—such as changes in prices, schedules, and markets served—can be evaluated

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<sup>52</sup>An organized set of activities or processes undertaken to carry out agency responsibilities, such as those involved in granting antitrust immunity, is considered an agency program for the purposes of applying internal controls. GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: Sept. 1, 2005).

<sup>53</sup>Federal officers and employees are prohibited by statute from disclosing business confidential or proprietary information, except as authorized by law. 18 U.S.C. § 1905.

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without relying on proprietary information. For example, the number of competitors serving city-pair markets and carriers' market shares can be calculated—as DOT does during the approval process—using publicly available data. Prices changes under the immunity can also be evaluated using publicly available information. Likewise, an assessment of the market outcomes of competitive remedies—such as whether slots were divested and competitors provided new service as expected—does not require business-sensitive information about the internal workings of an immunized alliance, but rather data on the public actions of carriers in the marketplace. These data are publicly available through schedule data and information in DOT datasets. Government reporting can also protect proprietary information from improper disclosure, either by issuing restricted reports to Congress or through stating findings at a very general level. For example, the Federal Trade Commission has balanced the protection of proprietary information from public disclosure while also reporting on the commission's findings of the effects of its commission-imposed competitive remedies. Specifically, the Federal Trade Commission published two merger remedies studies, eliminating the names of and financial information about the merging parties and the buyers of the divested assets in publicly available versions. The Federal Trade Commission made both of its studies public.<sup>54</sup>

The lack of information available on the observed effects of immunities in the marketplace, including the effects of DOT-stipulated remedies, can make it difficult for external stakeholders to assess what consumer benefits have, or have not, been realized. According to consumer and antitrust organizations we interviewed, the lack of available information left them speculating that DOT did not conduct any monitoring of granted immunities after approval. Likewise, representatives from two of the three non-immunized carriers we interviewed noted the contrast between the transparency of DOT's approval process and the opacity of its monitoring process. Additionally, two stakeholders we interviewed opined that airline alliances have harmed consumers by, for example, creating restrictive rules that make certain types of travel more difficult than in the past, among other anti-consumer effects. Some stakeholders mentioned they had no basis to review or comment on whether DOT monitoring activities are sufficient. Another stakeholder mentioned that in the absence of any

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<sup>54</sup>See Federal Trade Commission, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, (January 2017) and Federal Trade Commission, *A Study of the Commission's Divestiture Process*, (1999).

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reports or other information from DOT, they did not know if alliances have delivered the consumer benefits initially expected.

DOT officials stressed that because the process for consideration of immunity is public any outside party may petition the department for review of an existing immunized alliance and provide information on the docket—which remains open—if any party believes that an alliance is acting contrary to the public interest. However, two stakeholders we interviewed indicated that it was difficult to use the docket comments process to lodge observations or criticisms without, for example, disclosing their own competitively sensitive information and absent information on the implementation of immunized alliances. Further, the information available on dockets does not provide congressional policymakers with readily available information on the findings of DOT’s many ongoing monitoring activities. During the approval process, DOT publishes key aspects of its analytic findings in show-cause and final orders to the public docket. These documents provide insights into the basis for DOT’s decisions. DOT could periodically provide information on the effects of immunities, based on its monitoring activities, on the docket, or through other mechanisms, such as public reports or through confidential reports to Congress. This information could provide greater transparency and be useful in considering changes in DOT’s authority to grant antitrust immunity, an authority the Congress and others have considered at various points.<sup>55</sup> With more information about DOT’s monitoring activities and findings, policymakers, stakeholders, and the public would have an improved understanding of the competitive effects of immunities.

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<sup>55</sup>For example, Congress considered limiting grants of antitrust immunity to a specified period of time, H.R. 831, § 1(e), 111th Cong (2009). Additionally, in 1999, the Transportation Research Board recommended a two-part process for the review of international airline alliances seeking antitrust immunity in which the Department of Justice would consider competitive effects and forward to DOT only those applications acceptable on competitive considerations. Transportation Research Board, *Special Report 255 Entry and Competition in the U.S. Airline Industry: Issues and Opportunities*, (July 1999).

