U.S.-E.U. OPEN SKIES AGREEMENT: WITH A FOCUS ON THE U.S. DEPARTMENT OF TRANSPORTATION'S NOTICE OF PROPOSED RULEMAKING (NPRM) REGARDING ACTUAL CONTROL OF U.S. AIR CARRIERS

(109–44)

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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CONTENTS

TESTIMONY

	Page
Byerly, Hon. John, Deputy Assistant Secretary for Transportation Affairs, U.S. Department of State	15
Dunkerley, Mark B., President and Chief Executive Officer, Hawaiian Airlines, Inc.	44
O'Keefe, M. Rush, Jr., Senior Vice President and General Counsel, FEDEX	44
Shane, Hon. Jeff, Under Secretary for Policy, U.S. Department of Transportation	15
Smisek, Jeffrey A., President, Continental Airlines	44
Whitaker, Michael G., Vice President, Alliances, International and Regulatory Affairs, United Airlines World Headquarters	44
Woerth, Captain Duane, President, Air Line Pilots Association	44
Wytkind, Edward, President, Transportation Trades Department, AFL-CIO	44

PREPARED STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

Costello, Hon. Jerry F., of Illinois	70
Johnson, Hon. Eddie Bernice, of Texas	77
Oberstar, Hon. James L., of Minnesota	81
Porter, Hon. Jon, of Nevada	89
Salazar, Hon. John T., of Colorado	90

PREPARED STATEMENTS SUBMITTED BY WITNESSES

Byerly, Hon. John	60
Dunkerley, Mark B.	73
O'Keefe, M. Rush, Jr.	84
Shane, Hon. Jeff	92
Smisek, Jeffrey A	96
Whitaker, Michael G	147
Woerth, Captain Duane	158
Wytkind, Edward	180

U.S.-E.U. OPEN SKIES AGREEMENT: WITH A FOCUS ON DOT'S NPRM REGARDING ACTUAL CONTROL OF U.S. AIR CARRIERS

Wednesday, February 8, 2006

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE AVIATION, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WASHINGTON, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2167, Rayburn House Office Building, the Hon. John L. Mica [chairman of the subcommittee] presiding.

Mr. MICA. Good morning. I would like to welcome everyone this morning. We are getting accustomed to some of the new electronic and other improvements that have been made here in the committee room. This is the first time we are doing our hearing in these renovated facilities.

And we are pleased to see Jimmy Miller back. Where is Mr. Miller? Everybody wishes him a speedy recovery.

[Applause.]

Mr. MICA. It looks like he is doing well and back at it again. We do appreciate his many years of service, and it does take a toll on one's health, but we appreciate all he has done and wish him a speedy recovery.

Well, this morning, the Aviation Subcommittee's hearing is going to deal with the United States and European Union Open Skies Agreement, and also the other subject that is closely related is the Department of Transportation's Notice of a Proposed Rule Change relating to actual control dealing with aviation ownership issues.

The order of business will start with opening statements. I will start with mine and then yield to members. Then I believe we have two panels of witnesses today, and we will proceed with those witnesses.

So, again, I would like to welcome everyone this morning, and we will go ahead and get started.

I have an opening statement, and I will proceed with that and then, as I said, will yield to other members.

This morning's hearing, as I said, will focus on two issues that are both timely, and I believe very important. The Subcommittee will receive testimony, first about the Department of Transportation's Actual Control Rulemaking Proposal, and then secondly, we are going to take a look and review the status of the tentative Open Skies Agreement between the United States and the European Union.

There is some urgency to resolving these issues. Several United States airlines in recent months have announced plans to expand

and in some cases to significantly increase their international services. This reflects the increasingly common belief that greater service to foreign locations will be a very key element in the U.S. airline industry's efforts to recover from some four years of very difficult financial problems. The American aviation industry has lost, as we know, some $40 billion since 2001. It does need the freedom today to compete and succeed anywhere and everywhere.

Some of the best future opportunities for expansion will really depend on having U.S. cities link with growing markets that are across the globe. All of us in labor management, U.S. communities, and government have an important stake in the removal of barriers that will allow our airlines to pursue competitive opportunities necessary for future economic success in that global marketplace. Expanding air transportation between the United States and foreign countries can indeed hold the promise of directly improving the well being of our airline workers, can also benefit our air travelers, and certainly can also benefit American cities that have this service.

This hearing will permit us to learn more about the status of the Administration's efforts to secure a new Open Skies Agreement with the European Union. We have to ask ourselves today, however: Are the skies between Europe and America opening, or will the protective self-interests provide enough thunder and clouds to rain on that prospect?

The growing opportunities that we have seen with Open Skies Agreements has been a singular achievement for our Nation's international commercial aviation policy. It began amidst much skepticism, both in the United States and among our aviation trading partners overseas. Of course, reality has silenced some of the initial skeptics. Our Government's perseverance exhibited by administrations of both parties in pressing for accepting of Open Skies principles has produced extraordinary benefits for both passenger and for cargo airlines.

With difficulties, again that the American aviation industry has had in attracting capital and also in expanding service and providing better future opportunities, wages, and benefits for employees, Open Skies, I believe can have many positive aspects and benefits for the future.

However, one contentious issue that has emerged is the question of ownership and control of the United States airlines. Our European counterparts regard this as indeed a very critical issue. The Department's November 7th Actual Control Notice of Proposed Rulemaking is an effort to respond to that concern.

Congress has been involved in the criteria for U.S. airline and aircraft ownership for nearly eight decades now. The Air Commerce Act of 1926 included a U.S. ownership requirement. Most recently, Congress in 2003 revised the longstanding definition of a citizen in our Federal Aviation Law. That definition can be traced back to the Civil Aeronautics Act of 1938. This history tells us that Congress has been always mindful of citizenship and ownership issues. This hearing continues that tradition.

We look forward to Under Secretary Shane informing us on how the Department's Proposed New Actual Control Test will affect labor management relations in the airlines, also its effect on con-

sumer protection issues and day to day management of U.S. airlines. Also we need to look at how this affects the Department of Defense's ability to obtain the civilian airlift it so critically needs with respect to the Civil Reserve Air Fleet Program.

Similarly, we look forward to both Deputy Assistant Byerly and Under Secretary Shane advising us whether a change in the Actual Control Test language will result, what exactly will be produced as a result, or do we risk the rejection and disappointment that we experienced in June of 2004.

Our Subcommittee also will look forward to hearing the views of the second panel which is composed of airline and labor leaders from across the Country.

All of us who have a role in the formulation of the United States Government's Commercial Aviation policies realize the importance of encouraging U.S. aviation to maintain its historic preeminence. We hope that today's witnesses will provide us with some insights to how we can achieve that goal.

I am pleased now to recognize the Ranking Member of the Subcommittee, the gentleman from Illinois, Mr. Costello.

Mr. COSTELLO. Mr. Chairman, thank you, and Mr. Chairman, I do have a statement which I will enter into the record.

I first want to thank you for calling this hearing today to examine the U.S. Open Skies Agreement with a focus on DOT's NPRM regarding actual control of U.S. carriers. The Department's proposal would change longstanding policies prohibiting foreign interests from exercising actual control over United States airlines.

The question before us today is: Is it beneficial to allow foreign interests to exert a greater authority or even operational control over the operations of domestic carriers? I have serious concerns of allowing greater control, and I certainly believe that this should not be in the hands of the Department of Transportation solely, but the Congress of the United States should have the authority to issue a final opinion and to legislate on this matter.

For over 65 years, the Civil Aeronautics Board and its successor, the Department of Transportation, have required U.S. citizens to have actual control over all management decisions of U.S. airlines. Congress has repeatedly refused requests from the Department of Transportation to pass legislation to allow foreign interests to gain increased control over U.S. airlines. In fact, in 2003, Congress passed an amendment requiring the Department of Transportation to continue to prevent foreign interests from exercising actual control over U.S. airlines.

Yet, despite our strong opposition, the opposition of the Congress to any change in foreign control, the Department of Transportation proposed new standards: foreign investors would be allowed to exercise control over all commercial aspects over U.S. airline operations. This includes marketing, fleet composition, routes, branding, alliances, and pricing, just to name a few. U.S. citizens would be required to control only decisions affecting the Civil Reserve Air Fleet, transportation security, safety, and organizational documents.

I don't believe the Department of Transportation has the legal authority to interpret the statutory requirement that U.S. citizens must have actual control of a U.S. airline and limit it to a require-

ment that U.S. citizens should have control over only safety, security, and Civil Reserve Air Fleet and not over economic decisions.

If the new standard is allowed to be implemented, there could be serious consequences for the Nation's aviation system. Foreign interests could restructure the route system and fleet of U.S. airlines so that the U.S. airlines would become, in effect, a feeder for the international operations of foreign carriers. Employees of U.S. airlines would lose high quality jobs to employees of foreign carriers. The service, particularly service to small communities, the essential air service program in the United States today serving rural America in Illinois, in my District, my State, and throughout the United States could be impacted by any changes in the route system and fleet decisions.

We should not underestimate the impact of the Department of Transportation's policy proposal in how it would affect safety. I am particularly concerned that allowing foreign interests to control U.S. carriers will accelerate the outsourcing of critical safety functions, such as maintenance and flight attendants' jobs.

Paul Gretch, Director of the Office of International Aviation at DOT on November 29, 2005, stated that if the NPRM was made final, foreign investors would be able to direct the airlines to buy foreign aircraft and to have repairs exclusively done overseas. A policy that eliminates U.S. jobs and may compromise the safety of the flying public is a policy that we cannot and should not support.

I strongly support H.R. 4542, which prohibits the Department of Transportation for one year from issuing any final decision or final rule that requires the Department of Transportation within 90 days of enactment to issue a report to Congress that assesses the impact on all aspects of U.S. airlines operations including national defense, safety, security, competition for small communities, air service, and airline employees. H.R. 4542 will ensure that Congress has adequate time to review these complex issues, and I urge my colleagues to co-sponsor and support this legislation. Any major change in policy on foreign control of U.S. airlines should be approved by the Congress, not imposed by the Department of Transportation.

Mr. Chairman, I look forward to hearing from our witnesses today and yield back the balance of my time.

Mr. MICA. I thank the gentleman, and his entire statement will be made part of the record without objection.

I am pleased to recognize the distinguished gentleman from Tennessee, Mr. Duncan, former Chair of the Subcommittee.

Mr. DUNCAN. Well, thank you, Mr. Chairman. I will be very brief because both you and Mr. Costello have summarized the issue very well in your statements, and as both of you have made clear, this is not a simple issue or as simple as it might appear on the surface. I agree with Mr. Costello that this is something that both the Department of Transportation and the Congress should look at very, very closely to try to find all the different ramifications. We want to make sure that we don't lose, in some indirect ways, more American jobs to other countries. That is very, very important to all of us.

I thank you for calling this hearing, and I am glad that we are looking into this in a detailed way. We should look before we leap on this particular matter.

Thank you very much.

Mr. MICA. I thank the gentleman.

I am pleased to recognize the Ranking Member of the full Committee, Mr. Oberstar.

Mr. OBERSTAR. Thank you very much, Mr. Chairman. This is a very important hearing. I am glad you have called it. I am glad to see the room full. I welcome our witnesses and those in the audience to our newly refurbished committee hearing room, although we are missing a few elder statesmen on the wall.

We gather to examine in detail the most important aviation policy decision since deregulation was enacted by Congress in 1978. The ownership proposal before us is different, however. The difference is that it was bargained away in an international trade arena like the much bemoaned Bermuda II Agreement of the Carter years. Deregulation was enacted by the Congress.

Had this outcome been negotiated by any previous Assistant Secretary of Transportation, I would have said, you can shrug it off as the work of a duped novice, out of his league, unwittingly trading away the crown jewel of American transportation, aviation. But this was not the work of amateurs. This was the work done knowingly, carefully constructed by the most seasoned negotiator in America's aviation trade history, a man I love as a friend, Jeff Shane. He has thousands of hours of experience, Mr. Chairman, at the international aviation trade bargaining table, dealing with dozens of wily foreign competitors. He was not duped.

This decision was made with full knowledge of U.S. law, of historical precedence in the CAB and the Department of Transportation, and Department of State at the international bargaining table, and in the domestic area, and in U.S. court cases on the matter of ownership and control. And the decision was clearly made with the concurrence of the next most experienced aviation trade policy authority, the Secretary of Transportation. The NPRM before us was artfully crafted, carefully and shrewdly worded, and in the statements that I have read that Mr. Shane stoutly defended.

But its purpose is to hand over U.S. airlines at their most vulnerable moment to their international trade competitors, and that will be the force and effect of this NPRM if it becomes a rule and is implemented. But I caution that it will not go that far. If this Congress does not act, if this Congress stands meekly by and allows the stroke to be carried through, someone will challenge it in court, and the court will overturn that decision. But, if not, history will record it as Bermuda III.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

The gentleman from New Jersey, Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Mr. Chairman, for holding this very important meeting.

For over 60 years, it has been the standing policy of this Country to ensure U.S. citizens control the operation of our airlines. Requiring U.S. control is critical for a number of reasons, most importantly, for our homeland and economic security. I am very, very

concerned about the DOT's proposed rule and that it could severely undermine this critical policy. Allowing the daily operations of our airlines to be controlled by competing and potentially unfriendly foreign interests could undermine our homeland security and national defense and result in the loss of U.S. jobs.

I appreciate the pressure the Administration is under to complete an Open Skies Agreement with the European Union, and I want to see an agreement reached as well. It would benefit our airlines and our citizens traveling to Europe tremendously, but it cannot, I repeat, it cannot come at the expense of our homeland and economic security. And that is why Ranking Member Oberstar and I introduced legislation to delay the implementation of this rule. There are too many unanswered questions on what impact this rule will have on homeland security, national defense, access to air service, and American jobs.

Once again, Mr. Chairman, I would like to thank you for holding this hearing, and I look forward to hearing from our witnesses.

Mr. MICA. I thank the gentleman.

I would like to recognize the gentlelady from Texas, Ms. Johnson.

Ms. JOHNSON. Thank you very much, Mr. Chairman, and I want to commend you and Ranking Member Costello for holding this important and timely hearing.

The Administration's most recent proposal to alter policy regarding the role of foreign ownership in U.S. airlines carriers is an issue that, without question, warrants the full attention and oversight of this Committee. Despite the express consent of Congress in 2003 regarding the actual control of U.S. carriers by U.S. citizens, the Administration seems intent on circumventing the will of this body in an effort to fast track an international air service agreement.

While I wholeheartedly support the notion of our aviation industry being afforded every opportunity to excel in the global economy, I do not support the Administration's utter disregard of this Committee in achieving that objective. Any modification to laws governing foreign control of domestic carriers will have enormous implications for industry stakeholders and jobs here at home.

As a result, such changes should not be hastily promulgated through a proposed rulemaking introduced in the dead of night while we were busy over here looking at something else in emergency. The Congress should be afforded the opportunity to perform the necessary due diligence, conduct hearings, and debate any proposed changes to foreign ownership laws.

To characterize DOT's current rulemaking proposal as an artful maneuver would be an understatement. DOT asserts that in order for the U.S. air transportation industry to remain a leader in the global economy, a reinterpretation of actual control is needed to ensure access to capital afforded by global financial markets.

Under DOT's proposed rule, foreign investors would be allowed to exercise decisions over all commercial aspects of domestic carrier operations. U.S. citizens would be required to control only decisions related to safety, security, organizational documents, and the Civil Reserve Air Fleet. To think that commercial aspects have no implication on security, safety, and the CRAF Program underscores the shortsightedness of this proposal.

In closing, I would like to state for the record that I have added my name to the growing list of bipartisan opposition against this proposed rule. It is my view that DOT's proposed changes to the foreign control laws clearly exceed the agency's legal authority and conflict with the plain meaning of current law. I support the halting of DOT from issuing any final rule on actual control and hope that we, as a Committee, continue to proactively exercise our oversight obligation on this matter.

Thank you, and I yield back.

Mr. MICA. I thank the gentlelady.

Mr. Ney?

Mr. NEY. Thank you, Mr. Chairman.

I think everybody has heard today from our colleagues about how they feel about this, and it is a bipartisan feeling which I also add to. I also joined Congressman Oberstar and LoBiondo in supporting their bill which would prohibit any final decision.

Also, I think this is a little bit comparable, and it will as time goes on here in the House, be comparable to when China attempted to come over here and basically buy an oil company, and you saw the outpour here in the U.S. House. In this case, it is not China necessarily, but it is still about foreign control or American control, and I think you are going to see the same attitude on a bipartisan basis.

Again, the restrictions date back to 1926, and the Congress has reaffirmed over and over our intent to keep the control of airlines in the hands of Americans. I am concerned about the outsourcing trend all the way around, and in this case I think it is also an outsourcing issue. Critical safety operations are being outsourced. It has been reported that major air carriers are outsourcing 51 percent of their maintenance operations. Customer service operations are being outsourced.

I can tell you, personally. Usually our office books the flights here to Washington. I went ahead and called an air carrier. Booked the flight change myself. Got to Port Columbus, and then the lady said, where is your—I won't say which airline it was—but where is your employee badge? I said, why is that? She said, you are rated an employee rate to fly to Washington. Well, today, that is all you need--a private travel controversy to be on the airline's tab as an employee to Washington D.C. And she said, this is happening all the time.

Well, I found out I was calling, I think it was, India. That is where I was calling for my reservation. Nothing against India, but I think that if the airlines, and I understand one of them has now stopped this practice, if they look at it, I think they are losing money because people are not booked on proper flights.

But it is another example, again, of outsourcing. I don't know that it is to the benefits, frankly, of the airline industry. I know it is not to the benefit of the American workers. So now, we may be allowing the airlines to outsource financial control.

The Department of Transportation assures us that Americans will still be in charge of safety and security operations, but I think we have to ask ourselves: Will safety and security be next? If a foreign company is making the financial decisions, how can we be sure they are not making vital safety and security decisions?

The final question I pose, and I don't know if it can be answered or not, but I would like to ask it: Could this new rule jeopardize the Pentagon's Civil Reserve Air Fleet Program, which transported nearly a half million troops to Iraq? So, in other words, if this does come under the control or the interests, and the country doesn't agree with maybe what we are doing in a situation in a time of war, would their influence be able to say, we will have to find another way to get the troops over there? And I just throw that out there, I think, as a vital question.

I thank the Chairman for the hearing, and I look forward to the witnesses.

Mr. MICA. I thank the gentleman.

Mr. Salazar?

Mr. SALAZAR. Thank you, Mr. Chairman. Thank you for having this important hearing today.

Like many of my colleagues, I am concerned about the current state of the U.S. aviation industry and in particular how it impacts rural America. The financial instability that has been plaguing the industry means higher costs and fewer choices for consumers. It also has a direct impact on jobs in America. For this reason, I support the need to establish an Open Skies Agreement between the E.U. and the United States. However, I believe that there are some areas where we can agree on what will benefit both markets and consumers.

But I also have some serious concerns about the proposed rule relating to foreign ownership of U.S. air carriers. This is a complicated issue and with many competing interests. It is not a decision that we should make lightly or without Congressional involvement.

I look forward to hearing today's testimony and ask that the witnesses touch on the Oberstar-LoBiondo bill and their opinion on what a one year delay would or would not accomplish.

My number one priority is to determine how this will impact those living in rural America. To me, an Open Skies Agreement means nothing if rural America loses air service and cannot conveniently take advantage of the service routes.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Mr. Poe?

Mr. POE. Thank you, Mr. Chairman. Thanks for holding this hearing.

With many airlines in financial trouble, it is important for us to look at some of the causes that put them there and solutions we can help resolve here in Congress. The DOT seems to believe that interpreting the law to allow for further foreign ownership or foreign control of U.S. airlines is one of those solutions.

The reason behind this has been to encourage foreign investment in U.S. carriers and to help the U.S.-E.U. Open Skies negotiations. However, it seems to me that this is very flawed reasoning. We do not need foreign investment in U.S. air carriers. Do we really want foreign countries controlling the American skies? Do we want foreign countries replacing our American Boeing fleet, for example, with the Airbus?

I am not sure the DOT even has the unilateral authority to act without Congress' approval. And as to the Open Skies Agreement, I don't see that the rule change is providing us with further access to the E.U. It may help the U.S. get into foreign airspace, but that doesn't mean they can land anywhere. It doesn't guarantee that there will be further slots at international airports, such as Heathrow.

Also, our airlines are committed to transporting American troops. If a foreign investor, or investors, buys an American airline, who is to say they will be an ally in case of international conflict? Why are we bringing this trouble on ourselves?

So this proposed rule change appears to be bad for America, and certainly bad for our American airline industry, and certainly for American security. I look forward to seeing why we should change this rule at all.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Mr. DeFazio?

Mr. DEFAZIO. Thank you, Mr. Chairman. I see the spiffy little lights here, and the numbers go down. Except when the Chairman was talking, it started at five and stayed there. What is that?

[Laughter.]

Mr. MICA. A new technical improvement.

Mr. DEFAZIO. Okay, that is very good.

Thank you, Mr. Chairman. I am really pleased that you called this hearing. There are some very grave issues before the Committee.

The Administration has, very much as Mr. Gonzalez has so ably stated, the inherent powers of the President in a time of war, even though Congress hasn't declared war, to do virtually anything to contravene the Constitution of the United States. And this is yet another example of them using those inherent powers.

There is no legal authority for this Administration to reinterpret this law, none. If this ends up in court, they will lose. They would be best served, and we would be best served if Congress took up this issue—this is a good start today with this hearing—and debated it, and legislated in this area. Of course, they fear they might lose that debate because of some of the potential problems here that have been mentioned by many of our colleagues.

This is all about the underlying agreement, a big fight over how are you going to feed your lucrative international routes. The foreign carriers want to come here to do that. They don't want to come here to provide improved domestic service in the United States. And it would further degrade, Mr. Salazar, in response to your question, this agreement that underlies, that this dispute over ownership is embodied in, would degrade domestic service in the United States of America, no question, no question about that. Smaller cities will lose service because they don't provide big feeds to the lucrative international market.

It is about jobs. Yes, it is about jobs. Well, we need jobs in America. It is about jobs for pilots and flight attendants. It is about jobs for people who build airplanes. When you give up this control to foreign dominated airlines, we will lose American jobs. We will lose them to France because they have stronger labor laws. We will lose

them to low cost markets, Eastern European flight attendants and pilots, maybe the Chinese.

Have you thought about that? Because the WTO agreement requires reciprocity. If you enter into this agreement and these conditions with Europe, China can go to the WTO and force us to give them the same thing. Isn't that a dream? American airplanes flown by Chinese pilots controlled by the Chinese. Then maybe they can finally start making all the planes over there too. This is really unbelievably shortsighted, ideological claptrap, that is what this Administration is engaged in here.

Security issues, come on now. Oh, they say, well, don't worry. The CRAF, well, CRAF is voluntary. So if a foreign airline voluntarily opts out, what are we going to do about it when all the wide bodies are opted out of the program?

It seems to me that we have been taken to the cleaners so many times by the Europeans in protecting their markets, their manufacturers, and others, and here we are again. You know, it is like Lucy and the football. This time, it is straight up and we are just going kick it. No, it is not straight up. It is the same bad deal that we have gotten every time around.

Let us wake up. Let us serve the interests of the American traveling public, American security, American jobs, and start doing the same things that some of our competitors have done so well, which is protect high value jobs. We are not doing that, and we are not going to sacrifice them on this ideological altar.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Mr. Ehlers?

Mr. EHLERS. Thank you, Mr. Chairman.

I will do my best to avoid ideological political claptrap, but I did just want to make one brief comment. That is that I appreciate the advances this has made above and beyond the Bermuda Agreement which we have had with the U.K. which I felt was a very unfair agreement for the United States and put us at a major disadvantage. I appreciate the progress made on that score, and I will be interested in finding out more details about that and the rest of the topic.

Thank you very much. I yield back the balance of my time.

Mr. MICA. Mr. Pascrell?

Mr. PASCRELL. I would really like to know what Mr. DeFazio thinks about this.

[Laughter.]

Mr. PASCRELL. I will tell you right now.

Before I make my opening remarks, I want to preface it by saying that this proposed rule makes a controversial fundamental change to U.S. aviation policy through backdoor channels. Sound familiar? It tries to get around an open debate in Congressional jurisdiction. That is nothing new around here.

And it is so vague. It leaves so many legitimate questions and concerns about the Civil Reserve Air Fleet, that program, national defense, and homeland security. The effect on existing collective bargaining agreements, purposely left vague. In the matter of control, foreign capital would be able to dictate management's policies about labor issues.

Having said that, I want to thank the Chairman and the Ranking Member. I appreciate their decision to hold a hearing on this rule which proposes a profound change—that is the Department of Transportation's own words—to Federal aviation policy. I would submit that it is actually a radical change. Altering the foreign control requirement for U.S. airlines does not belong in rulemaking.

There is a checks and balance system, and the Constitution of the United States, gentlemen, still means something to us on this side of the table. In their attempt to complete an Open Skies Agreement, the Administration has sought to avoid an open debate in the halls of Congress. That is radical as far as the Constitution goes but not new for this Administration.

Congress has twice rejected attempts to change foreign ownership and control requirements. This time should be no different.

The proposed change is heavy handed and is vague. It leaves too many legitimate questions. Being a member of both the Transportation and Homeland Security Committees gives me a unique perspective on the vital role the U.S. airline industry plays in the homeland security and national defense of our Nation, a point which Congressman Ney has pointed out. For these reasons, unlike most other industries, airlines do not easily lend themselves to foreign control. I am concerned that the proposed rule is unclear and does not guarantee that heads of security and safety would have complete autonomy from their foreign national leadership.

It is no secret that security costs are one of the financial challenges facing our domestic industry. In fact, many additional security measures have been voluntarily undertaken by U.S. carriers. But under foreign control, commercial interests may carry more weight when it comes to cutting costs. Measured foreign investment may be beneficial for U.S. air carriers, but throwing open the flood gates to foreign control is not the answer.

At the very least, Congress should have a vigorous, robust debate on this highly sensitive matter before anything is finalized. So I applaud this Subcommittee for starting this discussion. I think we should be confident that most members, under judicious review, will conclude that this proposed rule change, as it stands, is not in the best interest of our Nation, and that will always be the motivating factor on this side of the table.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

I would like to recognize and welcome, he is looking good and chipper, Mr. Boswell.

Mr. BOSWELL. Thank you, Mr. Chairman, and it is good to be back. I don't recommend you do what I have done in the manner I did it. Just for the record or for your information, my malady was one in a million, but I got directed to the right person at the right time, and the lights didn't go out; they are coming back on bright.

I would like to make a short comment. I think everything has been said, but everybody hasn't said it yet, so I want to participate.

[Laughter.]

Mr. BOSWELL. I am very much in concert with what has been said by others. And I hope that our panel is listening carefully. I think it is extremely important, and I trust you are getting the

idea of how we feel. But this is an important hearing on the tentative Open Skies Agreement between the U.S. and E.U.

