

## Clear Skies Seen Ahead for the American Airlines/U.S. Airways Merger

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The recently announced merger of American Airlines and U.S. Airways creates a new carrier that is a behemoth by any measure. The combined airline will have revenues of \$39 billion, slightly larger than the current revenue leader, United Continental. It will operate more than 6,700 flights to 336 designations in 56 countries. One might wonder whether the merger would face exacting antitrust scrutiny. Yet press coverage treated approval as a fait accompli.

Airline mergers are subject to oversight by the Department of Transportation (DOT), backstopped by the Department of Justice's Antitrust Division (the "Division"). The government hasn't tried to block an airline merger since 2001, when it forced United Airlines to abandon its attempt to acquire U.S. Airways. In recent years the Division has permitted a series of mergers: US Airways and America West Airlines (2005); Delta-Northwest (2008); Republic Airlines and Midwest Airlines (2009); Republic Airlines and Frontier Airlines (2009); United Airlines and Continental (2010), and Southwest Airlines-AirTran (2011).

The new carrier, which will fly under the American Airlines name, will have a national market share of 20%, compared to 18% for Southwest, 17% for United Continental, and 16% for Delta. Calculating the market share of the top four carriers yields a Herfindahl-Hirschman Index (HHI) score of 1269, which the federal government's Antitrust Guidelines would classify as "unconcentrated."<sup>1</sup> Monopolization of the U.S. airline industry is a very distant prospect. Moreover, in analyzing airline mergers, the Division focuses on the number of overlapping routes and the extent to which the merged carrier will dominate particular airports. Overlap between the two airlines' footprints is surprisingly limited. U.S. Airways' hubs are Charlotte, Philadelphia, and Phoenix. American Airlines' hubs are Dallas-Fort Worth, Chicago, Miami, and Los Angeles. Of the two airlines' top 15 routes by passenger miles, only on DFW-PHL (Dallas-Fort Worth/Philadelphia), CLT-LGA (Charlotte-LaGuardia), and ORD-PHL (Chicago O'Hare-Philadelphia) do both have more than 15% market share. AMR-owned American, which has been in bankruptcy since 2011, is also seen to be in a weak competitive condition. American reported net losses of \$1.9 billion on revenues of \$25 billion in 2012. Thus, though it is likely that the merged airline will be forced to sell some of its overlapping routes, approval of the merger is almost certain.

Because AMR is in bankruptcy, the merger is subject to the approval of the bankruptcy court. Under a deal worked out with AMR's creditors, 28% of the equity in the reorganized airline will be owned by U.S.

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<sup>1</sup> Of course such a calculation ignores other carriers. Including them would raise the HHI score, but not to "concentrated" levels.

Airways shareholders, and the remaining 72% will be distributed to AMR creditors, unions, employees, and shareholders.

## About the Authors

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Mr. Cohen is a partner and co-founder of the firm, and head of its Litigation & Arbitration practice group and its *Chambers USA* recognized White Collar Defense, Regulatory Enforcement and Internal Investigations practice group. He is a former Assistant United States Attorney for the Eastern District of New York. Mr. Cohen was recognized as a leading lawyer in his field by the 2013 edition of *Chambers USA*, the 2012 edition of *Benchmark Litigation*, and included as one of New York's *Super Lawyers* in 2008-2012.

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