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## Conclusions

As U.S. and foreign air carriers have pursued more integrated forms of cooperation through international air alliances, DOT has extended American Airlines, Delta Air Lines and United Airlines antitrust immunities with their major foreign partners with the expectation that the immunities would yield public benefits. Cooperation between international air carriers can lead to certain benefits for consumers, and immunizing such cooperation from antitrust laws may yield additional benefits. DOT's review of requests for immunity and oversight of immunized agreements are important to ensuring robust competition and, thus, consumer benefits in the marketplace. DOT's ongoing monitoring pays significant attention to whether and how grants of immunity affect consumers. However, DOT generally has not reported on its monitoring activities and market outcomes of immunities. As the authority responsible for granting antitrust immunity, DOT holds a unique responsibility for reporting on these effects. Per internal control standards, the department's responsibilities extend to communicating information to key stakeholders about the effect of immunities, based on DOT's monitoring activities. DOT must balance providing information to policy makers and the public with statutory requirements that protect proprietary information from disclosure. DOT rightly keeps information on the status of cooperation under immunized agreements confidential. However, the market outcomes of immunities are not proprietary and DOT could publicly report on them. Such reports feasibly could include DOT's views on whether the prospective benefits projected at the time of immunities' approval have been realized and whether the department's remedies have been implemented by immunized carriers and have had the effects expected by DOT. Like DOT's current practice of periodically updating the summary document on immunities, DOT could issue such reports at a time interval it determines appropriate. Doing so would improve transparency and provide the public with improved information on the effects of antitrust immunities on consumers.

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## Recommendation for Executive Action

The Director of DOT's Office of Aviation Analysis should provide periodic external reporting, at a time interval DOT determines appropriate, to the public and policymakers, on the effects of antitrust immunity—based on the range of monitoring activities undertaken by DOT—including whether grants of immunity have achieved anticipated benefits and the status of

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remedies—such as airport slot divestitures—imposed as part of DOT’s approval. (Recommendation 1)

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOT and the Department of Justice for review and comment. We received written comments from DOT, which are reproduced in appendix II and summarized below. In email, the Department of Justice told us they had no comments on the draft report. DOT and the Department of Justice also separately provided technical comments, which we incorporated as appropriate.

In its written comments, DOT partially concurred with the recommendation. More specifically, DOT stated it will provide additional public information about the status of its monitoring activities and remedies, but it did not agree to report publicly on its findings about whether grants of immunity have achieved anticipated benefits. As discussed below, after evaluating the concerns that DOT raised, we continue to believe that periodically reporting on the effects of antitrust immunities would improve transparency and accountability.

In its written response, DOT stated that if DOT were to release any additional materials than it already does, it could have a chilling effect, not just on competition by revealing proprietary information and insight on the real-time commercial strategies of a particular alliance, but also on the carriers’ willingness to share detailed and sensitive information with DOT that is necessary to conduct oversight. We disagree with DOT’s assertion that reporting on the effects of immunities would have a chilling effect on competition and the willingness of airlines to share information with DOT. Our report explains that DOT is prohibited from releasing proprietary information to the public and we expressly called on DOT to balance protecting this information while making appropriate information available to policy makers and the public. Moreover, contrary to DOT’s implication, we are not recommending DOT release the information DOT reviews during the annual reporting process, such as alliances’ revenue management and competitive strategies. Instead, the recommendation calls for DOT to report on the market effects of immunity relative to DOT’s anticipated benefits cited in DOT’s approvals of antitrust immunity and the status of remedies. As we noted in the draft report, these include trends in consumer fares, schedule offerings, and the like that DOT could report on without relying on proprietary information.