This agreement, if signed, would significantly benefit consumers, air carriers, and communities on both sides of the Atlantic. Access for U.S. air carriers into the long protected London Heathrow Airport would certainly be a welcome and beneficial change. As you know, this comprehensive agreement would replace existing bilateral agreements with individual Member States. By permitting any carrier in the U.S. to operate from any point in the U.S. to any point in the E.U. and vice versa would be a tremendous benefit to our constituents.

One aspect of this proposed agreement, which you have heard about, causes me great concern, and that relates to the Department of Transportation notice of proposed rulemaking regarding the definition of what constitutes actual control of a U.S. airline. As we know, this description has drawn the interest of several members of this body, including myself and as a co-sponsor of Congressman Oberstar's legislation, H.R. 4542, to ensure Congress exercises its oversight responsibility, our Constitutional responsibility, and prevent, in this case, the DOT from exercising so much authority in defining what constitutes actual control of an airline.

If we are to make a significant change to the foreign ownership statute, I believe, and I think it is clear we all believe Congress should be the origin of such change. We should not cede this authority to the Executive Branch, this Executive Branch or any other later Executive Branch. This issue is too important for a bureaucratic alteration to this long established provision.

As a strong supporter of our airline industry, I recognize the hardships these companies and their hardworking employees have endured in the past few years. The economic difficulties they have experienced have caused significant financial losses and a painful reduction in the workforce. The airlines' ability to attract new business capital is a constant challenge. However, I would not want to see our trading of foreign ownership for such capital infusion.

I welcome a full and complete debate on this issue and urge the DOT to refrain from acting unilaterally. I welcome the testimony and appreciate the opportunity to be here today. Although I have a conflict with the Intel Committee and I will have to leave, I will read this hearing very carefully, these minutes.

I thank you, Mr. Chairman. I appreciate your doing this.

I might just add something that is totally off the subject today, but I want us to sit down seriously and talk about what is happening to general aviation and their suggestions of what they are wanting to do to fees and so on. We need to talk about that. We really do.

I thank you for holding this hearing.

Mr. MICA. I thank the gentleman. I can assure you that in the next 12 months, we will be talking about fees, and general aviation, and funding our entire aviation system.

Mr. BOSWELL. You know, I got a new outline now with Mr. Salazar. Robin Hayes and a few other ones in here are actually using the new system every time we get a chance.

Mr. MICA. Well, we will get to that at another hearing. We do have some of that scheduled.

Mr. Holden, do you pass? Okay.

Mr. Honda, you are recognized.

Mr. HONDA. Thank you, Mr. Chairman.

I, too, welcome this opportunity to express my concern about the DOT's NPRM on the term, actual control of U.S. carriers, and to question the overall value of a proposed U.S.-E.U. Open Skies Agreement that appears to be contingent upon this NPRM.

Generally speaking, I support U.S. efforts to strike Open Skies Agreements. Agreements when properly negotiated lead to real and tangible benefits for U.S. air carriers, the workers they employ, and the communities they serve. In this era of globalization, it is important that we offer new opportunities for citizens of all countries to travel more freely and more affordably.

That said, I am surprised and perplexed that the Department, in order to secure E.U. approval for an Open Skies Agreement, has issued an NPRM that would allow foreign entities greater ownership of U.S. airlines, effectively permitting foreign control over all commercial decisions of a U.S. airline.

As recently as 2003, the Congress made its views on this issue crystal clear when it put into law the expectation that the U.S. airlines be "under the actual control of U.S. citizens." I fear that this NPRM is the latest example of a Executive Branch that misinterprets U.S. laws to its own liking. This NPRM constitutes a major change to current law, and its potential impacts on U.S. air carriers, communities, and workers are significant.

This issue demands Congressional involvement and deliberation, and accordingly, I support H.R. 4542, legislation introduced by Representatives Oberstar and LoBiondo that would require the Department of Transportation to give appropriate deference to Congress.

Once again, I thank the Subcommittee for its attention to this important issue. I look forward to today's testimony and ask that the Subcommittee's leadership continue to provide opportunities to scrutinize this NPRM and to more evaluate its potential impacts on the U.S. airline industry.

I yield the rest of my time. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

And now, waiting patiently, Ms. Norton, you are recognized.

Mr. NORTON. Thank you very much, Mr. Chairman. I particularly appreciate this hearing. I particularly appreciate it being one of your first hearings.

I wanted to say mostly a word about the legal, or shall I say the illegal, underpinnings of this proposed rulemaking. But let me just begin by indicating that I think that this Committee is very sophisticated about the new rules, the new policies that are necessary in a global economy, especially with respect to this industry.

But what is proposed here could not be more major. This is the kind of proposal that can be done only by law; this is not rulemaking. This is lawmaking, my friends. We are talking about a perpetually troubled industry and a policy that is the most radical that has been made in decades concerning that industry. We are talking about everything from the future of its employees to the future of service in this Country to the future of the industry itself.

We are told this is only the commercial side. What other side is there? I mean I am already nervous that outsourcing of maintenance has been a practice for some time in this industry even after 9/11. Is that commercial or not? Safety and security, we are told is not involved.

But I don't see how this rulemaking got past the General Council of the Agency because the proposed rule is illegal on its face. An administrative agency may interpret, must interpret the text of a statute. In order for the Country to operate, administrative agencies have very broad discretion. They do not have the discretion to rewrite a statute.

Now, Congress often is unclear. In my law classes, I teach a seminar at Georgetown called Lawmaking and Statutory Interpretation, and it is full of how Congress messes up all the time. We use ambiguous. Sometimes we use it on purpose because we couldn't get an agreement; sometimes we do it because we just don't know what we are doing. And the administrative agency, according to the Supreme Court, has great discretion when the Congress has used language that is not clear on its face, and then the administrative agency can use its expertise to, in fact, interpret the statute. All that an agency does, however, is by expressed delegation from the Congress.

Now nothing could be more express than the words, actual control. As I look at what the rule cites as the kind of control that would be left, I find this laughable. A determination whether U.S. citizens retain actual control through the airlines organizational documents, such as certificates of incorporation, shareholders' agreements, and corporate bylaws. Is that what actual control means in law or in commerce? Do you have to go to law school to understand that actual control means what it says and that Congress was explicit because it understood exactly what was being proposed.

What is being proposed here is indeed not an interpretation of the law. Administrative agencies have extremely broad latitude. I not only defend that latitude, that latitude is absolutely necessary in order for laws to be implemented. But administrative agencies do not have the authority to reinterpret the law to put new meaning on the law. This, my friends, is not rulemaking; this is lawmaking.

If you want this kind of change in law, you have got to go through the steps that every other change in law requires; you have got to get it out of this Committee. You have got to get it out of the House and the Senate on a bipartisan vote. And all I can say about that is good luck.

Thank you very much.

[Laughter.]

Mr. MICA. Thank you for the well wishes.

[Laughter.]

Mr. Carnahan?

Mr. CARNAHAN. Thank you. I, too, want to add my thanks to the Chairman and Ranking Member Costello for holding this hearing today to determine the Department of Transportation's proposed changes to rules governing actual control of U.S. air carriers.

Although I understand the need for our Country's air carriers, like other U.S. businesses, to be able to evolve into the international marketplace, the DOT's proposed rule goes too far. Despite claims to the contrary, this proposed rule does, in fact, have the potential to cause significant safety and security problems.

As Mr. DeFazio earlier said so eloquently, this NPRM also threatens U.S. jobs and is outside the scope of the Department's legal authority given by Congress. I, too, am pleased to see the loud chorus of bipartisan voices, demanding the Administration withdraw this proposal and have co-sponsored H.R. 4542, the LoBiondo-Oberstar bill.

I look forward to hearing the testimony from the witnesses here today.

Mr. MICA. I thank the gentleman. Do any other members seek recognition? If not, we will proceed with our first panel.

Our first panel consists of the Honorable Jeff Shane, Under Secretary for Policy of the United States Department of Transportation and the Honorable John Byerly, Deputy Assistant Secretary for Transportation Affairs at the U.S. Department of State.

We probably won't go just for the five minute rule. We only have these two witnesses, and we will give you a little bit of extra time. If you have lengthy statements or additional information you would like to have made part of the record, just request that through the Chair.

So, with that, let me welcome back Jeff Shane, and you are recognized.

TESTIMONY OF HON. JEFF SHANE, UNDER SECRETARY FOR POLICY, U.S. DEPARTMENT OF TRANSPORTATION; AND HON. JOHN BYERLY, DEPUTY ASSISTANT SECRETARY FOR TRANSPORTATION AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. SHANE. Thank you, Mr. Chairman. We appreciate very much your convening this hearing and having an opportunity to discuss both the proposed agreement with the European Union and, of course, the NPRM that the Department issued in November of last year.

Mr. Chairman and members of the Committee, I would beg your indulgence to start out with a disclaimer. It is a little unusual for an Executive Branch representative to testify on a pending rulemaking. We wanted to do the testimony. We wanted to engage because there is so much importance attached to the issue. But because the rulemaking is pending, I am admonished by our lawyers that what I can talk about is the genesis of the rulemaking.

What was the thinking of the Department in issuing the rule? We do not know at the end of the day what the Secretary of Transportation will decide to do with the notice of proposed rulemaking. A lot of comments have come in, as you know, and we are reviewing those comments, and there can be no foregone conclusion.

Let me just also say, just as a preliminary matter, that the suggestion that this has been negotiated with the European Union and that therefore it might be a foregone conclusion because the United States is interested in having an agreement with the European Union is, with great respect, mistaken. Secretary Mineta has been adamant in every conversation he has had with counterparts from

the European Union that, if the United States decides to make a change in its interpretation of the ownership statute that is in our Federal aviation laws, that change will be made in the interest of United States and for no other reason, and our European counterparts have fully understood that. It is not on the table for negotiation and has never been part of the negotiation.

Yes, there is a context that is provided by the fact that we have a negotiation going on, and indeed there is a relationship between what the European Union will do with respect to this agreement and what we do with respect to the rule. But we have a legal, a statutory obligation to decide the rulemaking based on statutory considerations in the best interest of the United States and for no other reason that that. So I just didn't want to leave any confusion about that.

If you forgive me, I will talk about the genesis of the rule and not make any predictions as to what will happen at the end of the process.

I think that, let me say first, Mr. Chairman, I do have a longer statement. Per request, could it be put on the record?

Mr. MICA. Without objection, the entire statement will be made part of the record.

Mr. SHANE. Thank you, sir.

And it is clear from all of the opening statements that members are pretty familiar with the rule. So I am going to try to sum up what we did fairly quickly, so that we can get to questions. I also want to spend just a moment talking about why we proposed what we proposed, lest there be any doubt about that.

What we did: Mr. Chairman, in your opening statement, you recounted the history of the ownership laws of the United States. They go back to 1926. They were redone in 1938. It is a very short provision that simply says that U.S. citizens must own or control 75 percent of voting shares of an airline company; two-thirds of the officers and directors of the company must be U.S. citizens; and the President of the company must be a U.S. citizen. That is all it says.

A couple of years after the 1938 statute was passed, the Civil Aeronautics Board added a new layer of interpretation onto that statutory requirement. The Civil Aeronautics Board said that there should be no shadow of foreign influence, words to that effect, in the running of a U.S. airline company. That wasn't part of the statute; it was an interpretation of the Civil Aeronautics Board. That interpretation, at a time when the United States was preparing for war, at a time when most U.S. airlines were subsidized either by mail rates or in other ways, was absolutely an appropriate interpretation. That interpretation informed decisions of the Civil Aeronautics Board up until the end of its existence in 1985 and continued to inform all Department of Transportation's decisions after that.

Sixty-five years later, we felt an absolute obligation, given the amount of change that has taken place in the airline industry, both here and abroad, to reexamine that interpretation and see whether or not, in fact, it continued to have relevance to today's circumstances. That was the purpose of the NPRM.

It does, it is not, forgive me, an ownership rule. The NPRM changes not one iota of the ownership statute. If we were to final-

ize the rule exactly as proposed, 75 percent of the voting shares of an airline company would still have to be owned by U.S. citizens, and two-thirds of the board would have to be U.S. citizens, and two-thirds of the officers would have to be U.S. citizens, and the President of the company would have to be a U.S. citizen.

If you take a look at any corporation, three-quarters of whose shares are owned by U.S. citizens and two-thirds of the board are U.S. citizens, you would probably say that company is controlled by U.S. citizens. It was never the intention of the Department of Transportation in proposing this rule that U.S. citizens not be in actual control of an airline company even if, in fact, the new interpretation is adopted. Actual control is what is required by the statute, and actual control is what the Department of Transportation intends be maintained.

There were references to the 2003 amendment to the law which actually incorporated the words, actual control, in the statute. The suggestion, I think implicit in some of those comments is that this was an interpretation rammed down the Department of Transportation's throat. Quite the opposite, the case was being made to the Department and indeed to the United States Congress that the Department of Transportation did not have the authority to interpret actual control, and that was because of a little idiosyncrasy in the language of the 1938 statute. We were determined, and the Congress was determined to make sure there was no doubt about the importance of actual control as part of the inquiry that the Department enters into in reviewing the fitness of airline.

So we welcomed the change when Senator Stevens, who I think was responsible for the change within the Senate, proposed it, he said, my amendment will codify the existing standard; it leaves the interpretation of effective control up to DOT. The existing standard was precisely what the CAB faced in 1940. It was a brief statute with the actual content of what actual control means left to the administrative agency.

We propose a change. The change we propose is simply to eliminate a lot of confusion about what actual control requires and to limit the inquiry, at long last, to four quite objective tests: Are U.S. citizens in control of decisions that relate to the safety of the operation? Are U.S. citizens in control of decisions that relate to the security of the operation? Are U.S. citizens in control of anything that might have to do with national defense? Are U.S. citizens, finally, in control of the bylaws, and the charter, and the certificate of incorporation, the very documents that form and organize the corporation?

The reason for that last requirement, just to be clear about it, is because, while we envision in the proposed rule the possibility of greater participation by foreign investors or foreign citizens of any stripe in the actual operation of the commercial side of an airline, the essential requirement is that U.S. citizens remain in actual control of that airline.

So if it turns out that the U.S. majority owners of the airline, the majority directors of the airline, the majority officers and the President of the airline are unhappy with the way in which this airline is, in fact, being run by the foreign citizens who are given greater scope by our rule, it is up to them, it is available to them to change

the agreement, to kick the foreigners out if necessary, to take whatever steps they believe to be in the interest of the company, in the interest of the company's shareholders, pursuant to their fiduciary responsibilities. That is not being divested in any way.

That is what actual control is. Congresswoman Norton, that is the reason why we talk about the charter, and the bylaws, and the certificate of incorporation, and other organizational documents remaining in the control of U.S. citizens. That is all we have done.

We had a report some time ago, it was a report to the Congress actually from our outgoing Inspector General, Ken Mead, who was asked about what the tests were within the Department of Transportation. You will have probably seen that letter. It said the tests are not very clear. They are not written down anywhere. It is for the Department of Transportation to know and for everybody else to find out. We thought one important reason for putting a proposed rule on the street and seeking comment was that we needed more objective tests.

There have been a lot of anomalies in the administration of this statute over the years. I thank Congressman Oberstar for his kind words. I have had a long history at the Department of Transportation, and I can speak personally about a lot of those anomalies. There are things that we are required to do by the 1940 interpretation that, quite frankly, are not in the interest of a healthy U.S. airline industry, not in the interest of competition, not in the interest of jobs, not in the interest of security, and not in the interest of safety. What we are seeking to do is to have a change in the rule that gives us greater clarity about all of that.

The last thing I will say, Mr. Chairman, and then I will close is that in 1978, the Congress enacted the Airline Deregulation Act. It was actually a Democratically-controlled Congress at that time. The act was passed by a Democratic President. The Airline Deregulation Act was embraced by subsequent administrations of both political parties. It is one of the most important economic policy decisions this Country has ever made.

And, of course, it begot deregulation of our surface transportation systems; it begot deregulation of telecommunications; it begot deregulation of energy. It is a policy forged here in the United States Congress that has been exported around the world. It has become the default economic policy for every industrialized nation today.

Our job in the Department of Transportation and the Executive Branch has to be to see where there is opportunity to continue this important success. Deregulation is a work in progress. The NPRM is not intended to be a radical change. It is intended to be another step along the road to genuine deregulation, giving the airline industry the scope to find its own economic level, to tap economic opportunities where they may be available, to get government out of the way of what the airline industry is doing.

If our regulations do not add value to the industry, then we should be pulling those regulations back. The NPRM asks the question: Does the 1940 policy that has been applied by the CAB and the Department of Transportation for the last 65 or 66 years continue to add value today? That is what we seek comment on. That is what we will be reviewing. And the determination that we make

will be in the best interest of the United States at the end of the day.

Thank you very much, Mr. Chairman. I am sorry to go over.

Mr. MICA. No problem, I thank you for your testimony.

We will now hear from the Deputy Assistant Secretary for Transportation Affairs at the State Department, John Byerly. Welcome, and you are recognized.

Mr. BYERLY. Thank you very much, Mr. Chairman, Ranking Member Costello, members of the Subcommittee. I want to express my appreciation for your inviting me to testify here today. I have submitted a detailed written statement for the record and would ask that that be entered into your record.

Mr. MICA. Without objection, the entire statement will be part of the record. Proceed.

Mr. BYERLY. Thank you very much.

As requested, I will focus my comments on the opportunity America has to achieve a comprehensive air transport agreement with the European Union, and I will try and keep my remarks to about five minutes.

I commend the Subcommittee for taking up this very important subject. Since 1991, with the support of both aisles, both sides of the aisle in Congress, we have negotiated some 70 plus Open Skies Agreements around the world. Those agreements have vastly expanded markets for U.S. airlines. They have created countless jobs, bolstered the economic well being of U.S. airports, cities, and communities. They have given U.S. manufacturers, merchants, and shippers new opportunities to transport high value cargo. And they have provided America's travelers new and better air service at affordable prices.

The agreement we have negotiated with the European Union would take our Open Skies policy to the next level. It would safeguard the Open Skies rights we have obtained in the past with 15 E.U. Member States, and it would expand Open Skies to the remaining 10 countries, including the United Kingdom. It would enhance the ability of our cargo carriers to build global networks for a global economy. It would create new opportunities for passenger airlines, including our network carriers which have increased their focus on international markets in recent years. It would establish a joint committee of European and United States representatives to foster cooperation and to seek further liberalization.

Indeed, the agreement would alter the essential structure of transatlantic air service in ways that transcend what we have accomplished bilaterally. It would set an example for the rest of the world where protectionist aviation policies still thrive.

Now my written statement describes in detail the path, a long path, to the negotiation, stretching back over a decade. Suffice it to say here that when the Member States granted the European Commission a negotiating mandate in June, 2003, we saw an opportunity. Formal negotiations began in October of that year. The U.S. delegation included representatives from State, DOT, Commerce, Defense, Justice, Homeland Security, the General Services Administration, from our airlines, airports, labor, and CRS providers, and from the committee staffs of both the House and the Senate.

America and the E.U. brought different perspectives to the negotiating table. For our part, the United States insisted that Open Skies principles must extend to the entire European Union, including unrestricted market entry, unlimited frequencies, unlimited beyond rights and market based pricing. The agreement we have negotiated meets all our Open Skies objectives for all 25 E.U. member states. The agreement we have negotiated with the E.U. would end the anachronistic limitations in the notorious Bermuda II Agreement with the United Kingdom, something we have sought to accomplish for over a quarter century. That would be an enormous achievement.

For its part, the E.U. entered the negotiations with a mandate to achieve a fairly radical open aviation area. That would require repeal of our statutory prohibition on cabotage, abrogation of the Fly America Act, and new legislation from you to allow European citizens to own and control U.S. carriers. We could not agree to those proposals.

We were, however, responsive where we could be to European requests in other areas. In particular, we agreed to authorize every European carrier to operate to the United States from any and all points in the E.U. This is a real plus for U.S. cities that might like to encourage, for example, Lufthansa to provide service from Milan or Air France from Madrid.

In addition, we sheared away unnecessary red tape in our relationship. We agreed on far reaching cooperation on airline competition matters between the Commission and the Department of Transportation. We added new provision on State aids, the environment, consumer protection, leasing, computer reservation systems, and security cooperation.

The E.U. Transport Council of members, in which each of the 25 Member States is represented, must approve signature of the agreement. The E.U. has informed us that, in making a decision, the Council will take into account DOT's rulemaking on actual control. In practical terms, that means the E.U. will await a final rule from DOT. Assuming a final rule is issued this spring, we expect the E.U. Transport Ministers to reach a decision when they meet on June 8th and 9th. If their decision is positive, we would aim to sign the agreement soon thereafter and apply it as of October 29, the start of the winter traffic season.

Mr. Chairman, members of the Committee, it was a deep honor when Secretaries Rice and Mineta asked me, gave me the opportunity and the challenge of leading the U.S. delegation in these negotiations. I had the advantage of the deep expertise and commitment of colleagues from throughout the U.S. Government and U.S. industry. We have sought to keep your Subcommittee informed of our progress at each step of the way. That is important to us.

Like any product of tough and extended negotiation, the agreement is not perfect. It contains elements of compromise. However, I am convinced, and I hope that you will agree that this agreement more than meets fundamental American objectives of securing our existing Open Skies rights, of expanding Open Skies to all of the European Union, and of establishing a template of opening markets, encouraging vigorous airline competition, and forging close aviation cooperation. With this agreement, we and Europe can send

a message to all the world that the days of protectionist bilateral agreements are drawing to a close, and that open markets and airline competition represent the future. I urge you to support this historic endeavor.

Thank you. I look forward to your questions.

Mr. MICA. Thank you. We will go right into questions, and I have a couple.

Mr. Byerly, you just mentioned in your testimony that, and I was always under the understanding that the change in the rule on the control issue or definition was not a part of the Open Skies Agreement, that is correct?

Mr. BYERLY. Yes, it is absolutely correct.

Mr. MICA. But you did testify, however, that the legal counsel is awaiting that change, and if we don't make that change, it will trigger a rejection, is that correct?

Mr. BYERLY. We will have to see what the Transport Council, that is the Transport Ministers of the 25 E.U. Member States and Transport Commissioner Barrot would decide when they meet. But from the European perspective, if I could just comment on how they see it. We don't have to agree but how they see it.

They seek an agreement that, from their perspective, has balance. When they opened the negotiations, they sought to achieve a balance, to rectify an imbalance they see. It is not a view we accept, but the view they take is they are denied by our law any opportunity to do operations within the United States, our cabotage laws. We were clear. We are not changing those. You wouldn't endorse it; the Administration doesn't endorse it.

They pointed to the opportunity that U.S. carriers have today with respect to 15 Member States and what this agreement would have with respect to every Member States to operate without limitation between E.U. Member States. Our carriers would have the legal right to operate from the United Kingdom to France, from Germany to Italy, from Slovenia to Spain. The European carriers can't do that in what they see as a somewhat equivalent market, the United States. We said, sorry, it is not in the cards.

What we said we could listen to was their concern about obtaining access in some other way. We looked at that opportunity, and we made the decision that Jeff Shane has just described. The decision on the control rules, the ownership rules for U.S. carriers have to be ones we make on their own merits. They are not items for negotiation.

For that reason, they are going to look at what the balance in opportunities that may be a sort of light surrogate for actual access to the U.S. domestic market, that is, greater cooperation and participation in the management decisions of U.S. carriers. So they are very interested in this. Before they make their decision on whether the agreement in the context of the aviation relation, our laws, their laws, represents a balance.

But the decision is ours. We are under no obligation to produce any change in our regulations or in our laws.

Mr. MICA. There is legislation, as you know, pending before Congress or being proposed that would block implementation of the rule or delay that process for a year. If that passes, would you pre-

dict that Open Skies would be dead for a year or until some action is taken?

Mr. BYERLY. Mr. Chairman, I think it would be dead for a year, and an opportunity, a unique opportunity we have right now to achieve what we have been trying to achieve for so long with respect to 10 additional countries, including the United Kingdom. The opportunity to get rid of Bermuda II, an agreement we should not have signed in the first place, I agree with those who made that comment. We can get rid of it now.

Will that opportunity be here in a year? There is a tremendous worry I have that it won't be. Times change, especially in this volatile industry. The alignment of forces may be very different in 12 months time. It is a real concern and something I would urge you to ponder very carefully as you look at the legislative proposals before you.

Mr. MICA. One of the concerns that has been raised, now most industries, almost all the industries in the United States are free to foreign investments. There may be some restrictions here and there. The aviation industry is one of sort of the last remaining protected industries.

One of the concerns, and you heard it expressed—Mr. Ney and some others expressed it—Mr. Shane, was their concern about the ability to fulfill obligations for military use in a difficult situation with a Civil Reserve Air Fleet. That is a distinction that is different than, say, the automobile industry or the widget industry. How do you respond? How is that going to be affected, and is this something that should be of concern?

Mr. SHANE. It would be the first question that Secretary Mineta asked about what would happen if, in fact, we proposed a rule like this and then adopted something along these lines? The first agency that we actually discussed this proposal with was the Department of Defense.

Some may remember that a few years ago we were talking about a different proposal, a proposal to the Congress which would have been to raise the 25 percent ceiling on the maximum amount of foreign owned shares in a U.S. airline to 49 percent. We did not do a very good job prior to bringing that proposal to the Congress of consulting with the Department of Defense, and it ended up delaying the actual transmission to the Congress such that it was not part of the deliberations on Vision 100. We didn't want to make that mistake again. So before we even finished drafting a notice of proposed rulemaking, we were talking to the Department of Defense.

We would not have proceeded. I want everyone to understand this because it is a very serious point. We would not have proceeded with this NPRM if there had been any residual concern in DOD about the ability of U.S. airlines to fulfill their CRAF obligations. That was essential.

If I can just offer a personal footnote, I served as the Chairman of the Military Airlift Committee of the National Defense Transportation Association for seven years while I was in the private sector. The CRAF obligations have been a very important part of what I worked on personally for a long time. So nothing in this rule was intended to leave any of that to chance.

Mr. MICA. Thank you.

Just one quick last question of my interest is I have read that with this rule change, probably the Open Skies Agreement would move forward, but I have also heard some comments that it might be necessary to make some legislative changes to implement Open Skies or as a result of Open Skies. Do either of you know of anything that would need to come before the Congress as far as legislative or Federal law changes that you would anticipate changes being made or needed?

Mr. BYERLY. No, sir, no changes would be needed.

Mr. MICA. Okay, okay. Anything, Mr. Shane?

Mr. SHANE. No, Mr. Chairman, none that I am aware of. I think we are required to deposit the agreement with the Congress under, is it the CASE Act? Yes. But it doesn't require action on the part of the Congress.

Mr. MICA. All right.

Mr. Costello?

Mr. COSTELLO. Mr. Chairman, thank you.

Mr. Shane, let me ask you, is there any indication that there would be foreign investors investing in U.S. airlines other than foreign airlines?