DOT also stated that it must balance the importance of transparency with its statutory obligations to adjudicate each request for antitrust immunity fairly. Further, it stated that making such findings independently from the decision-making process in dockets with pending matters raises issues with prejudgment and ex parte communications, and is administratively unworkable. Doing so for cases that are not pending also raises issues of prejudice and prejudgment of “issues that are likely to be raised in future cases involving amendment of the alliance agreements (e.g., when membership changes).” We agree that DOT’s role as an impartial adjudicator is critical. We do not agree with DOT’s assertion that making public its assessment of the effects of immunities that have been granted would jeopardize its impartiality, because DOT could report this information and still consider each case based on its particular facts and circumstances. Further, the recommendation provides DOT with flexibility on how, when, and exactly what to report on that should allow DOT to avoid any prohibited ex parte communication.

DOT described existing activities it believes maintain transparency for the public and ensure an ability for interested parties to seek review on the record of previously granted authorities. These activities include DOT’s public dissemination of passenger ticket and schedule data and the publication of DOT’s own orders that summarize departmental assessments of the state of competition as well as its immunity decisions. We note that our draft report described these activities in detail and recognized the overall transparency of DOT’s application review process. Nonetheless, we maintain that these activities do not provide regular or reliable information on the actual effects of antitrust immunities, based on DOT’s monitoring activities, and that DOT could do more to increase transparency through external reporting on these matters. For example, DOT’s provision of data to the public does not diminish the value of DOT providing its own independent reporting on whether expected consumer benefits, in fact, have materialized. Likewise, DOT’s published orders on specific immunities come at time intervals largely determined by the applicants and, naturally, when reviewing these applications, DOT’s competitive analysis focuses only on those markets relevant to the application at hand. More intentional reporting on the effects of immunity from DOT could address these shortcomings of existing activities.

In other comments that were not included in DOT’s letter, DOT questioned the applicability of internal control standards to its role in monitoring grants of antitrust immunity. The principle of internal control we applied calls on management to externally communicate quality information that helps the agency achieve its objectives and manage

risks. As we stated in the report, such communication can help program managers achieve desired results and adapt to shifting environments, which is relevant to DOT's responsibility in this area.

Ultimately, the recommendation, in full, aims to improve the transparency on the effects of antitrust immunity. Providing external stakeholders with additional information on DOT's monitoring activities, as DOT agrees to do, should enhance confidence that DOT is undertaking oversight activities. Providing information on whether grants of immunity have achieved anticipated benefits, will further improve transparency and provide the public and Congress with useful information to inform policymaking in the future.

We are sending copies of this report to the appropriate congressional committees, the Secretary of the Department of Transportation, the Attorney General, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>. If you or your staff have any questions about this report, please contact me at (202) 512-2834 or [vonaha@gao.gov](mailto:vonaha@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.



Andrew Von Ah  
Director, Physical Infrastructure Issues

# Appendix I: Listing of Grants of Antitrust Immunity

**Table 4: DOT-Adjudicated Applications for Antitrust Immunity Involving a U.S. and Foreign Carrier(s), by Global Alliance, Carrier Partners/Cooperative Agreements, Status as of November 2018, DOT Order and Final Decision**

Global Alliance	Carrier Partners / Cooperative Agreements	Status	DOT Final Order	Final Decision
<b>SkyTeam</b>	Delta - Korean Air Lines - Air France/KLM - Alitalia - Czech Airlines (Skyteam II)	Active	ORDER 93-1-11	Approved and granted immunity
			ORDER 2002-1-6	Approved and granted immunity
			ORDER 2002-6-18	Approved and granted immunity
			ORDER 2008-5-32	Approved and granted immunity
	Delta – Virgin Atlantic - Air France/KLM – Alitalia <sup>a</sup>	Active	ORDER 2013-9-14	Approved and granted immunity
	Delta Air Lines – Aeromexico	Active	ORDER 2016-12-13	Approved and granted immunity
	Delta – Austrian – Sabena - Swissair	Inactive	ORDER 96-6-33	Approved and granted immunity
	Northwest – KLM - Alitalia	Inactive	ORDER 99-12-5	Approved and granted immunity
	Northwest – Malaysia	Inactive	ORDER 2000-10-12	Approved and granted immunity
Delta-Air France-Alitalia-Czech & Northwest-KLM (Skyteam I)	Inactive	ORDER 2006-2-1	Denied and withdrawn	
Delta - Air France/KLM – Air Tahiti Nui – Alitalia	Inactive	ORDER 2014-4-31	Denied and withdrawn	
<b>Oneworld</b>	American – LAN Airlines	Active	ORDER 99-9-9	Approved and granted immunity
	American Airlines – LAN – LAN Peru <sup>b</sup>	Active	ORDER 2005-10-8	Approved and granted immunity
	American Airlines – Japan Airlines	Active	ORDER 2010-11-10	Approved and granted immunity
	Airways – Iberia – Finnair – Royal Jordanian	Active	ORDER 2002-7-39	Approved and granted immunity
			ORDER 2010-7-8	Approved and granted immunity
	American – Canadian International	Inactive	ORDER 96-7-21	Approved and granted immunity
	American – British Airways (AA/BA I)	Inactive	ORDER 99-7-22	Dismissed
	American – Swissair - Sabena	Inactive	ORDER 2000-5-13	Approved and granted immunity

**Appendix I: Listing of Grants of Antitrust Immunity**

<b>Global Alliance</b>	<b>Carrier Partners / Cooperative Agreements</b>	<b>Status</b>	<b>DOT Final Order</b>	<b>Final Decision</b>
	American – TACA Group	Inactive	ORDER 2005-6-16	Dismissed
	American – Swiss International Air Lines	Inactive	ORDER 2002-11-12	Approved and granted immunity
	American – SN Brussels	Inactive	ORDER 2004-4-10	Approved and granted immunity
	American – British Airways II	Inactive	ORDER 2002-4-4	Dismissed
	American – Iberia – Finnair – Malev – Royal Jordanian	Inactive	ORDER 2008-6-18	Dismissed
	American-Qantas	Inactive	ORDER 2016-12-15	Denied and withdrawn
<b>Star Alliance</b>	United - Air New Zealand	Active	ORDER 2001-4-2	Approved and granted immunity
	United - Copa	Active	ORDER 2001-5-1	Approved and granted immunity
	United - Asiana	Active	ORDER 2003-5-18	Approved and granted immunity
	United - ANA	Active	ORDER 2010-11-10	Approved and granted immunity
	United – Brussels– Lufthansa – Air Canada – SAS – Austrian – bmi – LOT – Swiss – TAP	Active	ORDER 96-5-27 ORDER 96-11-1 ORDER 97-9-21 ORDER 2001-1-19 ORDER 2007-9-12 ORDER 2007-2-16 ORDER 2009-7-10	Approved and granted immunity Approved and granted immunity
<b>Other</b>	Delta-Virgin Blue Group	Active	ORDER 2011-6-9	Approved and granted immunity
	America West - Royal Jordanian	Inactive	ORDER 2005-1-23	Approved and granted immunity

Source: GAO summary of DOT information. | GAO-19-237.

Note: In addition to excluding pending cases, we also excluded four adjudicated proceedings from our analysis: one involved the International Air Transport Association activities on tariff conferences (DOT- OST-2006-25307), one did not involve a U.S. carrier (SAS-Icelandair, DOT OST-2000-7248), one did not involve a foreign carrier (Aloha-Hawaiian, DOT-OST-2002-13002), and one did not include a request for antitrust immunity (American-Qantas, DOT-OST-2011-0111).

<sup>a</sup>Virgin Atlantic is not a member of SkyTeam, but has obtained a grant of antitrust immunity.

<sup>b</sup>LAN Peru is an affiliate of LAN Airlines, but is not a member of Oneworld.