Mr. SHANE. I don't have any basis for offering you a very clear answer on that. Airlines in the United States, they have unique opportunities in the air transport business. They are, I think, as efficient as they have become, particularly with the restructuring that has been going on, probably attractive investments, attractive investments for investors of any stripe. So, yes, I think airlines might well be expected to invest from overseas, but I wouldn't limit necessarily the expectation to airline investors.

Mr. COSTELLO. And what would be the motivation for foreign carries to invest in a U.S. airline?

Mr. SHANE. Since we established the Open Skies policy in 1992, we have discovered that both U.S. and foreign airlines have turned the alliance phenomenon into a very important new competitive tool globally. In fact, it has reshaped the quality of competition in international aviation, providing far more seamless opportunities for marketing and for carrying passengers and freight.

The most important, my guess is the most important opportunity that a foreign airline might see in investing in a U.S. carrier would be a way of solidifying an alliance that is delivering economic benefit to both parties.

Mr. COSTELLO. In what types of economic decisions would a foreign investor be able to participate if this rule was in place today?

Mr. SHANE. If we finalize the rule as it was proposed, then foreign investors, again depending upon what agreement they had with the U.S. owners and the people that are in control of the airline, they would be able to make the commercial decisions that define the shape of the product, the quality of the product, the routes that are flown, all of the commercial decisions that an airline makes every day.

Mr. COSTELLO. So they would be able to, if not control, have a large voice in the routes, frequency, service, all of those decisions, code-sharing?

Mr. SHANE. That was the proposal, yes, sir.

Mr. COSTELLO. We are going to hear in the next panel from the President of Continental. In his testimony, if you are around, you will hear it, but in his written testimony, he says that Continental opposes the Department of Transportation's proposal because it unlawfully places actual control of U.S. airlines in foreign hands. How would you respond to that?

Mr. SHANE. It doesn't. If we adopt the proposal exactly as we put it into the NPRM, control, actual control would remain in U.S. hands. That is the intention of the proposal. The reason we are deliberating right now over those comments is to take views, like those from Continental and others, into account.

Mr. COSTELLO. In your discussions with the E.U., was there ever a representation by you or the Department of Transportation, specifically on November 15th, that a foreign minority shareowner could have the ability to determine an airline's commercial decisions by virtue of a super majority? In other words, couldn't what you would call a minority foreign investor or a foreign air carrier, couldn't they, in fact, negotiate for a larger share in the say-so of the operation of that U.S. airline?

Mr. SHANE. Yes, if they were going to enjoy that ability, they would almost certainly have to have a super majority voting opportunity. They would have to negotiate, again, with the majority owners.

Mr. COSTELLO. So they would be able to come to the table and negotiate all of those decisions, and it would require, if in fact they were successful in negotiation, it would require a super majority to either overturn or not do what the foreign investor or foreign carrier wanted, is that correct?

Mr. SHANE. That would be the nature of the agreement under those circumstances, yes, sir.

Mr. COSTELLO. Let me ask you, is there a downside? In your judgement, for both of you gentlemen, is there a downside to this rule to either U.S. workers, to U.S. airlines, to safety issues, outsourcing? Of course, outsourcing takes place today on maintenance, but is there a downside at all?

Mr. SHANE. Again, Congressman, forgive me, but let me just talk about what we thought when we put it on paper as a proposal. We did not think there was any downside. We thought there were upsides on every one of those fronts. Again, the intention is that security, and safety, and defense related be in the hands exclusively of U.S. citizens as they are today.

Mr. COSTELLO. Now that you have heard from members of Congress and from others in the industry about their concerns, about the loss of jobs, about the outsourcing of maintenance, about safety issues, and all of the things that you have heard in opening statements and comments here, does that make you go back and think, well, maybe we didn't consider these issues, or do you still firmly believe that there is no downside?

Mr. SHANE. We have considered all of those issues, and we continue to consider them. I want to really underscore that. I don't want anyone to think that there is any foregone conclusion in this proceeding.

But these will be U.S. airlines by any definition, if we were to adopt the rule as proposed. They would continue to be owned, in

keeping with the statute. They would continue to operate under U.S. law. The FAA would continue to regulate them. U.S. labor laws would apply. There is nothing in the rule that would have any impact on the shape of the workforce within an airline. That couldn't change today.

Mr. COSTELLO. You said that U.S. labor laws would apply.

Mr. SHANE. Yes.

Mr. COSTELLO. It was represented to me about a union contract that is in place today that would continue to be in place if, in fact, the rule was adopted tomorrow. That contract would continue to exist?

Mr. SHANE. Certainly. The contract is with the management of the airline. The management of the airline would remain in place. Two-thirds of the managers are U.S. citizens.

Mr. COSTELLO. And the managers of the airline, certainly by negotiating a super majority from a foreign investor or foreign carrier, would give that foreign investor or foreign carrier a large say-so in the operation of the airline, including union contracts that exist today or that would expire and have to be renegotiated, is that correct?

Mr. SHANE. Sure. Yes, they would be participating in management.

Mr. COSTELLO. Also, recognizing from the standpoint of the labor force, from the flight attendants to the pilots to the mechanics and so on, they have to believe, or isn't it reasonable to assume that labor in other countries where we may attract foreign investors, a foreign carrier in particular, is much cheaper in those countries than the union contracts call for today in the United States? Isn't it reasonable for them to assume that if it is cheaper to get labor from a foreign carrier who now has a large voice, if not total control over the operation of the U.S. airline, isn't it reasonable to assume that they are going to bring in the cheap labor?

Mr. SHANE. Number one, it is not self-evident that the labor is cheaper in other places, especially if you are talking about Europe. Second, U.S. airlines are still required to comply with FAA regulations in terms of having U.S. airmen, U.S. licensed crews on board. None of that would change by virtue of anything that we are doing in the NPRM, even if it were finalized.

So it is not at all clear to me, sitting here now—again, we will take all of these comments very seriously—but not at all clear to me that there would be any change in the labor picture as a result of anything we are doing in the NPRM.

Mr. COSTELLO. Mr. Chairman, I have other questions, but I will come back, hopefully, for another round.

Mr. MICA. Mr. LoBiondo?

Mr LOBIONDO. Thank you, Mr. Chairman. For our panelists, thank you very much for being here. I think this is helpful and informative.

If the DOT rule were implemented, I have a question about how it would work. For example, when an airline debates whether or not to participate in the Civil Reserve Aviation Fleet, or if there is a question about the airline's security policy, how will foreign executives be handled in that? Will they be asked to leave the board room, or is there any practical way of truly separating foreign in-

fluence from the decisionmaking process on the critical issues of safety, security, and defense?

Mr. SHANE. Well, we are getting a lot of comment on that precise question, Congressman. So we are going to be examining those comments closely. But the concept, at least, built into the proposal was yes. I don't know if I can tell you precisely what device each airline company would adopt, but a form of a Chinese wall would have to be created to ensure that those decisions that affect defense were made by U.S. citizens and not influenced in any way, shape, or form by foreigners.

This is something that we do quite commonly with a lot of other industries. Industries that have national security implications, which are nevertheless owned and controlled by foreigners have to, as a result of the Scythias Process, have to put those kinds of walls in place to ensure that certain categories of decisions are restricted to U.S. citizen participation only. This is not an unfamiliar device.

Mr LOBIONDO. But as of this time, we do not know what that process exactly is?

Mr. SHANE. We don't know what it is. And again, we will undoubtedly have a lot of comment on that in the docket. But at the end of the day, if we were to finalize the rule, we would create a requirement, not prescribe a device. It would be for the company's lawyers to ensure that it was complying with legal restrictions that apply to the airline, and that is what typically happens.

Mr LOBIONDO. I think I speak for a number of my colleagues. We will be anxiously looking to see what some of those particulars are.

Can you tell me, has the Department of Defense weighed in on this proposed rule?

Mr. SHANE. Yes, we brought the proposal to the Department of Defense long before we were even circulating it to other agencies of the government. Defense, in our minds, loomed largest as the one agency of the government likely to have the greatest concern. The Department of Defense, after considering it for a decent period of time, came back to us and said, no, as long as U.S. citizens are, in fact, controlling all the defense related decisions that the airline company can make, we have no objection to this proposal.

Mr LOBIONDO. Mr. Costello talked a little bit about some of the jobs aspect and how this would work, and I know you have stated that you have considered the impact of the rule on jobs that are currently held by Americans. So you feel, without any hesitation, that jobs currently held by Americans have no threat, no worry, no concern at all if this were implemented?

Mr. SHANE. Again, I have to go back to my disclaimer. Let me talk about the genesis of the proposal. As we put the proposal together, we did not believe that there would be a negative impact on labor of any kind. That is obviously the subject that a lot of commenters have weighed in on, and so we are obliged to take those comments seriously and deliberate about those along with other factors before we come to a conclusion.

Mr LOBIONDO. All right. I thank you very much.

I just know that I feel this way, that we sit through hearings, and we ask questions, and we get feedback on an understanding of how someone thinks something is supposed to work. And then after a period of implementation, we find out that there was some

fine print somewhere along the way that causes a different result, and I am very concerned. So I appreciate your being here, and I will continue to look at it carefully.

Mr. SHANE. If I could add one more point, Congressman LoBiondo. In his opening statement, Congressman DeFazio said that this was an example of the Executive Branch attempting to, I guess, arrogate responsibility to itself that might more properly be shared with the Congress. I really want to take issue with that, if I may. There is no doubt at the Department of Transportation that were we to finalize the rule as proposed or in any other way, and if the Congress didn't like what we did, the Congress has plenary authority to just repeal that rule. That is clear.

This is not about the separation of powers. This is not a challenge to Congressional authority. There is no doubt that Congress has the statutory, has the ability to write in a statute whatever it wants about U.S. ownership. If it wants to have 100 percent ownership by U.S. citizens, and total control, and no participation by foreign citizens in any commercial element of the running of the company, it is available to the Congress to do that. And we would be, we would stand up and salute if we got that statute.

So I just want to remove that one possible source of confusion. You have, at the end of the day, complete authority to do what it is the Congress wants to do.

Mr LOBIONDO. Well, I appreciate that. This is an issue that I don't think is on the radar screen of a lot of people across the Country, other than those really tuned into transportation and aviation issues, but the implications are so huge. I really applaud the Chairman for holding this hearing and thank you again for being here today.

Mr. MICA. I thank the gentleman.

Mr. Oberstar?

Mr. OBERSTAR. Thank you, Mr. Chairman.

Mr. Shane and Mr. Byerly, you may recall that in 1989 at an AOCI, Airport Operators Conference in Munich, I proposed to the assembled delegates, mostly Europeans, that the European community establish a single negotiating authority to deal with the United States on aviation bilaterals. They rejected it. I proposed to then Secretary Skinner that he initiate a re-creation of the Chicago Conference, which he politely demurred and said, we are not quite ready for that, but I agree with your other proposal.

Well, the Europeans have come around to it. And you spent a lot of time on this negotiation. How much time have you devoted personally, hours, weeks, months to this negotiation?

Mr. SHANE. Congressman, I graduated from the negotiating business. I have John Byerly, my esteemed colleague, who is actually doing the heavy lifting. I basically watch my computer to see what he reports.

Mr. OBERSTAR. Mr. Byerly, you have spent a lot of time on this?

Mr. BYERLY. Mr. Chairman, I guess I spend about 60 hours a week on my job. During the height of the negotiations and the height lasted for about two years, I would estimate that it was between 25 and 30 hours a week on average, and sometimes it was 100 hours a week when we had the actual negotiating rounds. This was a big deal. It was really important.

Mr. OBERSTAR. It is a big, big issue. And I hope, Mr. Chairman, we will devote more than just a couple of hours of committee hearing to examining this subject and let it weigh extensively upon the public record because it deserves to be plumbed to its depths.

Now, Mr. Shane, will the U.S.-E.U. pending agreement be rejected by the E.U. without the ownership provision in it?

Mr. SHANE. That is difficult for me to say. You heard Mr. Byerly's prediction which is that they probably would because they have decided that without a change along the lines that we have proposed, there would not be sufficient balance in the agreement. But that, you know, that is a decision that only Europeans can make.

Mr. OBERSTAR. I had a discussion yesterday with Mr. Petri and the French Minister of Transportation, Tourism, and Maritime. I don't want it to be characterized totally on the record here, but I got the very clear impression in our discussion in French that, well, this is interesting, the ownership; it is not fundamentally critical, but that an Open Skies Agreement is important to the French. I am not quite convinced they would reject it, but then they won't make that decision alone.

Who, which foreign airline, which foreign corporation, or non-U.S. financial interest will invest in a U.S. carrier without the prospect of controlling the decisions and the fate of their investment?

Mr. SHANE. You are asking me, Congressman?

Mr. OBERSTAR. Yes.

Mr. SHANE. Well, history teaches that not many airlines will invest in other airlines without some means of protecting their investment. I would redefine the criterion as not needing to control the airline but simply needing some means of protecting the investment. We saw with the investment of $400 million into Northwest Airlines that our absolute determination to enforce the 1940 policy to the hilt—

Mr. OBERSTAR. And you recall that I labored vigorously to hold that decision up, the final approval, for about a year until it was further clarified because at the time I said, KLM didn't just buy a ticket to the game; they bought a seat on the bench next to the coach to tell him what to do.

Mr. SHANE. They thought they were going to buy a seat to the game and sit next to the coach, but as it turned out—

Mr. OBERSTAR. It didn't.

Mr. SHANE.—as a result of your efforts and the Department's own enforcement mechanisms, they didn't have a seat next to the coach, and they got so frustrated in their ability to just work with their partners that, as you know, they withdrew their money. They pulled that investment out.

And so, for those of us sitting there in the Department of Transportation, we are compelled to ask ourselves: What, precisely, what public policy objective was furthered by this determination not to let them have a seat on the bench next to the coach?

If they weren't going to be controlling the airline, if they were simply going to be able to protect their investment to some extent, would we not have been better off? Would competition in the U.S. aviation market not have been enhanced to some extent if that

working capital had remained available to KLM? It is that kind of question that serves as the genesis for an NPRM like the one—

Mr. OBERSTAR. But then there is a contradiction in what you say, what you acknowledge in your description of control, and it is ownership and control in the context of this agreement.

Will the U.K. restrictions, our bilateral Bermuda II restrictions that remain—Mr. Byerly, I want to get a more clear answer from you—be immediately rescinded upon E.U. approval to the bilateral, that is, to pricing and slots at Heathrow, and gates, or will it be done over a period of years?

Mr. BYERLY. Mr. Chairman, as soon as the agreement is, or Mr. Oberstar, as soon as the agreement is—

Mr. OBERSTAR. That is all right. I don't mind.

[Laughter.]

Mr. BYERLY. Yes, sir. As soon as we apply the agreement, which we are aiming to do as of next winter season, late October, 2006, all the legal restrictions in Bermuda II will be gone. The new rules in the Open Skies Agreement with the E.U. will apply. Thus, every U.S. carrier, every U.S. carrier will have the legal right to serve Heathrow.

You have asked about the tough issue of slots, and maybe I can say a few words about that.

Mr. OBERSTAR. Sure.

Mr. BYERLY. Because I know it is an issue of contention and an important issue. During the negotiations, we talked about the issue of slot limitations, not only at Heathrow but generally at a number of European airports. They haven't done what this Administration, past administrations, and Congress have done, which is to encourage the building of airports sufficient to meet current needs and future needs. We have language in the agreement that allows us to discuss limits on infrastructure and how they affect the exercise of rights under the agreement.

We did not, however, seek in the negotiations to acquire a special carveout for U.S. carriers to give them free slots at Heathrow, and I would like to explain why. Such carveouts would be inconsistent with E.U. legislation. More important, from our perspective, they would be inconsistent with established international norms for allocating slots. These are norms we insist upon with other countries. To have demanded free slots for U.S. carriers would have meant expropriating slots from other carriers at Heathrow or any other airport—

Mr. OBERSTAR. But—

Mr. BYERLY.—and would have set a very dangerous precedent.

Mr. OBERSTAR. I understand what you are saying, Mr. Byerly, but let me interrupt there. We are not talking about free slots. In the past, you will recall in our negotiations on Open Skies Agreements in which you participated and Mr. Shane participated, when JFK was a slot-controlled airport and O'Hare, much more a slot-controlled airport than it is today, U.S. carriers had to give up slots which foreign carriers could then buy.

But they were required, our carriers were required to give up slots so the foreign carriers could have access to those airports. United and American giving up slots at O'Hare, in some propor-

tionate fashion given their presence at O'Hare, so that under our bilaterals, foreign carriers could have access to O'Hare.

So it is not a matter of free. They were required to buy. Our carriers then had to find some other way to replace those slots so they could continue to serve out of those airports.

Mr. BYERLY. Mr. Chairman, I think that is certainly an accurate description of the application of the high density rule as it applied at Kennedy and at O'Hare when it is applicable. It isn't, to my understanding, it is no longer applicable there.

The problem with telling the British or the European Union, as a requirement in this agreement, you are going to have to cough up slots. You are going to have to take them from somewhere. You can't just create slots out of thin air. You are going to have to take them from someone and give them to U.S. carriers.

Let us take the example, what if the Japanese—

Mr. OBERSTAR. Okay, go ahead.

Mr. BYERLY. What if the Japanese said to the United States, we are going to take slots from FedEx, from United, Northwest. We think they have too many. We are going to give those slots to the Chinese. Maybe there will be some compensation involved, because we want to reach an agreement with the Chinese which, in fact, they do.

I think I can assure you that we would jump to the ramparts in the blink of an eye to defend our carriers from such an onslaught. We should not create such a precedence of saying that slots will be expropriated from other carriers, whether they are British or third country, in order to supply our needs.

What is important is there is a slot market at Heathrow. Slots can be bought. They can be leased at Heathrow. They are available. They don't come cheap. It may take hard work to get exactly the time you want, but they are available.

In this connection, I would point to a story in The Financial Times from last November, that story, and I will quote from it, says, "The deals for slots that occurred in the last few months before the story was written in November undermine claims from some U.S. carriers that it is virtually impossible to acquire slots at Heathrow." This is coming from a British journalist.

They reported, for example, that Emirates has recently acquired slots from BMI, the former British Midlands, to allow it to start a fifth daily service at Heathrow. Jet Airways, the successful new Indian carrier, it has acquired slots, I think from United and Air France to start service to Heathrow from both Delhi and Mumbai. Qantas of Australia, Etihad Airlines of Abu Dhabi, they have been able to expand or start service at Heathrow by acquiring slots on the market.

That is the opportunity that will exist for U.S. carriers if we do this agreement. If we don't do this agreement, they can't do it at all. They are out of the ball game totally.

Mr. OBERSTAR. I understand. Mr. Chairman, I know I have run over the time, but this is key to the agreement here, to the larger agreement.

If you are really suggesting that we magnanimously agree to some lesser deal on slots and let U.S. carriers wait some period of time until the Brits are ready, good and ready to give us slots,

without access to Heathrow. Heathrow is half of the U.S.-European financial market in aviation. That is a $28 billion, $30 billion market. Heathrow not only is half of that market but is the access point to the rest of it. Without access to slots in some effective way, this agreement is not worth much.

Thank you, Mr. Chairman.

Mr. MICA. Well, thank you.

Let me yield now to Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman.

I commented earlier I was pleased that you are superceding the Bermuda Agreement, but there is obviously still some work to be done on that part.

I have a general question. Because the Open Skies Agreement includes framework for closer cooperation on competition issues, can you explain how the agreement would impact the current international airline agreements, such as the Star, one world, and SkyTeam alliances. I am not sure which of you would like to answer that.

Mr. BYERLY. Mr. Chairman, there would be no immediate effect on those alliances at all. What we have had in the past is ad hoc, case by case, sporadic cooperation, consultation between, on the one hand, the Department of Transportation which functions as a competition authority in looking at alliances, and on the other hand, the Competition Directorate of the European Commission as well as national competition authorities. So when AABA was under consideration at various points in history, their proposed alliance, both sides looked at it, and there was some informal dialogue. That is not a really satisfactory solution.

What this agreement does, and it was a proposal from both sides, is it structures more regular, detailed, focused conversation, dialogue between the two sides on how to approach airline competition issues. By listening and talking, we can learn things, and maybe, through that process, will decrease the costs to airlines of duplicative remedies. We will see some light in what the Europeans do or vice versa in what we do, and we can approach each other in a more cooperative way on these airline competition issues.

Let me just state for the record very clearly, there is nothing in this agreement that affects the Sherman Act, that affects in any way the legislative standards under which the Department of Transportation or any other U.S. agency addresses competition issues. This is to get a good discussion going between us and the European side on airline competition issues. As alliances grow, this is going to become more important. That, we think, has real value in this agreement.

Mr. EHLERS. Just following that up then, and perhaps this should go to Mr. Shane since he was involved in that. Does the negotiation of this agreement allow you to go back and evaluate the SkyTeam antitrust immunity application, which I believe, Mr. Shane, you just recommended not go forward even though the Department of Justice had said it could? I was very surprised at your decision, and we may have time to question that. But does this now mean that can be reopened and would more likely be approved?

Mr. SHANE. I would have to answer that in the most abstract way, Congressman. First of all, our decision was consistent with

what the Department of Justice recommended. They were quite adamant that we decide the case in the way we did. There was no conflict between the Department of Transportation and the Department of Justice in this case. There had been conflicts in the past, but not on this one.

It is available to the parties, to the SkyTeam alliance, to refile their proposal for antitrust immunity if they so wish. After circumstances have changed, that would be available to them, and we would be obliged to consider it in light of those changed circumstances. There is no question about that.

Mr. EHLERS. But how do you deal with it in this particular case? There is a merger on the Atlantic side, on the European side which has impacts on two United States Airlines, both of which incidentally are going through bankruptcy proceedings now. It seems to me your treatment of that basically took sides on that because I assume Air France merging with KLM means that they would continue to work with Delta and send Northwest packing into the big blue sky beyond and no chance of survival at that point. How are you going to deal with that and not just that specific case? I am very concerned about that one because in view of what we have developed here.

But are you going to then let decisions made by other countries such as the E.U. allowing Air France and KLM to merge which has a very negative on one U.S. airline and a good effect on another one? How are you going to fairly adjudicate that on this end if we are going to deny them the opportunity to join that partnership?

Mr. SHANE. Well, we haven't, I think we haven't tried to decide any cases in the abstract before there is an agreement. Clearly, if there is an agreement with the European Union, we will have some new correspondence with the E.U. Commission in Brussels with the competition authorities there. I think you will have some more coherence in terms of the way both the United States and the European Union apply their respective competition laws.

In the context of SkyTeam and Wings, we still have an immunized alliance between Northwest and KLM; we still have an immunized alliance between Delta and Air France. Those two alliances continue to exist.

What was being asked for in the proceeding to which you are referring is that we allow those two alliances, in effect, to merge and get antitrust immunity for that additional merger. The reason, if I can just refer back to that case briefly, that we came out the way we did, and it is all spelled out very clearly in the final order, is that the statute made us do it. The statute is very clear about the importance of demonstrating benefits from the additional immunity.

We granted code-sharing authority to both alliances, which we felt, and which we felt their own proposals supported, delivered 90, 95 percent of the benefits that they were seeking to get from antitrust immunity. And the way the statute is written, it makes it awfully difficult for the Department of Transportation to immunize an agreement from the operation of an antitrust laws when so many of the benefits that that agreement would produce are available without immunization from the antitrust laws. It is all about trying to maintain some semblance of competition across the Atlantic.

I am sorry to go on about that, but I just wanted to see if I could clarify to some extent what the rationale of the Department was and to suggest that it is not, by any means, a pronouncement about the future of alliances in the transatlantic market or how we would apply our authority, competition rules in the U.S. and Europe after they were in agreement with the European Union.

Mr. EHLERS. Well, thank you very much. I am just very concerned about this decision because, as I recall, all the previous decisions have been in the opposite direction in dealing with this problem. And suddenly, we have two airlines in bankruptcy, U.S. airlines in bankruptcy, and the decision is very likely to kill one of them. That strikes me as being a very poor approach to take.

Thank you. I yield back, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Ms. Johnson?

Ms. JOHNSON. Thank you very much, Mr. Chairman.

I have listened very intently to the responses, and what I would like to know is what laws that you review before going into this negotiation to arrive at the potential change? Would you review the laws?

Mr. SHANE. You are talking about the potential change in the interpretation of the foreign—

Ms. JOHNSON. Yes.

Mr. SHANE. We looked very hard at the statute, and we looked at all of the precedence that has come down to us from the earliest days of the CAB down to the Department of Transportation when it took over the CAB's functions. And we examined the number, I would call them, of anomalies of difficult decisions we have had to make because of the application of those old interpretations, forcing the Department to put applicants through a real wringer, in many cases with no particular benefit that anybody would cite as being of interest to the United States.

You will hear later on, I believe, from Hawaiian Airlines who just came through what we call a continuing fitness investigation. They had to restructure themselves with new investment. They used some innovative financing. They used hedge funds, offshore. The strict application of those 1940 precedents that have come down to us made it very difficult to do something which we very much wanted to do, which was ensure that Hawaiian Airlines lived on to see a new day.

We finally worked our way through that, but it took many, many weeks and a great amount of expense on the part of the applicant in order to get us to that point. They had to restructure the investment in ways that—and you will hear more detail from the airline itself—probably didn't produce any net benefit to the United States in terms of any public policy objective we are trying to achieve and just drove them crazy for reasons that have to do with the technical interpretation that existed from 1940.

So there is a real obligation in an agency like ours to see whether or not we can make the regulatory framework more user friendly than it is today. That is its principal objective.

Ms. JOHNSON. And you went to the Department of Defense. Did it ever occur to you to talk to anybody on the Transportation Committee?

Mr. SHANE. Yes, we attempt to stay in pretty close touch with the Transportation Committee. We can, undoubtedly, do a better job. I understand that we were, that Transportation Committee members were not pleased, and in fact I think we have learned a lesson from that.

I will say, in feeble defense of the Department of Transportation, that members of the Transportation Committee staff were among the first to know about the rule before it was published. We came up here and spoke to both Senate and House staffers, and I met with the Chairman before the rule was published, so that we attempted to offer previous notice, but perhaps that is not as much as you were looking for.

Ms. JOHNSON. Where do you go from here? Are you going to respect what you heard today, or are you going to be full speed ahead?

Mr. SHANE. Well, both, Congresswoman. We are trying to bring ourselves to a conclusion in this proceeding. The comments were all due by January the 6th, so we have had them for a while. Staff is reviewing them. I have read them. The Secretary will be looking for recommendations from people like me.

Ms. JOHNSON. Thank you.

I have one more question before my time runs out. What, in your negotiations or discussions, came up that you would ensure that employees of the industry in the United States be protected?

Mr. SHANE. The rule doesn't really change the situation of employees in the United States. We have commercial agreements between airlines today, including agreements by U.S. airlines with foreign airlines. And some of these alliances, including some that have antitrust immunity right now, are pretty robust. To the extent that it would be available to change the ownership, I sm sorry, the workforce structure of a U.S. airlines, those opportunities, if they are available, they are available today. Nothing that we are proposing to do in this rule would change that picture in any way, shape, or form.

Ms. JOHNSON. Thank you. I will sit through the next round. I am about out of time, so I will yield, Mr. Chairman.

Mr. MICA. Mr. Poe?

Mr. POE. THANK YOU, MR. CHAIRMAN. I have a few brief questions.

Mr. Shane, do you believe that the Department of Transportation may implement this proposal without Congressional approval?

Mr. SHANE. Yes, I do, Congressman.

Mr. POE. Okay, thank you.

As I understand this proposal, it has to do with Open Skies. My concern is national security, so let me just be frank about that. The United States has Open Skies Agreements with Nigeria and Indonesia, do we not?

Mr. SHANE. Correct.

Mr. POE. And the proposal is to let countries where we have Open Skies Agreements buy American, buy into American airlines, isn't that this proposal?

Mr. SHANE. It is not about buying into in any way at all.

Mr. POE. Investing? Investing?

Mr. SHANE. No. They can invest today, Congressman. It is not about investing. It doesn't change any opportunity that they have to invest today. It is a question of—

Mr. POE. Doesn't the Department of Transportation have a travel advisory warning to Indonesia?

Mr. SHANE. Bali, yes.

Mr. POE. That is right.

Mr. BYERLY. The State Department keeps travel advisories, in fact, also for Nigeria.

Mr. POE. For both of them?

Mr. BYERLY. Yes, sir, and for many others.

Mr. POE. And would it be wise, do you think, for us to encourage or allow foreign investment into our airline industry to countries that we don't really recommend that Americans even travel to? Do you see a problem with that?

Mr. SHANE. We are not providing any greater opportunity for them to invest than they have right now, Congressman, under existing law. All we are dong is we are saying that, if they do invest and they wish to protect that investment to some extent, they are in a position to enter into agreements with management such that they can participate to some greater extent in the actual operation of the airline on a commercial basis.

Mr. POE. So you don't see a problem with—

Mr. SHANE. Except with—

Mr. POE. Let me finish. You don't see a problem with foreign investment in American airlines to areas where those countries have a travel advisory warning because of security? You don't see a problem with that?

Mr. SHANE. We have a restriction in the proposed rule that would say any decision having to do with security, or safety, or national defense would have to be made exclusively by U.S. citizens. That is the proposal, so.

Mr. POE. And if it is run by somebody that is from a foreign country, they can control the purse strings on this security department in the airline industry and then cut the funding. They can give them one person as opposed to a whole department. I mean that is just semantics to me. It seems like—

Mr. SHANE. It is not semantics.

Mr. POE. I am not through. It doesn't seem to me that that is very wise to put our security really under the oversight of some foreign investors. Now if you can explain that to me so I can understand it, I will let you talk. Go ahead.

Mr. SHANE. Thank you. I don't know how to make it clearer than to say that the security of a U.S. airline will never, ever, under our rule be under the oversight of a foreign investor, period.

Mr. POE. Even if the supervisor over that department is a foreign investor?

Mr. SHANE. If you are implying that the supervisor is actually determining the outcome of those decisions, then that airline is disqualified. It loses its ticket.

Mr. POE. And once again, you think you can implement you can implement this proposal without Congressional approval?

Mr. SHANE. Yes, sir, I think that the division of labor between the Congress and the Executive Branch is pretty clear, and we interpret the law; you write it.

Mr. POE. Well, we may have to write it so it is clearer to you. Thank you very much, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Mr. DeFazio?

Mr. DEFAZIO. Thank you, Mr. Chairman. The courts, I think, interpret the law, not the Administration.

Let us get clear what we are talking about. I remember precedent, and what is actual control, what is control. Under your definition of control, rates, routes, fleet structure, marketing, alliances, and branding could be controlled by foreign interests. Isn't that correct, because those are not in your precluded categories?

Mr. SHANE. If the majority owners of the airline who are all U.S. citizens think that that is in the best interests of shareholders, yes.

Mr. DEFAZIO. But if there is a super majority, voting majority of this foreign interest, then they would control those things?

Mr. SHANE. Yes.

Mr. DEFAZIO. Okay, they would control those things.

Now if they control those things, what if they decide that the domestic operations, and I understand your underlying agreement you are negotiating would allow international operations to be conducted for domestic airlines by foreign operators. So they just decide, well, we don't need any of those big planes flying around domestically anymore. We are going to have an all narrow body fleet here for United, or for American, or for whomever they have chosen to invest in. Now if they do that, does that fall under the CRAF exemption, national security exemption, because they are limiting the equipment to something that won't serve the CRAF needs.

Are you going to delve into the equipment decisions even though they control the equipment decisions? Are you going to oversee the equipment decisions to make sure the equipment decisions don't jeopardize national security? Are you going to oversee that?

Mr. SHANE. Well, to the extent that you are talking about a commercial decision, I mean any U.S. airline—

Mr. DEFAZIO. Yes, a commercial decision that happens to deprive us of the CRAF capabilities?

Mr. SHANE. Any U.S. airline could decide right now to take itself out of the CRAF?

Mr. DEFAZIO. Yes.

Mr. SHANE. It is a volunteer program.

Mr. DEFAZIO. That is correct. You are just saying—

Mr. SHANE. So you can have some other people talking about the commercial operations—

Mr. DEFAZIO. You are saying that foreigners won't control the decision to go into CRAF or not, but they could limit a domestic carrier so it wouldn't have the capability to participate in CRAF. I just happen to remember during the Gulf War that we had a European nation that was very reluctant to sell us a critical component of cruise missiles which we ran out of because they didn't support the war. Now this could be a real problem here. So I have got to agree with Mr. Poe.

But let us go sort of beyond that. You have agreed on the rates, routes, fleet structure, marketing, alliances, and branding, foreigners can control it.

Now Mr. Tilton says, when he looked at that in a recent speech at the U.K. Aviation Club, it would allow foreign investors in U.S. airlines to effectively control the bulk of the airlines commercial operations. Do you disagree with that?

Mr. SHANE. No.

Mr. DEFAZIO. Okay, so U.S. in name only. I don't understand. When you link these two things together, the two things you are doing together are so destructive to the potential of the domestic fleet and jobs in this country. They are extraordinary. I don't think that the ideologues who are pushing for the Open Skies have thought this through.

So, let us see. We don't see an awful lot of people flying from these podunk towns in Colorado that Mr. Salazar is concerned about. He wouldn't call them podunk; I did, but.

[Laughter.]

Mr. SALAZAR. I would appreciate if you wouldn't call them podunk as well.

Mr. DEFAZIO. Yes, yes, but I have some small towns myself that I am concerned about. And so, the foreign airline, which is now controlling the routes, decides, we really don't want to serve those markets anymore because they aren't feeding the international flights which we now fly with our planes and our crews. What would preclude that? It is a commercial decision. What would preclude that?

So is this going to enhance access to the domestic market for U.S. citizens? Is it going to improve an already truncated system with failing deregulation and bankrupt airlines? Or is it just going to benefit the high profit market? That is one question.

The second question is: Again, I really hope we hold a hearing on this underlying Open Skies Agreement because I don't understand. The formerly bankrupt U.S. airline is going to be able to get a desirable, or let us say they have already got slots.

But someone else, Continental is not going to be able to get slots, or financially viable slots at Heathrow. You are leaving that to a market-based system. They could go in and pay a billion dollars and maybe get a decent slot, but they don't have it. Okay, so that is moot. But they are just anxious to get in there so they can compete with Ryan Air and fly people from Heathrow to Milan for $32 and make money. Now what are the benefits of this much smaller aviation market for the U.S. carriers?

And then, third: You say, well, your question about wages. Well, what about the Eastern European countries that are now part of and/or accessing the E.U.? They do have much lower wage rates. They do have Open Skies Agreements. And this won't have an impact on U.S. labor?

Could you address those three points? I think they are problems that really aren't being considered by the Administration.

Mr. SHANE. In the first instance, we have the most efficient airline industry in the world, and it is the product of the decision Congress made in 1978.

Mr. DEFAZIO. They are bankrupt.

Mr. SHANE. The U.S. airline industry is a lean, mean machine. So many of the questions that we have had and so many of the comments that have come in as a result of the rulemaking seem to take the view that we are just weak, vulnerable, sitting ducks, that all these rapacious foreign airlines are going to come in and just take over the U.S. airline industry, kick all the U.S. workers out. What made this Country great was exactly the opposite. It was the strength and the entrepreneurial spirit of the American industry.

Mr. DEFAZIO. Okay, I am getting it. Why don't you move on to a more factual answer to one of the other questions because my time has expired.

Mr. SHANE. Well, the factual answer—did you want to say something?

Mr. BYERLY. Perhaps, I could address the economic value question under the U.S.-E.U. agreement which I think is what you are aiming at in the second question. Let me give you some practical examples of the value to U.S. carriers. It is not flying from Heathrow to small cities in the United States. No U.S. carrier today—

Mr. DEFAZIO. In Europe, you mean.

Mr. BYERLY. In Europe, no. Just as European carriers will have no opportunity to fly between any U.S. cities because of the cabotage laws which you support and we support. Some practical examples—

Mr. DEFAZIO. Thus far, you may reinterpret cabotage, too, in the future.

[Laughter.]

Mr. BYERLY. I promise you, not on my watch, Congressman DeFazio.

FedEx, for the first time, could connect its major operations at London Standstedt to—

Mr. DEFAZIO. I understand. There is a benefit.

Mr. BYERLY. There are lots of benefits.

Mr. DEFAZIO. Yes, we are looking, but we are talking FedEx; we are not talking passenger carriers.

Mr. BYERLY. I can give you some—

Mr. DEFAZIO. And FedEx isn't going broke.

Mr. BYERLY. Let me give you some passenger carrier examples then. For example, American Airlines and Iberia, which have had an alliance, the oneworld alliance, would be able, with this agreement, to apply for antitrust immunity and level the playing field from their perspective with the SkyTeam and Star alliances. U.S. carriers would be free for the first time in history to serve Dublin on a non-stop basis without having to do a one for one stop at Shannon. Delta Airlines, for example, estimates that this mandatory Shannon stop requirement—

Mr. DEFAZIO. Okay.

Mr. BYERLY.—costs them $5 million a year, $100 million a year to—

Mr. DEFAZIO. But, of course, this isn't going to the whole issue of who is going to be flying those international routes which, under this agreement, could be the foreign airlines flying the inter-

national routes for U.S. airlines. Where are the benefits going to accrue? Who is going to actually get those benefits? But anyway.

Mr. BYERLY. It is the market that would determine that.

Mr. DEFAZIO. Right, right.

Mr. BYERLY. Just as it is today with—

Mr. DEFAZIO. The market has served us really well recently with the number of bankrupt airlines we have—

Mr. BYERLY. That's exactly the point, Congressman. What is it about the current system that attracts into it? What is it that—

Mr. DEFAZIO. It doesn't. I would like to enter back into some sort of a regulatory scheme. Mr. Lipinski and I have discussed this for years, that this system is not going to provide us a system of universal transport which serves all size cities in America. You will be able to go to one or two airports and get a cheap ticket to go somewhere. But for people in my District, you are driving 200 miles to get to that airport or 400 miles to get to the airport. It is not working real well for the majority of the American people, but that is a discussion for another day.

Thank you, Mr. Chairman. My time is up.

Mr. MICA. Thank you.

Mr. Pascrell?

Mr. PASCRELL. Thank you, Mr. Chairman.

Mr. Shane, if the proposed rule is made final, in your estimation, would foreign investors be able to dictate the routes, frequency, classes of service, pricing, advertising, code-share partnerships of a U.S. carrier, and still not be found by the Department of Transportation to be "in actual control" in your estimation?

Mr. SHANE. In my estimation, the answer is yes, provided that the majority owners of the airline, all of whom are U.S. citizens and the managers, two-thirds of which have to be U.S. citizens, agree to allow that participation by foreign entities.

Mr. PASCRELL. So you are not equivocating, but you are putting out a condition.

Mr. SHANE. No. I am saying that U.S. citizens are still in control. And so the ability of foreign entities to enter into those kinds of arrangements will depend upon an arm's length agreement with the people that own and control the airline.

Mr. PASCRELL. Now it is my understanding, from both your oral and written reports, with representatives of the E.U. on November the 15th, that you told them a foreign minority shareholder—and correct me if I am quoting you incorrectly—could have the ability to determine an airline's commercial decisions by virtue "a super majority provision embodied in the contracts that would exist between the airline and the foreign owner or in the airline's bylaws." Would you explain that?

Mr. SHANE. We are really talking about the decisions of the sort that would be taken by the board of directors. By definition, by statute, the board of directors must have a minimum of two-thirds U.S. citizens. So, by definition, any foreign entity would be relegated to a one-third or less stake. In order for them to be able to have the sort of influence that they are looking for over certain commercial decisions, there would have to be an agreement or a revision in the bylaws of the company that established that for cer-

tain kinds of decisions, ti would take a super majority vote in order to make a decision.

Mr. PASCRELL. So regardless of the agreement, if they worked out within the contract that there are certain provisions that would permit them, even though they needed a super majority, this could be done. It is possible.

Mr. SHANE. Yes, yes it is, as long as it is limited to purely commercial decisionmaking.

Mr. PASCRELL. Then my third question is this. I have looked at the testimony of Mr. Smisek of Continental Airlines. He calls the notice of proposed rulemaking unworkable, is what he says in this. Trust me, that is what he said. This aspect of the proposed rule, assuming the heads of security of safety would have complete autonomy from their leadership, he says is unrealistic and naive.

And my question to you is this: How can you suggest that these people will function independently? That is the question. On their own leadership, independent of their own leadership, leadership that presumably decides their budgets, I would assume, the size of the staff, their annual goals, and their priorities, how in God's name are you suggesting that these people will function independently? That is my final question to you, but I would like to hear your answer.

Mr. SHANE. Well, it implicates in a way my colloquy with Mr. Poe. If the control of the budget has the effect of controlling security and safety decisions, then they aren't complying with the condition, and therefore, they would not be eligible for a license. They would be violating the actual control test as it was defined in this rule, again assuming it were made final.

We have only proposed this rule, and comments like those of Mr. Smisek and others will have to be considered. I have to say that, as you know, there are comments on both sides of the issue, both sides of the question that are in the docket. And so, it will be important for the Department to consider them all seriously.

Mr. PASCRELL. I want to take issue with some of the things in your response, but I thank you for your candidness.

I have just one quick question for you, Mr. Byerly, and it is this. Let us talk about what you consider to be this "unique opportunity." That is how you phrased it. Anything you talk about really goes back to that, that this is a unique opportunity, we shouldn't pass it by. Let us take hold of the situation. I want to know, specifically, why you think this is so unique, period?

Mr. BYERLY. Congressman, we have been trying for a quarter century to consign the Bermuda II Agreement to the history books. We have got a chance to do it right now. I can't tell you with absolute certainty that we won't have a chance to do it six months from now, or a year from now, or five years from now, or a decade from now. What I do know is we have got a chance now. I would hate to see us miss that opportunity.

Mr. PASCRELL. And you think this is the solution.

Mr. BYERLY. Yes, sir.

Mr. PASCRELL. Thank you. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

We are going into sort of a quick second round, and Mr. Oberstar has two quick questions.

Mr. OBERSTAR. Thank you, Mr. Chairman.

We are having this hearing against the backdrop of weeks and months of negotiations and trying to accomplish in a few minutes understanding of those negotiations. I want to ask either or both of you how it can be within the plain meaning of actual control to say that it means control of only safety, security, and CRAF, but does not require control of basic commercial decisions, such as cities to be served and fares to be charged?

Mr. SHANE. Again, Congressman, all I can do is refer back to the proposal because that is as far as we have gone. We have proposed this as a means of inviting the kind of comment that we are hearing today. That is what the process is, and it shouldn't be defined as more than that.

We felt that Congress, by virtue of its deregulation of the airline industry, has in effect left only a few equities to the concern of government, and those are safety, and security, and defense issues. And, therefore, that the most important equities that we should be watching out for in terms of the way in which we review the fitness of airlines, of U.S. airlines that operate within our system is to limit our concern to those aspects, those aspects which have expressly not been deregulated.

The commercial decisionmaking that is being, that would be allowed by foreign entities if the rule were finalized, would be allowed by the U.S. owners of the airline. It was the U.S. owners of the airline or the U.S. managers who remain the majority who would be allowing that to happen. It is their decision. They are making the decision. It is their actual control that facilitates the ability of foreigners to play in the commercial operations of the airline to this greater extent.

Mr. OBERSTAR. Mr. Shane, dear friend, when in reviewing the Congressional record debate of the amendment offered by Senator Stevens, there was discussion back and forth between the Department, and the Senator and Senator McCain, and the language was proposed that accurately reflects the current state of law regarding citizenship and did not have any qualifications on it. It didn't say actual control means only safety, security, and CRAF. Actual control has a body of content around it.

You recited the 65 year history of this language and then sort of said, without saying it this way, stare decisis is good for the Supreme Court for Judge Alito but not for the Department in rulemaking. Yes, Mr. Chairman, it is a quick question, but it is a long answer, and it goes to the heart of this whole discussion and this whole issue.

Does DOT have the authority, do you assume for DOT, the authority to make an interpretation of actual control that is inconsistent with the plain meaning of actual control?

Mr. SHANE. The plain meaning of actual control as it existed in 2003 was a mystery to everyone. That is what Ken Mead said to the Congress. It is not written down anywhere. There isn't anybody who can tell you what it means. It is a case by case determination.

Mr. OBERSTAR. Yes, but that case by case embodies the law.

Mr. SHANE. It is for us to know and people to find out. What Senator Stevens said, I am looking at Page S7813 of the Congressional Record.

Mr. OBERSTAR. So am I.

Mr. SHANE. My amendment will codify the existing standard. The existing standard included the ability of the CAB and/or the Department of Transportation to interpret actual control over time. It says, it leaves the interpretation of effective control, this is Senator Stevens talking, up to DOT. That is what we understood to be the case.

We were in favor of the amendment. He wanted the amendment because there was a challenge to whether or not the Department of Transportation even had the wherewithal to insist on actual control by U.S. citizens at that time. It was resolved by this amendment with the concurrence and support of the Department of Transportation. The Department of Transportation did not intend to freeze in place for all time an interpretation of the statute which was issued in 1940. That would not have been our view.

Mr. OBERSTAR. There is case, not law, but case practice on this matter, and Senator McCain said, Senator Stevens changed the term, effective control to actual control to more accurately represent the test that DOT uses in these types of reviews, understanding or intending that the interpretations of time be included the definition of actual control.

All right, I know I have gone over time. But this is not a matter that can be decided exclusively by the Executive Branch.

Mr. SHANE. Congressman Oberstar, and I mean this sincerely, I very much welcome the opportunity to continue the conversation off the record later on. I would like to tell you some stories about our effort to try to apply the 1940 standard which we would both agree readily produced cockamamy results.

Mr. OBERSTAR. We could have had these discussions well before reaching an agreement and this rather abrupt notice. I was given a call on a Tuesday night and told that the following week a decision would be made, and it came out the next morning. We never had this conversation. It could have helped you.

Mr. SHANE. Nobody in this room wishes we had more than me.

Mr. MICA. I thank the gentleman and one quick question.

Mr. DEFAZIO. Mr. Chairman, this goes sort of to the crux of Mr. Shane's argument that don't worry, that ultimately it will be the executives, U.S. executives of the airline and the U.S. owners, who will respond to any attempts by the foreign interests which have control.

My question to Mr. Shane would be: Since I believe the setting of salaries is probably commercial, who will determine the compensation of the U.S. executives and/or board of directors of directors of these airlines if the majority of commercial control has gone to a foreign interest, and might that foreign interest reward them very handsomely for allowing decisions that are not in the best interest of the Nation?

Mr. SHANE. I think we are getting into an area of speculation.

Mr. DEFAZIO. But isn't that possible? All right, here is the question. Is setting of salaries a commercial undertaking, and would that be potentially under the control of the foreign interests, yes or no? Is setting of salaries commercial?

Mr. SHANE. I actually don't know the answer to that question.

Mr. DEFAZIO. Oh, okay. Well, boy, I guess they really—

Mr. SHANE. What I do know is that we are only talking about commercial decisionmaking here. We are talking about decisions that can only be made for one purpose, and that is to make more money. The majority of the owners of the airlines have a fiduciary responsibility to shareholders.

Mr. DEFAZIO. But we hear that the United executives are getting huge bonuses because they are doing such a great job, and they are going to make money for the airline. So I think that you would, salaries do fall within that purview. Therefore, I would say that the wall we have erected here is more like the Maginot Line in France.

[Laughter.]

Mr. DEFAZIO. Thank you very much, Mr. Chairman.

Mr. MICA. I thank the gentleman. I thank the members of the Subcommittee.

Ms. Johnson, real quick?

Ms. JOHNSON. Sir, I will be as quick as I can.

Mr. Shane, it is my understanding that both in written and oral reports of your discussion with the representatives of the E.U. in November that you told them a foreign minority shareholder could have the ability to determine an airline's commercial decisions by virtue of super majority provisions embodied in contracts between the airline and its foreign owner or in the airline's bylaws. Could you explain what that meant?

Mr. SHANE. Yes, Congresswoman. If we could just imagine a board of directors that were, by necessity, two-thirds U.S. citizens because that is what the statute requires, that means the foreigners are only one-third. The foreigners want to have some say, at least a veto right over certain kinds of commercial decisions. What they would say is, look, we don't want a simple majority to be the way this board decides anything. We want to have a super majority vote. In other words, since we only have a third of the vote, we want to make sure that it takes more than two-thirds in order to make a decision.

So let us make it 80 percent. If it is an 80 percent majority requirement for any decision to be made, then the foreigners know that the decision cannot be made without their participation. The U.S. citizen majority will not be in a position to control those kinds of commercial decisions. That is what is meant by super majority voting in the context of a corporate board. And that's all I meant. It is just a device.

Ms. JOHNSON. It gives the minority the majority influence, is that correct?

Mr. SHANE. It is to provide the minority shareholders, the foreign shareholders, I am sorry, the foreign board members the ability to participate in decisions which they might be denied by virtue of a simple majority since they are only allowed to have a maximum of a one-third of members of the board.

Ms. JOHNSON. Thank you very much. Thank you, Mr. Chairman.

Mr. MICA. I thank the members of the Subcommittee. No others have any quick last questions?

Gentlemen, there are additional questions from Mr. Costello, and I have additional questions which we will submit for the record. We thank you for your participating in today's Subcommittee hearing, and we will excuse you at this time.

Mr. SHANE. Thank you, Mr. Chairman.

Mr. BYERLY. Thank you very much.

Mr. MICA. Next time I will invite you for root canal work.

[Laughter.]

Mr. MICA. The second panel that we have, I will call them and introduce them as they are being seated. Mr. Rush O'Keefe, Jr., Senior Vice President and General Counsel of FedEx; Mr. Michael Whitaker, Vice President, Alliances, International and Regulatory Affairs for United Airlines; Mr. Mark Dunkerley, President and CEO of Hawaiian Airlines; Mr. Jeffrey Smisek, President of Continental Airlines; Captain Duane Woerth, President of Air Line Pilots Association; and finally, Mr. Edward Wytkind, President of the Transportation Trades Department, AFL-CIO.

I would like to welcome all of our panelists. Some are new participants, and some have been here before. If you do have a lengthy statement or information you would like to be made part of the record, just request that through the Chair. I don't know if you have lights in front of you, but we try to limit the testimony to five minutes. So if you could summarize, we would appreciate it. I am sorry you have had to wait so long, but that is part of the Congressional hearing process.

And with those opening comments, let me first call on Mr. Rush O'Keefe, Senior Vice President and CEO for FedEx. Go ahead. You are recognized.

TESTIMONY OF M. RUSH O'KEEFE, JR., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, FEDEX; MR. MICHAEL G. WHITAKER, VICE PRESIDENT, ALLIANCES, INTERNATIONAL AND REGULATORY AFFAIRS, UNITED AIRLINES WORLD HEADQUARTERS; MR. MARK B. DUNKERLEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HAWAIIAN AIRLINES, INC.; MR. JEFFREY A. SMISEK, PRESIDENT, CONTINENTAL AIRLINES; CAPTAIN DUANE WOERTH, PRESIDENT, AIR LINE PILOTS ASSOCIATION; AND MR. EDWARD WYTKIND, PRESIDENT, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

Mr. O'KEEFE. Thank you, Mr. Chairman. If I could correct that, I am the Senior Vice President and General Counsel. Mr. Smith is still the CEO of Federal Express.

Thank you, Chairman Mica, and Ranking Member Costello, and other members of this distinguished Subcommittee. On behalf of the more than 260,000 employees and contractors of FedEx Corporation worldwide, we would like to thank you for the opportunity to testify on these important matters today. I have a longer statement that I would appreciate being made part of the record.

Mr. MICA. Without objection, the entire statement will be included in the record. Please proceed.

Mr. O'KEEFE. Thank you.

Over the years, this Subcommittee has made an invaluable contribution to U.S. international aviation policy by steadfastly supporting market opening agreements. FedEx is very grateful for that unwavering leadership which has significantly benefitted our customers, our employees, and the U.S. economy.

Please let me convey the regrets of Frederick W. Smith, the Chairman of FedEx Corporation that he could not be here today to

testify. As you know, Mr. Smith has a great passion for removing barriers to global competition and permitting the marketplace and not governments to allocate air service opportunities. Regardless of the messenger, our message today is one that is familiar to any observer of FedEx over the years. Support for opening up global trade and in particular liberalizing global air transportation services is a bedrock principle of FedEx.

The subject of this hearing is the opportunity or, perhaps more accurately, how not to miss an opportunity and to start a U.S.-E.U. open air service trade agreement is at our fingertips. The question is whether we step forward and grasp the future by embracing these opportunities now or instead stand back and gamble they might be obtained at some other date.

In November, 2005, the U.S. and E.U. negotiators announced they had reached an agreed text for a new agreement. When signed, it would provide for full Open Skies rights for U.S. and E.U. carriers, completing a network of liberalized rights among the world's largest two aviation markets. DOT, the State Department, and the European Commission negotiators should be applauded for their perseverance, creativity, and hard work in forging this agreement.

From our point of view, as a global all-cargo carrier, this agreement will provide great benefits in the form of complete and unfettered rights to fly to, between, and beyond the Member States of the E.U. Gaining Fifth Freedom rights with all European countries has been a long sought goal of FedEx. Such operational flexibility is vital to the development of a highly efficient network, permitting us to connect all points in the E.U. in order to offer the best and most cost effective services between the U.S. and Europe and beyond.

It would be a serious mistake to put the agreement on hold because delay could be fatal. Maintaining the optimal political and policy conditions required for any international aviation agreement, let alone one of this magnitude, is a gargantuan task.