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# Appendix II: Comments from the Department of Transportation

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**Appendix II: Comments from the Department  
of Transportation**



**U.S. Department  
of Transportation**

Office of the Secretary  
of Transportation

1200 New Jersey Avenue, SE  
Washington, DC 20590

**FEB 28 2019**

Andrew Von Ah  
Director, Physical Infrastructure Issues  
U.S. Government Accountability Office (GAO)  
441 G Street NW  
Washington, DC 20548

Dear Mr. Von Ah:

Consistent with its international air transportation policy, the U.S. Department of Transportation (Department or DOT) reviews requests for antitrust immunity in international markets, and engages in ongoing monitoring of approved alliances, with the objective of enhancing airline competition and providing consumers with robust public benefits. The Department uses its authority to ensure that the airlines' commercially sensitive joint venture arrangements are structured in a way that is most likely to pass through tangible benefits to consumers, such as additional capacity, lower fares for many itineraries, and more seamless service across global networks.

In markets governed by open-skies agreements, DOT's policy is to approve, and make grants of antitrust immunity for, proposed alliances that are pro-competitive and likely to provide substantial economic and consumer benefits that could not otherwise be achieved without a grant of antitrust immunity. As with analogous reviews undertaken by U.S. government agencies, as well as competition authorities around the world, the Department's process of analyzing joint ventures prior to their implementation is inherently forward-looking. However, we take steps to maximize the public benefits ultimately realized, to maintain transparency for the public, and to ensure an ability for interested parties to seek review on the record of previously granted authorities. For example, the Department:

- Sets clear, consistent and rigorous policy standards to obtain approval and a grant of antitrust immunity. DOT's policy standards are more rigorous than what other industries meet to obtain clearance for analogous joint ventures.
- Requires detailed descriptions of the proposed joint ventures on the public record. This level of transparency is not available in most industries or countries, especially not during the antitrust clearance process
- Implements internal controls, such as safeguarding competitively sensitive information, requiring detailed annual monitoring reports to be submitted to the Department, and publishing detailed status reports on the DOT website. As with traditional antitrust reviews, the authorities granted are not tied to ongoing scoring by the Department. We nonetheless conduct a substantive review of submitted annual reports that include

business confidential details validating alliance implementation across activities, including revenue management, network planning, revenue sharing, competitive strategy, marketing coordination, alignment of customer service policies, and employee training related to provision of seamless travel. Additionally, all final orders placed in the public record explicitly state that the immunity may be amended or revoked at any time.

- Conducts and publishes comprehensive competitive analyses each time an immunity request is made. There has been a steady stream of requests for decades, giving DOT a continual opportunity to assess, on the public record, the state of competition and the public benefits of both proposed alliances and those that already exist.
- Reviews and supports academic and expert research assessing immunized alliances operating in the marketplace and their observed competitive effects. The Department collects and disseminates airline passenger ticket data, which facilitates the study and examination of airfares at the market level, and airline schedule data is widely available. Academicians and industry observers routinely use this information to conduct assessments of the competitive impact of alliances, resulting in a number of independent studies on the competitive impact of alliances.<sup>1</sup>
- Maintains open dockets for all active immunized alliances so that the public and interested parties may register complaints or comments.

Upon review of the GAO's draft report, we concur, in part, with Recommendation 1. The Department is committed to ensuring that immunized alliances remain in the public interest. By augmenting existing actions, we will expand public reporting on the implementation of immunized alliances by providing additional details on the status of monitoring activities and remedies.