Mr. Chairman, let me turn to FedEx's views on the proposed NPRM. The NPRM offers a policy which should encourage investment in U.S. carriers and create reciprocal opportunities for U.S. interests. It does so without changing existing statutory restrictions on foreign ownership which, of course, is solely within Congress' jurisdiction. We support DOT's proposal as both an important public policy advance as well as an indispensable tool to help open aviation markets through the E.U. and with other U.S. aviation partners.

This changes does not alter the fact that airlines in the U.S. and abroad will have a choice about whether to accept or reject any foreign investment. No U.S. carrier will be required to take on a new investor, and no foreign investor will be allowed to exceed the numeric limits on equity board membership or senior management participation set forth in the statute. But the NPRM will create opportunities for new ideas and new dollars to come to those carriers that may want and need them.

In our view, the NPRM respects and safeguards sensitive U.S. governmental interests. It reserves for U.S. management all decisions related to areas such as safety, security, and national defense

participation. At the same time, it gives greater flexibility in other areas and day to day operations that do not raise similar governmental concerns. The proposal limits its benefits to countries that have signed Open Skies Agreements with the U.S. and which offer reciprocal investment opportunities. We believe this is an important aspect of the Department's proposal as it creates a policy carrot for countries which have yet to embrace Open Skies and offers potential benefits beyond the transatlantic market.

We want the agreement with the E.U. to be finalized. We also want the success of Open Skies to be repeated in the fast growing markets of Asia. The FedEx network, which as hubs in places like Anchorage, Memphis, and Dallas, providing services to every U.S. address can benefit from expanding Open Skies opportunities and become an even more valuable tool for U.S. business competitiveness.

Aviation partners around the world are watching how the U.S.-E.U. Open Skies initiative progresses. To stop now, with a number of critical U.S. negotiations scheduled for 2006, will certainly send a harmful message. To withdraw the policy carrot of the NPRM would also signal an acquiescence to protectionism at a time when U.S. carriers want more and not less international opportunities.

Thank you for the opportunity to share our views today with this distinguished Subcommittee.

Mr. MICA. He had that perfectly timed. Thank you.

[Laughter.]

Mr. MICA. Mr. Michael Whitaker, Vice President, United Airline World Headquarters, welcome, and you are recognized.

Mr. WHITAKER. Mr. Chairman, members of the Committee, thank you for the opportunity to present United's view on the U.S.-E.U. air talks and the issue of foreign ownership. We have submitted written testimony, and I would ask that that be entered into the record.

Mr. MICA. Without objection.

Mr. WHITAKER. United Airlines supports the Open Skies Agreement the U.S. government negotiated with Europe. We also support the proposed rulemaking to clarify the meaning of actual control in determining the citizenship of U.S. carriers. Combined, these two initiatives are important steps in the ongoing work of deregulating the airline industry and moving it to an independent sustainable business platform. I will briefly address these two issues separately.

The U.S.-E.U. agreement is a real victory for U.S. aviation policy, and I think its importance cannot be overstated. It completes a 15 year effort to bring Open Skies to all countries of the E.U. The most significant element of this new agreement, of course, is that it will extend Open Skies to the U.K. after literally decades of efforts to liberalize that market. Currently, only two U.S. carriers are permitted to serve Heathrow, United and American. Those rights will now be available to all U.S. carriers.

And while it is true that Heathrow is a slots constrained airport, so are most major international airports outside of the U.S. Slots are available at Heathrow. In just the last few years, many airlines have gained access through acquiring slots in the market. As John Byerly mentioned this morning, Jet Airways and Emirates have

grown from virtually no service to four or five flights a day by acquiring slots in the market. Neither of these carriers received slots as a part of a government negotiation. They either received the slots pursuant to the IATA Allocation Rules or they bought them in the market.

The U.S.-E.U. agreement will also deliver many other benefits, as Mr. Byerly outlined this morning, bringing Open Skies to all 25 nations of the E.U. including important markets such as Ireland, Spain, and Greece. These are very significant market openings, and the true winners here will be the U.S. traveling public as these markets open to new service.

United also supports the proposed rulemaking to clarify DOT's interpretation of actual control in our foreign ownership statute. In fact, United would go further. We would support the complete elimination of statutory restrictions on foreign ownership of airlines, subject to a requirement of reciprocity and the normal Exxon-Florio national security safeguards. These limits on foreign ownership have been in place for nearly 80 years and may have been appropriate at a time when we were a regulated industry, but now they are merely a hindrance.

In fact, these types of restrictions have been eliminated within the E.U., much to the benefit of the European airlines. Since nationality restrictions were eliminated in Europe, we have seen mergers of Air France with KLM, Lufthansa with Swiss International Airlines. These mergers have allowed these carriers to grow in size, strength, and profitability. United and American are no longer the largest airlines in the world measured by revenue. That role is now held by Air France and Lufthansa.

DOT's proposal, obviously, does not eliminate the foreign ownership restrictions in the U.S. That is an issue for Congress to consider another day. But it is an important step in the still unfinished process of deregulating our industry and allowing it to operate in a more normal business environment.

United Airlines supports both of these initiatives, the U.S.-E.U. agreement and the proposed rulemaking because we believe they create important commercial opportunities for U.S. carriers. They also create the opportunity for the U.S. to begin to regain its role as the world's leader in aviation, a lead that we have lost in recent years.

At United, we have just completed an extensive restructuring of our company to enable us to compete in the global marketplace. In fact, almost all the U.S. major carriers have now gone through or are going through a Chapter 11 restructuring.

As an industry, we are well situated to compete, but the greatest growth opportunities are abroad. The fastest growing aviation markets are outside of the U.S., and many of these markets are more efficiently by our foreign competitors with hubs in those regions. Foreign ownership restrictions prevent U.S. carriers from acquiring or building hubs outside the United States.

As our foreign competitors merge and grow, we will be left behind if we attempt to protect U.S. carriers from competition by keeping our borders closed. We are looking for opportunities to compete more effectively in that world market, not for regulatory protection against foreign competition or foreign investment.

I thank you again for the opportunity to testify.

Mr. MICA. Thank you.

Let me recognize now Mr. Mark B. Dunkerley, President and CEO of Hawaiian Airlines.

Mr. DUNKERLEY. Good morning. Good afternoon, Mr. Chairman. Thank you for having me here today to testify. My main purpose here today is to make two points concerning the U.S. Government's application of the restriction on foreign investment in U.S. airlines, and this is from our direct experience in the last year.

The first is that the larger pool of capital that is attracted to an airline, the more its employees, its customers, its creditors, and the communities that it serves will benefit. Second, the regulatory uncertainty that exists in many regulatory processes, including the one that we are considering today, represents a serious deterrent to investors.

Now while neither of these conclusions amounts to a revelation, the application of the existing law on foreign ownership has, in our view, limited the pool of available capital to fund U.S. airlines and has made the prospect of investing in U.S. airlines that much less attractive. Though we believe that the current restrictions on foreign ownership should be changed, we also support DOT's position that clarifying the limits under the current law and broadening their interpretation is good public policy.

Hawaiian has firsthand experience regarding the applications of the restrictions on foreign ownership. Emerging from bankruptcy is often an obstacle course, and in our case there were few obstacles as high or as slippery as persuading DOT that Hawaiian Airlines was owned and controlled by U.S. citizens. A common sense review of our circumstance would have confirmed our U.S. citizenship in minutes, but the process that we were obliged to follow took five months, was fraught with uncertainty, and was unbelievably costly.

The investors who bought Hawaiian Holdings which is the parent of Hawaiian Airlines were a group of hedge funds, all based in the United States, all managed by U.S. citizens, and having no appreciable concentration of foreign funds. However, because the source of some of the capital being invested in Hawaiian was of foreign origin, we faced a daunting regulatory review.

Explaining to the sophisticated and worldly U.S. investors that having an insignificant portion of their managed funds contributed by non-U.S. citizens could lead to the revocation of our operating certificate was an event not to have been missed. They were incredulous, having not previously encountered a regulatory scheme so utterly disconnected with the nature of today's financial world nor one so seemingly capricious.

To its great credit, DOT took the opportunity presented by Hawaiian's case to both fulfill its oversight responsibilities and to provide clearer guidance to others who may follow in our footsteps. But it was a long, expensive, cumbersome, and painful process, poorly suited to encourage investment in our business.

We were required to submit to the DOT not only the financing and organizational documents associated with the airline and the group which directly controlled the company, but also the financing and organizational documents of each entity that made up the

group which purchased our holding company. This voluminous, and we would suggest largely irrelevant, information was reviewed microscopically by DOT in an attempt to determine if there was an indicia of control.

Had there been, and if that control was in the hands of a foreign entity, DOT would have found that the airline, despite being within 100 percent control of U.S. board of directors and U.S. officers, violated the restriction on foreign ownership in U.S. airlines. Our operating certificate would have been revoked, and our company liquidated with the consequent loss of jobs and service.

In the end, in order to conclude that the U.S. based and U.S. managed hedge funds which invested in Hawaiian Holdings were not foreign agents, they had to agree to a new U.S. entity controlled by the very same people who have controlled the original funds, the U.S. managers. The hedge funds received non-voting stock in the new entity while the U.S. managers held all of the voting stock. This bizarre structure satisfied the statutory requirements because the foreign interest were clearly passive. None of the new investors demonstrated any incentive or ability to exercise any control of the airline.

It is fair to say that the hedge funds involved were flummoxed as to why they had to arrange this complex structure to achieve what they had always intended, namely to make a plain vanilla investment in a publicly held company. The structure is no great thing of beauty, but at least now forewarned by our precedent and the proposed NPRM, future hedge funds interested in making an investment in Hawaiian or, for that matter, in any other U.S. airline enjoy a measure of clarity as to what they are getting themselves into.

Having been through the mill, we support any effort to streamline and demystify citizenship reviews. The NPRM issued by the Department of Transportation, which is presently pending, is a good first step and we believe should be supported.

Thank you very much for taking the time to hear our views today.

Mr. MICA. I thank you for your testimony.

I will recognize Mr. Jeffrey Smisek, President of Continental Airlines. Welcome, sir. You are recognized.

Mr. SMISEK. Thank you. Good afternoon. On behalf of my 42,000 co-workers, I appreciate the opportunity to express our opposition to the Department of Transportation's proposed rulemaking on foreign ownership and control. I also have written testimony that I have submitted, and I ask that that be made part of the record.

Mr. MICA. Without objection.

Mr. SMISEK. Thank you.

Let me start off by saying that Continental Airlines does not oppose increasing U.S. airlines' access to foreign capital. However, Continental is opposed to the Department's proposed rulemaking for three reasons. First, it is unlawful; second, it is unworkable; and third, it will not result in increased access to foreign capital.

Just a few years ago, Congress passed a statute codifying decades of DOT decisions that required U.S. citizens to not only own 75 percent of the voting stock of a U.S. airline and control two-thirds of the airline's board of directors and managing officers, but

also required that U.S. citizens have actual control of the airline. Through this statute, Congress made it clear that foreign citizens could not control a U.S. airline.

In its rush to appease its European Union counterparts, the DOT has decided to simply interpret the statute away. Simply put, DOT has no authority or discretion to interpret this law differently when Congress has already made clear that actual control of a U.S. airline must be in the hands of U.S. citizens.

This is not the case of Congress leaving the statute unclear and DOT filling the gaps with interpretation. This is the case of arrogant contempt by the DOT of the clear Congressional language. When Congress has spoken clearly, that is the end of the matter. Nonetheless, in the Alice in Wonderland world of the DOT, a statute that says U.S. citizens must have actual control of a U.S. airline has been interpreted through this NPRM to mean that foreign citizens may have actual control of a U.S. airline.

In fact, it has been widely recorded, and Mr. Shane confirmed it this morning, that the Department has promised foreign interests that when this NPRM is in place, that DOT will even allow super majority voting rules to protect and guarantee foreign domination and control of U.S. airlines and that foreign citizens will even be able to make decisions on the U.S. Civil Reserve Air Fleet or the CRAF Program as it is called, as long as the decisions are made for commercial reasons.

Second, the DOT's attempt to interpret the statute to mean that foreign interests can actually control every aspect of U.S. airlines' operations except in the areas of security, safety, CRAF, and the control of organizational documents is simply unworkable. Issues of safety and security permeate an airline and involve literally thousands of people and cannot be isolated into one U.S. citizen controlled function.

Let me give you an example. In March of 2001, a U.S. military aircraft was involved in a midair collision over the South China Sea and was forced to land in China. The crew was detained by the Chinese. The U.S. worked hard to obtain their release but believed that the Chinese would not allow a military aircraft to land in Hainan to retrieve our soldiers.

With our hub in nearby Guam, we were asked at Continental by our Government if we would take on that mission. Knowing that the mission could be dangerous for our crews, knowing that helping our Country in its time of need meant that we would have to cancel flights and inconvenience passengers while we kept a plane available, and fuel, and crews standing by, every minute of every day until the mission was executed, virtually all of or senior officers in flight operations, in-flight, maintenance, scheduling, airport operations, legal, finance, and other areas had to be involved in making the flight.

Our U.S. citizen officers and our then CEO, himself a former U.S. Navy mechanic, thought the answer was easy. Our Country needed us. We had no commercial obligation to accept the mission, but for us the commercial considerations, which by the way were 100 percent negative, were irrelevant. But make no mistake, if we had been controlled by a foreigner, that commercial decision would

have been very different, and that mission would not have been flown.

Finally, given the fatal flaws of this regulation, it will most certainly be challenged in court—I guarantee it—and the years it will take to resolve those challenges will mean that any foreign investment that might have occurred under today's rules will be postponed. And in the end, the NPRM will be thrown out, and we will have made no progress.

This leads me to one last point. The Open Skies Agreement that generated this NPRM is a triumph of form over substance. U.S. passenger carriers already have Open Skies for all intents and purposes to most locations in Europe except to London's Heathrow Airport, the single most important for business travelers in the European Union. And while the treaty would theoretically give us the right to fly to London Heathrow Airport, that right is meaningless since commercially competitive slots and facilities are not available to us at London Heathrow. The right to fly is useless without the right to land.

The U.S. government has refused to even attempt to get U.S. carriers the right to land at Heathrow because they say it is outside the bilateral. But while they are willing to go, while they are not willing to go outside the bilateral for U.S. carrier interests, they appear to be completely willing to go outside the law to appease foreign carrier interests.

We appreciate your holding this hearing, and we urge to let DOT know that if they want to change the law, they are going to have to make their case to the Congress and to the people, and not pervert a clear statute through unlawful, unworkable, and ineffectual rulemaking. Thank you.

Mr. MICA. I thank the gentleman.

Captain Duane Woerth, President of the Air Line Pilots Association, I recognize you next. Thank you.

Mr. WOERTH. Thank you, Mr. Chairman. I also have a lengthy written testimony.

Mr. MICA. Without objection, the entire statement will be made part of the record. Please proceed.

Mr. WOERTH. Thank you, Mr. Chairman.

Also, I would like to note that 100 percent of the pilots represented by the management at this table, I represent, and only Continental Management and I agreed with what they all want to do, that is to support Open Skies. We do support Open Skies. We are very saddened, quite frankly, that the European Union rejected the good faith agreement we achieved last year. We worked with our negotiators. We supported that. We worked with Secretary Mineta. And we are very upset that the deal we negotiated a year ago was shot down.

We don't think, and I was also pleased to hear the Honorable Jeffrey Shane say that there is no linkage between these negotiations. If there is no linkage, then there is no problem, and we should let the Congress deal with this matter. And certainly, the Open Skies benefits that will inure to European citizens and their airlines should be voted up by the European Union, but that is, of course, their decision.

I want to make sure this Committee understood we support Open Skies. We absolutely support Open Skies, and this has nothing to do with trying to undermine Open Skies. We want it to happen.

I also want to thank this Committee and certainly the House and Mr. Chairman for holding this hearing. It is very important that this hearing be held. And H.R. 4542, we support emphatically. As you probably know by now, we have 126 co-sponsors for that legislation and a great many are these Committee members. I want to thank all the Committee for their attention and concern about this matter.

As our colleague from Continental mentioned, the NPRM is fatally flawed from many, many respects. The notion that security and safety can be separated by a Chinese wall or Maginot Line or any other matter is just ridiculous. The way an airline works is safety and security are totally intertwined like marbled meat; there is no way to carve it out. I hope this, I know the Committee understands that. So the notion that security and safety can be carved out separately by separate citizens by some Chinese wall is dangerously naive.

Another thing we must assert here is that this issue, finally we are having it on the table. This has never been about foreign capital ever. The debate about foreign ownership or control has always been about foreign control by foreign airlines. That is the issue. I am not worried about hedge funds. I am not worried about pension funds. I am not worried about French insurance companies. I am extremely worried about foreign controlled airlines controlling U.S. airlines, particularly foreign airlines that have a high government ownership stake.

And anybody who does not think that that proposes extreme job risk for the United States citizens is not getting it at all. To those who also worry about it, I am worried about our pilots being displaced from international operations. I think that is a very real and understandable threat.

And, Mr. Chairman, ALPA has been studying this issue for over 10 years. I have all kinds of documentation that show what is going on already. The growth has been going to our European airlines. We have mostly been getting the code-share. There is a song about the gold mine and the shaft, and it kind of relates to jobs in the code-share. I would like to share that with the Committee, an in-depth analysis, and if you request that, I will certainly submit it to you.

Bottom line is there are huge job issues here. There was also a mention in the testimony, and certainly the statements by your Committee, that small communities have every reason to be worried here. As these global alliances go forward, if members of the Star Alliance, or SkyTeam, or oneworld controlled our major brands, their interest in anything that doesn't enhance their companies that they control with international markets, it is fair to that would be greatly reduced. So a lot of small communities have reason to worry, and a lot of carriers that provide fee for departure services should be worried what that would look like when it was all over.

Lastly, let me say again about the naiveness about the capital markets. The capital markets are global already. Every bank of any consequence is a total global enterprise. Most of the capital that is in the airline industry is not equity; it is debt. There is almost no equity in this industry; it is all debt. It has always been financed that way. Airbus finances all kinds of airlines. General Electric Credit Corporation may be a U.S. company, but it is a global corporation. Without GE, there wouldn't be any financing. How about Emery Air? How about Bombardia? The capital markets are globalized already.

This is not about capital. It is about foreign airline control of U.S. airlines.

Thank you, Mr. Chairman. I would like to conclude my remarks and take any questions you may have later.

Mr. MICA. Thank you.

We will hear now from the last witness on this panel. That is Mr. Edward Wytkind, President of the Transportation Trades Department, AFL-CIO. Welcome, and you are recognized, sir.

Mr. WYTKIND. Thank you, Mr. Chairman, Mr. Costello, and members of the Subcommittee for inviting Transportation Labor to offer our opinions on the NPRM before you. Let me summarize what I have submitted in detail for you.

After careful examination, we conclude the DOT's proposal is blatantly contrary to the statute, weakens the aviation industry and its workforce at the worst possible time, and denies Congress its historic role in shaping aviation policy.

We would submit that it would directly threaten the jobs and the rights of workers we represent as these employers around the world are given yet another tool to seek out the lowest common denominator in wages and benefits across the world. It would undermine workers' bargaining rights as I think the Air Line Pilots Association showed in its submitted testimony in detail. It would have an adverse impact on national defense and security. We have heard a lot of that from members of the Subcommittee. And we believe it would inspire even more outsourcing in this industry to the detriment of safety, security, and jobs.

The anger that we have heard today and that we heard leading up to this Subcommittee hearing by members of the Transportation Committee are quite warranted. We share your anger. We were not consulted either, and our view of this NPRM, in addition to all the comments made by our colleagues at Continental and by Duane Woerth, this NPRM has to be stopped. H.R. 4542, which we thank Mr. Oberstar and Mr. LoBiondo—and by the way, now we have more than half of the Subcommittee and more than half of the full Committee as co-sponsors of this legislation—we thank you for your leadership in trying to stop this NPRM before it harms the airline industry and its workforce.

We agree with the legislation in that the Administration has failed to make the case for why foreign entities should be able to control U.S. airlines. We think that DOT has not met the burden. In fact, it has made unsupported and very flawed arguments in favor of their NPRM. Let me point out that the Administration hasn't always been terribly concerned about access to capital for American airlines. After all, it is the same Administration that did

everything it could to derail assistance to the airlines after 9/11. It doled out only 16 percent of the Federal loan guaranties approved by this Committee and the Congress, and it tried unsuccessfully to block extended jobless benefits for our members.

The NPRM is plain and simple really about placating the E.U. It is about making sure that we take care of what the E.U. needs at the bargaining table instead of what America needs. America needs good jobs. It needs a strong transportation system. It doesn't need more giveaways at the bargaining table.

And I find it ridiculous that the witnesses for the Administration claim that on one hand the U.S.-E.U. is delinked from the NPRM but then to tell this Committee that the deal will die if the Oberstar-LoBiondo bill passes. I don't think that passes the laugh test.

[Laughter.]

Mr. WYTKIND. It is fairly clear that the Department's proposal runs counter to the plain meaning of the statute. I won't review that again. That has been discussed in detail. But we think it is pretty ridiculous that you can bifurcate a carrier the way that they propose: commercial aspects on one side; safety, security, CRAF, etcetera on the other side. Nobody believe that will work. I have heard nobody say it will except the two Administration witnesses.

We think it is creative interpretation of the law, and we think Congress needs to retrieve this NPRM quickly and stop the Administration from ignoring the plain meaning of the statute.

On the outsourcing issue, I want to point out a couple things. We have already seen a very troubling trend of outsourcing in the airline industry. Fifty-four percent of maintenance is performed now in outsource facilities. We think that has a very serious safety and security implication. This Committee agreed with us, and, in fact, this Committee enacted in Vision 100 a provision that requires a Transportation Security Administration in consultation with the FAA to conduct security audits of foreign repair stations.

Those security audits have been performed. Regulations have not been issued. And today we still have an old regulatory regime that doesn't deal with the real world consequences of allowing outsourcing around the world.

So why does that matter, and why is it related to the NPRM? It matters because if you allow foreign interests to control, especially foreign airlines to control decisions having to do with safety and security and all other operations of a company-FE I don't care what the witness of the Administration said-FE you can't separate the two out. So if you are going to make decisions about what aircraft you buy, who maintains your planes, whether flight attendance are going to staff the planes from the United States or from a foreign country, whether pilots are going to fly the planes, those decisions will rest in the hands of the foreign interests that control the company.

I don't think that is good for the Country, and I hope that this Congress does something about it before it is too late.

Let me just conclude by saying the following: There is no doubt that globalization has changed the airline industry forever. Our members that we represent understand that. We have done everything we can do to protect their interests.

But when you have got collective bargaining rights being potentially attacked under a scenario where foreign interest control airline companies, when you have outsourcing run amuck, when you have flight attendant and pilot jobs potentially being outsourced, and then when you have an NPRM that is so unworkable as pointed out by Continental and by many others who are members of this Committee, we think this NPRM needs to be stopped dead in its tracks, and we hope you will move the LoBiondo-Oberstar bill as quickly as possible.

Thank you very much.

Mr. POE. [Presiding] I thank all of you for being here. We will go to questions.

Mr. Costello?

Mr. COSTELLO. Thank you, Mr. Chairman.

Mr. Wytkind, let me ask you to elaborate a little bit more on outsourcing, although you covered it pretty well. There is no question, and I hope that you and everyone else understands from my opening statement and the concerns that I have expressed, that if this rule goes through that there will be more outsourcing. There is no question about that.

So I want to ask. It is interesting to me, in your testimony, you said that foreign ownership would weaken the connection between the FAA to the industry. I want you to explain a little bit about that.

And number two is to talk a little bit about your experience with the FAA's track record with regard to oversight of foreign repair stations.

Mr. WYTKIND. Well, it is interesting. We have been, I personally have been working on the FAA's grossly lacking oversight of foreign repair stations since I first came to work here in 1991 on behalf of the unions. The FAA's oversight has always been abysmal, and it has always been recognized that as you globalize the industry, you also have to figure out a way to deal with your safety and security challenges.

I think as you allow this globalization trend to continue, as you allow foreign airlines to exert control over U.S. operations and potentially make decisions about what planes you buy and where they are maintained more and more overseas, we are going to see this continued siphoning not only of good jobs, but we think that the safety and security problems that poses are significant.

The FAA openly admits that it doesn't have the resources to handle the responsibilities overseas yet. They continue to be apologist for the current regulations. And the Transportation Security Administration, which shouldn't get a pass here, was told by Congress to issue security regulations and to audit foreign based repair stations. They haven't even issued an NPRM, let alone finalize regulations or perform the audits. So it is clear to me that the FAA and the TSA have lost all control over that issue. The GAO has proven that. The DOTIG has proven that. Yet, they are just ignoring it.

Meanwhile, we have a bad NPRM like this that is going to exacerbate a problem that clearly is out of control already.

Mr. COSTELLO. Thank you.

Captain Woerth, I have got two or three questions for you in a limited time, so I would ask you to be brief. You were on the board

at Northwest when KLM had a significant ownership stake in the airline and then I believe British Airways, of course, took a significant stake in U.S. Airways. Can you tell us a little bit about your experience with respect to those two investments, foreign investments in U.S. airlines?

Mr. WOERTH. Yes. Certainly, from my experience, when ownership stake was large, there was conflict on the board. I am talking about the Northwest board and KLM. It actually became that public documents called it the Alliance from Hell, which was a real shame. It was a great alliance, but the conflict on the board, the perceived control fights were real. It entered in litigation. The litigation was resolved. At the end of the day, the solution was that Northwest decided to buy out the interest of KLM to preserve a great relationship, but they invested $400 million and it cost a billion dollars to buy out KLM.

British Airways and U.S. Airways had the same problem, conflicts on the board. At the end of the day, the board decided to buy out British Airways, again at a great profit to British Airways.

But the notion that there is no conflict on these boards when one airline is into another airline is dangerously naive. There is plenty of conflict.

Mr. COSTELLO. On the issue of my concern and the concern you have heard from many of other Committee members here today, about the concerns of U.S. workers losing jobs to those employees working for foreign carriers today and on the issue of safety, I wonder if you can elaborate just a little bit about your concerns for our U.S. workers.

Mr. WOERTH. Our main concern for U.S. workers is that, even if we are already cheaper and we are, a lot of foreign airlines, and their investors, and their governments treat the airlines as an instrument of foreign policy. And also, it is extremely expensive, for example in Europe, to lay off a European worker.

It is a very expensive proposition, three or four times more expensive and problematic even besides the politics of France or of Holland to lay off their citizens. It is very easy to lay off an American. We are used to outsourcing. So I am very concerned we will be the ones outsourced even if we are cheaper, and I think that is a big trouble for the United States.

Mr. COSTELLO. You heard the testimony from the previous panel that said, well, all of the labor contracts would stay in effect and basically everything would be fine. I want you to comment on that.

Mr. WOERTH. Well, the labor contracts would be in effect until they are amendable, and it will be in a couple years. And already the forces at work, what I showed you by these charts, that we are mostly becoming a code=share operation, and the majority of the jobs, about 60 percent now, are already swinging to Europeans even though they are more expensive. Their airlines are committed to buying aircraft and operating those aircraft with their citizens.

Mr. COSTELLO. Finally, your concerns that you expressed, and those of Mr. Wytkind as well, concerning safety. I wonder if you would elaborate a little bit.

Mr. WOERTH. Ed certainly covered it with the oversight, but in particular there are so many programs, vital programs, FOQA and ASAP that are voluntary programs, entered into by our manage-

ments with the FAA. They are not compulsory; they are voluntary. And these are not something I expect that would necessarily survive once it goes to transatlantic or transpacific ownership.

Mr. COSTELLO. Mr. Chairman, I have no further questions.

Mr. POE. Thank you.

Mr. DeFazio?

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. O'Keefe, if we could get this Open Skies Agreement without the creative new interpretation of control and the problems that we have been discussing or potential problems, would that meet the concerns of your organization? I mean are you looking at having foreign investors begin to, hopefully, shape your future?

Mr. O'KEEFE. As to your first question, I think the practical reality is that we will not have U.S.-E.U. agreement in the absence of this.

Mr. DEFAZIO. So you are saying, we are being blackmailed by the E.U. for something that was not negotiated as part of the Open Skies Agreement.

Mr. O'KEEFE. No, sir. I don't think—

Mr. DEFAZIO. Well, you said we won't get one unless we add this. I mean, they are not blackmailing us? They are just telling us we negotiated an agreement, but you can't have it unless you give us this other operative part which is ownership control?

Mr. O'KEEFE. No. I think it was explained earlier on the panel before us that from the view of the Europeans, there is not balance in the agreement. We get Open Skies or we get rights within and beyond European states; they do not get cabotage rights per the statutes of the United States. And so, the Europeans would view this as something that would bring balance to the agreement.

Mr. DEFAZIO. Yes, well, the balance with the Europeans is usually something which tremendously advantages the Europeans and/or Airbus, historically, and we have been taken to the cleaners before, but thanks for that.

Mr. Woerth, I have got to say that I am just shocked here. I mean you are saying that this could have an impact on domestic service. It could have an impact on jobs. Because the Administration witnesses denied that there would be any job impacts, and they seemed to have no concerns about domestic service and then the Civilian Reserve Air Fleet. You raised all those issues. Could you just maybe refute a few of the points they made, why you have those three concerns?

Mr. WOERTH. Well, first of all, they said that what we have been watching so far is that the growth opportunities already in the current environment are largely inuring to our foreign competitors and not us, even when we are cheaper. We have got some modest growth, but the overwhelming growth, after the German Open Skies Agreement for example, was that the lion's shares of the new flying opportunities went to Lufthansa. United had a few; Lufthansa had a great many.

And again, inside, anybody who understand European law about how expensive it is to lay off a European citizen, understand if there is a commercial decision to be made, you lay off the American which is easier to do and you keep the European. There is just no refuting that.

Mr. DEFAZIO. I raised a concern as did Mr. Poe. We have tremendous concerns about the Civilian Reserve Air Fleet. We were told, well, that is not a commercial decision. Well, I raised the specter that we may divest the now foreign-dominated American airline of its international routes, which you raised. The international routes could be flown with foreign equipment, with foreign pilots. And then, domestically, they would say, well, we just don't need these big planes anymore. That would be a commercial decision. Do you see that as a possibility?

Mr. WOERTH. Absolutely, I see that as a very real possibility.

Mr. DEFAZIO. So do you think we could get troops to the Middle East adequately in A320s or 737s?

Mr. WOERTH. Absolutely not. You have to have wide body airplanes, cargo airplanes, passenger airplanes. In the first Gulf War, where we had great international cooperation, about 99 percent of the lift, 99 percent was provided voluntarily by U.S. airlines flown by U.S. crews. Right now, all the beans, and bullets, and troops get there on commercial airplanes.

Incidentally, the CRAF hasn't been exercised recently. It has been volunteers. The U.S. airlines, and their citizens, and boards, and management employees volunteer these charters and volunteer these issues. I think it is an open question how much that would continue in different conflicts into the future.

Mr. DEFAZIO. Since you raised the issue of the boards, the Administration said that, don't worry, they are going to be U.S. citizens, and they would obviously not allow the stripping of planes, a commercial decision which would not be under their control, from the airline. They would certainly want to continue to participate in CRAF.

But when I raised the issue of whether or not the setting of their salaries and remuneration was a commercial undertaking, the Administration seemed not to know. Do you think, well, your salary, that is commercial as an airline pilot a commercial salary, right?

Mr. WOERTH. Not only that, I served on the board of directors for Northwest Airlines and was on the Stock and Compensation Committee. I think Alice in Wonderland was used here. They don't seem to understand corporate governance in America.

We can have the CEO, and the Chairman of the Board, and all these citizens could be U.S. citizens, but if there is a single serious foreign airline investor who is the big dog at the table, they will recruit; they will put forward their nominations for board of directors; they will control the board whether super majority or not; they will hire a CEO; he will hire everyone else; and he will do exactly what they want or they will fire him, and they will get somebody who will. That is the real world, not the Fantasy Island, Egghead, Ivory Tower I heard today.

[Laughter.]

Mr. DEFAZIO. Well, you know, you could be sitting up here. Thank you. That was a great answer.

[Laughter.]

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. POE. Thank you. I have a couple comments and then a couple questions.

I want to thank all of you for being here, Mr. Smisek, especially coming from Texas up here to testify. I am glad that, as a lawyer, you were here to learn some new Constitutional law from the Department of Transportation, that the Executive Branch interprets law rather than enforces it. As a judge for 22 years in Houston, trying, hearing about 25,000 criminal cases, I wish I knew that before I became a judge, that I was not supposed to be interpreting it.

[Laughter.]

Mr. POE. But be that as it may, that seems to be part of the problem that has been presented to us, that the Department of Transportation feels they can proceed without Congressional approval. I think that Congress disagrees with that, and certainly the Judiciary Branch probably will.

Can you explain in a way, can you explain the idea of having the security department of Continental, if you will, controlled by an American but yet the airline is controlled by a foreign airline, and when the conflict occurs with security, and the department of security in Continental disagrees with the control of the foreign entity, how that would play out in the real world. What would happen?

Mr. SMISEK. Sure. Actually, at Continental Airlines, the security department actually does report to me. So let us pretend that I am Indonesian. I can control the person who reports back. I can control his salary. I can control his bonus. I can control his stock options. I can control all his incentives. I can control his staff. I can control his budget. I can basically have him not blow his nose unless he talks to me. And I don't do that to him today, but if he weren't doing what I wanted him to do, I certainly could do all those things.

And if I were Indonesian, and he is in charge of security, the fact is I could make all of those judgements, and if he didn't do what I wanted him to do, I would simply replace him with someone who would. It is just the way the world works.

And I am mystified by the Administration's testimony today because it makes no sense to me. It is as if it is testimony from people who never worked ever in their lives in a corporate job.

Mr. POE. That sort of explains it. I don't have any more questions.

I want to thank everybody for being here today. We will keep the record open for this hearing for another two weeks. Additional statements can be entered from the witnesses and members of this Committee.

And so, the Subcommittee is concluded at this time.

[Whereupon, at 1:25 p.m., the subcommittee was adjourned.]

Statement of

John R. Byerly

Deputy Assistant Secretary
for Transportation Affairs
U.S. Department of State

before the

Aviation Subcommittee
of the
Transportation and Infrastructure Committee
U.S. House of Representatives

February 8, 2006

Mr. Chairman and Members of the Subcommittee:

Introduction

Thank you for inviting me to testify today on the opportunity that America has to achieve a comprehensive first-step air transport agreement with the European Community and its twenty-five member states.

Let me commend the Subcommittee for taking up this important subject. Over the past decade and a half, with support from both sides of the aisle in Congress, we have reached Open Skies agreements with over seventy countries around the globe. In a dramatic departure from the highly restrictive and regulatory accords that characterized international aviation over most of its history, those agreements have:

- vastly expanded markets for our airlines in Europe, Asia, Africa, and the Western Hemisphere;
- created countless jobs not only in our aviation, tourism, and export industries but also far beyond, in virtually every industrial and service sector;
- bolstered the vibrancy and economic well-being of U.S. airports, cities, and communities, large and small;
- provided manufacturers, merchants, and shippers new opportunities to provide their customers efficient, secure, and timely transport of high-value cargo; and
- given America's travelers new and better air service at affordable prices, ending the era when international travel was a luxury available only to the wealthy.

The comprehensive first-step liberalization agreement we have now negotiated with the European Union—an agreement we hope to sign as early as June of this year—would carry forward our country's Open Skies policy:

- It would safeguard the invaluable rights we obtained between 1992 and 2002 in bilateral Open Skies accords with fifteen of the twenty-five EU member states.
- It would expand full Open Skies rights to the remaining ten member states: the United Kingdom, Spain, Ireland, Greece, Hungary, Cyprus, Estonia, Latvia, Lithuania, and Slovenia.
- It would enlarge opportunities for our cargo carriers to build global networks for a global economy.
- It would create important new opportunities for our passenger carriers including network carriers, which have increased their focus on international markets.
- It would foster cooperation in areas as diverse as airline competition policy, aviation security, consumer protection, and environmental issues; would create a Joint Committee of U.S. and EU representatives; and would commit both sides to work toward further liberalization.
- Indeed, the agreement would alter the essential structure of transatlantic air services, increasing competition and benefiting consumers beyond what is possible through bilateral accords.

- **Finally, as a comprehensive Open Skies agreement in the world's largest aviation market, a U.S.-EU accord would set an example for the rest of the world, where narrow, protectionist aviation policies still thrive.**

The Path to Negotiations

On November 18, 2005, we completed negotiation of the full text of a comprehensive air transport agreement with the European Community and its twenty-five member states. Before turning to the substance of the agreement and a discussion of what lies ahead, it is appropriate to describe how we arrived at this juncture.

The early history, beginning over a decade ago, was one of sustained tension between the Commission and member states over competence for external aviation relations. In the early 1990's, the Commission sought to negotiate a cargo-only agreement with the United States but was thwarted by member state opposition. For our part, we seized opportunities to move ahead bilaterally with interested member states. We negotiated the first Open Skies agreement with the Netherlands at the end of the first Bush Administration and then continued that effort under Presidents Bill Clinton and George W. Bush, concluding Open Skies accords, as noted earlier, with fifteen of the EU member states by early 2002. These agreements afforded U.S. airlines unprecedented access and flexibility in their services to Europe—access that has served America's legacy carriers particularly well as the domestic market has become more challenging.

During the same period, the European Community was creating an open internal market within Europe through three stages—or "packages"—of liberalization. Notwithstanding liberalization within the EU, however, the member states refused Commission entreaties for a full mandate to negotiate an air transport agreement with the United States, authorizing it in 1996 to negotiate only so-called "soft rights," things like groundhandling and dispute settlement, but not subjects at the core of an air transport agreement, such as routes and rates. We held informal talks, but little progress was possible where our partner lacked the ability to address those core issues.

In 1998, the Commission went to the European Court of Justice (ECJ) to force the hand of the member states, challenging the legality under EU law of the seven then-existing Open Skies agreements with the United States, and of our 1977 Bermuda 2 accord with the UK. In November 2002, the ECJ issued judgments in the eight cases. It found that, although member states retained authority to negotiate bilateral agreements, certain provisions in the existing agreements were inconsistent with European law. In addition to the provisions on pricing within the European Union and on computer reservation systems, the ECJ found that the traditional article on ownership and control—the so-called "nationality clause"—violated member state obligations under EU law. After several months of internal debate, the member states granted the Commission a negotiating mandate in June 2003.

The United States saw this new mandate not as a threat but rather as an opportunity to expand Open Skies to all of the EU and, possibly, to go beyond the traditional Open Skies approach in areas of mutual interest. We also envisioned the potential to set a precedent of global significance. As Under Secretary Shane expressed it in late 2002, we saw a chance to consider how to "take liberalization to the next level" and to think seriously about "how the transatlantic market can be made more robust and competitive." We saw in the European Union, again to use Under Secretary Shane's words, "a like-minded partner on the other side of the negotiating table that represents an airline industry and an aviation market comparable to our own." We understood that success in establishing a liberal regime on the transatlantic would have a profound, positive, and irreversible effect on international civil aviation.

For this reason, at the U.S.-EU Summit in June 2003, President Bush joined his European Union counterparts in announcing the start of comprehensive air services negotiations. It was, they said, "an historic opportunity to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, and communities on both sides of the Atlantic."

<u>The Negotiating Process and Results</u>

Formal talks began in October 2003. The U.S. delegation included representatives from State, the Department of Transportation including the FAA, Commerce, Defense, Justice, Homeland Security, and the

General Services Administration. Representatives from airlines, airports, labor, and computer reservation systems were included as advisers and observers, as were interested members of relevant committee staffs from both the House and Senate. Our approach to these negotiations, as in all our air services talks, was one of inclusivity. This does not mean that we were able to please every participant all the time, but it did ensure that we had the benefit of wide-ranging expertise, and it guaranteed that decisions within the Administration took into account the full range of stakeholder views and interests.

As the talks began, each side brought a different perspective to the table. For our part, the United States focused on a handful of core objectives. First, and most important, we insisted that Open Skies principles must extend to the entire European Union, not just the fifteen Member States with which we had bilateral Open Skies agreements. From our perspective, it was important to establish a common foundation of traffic rights, including unrestricted market entry, unlimited frequencies, open route descriptions with unlimited beyond rights to every point on the globe, and market-based pricing. We also insisted upon strong, clear provisions on safety and security, the only foundation upon which we are prepared to build a commercial air services relationship, a perspective shared by our EU counterparts. I am pleased to report that the agreement we have negotiated meets these Open Skies objectives in full for all twenty-five EU member states.

In addition to Open Skies principles, I will mention three other issues that we raised during the negotiations: airport noise restrictions, labor concerns, and the Bermuda 2 agreement with the United Kingdom.

First, because of concerns about environmental restrictions at European airports, we asked that both sides affirm their commitment to the principle of the balanced approach to noise management adopted in 2001 by the Assembly of the International Civil Aviation Organization in reaction to the EU's unlawful hushkits regulation. In the negotiations, we were successful in obtaining a commitment to the balanced approach. In addition, we maintained the longstanding prohibition on taxation of fuel.

Second, we used the negotiations to raise issues important to U.S. labor. We sought clarification of EU rules addressing issues relating to so-

called flags of convenience, a concern tied in part to the expansion of the EU to twenty-five states. We also asked that the Joint Committee review after one year the effects of the new agreement on workers. And we stipulated that the provision of foreign aircraft with crew to U.S. carriers would not be permitted if it would give an unreasonable advantage to any party during a labor dispute where the inability to accommodate traffic in a market is a result of that dispute. Again, I am pleased to report that we obtained the labor-related provisions that we sought.

Finally, we noted the concerns of some U.S. stakeholders about slot limitations at European airports and sought language in the agreement to ensure that we could raise problems in the U.S.-EU Joint Committee. The agreement we negotiated contains precisely such a provision. We did not, however, insist that the European Union carve out special infrastructure advantages solely for American carriers, such as designated slots, gates, and counters at London's Heathrow Airport. Such infrastructure advantages would be inconsistent with European Union legislation and with well-established international norms for slot allocation—norms that we insist upon with other countries. To have demanded free slots for U.S. carriers would have meant expropriating slots from other carriers and would have sounded the deathknell of the negotiations. Indeed, one suspects that those who call for unlimited free slots at Heathrow are aiming precisely at the failure of these negotiations in order to preserve protectionist limits that may be good for next quarter's bottom line but are deeply injurious to broader U.S. interests, including the interests of other U.S. carriers, U.S. consumers, and our national economy.

Those protectionist limits are found in our almost thirty-year-old aviation agreement with the United Kingdom, the notorious Bermuda 2 accord. Bermuda 2 is the antithesis of Open Skies, severely limiting the number of carriers, the cities they serve, the airports they use, the other countries to which they fly, and the fares they offer. To take but one example, a cargo carrier such as Federal Express is barred from connecting London to its European hub in Paris and from serving beyond markets such as China. The agreement with the EU would end all these anachronistic limitations—something we have sought to accomplish for a quarter century. This in itself is an enormous achievement for the United States.

For its part, the European Union entered the negotiations with a mandate to achieve a radically transformed "Open Aviation Area" with the United States that would have required repeal of the U.S. statutory prohibition on cabotage, abrogation of the Fly America Act, fundamental changes in U.S. law so as to allow European nationals to own and control U.S. airlines, and a problematic commitment to the mutual recognition of each other's rules in areas such as safety and security.

Although we could not agree to these proposals, we did seek in the negotiations to listen to other European requests, to be responsive where possible, and also to use the negotiations to review some of the specific provisions in our standard Open Skies text. We made clear that we could meet the most pressing EU requirement, namely, to remedy the deficiencies under EU law identified by the European Court of Justice and, in doing so, to accommodate the EU's interest in eliminating international legal barriers to consolidation of the European airline industry. We responded with a new provision that, in effect, authorizes every European carrier to operate to the United States from any and all points in the EU. We saw such a provision as a plus for U.S. cities that might like to encourage, for example, Lufthansa to provide service from Milan, or British Airways from Frankfurt, or Air France from Madrid, especially where the carriers traditionally associated with those cities do not provide service. Moreover, the new provision is critical to the stability of the transatlantic market, eliminating fully the legal deficiencies under EU law identified by the European Court of Justice.

Beyond this provision, however, we also listened carefully and with an open mind to European suggestions in other areas. As a result, we were able, in my view, to improve upon our standard Open Skies model in a number of respects while also being responsive to EU needs. Put a different way, it takes two to tango in any negotiation, and we were happy to learn a few new steps in the process. Let me mention some examples:

- **We agreed to eliminate the longstanding requirement for formal designation of airlines, shearing away unnecessary red tape;**

- **We agreed on an Annex for far-reaching cooperation in airline competition matters between the Commission and the Department of Transportation;**
- **We added new provisions on state aids, the environment, and consumer protection;**
- **We agreed, on the basis of reciprocity, to include authorization for EU airlines to provide aircraft with crew to U.S. carriers for international operations, subject to appropriate measures to protect aviation safety and address legitimate labor interests;**
- **We negotiated new language on computer reservation systems (CRS) that is consistent with the decision by DOT in 2004 to end CRS regulation in the United States but that also guarantees national treatment to the CRS vendors of each side; and**
- **We agreed on some changes in the traditional text of our aviation security article—changes that maintain each side's fundamental right to implement measures to protect homeland security while also fostering increased cooperation with the goals of avoiding inconsistent requirements on airlines and facilitating rapid and efficient movement of passengers and cargo.**

The negotiations that began in October 2003 were among the longest, perhaps the most difficult, and certainly the most ambitious in modern U.S. air transport history. In fact, one could argue, in the history of international air transportation. An initial package we had largely worked out with the European Commission in the spring of 2004 proved unacceptable to the European Council of transport ministers. We had to work long and hard in the first nine months of 2005 to establish a basis for resuming negotiations in the fall. When we did, we discovered a renewed commitment on both sides of the Atlantic to find common ground and achieve success. Two intense rounds of talks—the first in Brussels in October and the second here in Washington in November—yielded the breakthrough I have described. We now have a fully agreed text of a U.S.-EU Air Transport Agreement and accompanying Memorandum of Consultations that clarifies certain provisions and understandings of the two sides. In advance of today's hearing, we have submitted to the Subcommittee copies of both texts, together with the Record of Negotiations signed by the delegation heads at the conclusion of our negotiations on November 18.

Next Steps

As that Joint Statement indicates, the EU Transport Council of Ministers, in which each of the twenty-five member states is represented, must approve signature of the agreement. In making a decision, the EU has informed us that it will take into account the outcome of the rulemaking process initiated by DOT to expand opportunities for foreign citizens to invest in, and participate in the management of, U.S. air carriers.

In practical terms, this means that the EU will await a final rule. If a final rule is issued this spring, we expect the EU transport ministers to reach a decision when they meet in the Transport Council on June 8-9. If their decision is positive, we would aim to sign the agreement soon thereafter and apply it as of October 29, the start of the winter traffic season.

Conclusions

It was a deep honor when Secretaries Rice and Mineta vested me with the unique opportunity and, equally, the enormous challenge of chairing the U.S. delegation in negotiations with the European Union. I had the advantage of the deep expertise and commitment of my senior DOT counterpart on the delegation, Mr. Paul Gretch, and of other colleagues from State, DOT, and other U.S. agencies, as well as the counsel of many colleagues from our airlines, airports, labor unions, and industry associations. We have sought to keep your Subcommittee informed on a timely basis of the progress—and the occasional set-backs—in the negotiations at each step of the way.

Is the agreement we have negotiated perfect? No, I cannot make that claim. Like any product of tough and extended negotiation, it contains elements of compromise. However, I am convinced and hope that you will agree that this agreement—historic by any measure—more than meets the fundamental American objectives of securing our existing Open Skies rights in Europe, expanding those rights to all of the European Union, and establishing a template of opening markets, encouraging vigorous airline competition, and forging close aviation cooperation in the future.

If we are able to move forward and sign the agreement this year, we and Europe will send a message to all the world that the days of narrow and protectionist bilateralism are drawing to a close and that open markets and airline competition represent the future of international aviation.

Again, I am deeply honored to have been given a role in this important effort and to have been asked to appear before you today. I urge you to support this historic endeavor.

Thank you.

STATEMENT OF
THE HONORABLE JERRY F. COSTELLO
AVIATION SUBCOMMITTEE HEARING ON U.S.-EU OPEN SKIES AGREEMENT:
WITH A FOCUS ON
DOT'S NPRM REGARDING ACTUAL CONTROL OF U.S. AIR CARRIERS
FEBRUARY 8, 2006

- I want to thank you, Chairman Mica, for calling today's hearing to examine the *U.S. Open Skies Agreement: with a focus on DOT's NPRM regarding actual control of U.S. air carriers.* The Department of Transportation's November 7, 2005 Notice of Proposed Rulemaking would change longstanding policies prohibiting foreign interests from exercising "actual control" over United States (U.S.) airlines.

- The question before us is whether it is beneficial to allow foreign interests to exert a greater authority, or even operational control, over the operations of domestic carriers. I have serious concerns about the effects of allowing greater control and believe we must maintain a primary role for Congress on this question.

- For the past 65 years, the Civil Aeronautics Board, and its successor DOT, have required that U.S. citizens have "actual control" over all management decisions of U.S. airlines.

- Congress has repeatedly refused DOT requests to pass legislation to allow foreign interests to gain increased control of U.S. airlines by changing statutory requirements that require U.S. citizens to own 75% of the voting stock of U.S. airlines.

- In 2003, Congress passed an amendment requiring the DOT to continue to prevent foreign interests from exercising actual control over U.S. airlines.

- Yet, despite Congress' strong opposition to any change in foreign control, under DOT's proposed new standard, foreign investors would be allowed to exercise control over all *commercial aspects* of U.S. airline operations. This includes marketing, fleet composition, routes, branding, alliances, and pricing to name just a few.

- U.S. citizens would be required to control **only** decisions affecting the Civil Reserve Air Fleet (CRAF), transportation security, safety and organizational documents.

- The Department does not have the legal authority to interpret the statutory requirement that U.S. citizens must have "actual control" of a U.S. airline and limit it to a requirement that U.S. citizens have control over only safety, security and CRAF decisions (and not over other economic decisions).

- It is inconsistent with the plain meaning of "actual control" to interpret it as only requiring control over some policies of an airline, but not control over many important decisions, such as the rates to be charged and the service to be operated.

- If the new standard is allowed to be implemented there could be serious consequences for our national aviation system.

- Foreign interests could restructure the route system and fleet of a U.S. airline so that the U.S. airline would become, in effect, a "feeder" for the international operations of a foreign carrier.

- U.S. airline employees could lose high quality job opportunities, in favor of employees of the foreign carrier.

- In addition, service and competition in markets served by the U.S. airlines, particularly service to small communities-like many in my congressional district, could be impacted by any changes in route system and fleet decision.

- Participation in the Civil Reserve Air Fleet program could also be affected if, for example, a foreign investor decided to change the fleet mix of U.S. airlines and reduce the number of large, wide-body civilian aircraft that the Department of Defense relies on to supplement its military fleet in times of national emergencies.

- We should also not underestimate the impact of the DOT's NPRM on safety. I am particularly concerned that allowing foreign interests to control U.S. carriers will accelerate the outsourcing of critical safety functions, such as maintenance and flight attendant jobs. Paul Gretch, director of the Office of International Aviation at DOT, in a presentation on November 29, 2005 at the IEA Future of Air Transport Conference, stated that if the NPRM was made final, foreign investors would be able to direct the airline to buy foreign aircraft and/or have repairs done overseas. A policy that eliminates US jobs and could compromise the safety of the flying public is something we cannot and should not advocate.

- I strongly support H.R. 4542, which prohibits DOT, for one year, from issuing any final decision or final rule on the NPRM that would change its interpretation of what constitutes "actual control" of a U.S. airline. The bill would also require the DOT, within 90 days of enactment, to issue a report to Congress that assesses the impact of the NPRM on all aspects of U.S. airlines operations, including national defense, safety, security, competition, for small communities, air service, and airline employees. H.R. 4542 will ensure that Congress has adequate time to review these very complex issues, and I urge my colleagues to support it.

- Increasing foreign control of domestic airlines has implications for national security, airline safety and security and U.S. jobs. We need to have the benefit of FAA's assessment of how the proposed rule would affect these issues. Any major change in policy on foreign control of U.S. airlines should be approved by Congress, not imposed unilaterally by DOT.

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
AVIATION SUBCOMMITTEE

U.S.-E.U. OPEN SKIES AGREEMENT: WITH FOCUS ON DOT NPRM REGARDING "ACTUAL CONTROL" OF U.S. CARRIERS

FEBRUARY 8, 2006

TESTIMONY OF
MARK B. DUNKERLEY

Mr. Chairman, my name is Mark Dunkerley. I am President and Chief Executive Officer of Hawaiian Airlines, Inc. and Chief Executive Officer of Hawaiian Holdings, Inc., the parent holding company of Hawaiian Airlines. It is a great pleasure for me to appear before this Committee today to present testimony concerning foreign ownership and control of United States airlines.

Hawaiian Airlines is the longest serving and largest airline of Hawaii. The hard work and dedication of our employees has given us the moniker of the best airline in the US with the industry's best punctuality, best baggage service and lowest rate of flight cancellations in 2005. Founded seventy six years ago, Hawaiian has enjoyed a significant number of 'firsts' including the first cargo certificate and the first all female crew. More recently, we believe we are the first airline to have emerged from Chapter 11 having paid back its creditors in full and having met its pension obligations to its employees.