In some important respects, the GAO draft report does not reflect the legal requirements of the adjudication process or the extent to which the Department's public orders provide analysis of the competition and public benefits issues raised by proposed and existing alliances. The Department must balance the importance of transparency with its statutory obligations to protect commercially sensitive information and adjudicate new requests fairly. Therefore, we cannot

<sup>1</sup> See Brueckner, Lee, Singer, ALLIANCES, CODESHARING, ANTITRUST IMMUNITY, AND INTERNATIONAL AIRFARES: DO PREVIOUS PATTERNS PERSIST? J.L. & ECON. 7(3), 573–602 (2011); Jan Brueckner & Tom Whalen, The Price Effects of International Airline Alliances, 43 J.L. & ECON. 503 (2000); Gillespie and Richard, Antitrust Immunity and International Airline Alliances, Economic Analysis Division (EAG) of the Antitrust Division, DOJ (2011), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/02/23/267513.pdf>; Jan Brueckner, International Airfares in the Age of Alliances: The Effects of Codesharing and Antitrust Immunity, 85 REV. ECON. & STAT. 105 (2003); Calzaretta, Eilat, and Israel, Competitive Effects of International Airline Cooperation, Journal of Competition Law & Economics, 1–48 (2017); Jan Brueckner & Stef Proost, Carve-Outs Under Airline Antitrust Immunity, 28 INT'L J. INDUS. ORG. 657 (2010); Olivier Armantier & Richard Oliver, Domestic Airlines Alliances and Consumer Welfare, 39 RAND J. ECON. 875 (2008); Volodymyr Bilotkach, Price Competition Between International Airline Alliances, 39 J. TRANSPORT ECON. & POL'Y 167 (2005); Tae Hoon Oum, Jong-Hun Park & Anming Zhang, The Effects of Airline Codesharing Agreements on Firm Conduct and International Air Fares, 30 J. TRANSPORT ECON. & POL'Y 187 (1996); and Jong-Hun Park, The Effect of Airline Alliances on Markets and Economic Welfare, 33 TRANSP. RES. PART E 181 (1997).

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**Appendix II: Comments from the Department  
of Transportation**

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concur with GAO's recommendation that external reporting include "DOT's findings regarding whether grants of immunity have achieved anticipated benefits." A policy of making such findings independently from the decision-making process in dockets with pending matters raises issues of prejudice and *ex parte* communications, and is administratively unworkable. Doing so with regard to cases that are not pending also raises issues of prejudice and prejudice of issues that are likely to be raised in future cases involving amendment of the alliance agreements (e.g., when membership changes). In addition, if DOT were to release any additional materials beyond what is outlined above, it could have a chilling effect, not just on competition by revealing proprietary information and insight on the real-time commercial strategies of a particular alliance, but also on the carriers' willingness to share detailed and sensitive information with DOT that is necessary to conduct oversight. For these and other reasons, the Department's monitoring is modeled on the practices of other agencies charged with adjudicating antitrust matters, including the Department of Justice.

We will provide a further response to the recommendation within 180 days of the final report's issuance. We appreciate the opportunity to respond to the GAO draft report. Please contact Madeline M. Chulumovich, Director, Audit Relations and Program Improvement, at (202) 366-6512, with any questions.

Sincerely,



Keith Washington  
Deputy Assistant Secretary for Administration

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# Appendix III: GAO Contact and Acknowledgments

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## GAO Contact

Andrew Von Ah, (202) 512-2834 or [Vonaha@gao.gov](mailto:Vonaha@gao.gov)

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## Staff Acknowledgments

In addition to the individual named above, Heather MacLeod (Assistant Director); John Stambaugh (Analyst in Charge); Friendly Vang-Johnson; Jim Geibel; Amy Suntoke; Delwen Jones; Amy Abramowitz; and David Hooper made key contributions to this report.

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# Appendix IV: Accessible Data

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## Agency Comment Letter

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Accessible Text for Appendix II Comments from the  
Department of Transportation

Page 1

FEB 28 2019

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Director, Physical Infrastructure Issues

U.S. Government Accountability Office (GAO)

441 G Street NW

Washington, DC 20548

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Upon review of the GAO's draft report, we concur, in part, with Recommendation 1. The Department is committed to ensuring that immunized alliances remain in the public interest. By augmenting existing actions, we will expand public reporting on the implementation of immunized alliances by providing additional details on the status of monitoring activities and remedies.

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### Page 3

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Sincerely,

Keith Washington

Deputy Assistant Secretary for Administration

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