I am here today to make two points concerning the US government's application of the restriction on foreign investment in US airlines from the experience our company has had over the course of the last year. First, the larger the pool of capital that is

attracted to an airline, the more our employees, customers, creditors and communities we serve stand to benefit. Second, regulatory uncertainty is a serious deterrent to investors. While neither conclusion amounts to a revelation, the application of existing law on foreign ownership in US airlines has, in our view, limited the pool of available capital to fund US airlines and has made the prospect of investing in US airlines less attractive. Though we believe that the current restrictions on foreign ownership should be changed, we also support DOT's position that clarifying the limits under current law and broadening their interpretation is good public policy.

Hawaiian has first-hand experience regarding the application of the restrictions on foreign ownership. Emerging from bankruptcy is often an obstacle course and in our case there were few obstacles as high or as slippery as persuading DOT that Hawaiian Airlines was owned and controlled by US citizens. A common-sense review of our circumstance would have confirmed our US citizenship in minutes, but the process we were obliged to follow took over five months, was fraught with uncertainty and was excessively costly.

The investors who bought Hawaiian Holdings, the parent of Hawaiian Airlines, were a group of hedge funds all based in the United States, managed by US citizens and having no appreciable concentration of foreign funds. However, because the source of <u>some</u> of the capital being invested in Hawaiian was of foreign origin we faced a daunting regulatory review. Explaining to these sophisticated and worldly US investors that having an insignificant portion of their managed funds contributed by non-US citizens could lead to the revocation of Hawaiian's operating certificate was an event not to be missed. They were incredulous and flabbergasted, having not previously encountered a

regulatory scheme so disconnected with the nature of today's financial world nor one so seemingly capricious.

To its great credit, DOT took the opportunity presented by Hawaiian's case to both fulfill its oversight responsibilities and to provide clearer guidance to others who may follow in our footsteps. The terms of Hawaiian's agreement with DOT were issued as new guidance to carriers in a letter dated March 7, 2005 and are referenced in the NPRM.

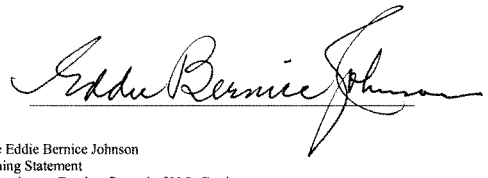
But it was a long, expensive, cumbersome and painful process poorly suited to encourage investment in our airline. We were required to submit to the DOT not only the financing and organizational documents associated with the airline and the group which directly controlled the company, but also the financing and organizational documents of each entity that made up the group which purchased our Holding company. This voluminous and we would suggest, largely irrelevant information, was reviewed microscopically by the DOT in attempt to determine if there were indicia of control which could somehow filter through to Hawaiian Airlines. Had there been, and if that control was in the hands of a foreign entity, the DOT would have found that the airline, despite it being within 100% control of a U.S. Board of Directors and U.S. officers, violated the restriction on foreign ownership in US airlines. Our operating certificate would have been revoked and the company liquidated.

In the end, in order to conclude that the US-based and US-managed hedge funds which invested in Hawaiian Holdings were not foreign agents, they had to agree to create a new U.S. entity controlled by the same people that controlled the original funds -- the US managers. The hedge funds received non-voting stock in the new entity while the

U.S. managers held all of the voting stock. This structure satisfied the statutory requirements because the foreign interests were clearly passive -- none of the new investors demonstrated any incentive or ability to exercise any control of the airline. It is fair to say that the hedge funds involved were flummoxed as to why they had to arrange this complex structure to achieve what they had always intended – namely to make a plain vanilla investment in a publicly held company. The structure is no great thing of beauty but at least now forewarned by our precedent and the proposed NPRM, future hedge funds interested in making an investment in Hawaiian or any other US airline enjoy a measure of clarity as to what they are getting themselves into.

Having been through the mill, we support any effort to streamline and de-mystify citizenship reviews. The NPRM issued by the Department of Transportation which is presently pending, is a good first step and should consequently be supported.

It has been my pleasure to appear today and I would be glad to answer any questions you may have.



The Honorable Eddie Bernice Johnson
Opening Statement
House Aviation Subcommittee Hearing on Foreign Control of U.S. Carriers
Wednesday, February 8, 2006 – 2167 Rayburn

Thank you Mr. Chairman.

I want to commend you and Ranking Member Costello for holding this important and timely hearing.

The Administration's most recent proposal to alter policy regarding the role of foreign ownership in U.S. airline carriers is an issue that, without question, warrants the full attention and oversight of this subcommittee.

Despite the expressed consent of Congress in 2003 regarding the "actual control" of U.S. carriers by U.S. citizens, the Administration seems intent on circumventing the will of this body in an effort to fast track an international air service agreement.

While I wholeheartedly support the notion of our aviation industry being afforded every opportunity to excel in the global economy, I do not support the Administration's utter disregard of this committee in achieving that objective.

Any modification to laws governing foreign control of domestic carriers will have enormous implications for industry stakeholders and jobs here at home.

As a result, such changes should not be hastily promulgated through a proposed rule-making introduced in the dead of night.

The Congress should be afforded the opportunity to perform the necessary due diligence, conduct hearings, and debate any proposed changes to foreign ownership laws.

To characterize DOT's current rule-making proposal as an artful maneuver would be an understatement.

DOT asserts that in order for the U.S. air transportation industry to remain a leader in the global economy, a reinterpretation of "actual control" is needed to ensure access to capital afforded by global financial markets.

Under DOT's proposed rule, foreign investors would be allowed to exercise decisions over all commercial aspects of domestic carrier operations.

U.S. citizens would be required to control only decisions related to safety, security, organizational documents, and the Civil Reserve Air Fleet.

To think that commercial aspects have no implication on security, safety, and the CRAF program underscores the shortsightedness of this proposal.

In closing, I would like to state for the record that I have added my name to the growing list of bipartisan opposition against this proposed rule.

It is my view that DOT's proposed changes to foreign control laws clearly exceed the agency's legal authority and conflict with the plain meaning of current law.

I support the halting of DOT from issuing any final rule on "actual control" and hope that we as a Committee continue to proactively exercise our oversight obligation on this matter.

Thank you and I yield back.

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
AVIATION SUBCOMMITTEE HEARING ON U.S.-EU OPEN SKIES AGREEMENT:
WITH A FOCUS ON
DOT'S NPRM REGARDING ACTUAL CONTROL OF U.S. AIR CARRIERS
FEBRUARY 8, 2006

- I want to thank you, Chairman Mica, and Ranking Member Costello, for calling today's hearing to examine the *U.S. Open Skies Agreement: with a focus on DOT's NPRM regarding actual control of U.S. air carriers.* The Department of Transportation's November 7, 2005 Notice of Proposed Rulemaking would change longstanding policies prohibiting foreign interests from exercising "actual control" over United States (U.S.) airlines.

- For the past 65 years, U.S. commercial aviation has been guided by a statute that provides that only an airline that qualifies as "a citizen of the United States" may provide service between cities in the U.S., or on international routes obtained by the U.S. through international agreements. The law provides that an airline may qualify as a U.S. airline, only if the airline is "a corporation or association … which is under the "*actual control*" of U.S. citizens, and in which least 75% of the voting interest is owned and controlled by U.S. citizens."

- The Civil Aeronautics Board, and its successor DOT, have traditionally interpreted "actual control" to mean that there can be "no semblance" of control by foreign nationals over any management decisions of a U.S. airline. In the 2003 FAA reauthorization, Congress specifically added the requirement of "actual control" to the definition of U.S. citizen. The purpose of including this term was to re-affirm the DOT's long-standing interpretations that U.S. airlines must be controlled by U.S. citizens.

- Under DOT's proposed new standard, foreign investors would be allowed exercise control over all *commercial aspects* of U.S. airline operations, including fleet mix, routes, frequencies, classes of service, and pricing etc. U.S. citizens would be required to control only decisions affecting the Civil Reserve Air Fleet (CRAF), transportation security, safety and organizational documents.

- The Department does <u>not</u> have the legal authority to interpret the statutory requirement that U.S. citizens must have "actual control" of a U.S. airline and limit it to a requirement that U.S. citizens have control over <u>only</u> safety, security and CRAF decisions (and not over other economic decisions). Courts have held that although an executive branch agency has discretion to interpret a statue, the agency does not

have discretion to make interpretations which conflict with the "plain meaning" of the law.

- It is inconsistent with the plain meaning of "actual control" to interpret it as only requiring control over some policies of an airline, but not control over many important decisions, such as the rates to be charged and the service to be operated.

- Moreover, the legislative history of the 2003 amendment itself suggests that, while Congress may have intended to give DOT the ability to interpret precisely what constitutes actual control around the margins, DOT had assured Congress that the amendment "will not in any way affect [DOT's] determination of what constitutes a citizen of the United States." Clearly, DOT's proposed radical change to the meaning of "actual control" exceeds the narrow discretion Congress gave the Department.

- If the new standard is allowed to be implemented there could be serious consequences for our national aviation system, particularly since the most likely foreign investors would be foreign airlines or persons with interests in foreign airlines. Foreign interests could restructure the route system and fleet of a U.S. airline so that the U.S. airline would become, in effect, a "feeder" for the international operations of a foreign carrier. This could limit service and competition in markets served by the U.S. airlines, particularly service to small communities.

- There could also be effects on national security: A foreign investor's decision to change the fleet mix of U.S. airlines could reduce the number of large, wide-body civilian aircraft that the Department of Defense relies on to supplement its military fleet in times of national emergencies.

- In addition, U.S. airline employees could lose high quality job opportunities, in favor of employees of the foreign carrier. There could be similar effects on other aviation industry employees. Foreign investors would be inclined to support the purchase of aircraft produced by foreign companies, and to have the airline use foreign repair stations.

- Late last year, I and over 124 of my colleagues, including Chairman Young, introduced H.R. 4542, which prohibits DOT, for one year, from issuing any final decision or final rule on the NPRM that would change its interpretation of what constitutes "actual control" of a U.S. airline. The bill would also require the DOT, within 90 days of enactment, to issue a report to Congress that assesses the impact of the NPRM on all aspects of U.S. airlines operations, including national defense, safety, security, competition, for small communities, air service, and airline

employees. H.R. 4542 will ensure that Congress has adequate time to review these very complex issues, and I urge my colleagues to support it.

- Any major change in policy on foreign control of U.S. airlines should be approved by Congress, not imposed unilaterally by DOT, and in contravention of the "plain meaning" of the statute.

STATEMENT OF M. RUSH O'KEEFE, JR.,

SENIOR VICE PRESIDENT AND GENERAL COUNSEL,

FEDERAL EXPRESS CORPORATION

BEFORE THE HOUSE AVIATION SUBCOMMITTEE

FEBRUARY 8, 2006

Chairman Mica, Ranking Member Costello, and other Members of this distinguished Subcommittee, on behalf of the more than 260,000 employees and contractors of FedEx Corporation worldwide, thank you for the opportunity to testify today. FedEx appreciates the chance to explain why we believe that now is the time to seize the enormous economic and consumer benefits of an historic U.S.-EU open aviation agreement and why we support the Department of Transportation's Notice of Proposed Rule Making (NPRM). Over the years, this Subcommittee has made an invaluable contribution to U.S. international aviation by steadfastly supporting market opening agreements. FedEx is very grateful for that unwavering leadership which has significantly benefited our customers, our employees, and the U.S. economy.

At the outset, let me convey the regrets of Frederick W. Smith, my Chairman, that he could not be here today to testify. As you know, Mr. Smith has great passion for removing barriers to global competition and permitting the marketplace, not governments, to allocate air service opportunities. More than once, he has expressed to this Subcommittee his frustration with protectionist barriers to air service trade to and beyond important international markets. Those barriers cause inefficiencies in our global network and harm our customers as well as the economies of those short-sighted countries. Regardless of the messenger, our message today is one that is familiar to any observer of FedEx over the years. Support for opening up global trade and, in particular, liberalizing global air transportation services, is a bedrock principle for FedEx.

The subject of this hearing is opportunity, or perhaps more accurately, how not to miss an opportunity. An historic U.S.-EU open air service trade agreement is at our fingertips. An important policy step is under review at the Department of Transportation. The question is whether we step forward and grasp the future by embracing these opportunities now or, instead, stand back and gamble that they might be attained at some unknown point in the future. We believe that is the stark choice presented to this Subcommittee by pending legislation that would prohibit DOT from issuing a final rule on its pending NPRM, and in doing so, doom the pending U.S.-EU agreement.

Given the significant economic and consumer benefits of a U.S.-EU agreement and the importance of continuing progress in global aviation liberalization, FedEx believes the choice is clear. Sound trade policy dictates that you enable the Administration to continue with these important steps. FedEx can tell you emphatically that delay in closing international aviation agreements is not risk-free. In 1995, we were on the cusp of a U.S.-U.K. agreement that would have fully liberalized air cargo rights. Instead of seizing that opportunity, U.S. Government officials decided to first conclude a limited

passenger mini-deal with the British. Government officials assured us delay would be benign, and a broader U.S.-U.K. agreement that fully liberalized cargo rights would require that we wait patiently for a few more months. We are still waiting — more than 10 years later. The political and policy stars that must align to permit contentious aviation agreements to be completed do not remain in place indefinitely. As our more than 10-year-long wait for full liberalization of the U.K. cargo market dramatically shows, opportunities delayed for months can easily turn into benefits lost for decades.

In November 2005, the U.S. and EU negotiators announced that they had reached an "agreed text" for an historic transatlantic air services agreement. This agreement, when signed, will represent a new approach for the U.S., in that it is a bilateral agreement, but with a large number of parties on one side – signatories will be the European Commission as well as each of the 25 EU Member States. It will provide for full Open Skies rights for U.S. and EU carriers, completing a network of liberalized rights among the world's two largest aviation markets. DOT, the State Department, and the European Commission negotiators should be applauded for their perseverance, creativity, and hard work in forging this agreement.

Is it a perfect agreement? No. Nonetheless, it is a very good agreement for the U.S. overall and it would be a serious mistake for Congress to force the Administration to put it on hold. Delay could be fatal, as we have seen before. The agreed text could unravel due to political pressure from parties unable to accept and adapt to change. Carriers who failed to undermine the talks to protect their parochial interests – such as those that seek to perpetuate Fortress Heathrow — would be given a reprieve to try again to block others' market entry. In addition, there could be unanticipated industry or political developments. Maintaining the optimal political and policy conditions required for any international aviation agreement, let alone one of this magnitude, is a gargantuan task.

Let me now turn to the value of this U.S.-EU agreement to FedEx and our customers. This agreement will provide for full Open Skies rights for U.S. and EU carriers, completing a network of liberalized rights among the world's two largest aviation markets. From FedEx's point of view as a global all-cargo carrier, this will provide great benefits in the form of complete and unfettered rights to fly to, between, and beyond the Member States of the EU. So-called "Fifth Freedom" rights – the ability to fly to a foreign country, pick-up cargo, and freely fly on to a third country – with all European countries have been a long-sought goal of FedEx. Such operational flexibility is vital to the development of a highly efficient network, permitting us to connect all points in the EU to offer the best and most cost-effective services between the U.S. and all of Europe, and beyond.

Without this agreement, outdated constraints on free air service trade would continue to adversely affect our global network. We will continue to be blocked in third-country operations at all those European points where an Open Skies agreement is not in force. To put this operational hardship into perspective, service opportunities would remain constrained with 40 percent of EU Member States, since only 15 of those 25 countries currently have Open Skies agreements. Let me emphasize these constrained markets are not small and insignificant ones. For instance, today our operations in important markets such as the U.K. and Ireland are still governed by decades-old agreements with the U.S. that restrict third-country operations. In the U.K., we have made significant investments at London's third airport, Stansted, but still cannot carry local traffic on aircraft from there to our hub at Paris' Charles de Gaulle Airport. That kind of barrier

makes no economic sense yet would remain in place if the U.S-EU progress were thwarted. In addition, of the 10 EU accession states, only six have agreements with the U.S. FedEx believes that the new traffic rights and other provisions of the agreed text offer significant immediate and long-term benefits for its operations and welcomes the milestone reached by the U.S. negotiating team.

Mr. Chairman, now let me turn to FedEx's views on the Department of Transportation's Notice of Proposed Rule Making (NPRM). As the Subcommittee is aware, the agreed U.S.-EU text is presently under review by European Member States. One element of their concern is the regulatory barrier to foreign investor participation in U.S. carrier commercial management. DOT's November 2005 NPRM is intended to address that concern, within the existing U.S. law on ownership and control of U.S. airlines. It does so without changing existing statutory restrictions on foreign ownership in any way, in much the same way as the Civil Aeronautics Board began to reinterpret the public interest two years before the Airline Deregulation Act passed. And of course, those fully-respected statutory restrictions are solely within Congress's jurisdiction. FedEx supports DOT's proposal as both an important public policy advance in its own right, as well as an indispensable tool to help fully open aviation markets throughout the EU and with other important U.S. aviation partners.

This change does not alter the fact that airlines in the U.S. and abroad will have a choice about whether to accept or reject any foreign investment. As we said initially, this is about creating opportunities – opportunities for U.S. airlines to seek out new investors, and opportunities for those investors to bring new approaches into our marketplace. No U.S. carrier will be required to take on a new investor, and no foreign investor will be allowed to exceed the numeric limits on equity, board membership, or senior management participation set forth in the statute. But the NPRM will create opportunities for new ideas and new dollars to come to those carriers that may want and need them.

The Department's proposal ensures that those areas of particularly sensitivity – the areas of the most important governmental interests – remain under the control of U.S. citizens. Safety, aviation security, and national defense: these areas will still be managed by U.S. citizens and the Department will review these requirements on a continuing basis. At the same time, it gives greater flexibility in other areas of day-to-day operations that do not raise similar public interests.

Furthermore, any carriers with foreign investment will be subject to the same U.S. regulatory system as a non-foreign invested one – this rule does nothing to relax any U.S. regulatory scheme outside of this economic arena. Aviation management and workers will still have the same rights and responsibilities that they have today under U.S. law and rules today.

DOT's NPRM thus offers an opportunity for both foreign and U.S. aviation interests to expand their commercial opportunities while respecting and safeguarding sensitive U.S. governmental interests. Simply put, we believe it strikes an appropriate balance. In these tough times, citizens look to their government to provide maximum public good with minimum governmental intervention.

Importantly, the NPRM requires that the homelands of foreign investors seeking to rely on the rule make similar investment and management opportunities available for U.S.

interests. As shown by the concerns we expressed regarding DHL Airways/ASTAR Air Cargo three years ago, FedEx believes strongly that fairness and sound trade policy dictates that U.S. businesses be guaranteed reciprocal opportunities. U.S. commercial interests should never be placed at a competitive disadvantage by policies or decisions of our own government that permit a foreign business to reap the full benefits of our markets while that foreign competitor's home country simultaneously denies the same opportunities to U.S. companies. We are very pleased that DOT embraced the principle of reciprocity in its NPRM. By doing so, it ensured the proposal is a reciprocal market-opening tool, not a unilateral gift.

The encouragement of investment in U.S. carriers from foreign sources and the participation of foreign managers in the commercial side of airlines can spur new businesses and innovate within existing ones, and thus can create jobs for U.S. workers. At the same time, by requiring that such opportunities be reciprocal, U.S. entrepreneurs – be they established U.S. carriers wanting to be in a new market or simply some Americans with new ideas and international ambitions – can broaden their scope and strengthen the U.S. position in aviation globally.

The proposal also limits its benefits to countries that have signed Open Skies agreements with the U.S. We believe that is another important aspect of the Department's proposal. It creates a policy "carrot" for countries that have yet to embrace Open Skies. While the U.S. government has made significant progress with this policy initiative begun in 1992 – 80 countries have signed these agreements, including those in the multi-party MALIAT agreement – there is still a significant way to go. In fact, markets of some of our largest and most important air service trading partners remain only partially liberalized. For instance, while China entered into a significantly more modern agreement with the U.S. in 2004, barriers to open U.S. air carrier access in that huge and critical market remain. Other important and growing air service markets such as Hong Kong steadfastly resist any meaningful expansion of U.S. carrier participation, even while arguing for increased access to the U.S. market for their airlines.

FedEx seeks Open Skies agreements in all those markets that still limit U.S. carrier market entry. By offering a new incentive to foreign governments and their citizens to embrace Open Skies, we believe that this proposal gives DOT and the State Department an important new tool to help pry open stubbornly restrictive air service markets. Contrary to what critics would have you believe, this proposal is not a special deal for Europe, but offers potential benefits beyond the transatlantic market. Its reach and potential profound impact as a lever for opening air service markets are far broader in geographic scope and potential magnitude. It will act as an incentive to help open air service markets wherever motivated investors might be found that have capital and new ideas for the U.S. air transport industry, provided that their home country embraces Open Skies.

We want the success of Open Skies to be repeated in the fast-growing markets of Asia. We want to provide our global services to all Americans, so that they might reach the international markets of interest to them, whether those markets are in Europe or in the new markets of Asia. The FedEx network, with its hubs and spokes that today provide services to every U.S. address, can benefit from expanding Open Skies opportunities and become an even more valuable tool for U.S. business competitiveness.

Mr. Chairman, FedEx strongly believes that the window of opportunity in which the U.S. and EU came together to forge this agreement will not remain open indefinitely. Given the enormous upside of the U.S.-EU agreement for consumers, the U.S. commercial aviation sector, and the U.S. economy, FedEx believes Congress should not mandate a delay that might be fatal to a long-sought, historic U.S.-EU agreement.

Furthermore, others around the world are watching how this Open Skies initiative progresses. To stop now, with a number of critical U.S. negotiations scheduled for 2006, would certainly send a harmful message. It would say that the U.S. no longer wants Open Skies opportunities for its carriers. To withdraw the policy "carrot" of the NPRM would also signal an acquiescence to protectionism at a time when U.S. carriers want more, not less, international opportunities.

Mr. Chairman, let me conclude by reiterating that FedEx consistently and steadfastly supports liberalization of the world-wide air service marketplace since it enables us to better and more efficiently serve our customers and allow more people, business, and communities to join in international trade. As I testified earlier, we believe that while the U.S.-EU agreement isn't perfect, it is a very important step forward and certainly deserves this Subcommittee's support for its completion without delay. Similarly, we regard the NPRM to be an important and measured step forward towards an important goal. An historic U.S.-EU open air service trade agreement is within our reach. We hope this Subcommittee and the Congress will agree, without further delay, that now is the time to seize it.

Again, on behalf of FedEx's more than a quarter million employees and contractors, thank you for the opportunity to share FedEx's views with this distinguished Subcommittee.

Thank you.

Statement of Rep. Jon Porter (R-NV)
House Transportation and Infrastructure Committee
Subcommittee on Aviation
February 8, 2006

Mr. Chairman, I thank you for holding this hearing today on U.S.-E.U. Open Skies Agreement: with a focus on DOT's NPRM regarding 'actual control' of U.S. air carriers.

This hearing should provide us with an understanding of the tentative Open Skies agreement reached between the United States and the European Union as well as the Department of Transportation's recent Notice of Proposed Rulemaking (NPRM) on 'actual control' of U.S. carriers.

I am told that DOT has received thousands of comments on its proposed rule. Comments have been submitted from individual citizens, local Chambers of Commerce, trade unions, airline pilots, and a number of industry stakeholders. It is my understanding that these comments span the spectrum from strong support to equally strong opposition.

Those filing supportive comments to the NPRM include, but are not limited to, Federal Express, United, Boeing, Hawaiian, Delta, Atlas Air/Polar Air Cargo, Washington Airports Task Force Board of Directors, US Airports for Better International Service, and the Greater Orlando Airport Authority.

Those filing comments in opposition to the NPRM include, but are not limited to, Continental Airlines, Virgin Atlantic, AFL-CIO, Air Line Pilots Association, Independent Pilots Association, Allied Pilots Association, Greater Elizabeth City, New Jersey Chamber of Commerce, City of Newark, New Jersey, New Jersey Business & Industry Association, and others.

I, myself, have received numerous letters from my constituents asking Congress to take a hard look at the impacts this NPRM could have.

I am extremely interested in hearing the comments from my fellow subcommittee members as well as the testimony from the witnesses. I yield back.

Congressman John T. Salazar
Opening Statement – Aviation Subcommittee Hearing on Open Skies
February 8, 2005

- Mr. Chairman, thank you for calling today's hearing.

- Like my colleagues, I am concerned about the current state of the U.S. aviation industry, and in particular, how this impacts rural America.

- The financial instability that has been plaguing this industry means higher costs and fewer choices for consumers. It also has a direct impact on jobs in America.

- For this reason, I support the need to establish an Open Skies agreement between the EU and the United States.

- I believe there are areas we can agree on that will benefit both markets and consumers …

- … but I have serious concerns about the proposed rule relating to foreign ownership of U.S. air carriers.

- This is a complicated issue, with many competing interests, and is not a decision that should be made lightly or without Congressional involvement.

- I look forward to hearing today's testimony, and ask that the witnesses touch on the Oberstar/LoBiondo (Low-BEE- on-doe) bill and their opinion on what a one-year delay would or would not accomplish.

- My number one priority is to determine how this will impact those living in rural America.

- To me, an Open Skies agreement means nothing if rural America loses air service or cannot conveniently take advantage of service routes.

- Thank you Mr. Chairman.

STATEMENT OF
JEFFREY N. SHANE
UNDER SECRETARY FOR POLICY
DEPARTMENT OF TRANSPORTATION
BEFORE THE
AVIATION SUBCOMMITTEE
OF THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
FEBRUARY 8, 2006

Thank you, Mr. Chairman, Members of the Subcommittee. I am pleased to appear before you today in response to your invitation to review the status of a comprehensive first-step U.S.-EU aviation agreement, with a focus on the Department of Transportation's Notice of Proposed Rulemaking regarding "actual control" of U.S. air carriers. Since the Department of State's Deputy Assistant Secretary, John Byerly, who led the multi-agency team that negotiated the agreement, is sitting beside me, I will let him review the negotiating dynamics that resulted in an agreement that has the potential to fundamentally transform the framework within which transatlantic air services operate, increasing dramatically the quality of competition in the market and benefiting consumers and communities on both sides of the Atlantic in ways that transcend anything achieved through our existing open-skies accords. I will focus my testimony on the Department of Transportation's Notice of Proposed Rulemaking.

As you know, it is unusual for DOT to appear at a hearing concerning an ongoing rulemaking. Since we are in the middle of the rulemaking process I cannot tell you what the Department is going to do. However, I recognize the importance of this initiative and this Committee's interest in it. Therefore, I wanted to share, to the extent possible, the Department's thinking in proposing to refine the administrative policies that guide our citizenship reviews. I hope that you will also understand that, since the comment period in the rulemaking has closed, I cannot address the substantive issues raised in those comments, other than to say that we will give them careful consideration, and I must be relatively circumspect in my own comments. I will do my best to be responsive to you within those parameters.

As a preliminary matter, let me clarify, from the Department's perspective, the relationship between the U.S.-EU agreement and the NPRM. It is no secret that, in reaching a decision on whether to proceed with an EU-U.S. Air Transport Agreement, the European Community and its 25 Member States will consider the results of the NPRM process as expressed in a final rule. The European side included those very words in the Record of Negotiations that was adopted upon the conclusion of our negotiations and that has been widely circulated. Nor will I pretend that we don't care whether the proposal, if finalized, will have a positive impact on the U.S.-EU talks. Of course we do. We want to conclude the agreement -- not only for the market access that U.S. carriers will achieve, but because it can be expected to enhance the quality of competition across the Atlantic in a dramatic way and provide impetus for further aviation liberalization around the world. However, I also want to be clear that, although European acceptance of the

Air Transport Agreement may be a consequence of adopting a final rule, the decision to initiate this proceeding was based on our assessment that the proposed change in the DOT approach was long overdue and is in the best interests of the United States, its air transportation industry, and those that rely on that industry, not only for transport services, but also directly and indirectly for jobs. Even if the U.S.-EU talks had collapsed, we would not have abandoned the proposal, but would have seen it through to its conclusion. However, thanks to the fine work of John and his team, we have a successful negotiating result.

Next let me address what DOT did not propose. DOT did not propose to change the specific tests in the statute for determining that a U.S. airline meets the U.S. citizenship requirement. Under DOT's proposal the company would need to be organized under the laws of the United States or a state; 75% of the voting stock would need to be owned or controlled by U.S. citizens; the president and two-thirds of the board of directors and other managing officials would need to be U.S. citizens; and the company would need to be under the actual control of U.S. citizens. In addition, we have not proposed any change in how DOT would assess the citizenship of the managers or members of the board of directors -- U.S. citizens appointed by, or otherwise beholden to, a foreigner would still be considered foreign. Therefore, the company would be a U.S. airline by any measure.

Turning to the affirmative, I will summarize what DOT proposed to do. The NPRM proposed that DOT move away from the subjective test of "no semblance of foreign control" in making decisions about the control of U.S. airlines. Many years ago, the Civil Aeronautics Board (CAB) added that test to the statutory requirements, at its administrative discretion. And the "no semblance test" is now buttressed by a long list of subjective criteria that have appeared over the years in CAB and DOT case law, which does not make it easy to predict how DOT might rule on any given foreign control case. In place of this approach, the NPRM proposed to make our criteria for validating the U.S. control of an airline both simple and explicit. Under DOT's proposal we would seek only four objectively verifiable answers:

- Will U.S. citizens be in a position to control decisions having to do with the Department of Defense?
- Will U.S. citizens be in a position to control decisions and activities relating to aviation security?
- Will U.S. citizens be in a position to control carrier policies and implementation with respect to safety?
- Is the corporate documentation - the charter, the certificate of incorporation, bylaws, etc. - under the control of U.S. citizens?

Finally, the only other requirements would be that, for a non-U.S. investor to enjoy the benefits of the flexibility newly available through this proposed policy, there would have to be reciprocity for U.S. investment and an open-skies agreement governing the aviation relations between the United States and the home country of the foreign investor, or other relevant international legal obligations.

By targeting the analysis of actual control to these four areas, the proposal would allow more meaningful participation of foreign interests in a U.S. airline's commercial decision-making if that is what the U.S. citizens who own at least 75% of the voting stock and the foreigners agree upon. At the same time, it would continue to protect those features of a U.S. airline's operations in safety, security, and national defense. These are areas in which, despite economic deregulation, there continues to be significant Federal government regulation and involvement.

Finally, I want to move beyond WHAT the Department has proposed to the central issue of WHY the Department proposed this change. The Department has a statutory mandate to foster a safe, healthy, and competitive airline industry that will remain capable of supporting U.S. economic growth by meeting the public's transportation needs. Our regulatory efforts are informed by a simple principle: that our oversight needs to be limited to those areas in which it adds value. For that reason, we have been reviewing carefully the entire corpus of DOT regulations in order to ensure that they pass this test. Where the added-value test is not met, or worse yet, when a regulatory approach actually impedes the ability to secure industry health, we need to make changes.

U.S. aviation policy since deregulation has been to continue to reduce government intrusion in commercial decision-making by airlines, and to recognize and accommodate changes in the marketplace. In other words, deregulation is a work in progress. This policy has been successful in areas such as pricing, route selection, fleet acquisition, and marketing, with positive consequences in many aspects of U.S. airline economic activity. Airlines now provide seamless, end-to-end service through global systems that depend upon webs of contractual networks among airlines, distribution companies, and service providers. These changes have enabled U.S. airlines to compete more effectively in domestic and international markets. However, as set out in the Notice of Proposed Rulemaking, substantial structural changes have taken place in global financial markets and we tentatively concluded that our current interpretation of the actual control test has failed to keep pace with changes in the global economy and evolving financial and operational realities in the airline industry itself, to the detriment of U.S. airlines.

Why did we consider it important to catch up? Because to continue to be effective players, U.S. airlines require significant capital investments in facilities, technology, and a variety of commercial arrangements. In their efforts to meet these challenges, U.S. airlines should have the broadest access to global capital markets permitted by law. Furthermore, new U.S. airlines seeking to enter the market should similarly be able to obtain the financial capital necessary to launch their businesses. Our tentative conclusion was that actual control should not be interpreted in a way that needlessly restricts the commercial opportunities of U.S. airlines, their ability to compete, and their potential to create jobs.

Today, in major industries, capital is allowed to flow freely across national borders so that competitors can establish a global market presence, exploit economies of scope and scale, respond effectively to customer demand and tap market opportunities wherever

they arise. It's a well-established policy, and one that applies even to industries long thought essential to our national and economic security, such as financial services, automobile manufacturing, information technology, steel and pharmaceuticals. And our proposal, consistent with our statutory mandate of "placing maximum reliance on competitive market forces ... to encourage efficient and well-managed air carriers to earn adequate profits and attract capital," was to open up global investment options to the very industry that facilitated the globalization of all the others. Today although many U.S. airlines participate in international alliances, we believed that the "semblance test" has chilled cooperation with, and investment by, foreign entities, since it has made it difficult for actual or potential foreign investors to protect their interests -- a situation that caused KLM to withdraw its investment in Northwest Airlines in 1997. The goal of our proposal is to eliminate that uncertainty with respect to economic decision-making.

Finally, I want to make this as clear as I can. Under DOT's proposal, U.S. citizens would still have to be in "actual control" of a U.S. airline for it to be eligible to keep its certificate. They would own 75 percent of the voting stock in the airline; they would occupy two-thirds of the directorships; the president and two-thirds of the officers would be U.S. citizens. It would be a U.S. airline by any measure. What we are saying is that the greater scope we have proposed to allow non-U.S. citizens for participation in the governance of a U.S. airline would no longer be deemed inconsistent with the finding of actual control by U.S. citizens, as it is today, provided that the short list of objective requirements in the proposed new rule are met.

The potential benefits of the proposal go well beyond our interest in enhancing the availability of capital to U.S. airlines. The international alliances among U.S. and foreign airlines represent a surrogate for the kind of globalization that occurs in other network industries. Our thinking was that our proposal, if adopted, would create an environment far more conducive to productive cooperation among airline alliance partners, providing new opportunities for U.S., as well as foreign, airlines. It could facilitate the further evolution of the world's airline industry into an even more robust and competitive global services sector, by changing the administrative policies that today are significant impediments to that evolution.

Thank you for the opportunity to share the Department of Transportation's perspectives with you. I would be pleased to respond to your questions.

The Notice of Proposed Rulemaking Issued by The Department of Transportation Regarding Actual Control of U.S. Air Carriers

Written Testimony Of

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Before The

House Committee on Transportation and Infrastructure

February 8, 2006

Good morning, Mr. Chairman and Members of the Committee. I am Jeffery Smisek, President of Continental Airlines. It is a pleasure to be here representing my 42,000 co-workers at Continental.

Thank you for your invitation to testify at today's hearing. Continental opposes the Department of Transportation's (the Department or DOT) Notice of Proposed Rulemaking on Foreign Ownership and Control (NPRM) for a number of reasons.

Continental believes that the proposal released by the Department is unlawful. Continental also believes that it is poorly conceived, unworkable, and therefore, unlikely to result in additional foreign equity capital for U.S. carriers. I have attached Continental's formal filing in the Department's docket regarding the NPRM and refer to that filing to provide the legal basis for my arguments and for further explanation of Continental's opposition.

Let me summarize the Continental filing. Continental opposes the Department of Transportation's proposal because it unlawfully places actual control of U.S. airlines in foreign hands, in complete violation of aviation statutes passed by Congress and in opposition to well settled precedent requiring genuine U.S. control of U.S. airlines. Additionally, many other Agencies have recognized that "control" means what the Department has historically recognized, not what the foreign control NPRM proposes. Simply put, DOT has no authority or discretion to interpret this law differently when Congress has already made clear that actual control of a U.S. airline, and that means every part of the airline, must be in the hands of U.S. citizens. This is not a case of Congress leaving the statute unclear and DOT filling the gaps with interpretation. This is a case of the Department attempting to turn actual control by a U.S. citizen into actual control by a foreign citizen. When Congress has spoken clearly, as it has in this case, that is the end of the matter.

Continental supports a thorough analysis and discussion on the topic of actual control and foreign ownership of U.S. airlines, but that discussion should take place in the Halls of Congress, not in the fine print of the Department's docket. The Department simply cannot, under the guise of "interpretation," turn the statute on its head and decide that the words "actual control" by U.S. citizens in the aviation statute mean precisely the opposite of their longstanding clear and unambiguous meaning. The deliberate lack of clarity about what is allowed and what is not allowed in the NPRM creates such uncertainty that, rather than foreign investment becoming more likely, it will almost certainly become less likely should the Department's proposal be adopted. Adding to the uncertainty will be the certainty of litigation over the final rule. Although the Department's proposal is based on the claim that foreign control of U.S. airlines would enhance access to worldwide capital markets, the uncertainty caused by adopting an NPRM that is completely at odds with the statute will discourage, rather than encourage, foreign investors from making the very investments in U.S. airlines that the Department says it intends to encourage.

Continental believes that the foreign control proposal will actually discourage investment in U.S. airlines, by both foreigners and U.S. citizens. The NPRM, in truth, is nothing more than a hoax intended to seduce European countries into signing a multilateral air transport agreement based on the false premise that European airlines will be able to gain effective control of U.S. airlines.

According to various credible written and oral reports, the Department's proposal would permit long-prohibited control via supermajority or disproportionate voting rights, negative control/power to veto, buy out clauses, significant contracts providing explicitly or implicitly for foreign control, credit agreements and debt containing control provisions, and control through webs of business relationships among U.S. airlines and foreign airlines, foreign manufacturers of aircraft, foreign labor, or even foreign religious or governmental agencies. Further, although the Department has indicated that this is simply an interpretation of the statute, it has nonetheless determined that "actual control" means something different depending on the nationality of the foreign investor – something clearly not contemplated by the statute.

The DOT's attempt to interpret the statute to mean that foreign interests can actually control U.S. airlines **except** in the areas of security, safety, CRAF and the control of organizational documents is simply unworkable. If the DOT truly believes that you can separate out the areas of safety, security and CRAF and isolate them from other areas of the company, I can only say there must be no one at the DOT who has ever actually worked at an airline. Continental has an officer who is in charge of Corporate Security and he has people who work directly for him. But the people who work at the airports, load cargo, fly the planes, schedule the planes, hire our employees, and contract with vendors, are all on the front lines of our security efforts, and they work for the Vice Presidents of Airport Services, Flight Operations, Cargo, Human Resources, Technical Services, System Operations and so on. And, of course, the CEO and other senior officers, who apparently could serve foreign interests and be controlled by foreigners, have the authority to hire, promote, fire and set the salaries and incentive compensation of all of those people. The same is true for Safety – everyone in the company has a safety role – there isn't "one" person in charge of safety. And, let's talk about CRAF. The CRAF program depends on wide body aircraft. If a foreign airline bought Continental and decided that the foreign airline would do all the international flying on their own wide bodies and Continental would simply be a feeder for their operations (which would be permitted by the NPRM), then Continental wouldn't have any wide body aircraft and wouldn't be participating in the CRAF program – for commercial reasons, of course. What if Lufthansa bought United and BA bought American and did the same thing? How would the U.S. protect the CRAF program from these "commercial" decisions? Is the U.S. Congress willing to commit the billions of dollars it would need to purchase and maintain a fleet of aircraft to move our troops when we need them moved quickly?

Just to give you a personal example of how airlines actually work and why you can't separate out certain functions, in March of 2001, a U.S. aircraft and crew were involved in a mid-air collision over the South China Sea while on a "surveillance" flight. The crew was detained by the Chinese. The U.S. worked hard to obtain their release but was concerned that the Chinese would not allow a military aircraft to land in Hainan in order to retrieve our soldiers. Continental has a large operation in Guam, and given our proximity to China, we were asked if we would be willing to take on that mission. Knowing that the trip could be dangerous for our crews, knowing that committing to be there for our country meant that we would have to have a plane fueled and crews available every minute of every day until the mission was executed (and that the time frame could go on for weeks), virtually all of the senior officers had to be involved in making the go/no go decision. Could we afford the cost of taking a plane out of service indefinitely? Of paying crews to stand by indefinitely? What about the inconvenience to the hundreds if not thousands of passengers whose flights would be cancelled? Were we willing to take on the commercial and security risks that the mission entailed? Were we willing to put our plane and our crews at risk of being seized? When all was said and done, our CEO (a former navy mechanic) thought the answer was easy – our country needed us. It was that simple. While we were not contractually bound to do so, we were uniquely situated to meet the mission and the commercial considerations were irrelevant. But, make no mistake – if it had been a "commercial" decision, the answer would have been different.

Finally, I would be remiss if I did not discuss the fact that the DOT is perverting a clear statutory standard and attempting to turn control of U.S. airlines over to foreigners by fiat in order to secure an aviation agreement with the European Union. While the Department has been careful to say that the two issues are unrelated, there is not a person involved in this process who does not agree that the NPRM and the European Union aviation agreement are linked. European Commission representatives have gone as far as to say " a change of the ownership and control system at (the) U.S. side" is "for us a very important contextual element, which at the end of the negotiations, we will take into account to assess if there is a balanced package on the table" (Reuters, November 3, 2005). Under the Department's proposal, the right to control U.S. airlines would be given away for rights of little to no value for U.S. combination airlines and the customers they serve. London Heathrow, Europe's largest and most significant airport for U.S.-Europe travel is closed to entry and would remain effectively closed to additional U.S. airlines, even if the multilateral open skies agreement were signed. This is because commercially competitive slots and facilities will not be available at London Heathrow to remedy the effects of years of discrimination against U.S. airlines denied entry at London Heathrow. Absent the provision of competitive, economically viable slots and facilities at London Heathrow, the greatest single impediment to free and fair U.S.-Europe competition will remain in place under the new open skies agreement. Usurping

Congress' role in determining the scope of foreign control over U.S. airlines for the purpose of securing this agreement with the European Union would be a poor trade at best. The right to fly is meaningless without the right to land.

Mr. Chairman and Members of the Committee, the Department should immediately withdraw its proposal and work with this Committee and the rest of Congress on a free and open discussion of the issues of foreign ownership and control in the proper forum, the Halls of Congress.

All of us at Continental appreciate this Committee's interest in this very critical issue. We support H.R. 4525, the proposed legislation that the Chairman and Ranking Member of this Committee, along with 110 other Members from both sides of the aisle, have sponsored. This legislation would remind the Department of its proper authority and prevent the ill-conceived proposal from being implemented. We urge you to pass this bill.

Mr. Chairman and Members of the Committee, again, thank you for the opportunity to address this critical issue which will dramatically impact U.S. carriers and potentially alter the landscape of our national air transportation system forever.

BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

ACTUAL CONTROL OF U.S. AIR CARRIERS	:	Docket OST-2003-15759

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January 6, 2005

Table of Contents

I. Introduction 1

II. The Foreign Control Proposal is Unlawful Because It Places Actual Control of U.S. Airlines in Foreign Hands 3

A. The Aviation Statutes and Well-Settled Agency Precedent Require Genuine U.S. Control of U.S. Airlines 4

B. Other Agencies Recognize That "Control" Means What the Department Has Historically Recognized, Not What The Foreign Control NPRM Proposes 16

III. The Foreign Control NPRM Would Discourage Investment in U.S. Airlines 20

IV. The Foreign Control Proposal Is So Poorly Crafted That It Fails To Meet the Statutory Standard or The Department's Objectives and Would Be Impossible To Implement Rationally 24

V. Changes to the Statutory Prohibition on Foreign Control Must Be Adopted by Congress; the Prohibition Cannot Be Annulled By DOT Fiat 30

VI. Perverting A Clear Statutory Standard And Turning Control of U.S. Airlines Over to Foreigners To Secure An Agreement With The European Union That Fails to Provide Competitive, Economically-Viable Slots and Facilities For New U.S. Entrants at London Heathrow Would Be A Travesty 34

VII. The Foreign Control NPRM Departs Radically From The Objectives Of This Proceeding, And The Original Objectives Should Be Considered Instead. 39

VIII. Conclusion 41

BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

ACTUAL CONTROL OF U.S. AIR CARRIERS	:	Docket OST-2005-15759

COMMENTS OF
CONTINENTAL AIRLINES, INC.

I. Introduction

Continental[1] supports an open debate regarding opportunities for enhanced foreign investment in U.S. airlines in the appropriate forum - Congress. Continental is strongly opposed, however, to the Department's back-door effort to subvert the aviation statutes in the unlawful, poorly conceived and unworkable proposal contained in the Department's November 7, 2005 Notice of Proposed Rulemaking in this proceeding at 70 Fed. Reg. 67389 ("Foreign Control NPRM" hereafter). If adopted, that proposal will be reversed by Congress or tied up in litigation for years to come and reversed by the courts because it would allow foreign airlines to control U.S. airlines in direct violation of Congressional codification of years of precedents explicitly prohibiting such control. Taking such an ill-advised step to secure a U.S.-Europe multilateral agreement that fails to

[1] Common names are used for airlines.

resolve the critical issue in U.S.-Europe aviation -- securing commercially viable slots and facilities at London Heathrow to bring effective competition to U.S.-London travelers -- would be a travesty. Discarding standards upheld for decades and confirmed only recently by Congress for the purpose of securing a multilateral agreement with the European Union that fails to ensure effective, competitive access to London Heathrow airport, the premier European airport, by securing commercially viable slots and facilities there for new entrant airlines would compound the harm done by adoption of the Department's proposal. Opening the doors for foreign airlines to start their own controlled airlines in the U.S. to skim traffic from major domestic U.S. routes at the expense of existing U.S. airlines and the smaller cities they serve and to support the foreign airline's international flights in competition with international flights operated by U.S. airlines without ensuring effective access for additional U.S. airlines, such as Continental, at London Heathrow would add insult to injury and inhibit new investment in the U.S. airlines providing service to cities large and small throughout the U.S. which need additional investment most.

Continental would welcome a thorough exploration of the potential benefits of enhanced opportunities for foreign investment in U.S. airlines and the best means of achieving those benefits in the proper forum: Congress. However, Continental strongly opposes the Department's unlawful attempt to subvert a clear statutory requirement that "actual control" of U.S. airlines must be held by U.S. citizens into an unprecedented new "interpretation" that permits "actual control" of U.S. airlines

by foreign citizens. The Department simply cannot, under the guise of "interpretation," turn the statute on its head and decide that the words "actual control" in the aviation statute mean precisely the opposite of their clear and unambiguous meaning. The Department's proposal is either a hoax intended to seduce European countries into signing a multilateral air transport agreement based on the false premise that European airlines will be able to gain effective control of U.S. airlines or a deliberate violation of the statutory requirement that U.S. citizens actually control U.S. airlines. Either way, the proposal should be withdrawn, and foreign ownership and control issues should be considered by Congress. The time has come for the Department to make a concerted effort to change the statutory standard by Congressional action rather than violating the current statutory standard.

II. The Foreign Control Proposal is Unlawful Because It Places Actual Control of U.S. Airlines in Foreign Hands

Despite explicit statutory language requiring that U.S. airlines must be under the actual control of U.S. citizens, the Foreign Control NPRM would allow actual control of U.S. airlines to rest with foreign citizens. Clearly, this perversion of the meaning of the statute could stand only if the Department were to adopt Humpty-Dumpty's method of determining meanings, as he explained to Alice in Wonderland:

> I don't know what you mean by 'glory', Alice said.
>
> Humpty-Dumpty smiled contemptuously. 'Of course you don't – till I tell you. I meant 'there's a nice knock-down argument for you!'

> But 'glory' doesn't mean 'a nice knock-down argument,' Alice objected.
>
> 'When *I* use a word,' Humpty-Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'
>
> "The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is, ' said Humpty Dumpty, 'which is to be master – that's all.[2]

In the real world, when Congress enacts clear and unambiguous language, Congress is master and words cannot be contorted by agencies to mean their opposites, as courts have often concluded. (See Section V) The aviation statutes, decades of Civil Aeronautics Board and Department precedent and common sense make it clear that genuine control of a U.S. airline entity by U.S. citizens is required. Moreover, where other agencies have defined "control" of entities in other regulatory schemes, they have not permitted the kind of control by prohibited entities that the Department seeks to provide to foreign investors. Finally, if the Foreign Control NPRM were adopted it would prove unworkable as written.

A. The Aviation Statutes and Well-Settled Agency Precedent Require Genuine U.S. Control of U.S. Airlines

Under the aviation statutes, airlines must obtain authority from DOT to operate as U.S. "air carriers." (See 49 U.S.C. § 41102) An "air carrier" is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air

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[2] Carroll, Lewis, Through the Looking Glass and What Alice Found There (Random House 1946) at 94.

transportation." (Id. at § 40102(a)(2)) A 2003 amendment to the citizenship element of the definition of "air carrier" in the aviation statutes expressly requires that an airline that is, or is owned by, a corporation must be under the "actual control" of U.S. citizens.[3] The Department acknowledged this clear statutory mandate for U.S. control of the entire "applicant" for air carrier authority as recently as last week:

> Section 41102 of the Transportation Code requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens and that <u>the applicant must be under the actual control of U.S. citizens</u>.

(Order 2005-12-19 at 7 (emphasis added)) As the Department recognizes in the Foreign Control NPRM, the 2003 amendment to the U.S. citizen definition in the Transportation Code "specifically codified" and "reflect[ed] Departmental precedent" dating back to the 1940s. (70 Fed. Reg. at 67390)

In view of this acknowledged Congressional tightening of the statutory U.S. citizen standard to incorporate a requirement that the applicant for certificate authority be entirely under the "actual control" of U.S. citizens, the Department erroneously asserts that "it remains for the Department to interpret that requirement" by, in this case, changing the standard from prohibiting even "the

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[3] Pub. L. 108-176, § 807, 117 Stat. 2588 (Dec. 12, 2003) (cited by the Department in the NPRM as a "2004" amendment, 70 Fed. Reg. 67389 at 67390 n.3, 67395).

shadow of substantial foreign influence"[4] to allowing actual foreign control of a U.S. airline's commercial activities, with carveouts only for nominal U.S. control of safety, security and corporate organizational documents. (Id.) Contrary to this assertion, the legislative history of the 2003 amendment suggests that, while DOT may retain the ability to interpret precisely what constitutes actual control, the Department had assured Congress that the amendment "will not in any way affect [DOT's existing] determination of what constitutes a citizen of the United States." (149 Cong. Rec. S7813 (June 12, 2003) (colloquy between Senators Stevens and McCain).

Although the explicit statutory language and the 60 years of precedents incorporated into the statute by Congress clearly require that actual control of U.S. airlines be vested in U.S. citizens, the Foreign Control NPRM would contort the statutory language to mean that U.S. citizens would not have to actually control U.S. airlines, but instead need only control certain specified aspects of a U.S. airline's activities. Aside from the fact that separating control of parts of an airline's day-to-day business and long-term planning into compartments of "foreign" and "U.S." control would be a totally unworkable sham, the Department's unauthorized and radical reconstruction of the statute would violate more than 60 years of precedents as well as the plain meaning of the statutory requirement that actual control of U.S. airlines must remain with U.S. citizens.

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[4] Uraba, Medellin and Central Airways, Inc.-Certificate of Public Convenience and Necessity, 2 C.A.B. 118, 120-121 (1940).

In Willye Peter Daetwyler, dba Interamerican Airfreight Co., Foreign Permit, 58 C.A.B. 118, 120-121 (1971) the Civil Aeronautics Board (CAB) concluded that U.S. citizens owned, but did not control, Interamerican and therefore refused to license it as a U.S. indirect air carrier. In reaching that decision, the CAB analyzed the original Air Commerce Act and the Civil Aeronautics Act and hearings held in 1937 on them and cited Uraba, Medellin and Central Airways, Inc., 2 C.A.B. 334 (1940), in which an airline applicant claimed that it was effectively controlled by Pan American even though fewer than the requisite percentage of officers and directors were U.S. citizens. CAB found that the airline did not qualify as a U.S. citizen during the relevant grandfather period and said, "the shadow of foreign influence may not exist." (2 C.A.B. at 337) In sharp contrast, the Foreign Control NPRM would permit foreign influence to literally overshadow and eclipse U.S. influence.

The Department has adhered consistently to the position, subsequently adopted by Congress, that foreign interests may not control U.S. airlines. As the Department's own inspector general said in 2003, "the Department, and the Civil Aeronautics Board ("CAB") before it, quite correctly, have interpreted these requirements to mean that U.S. citizens be in control of a carrier, both in form and in fact." (March 4, 2003, letter from Inspector General Kenneth M. Mead to The Honorable Don Young ("Inspector General's Letter" hereafter) at 2) Through numerous proceedings evaluating foreign control, the Department has carefully examined all of the relevant circumstances to determine if foreign interests have

the ability to control a U.S. air carrier. (See, e.g., Wrangler Aviation, Order 93-7-26; Page Avjet, Citizenship, 102 C.A.B. 488 (1983); and Intera Arctic Services, Order 87-8-43) In fact, the very kinds of financing, business relationship and supermajority voting provisions allowing foreign owners to exert control over commercial decisions by U.S. airlines now proposed in the Foreign Control NPRM have precluded a finding of actual control by U.S. citizens. (See, e.g., Order 93-3-26 at 7-8)

In this very Foreign Control NPRM, the Department cites to its longstanding precedent—more than sixty years of decisions affirming that "a corporation must be under the 'actual control' of U.S. citizens to meet or continue to meet the citizenship standard." (70 Fed. Reg. at 67390) Incredibly, the Department now attempts to assert that because the "standard and scope [of actual control] was refined" over the course of its past decisions, that it now has carte blanche to depart from this well-established doctrine. (Id.) While the Department's standards may have been "refined" over time, the Department's interpretations have consistently and vigorously enforced the actual control requirement.

- The combination of various factors, such as a foreign citizen's capitalization and business activities, administrative and support services, and marketing," while perhaps not in and of themselves dispositive of impermissible foreign control, have caused the Department to find that "when taken together, many of the above indicia compel the conclusion that [the airline] was under the control of [a] foreign citizen." (AMI Jet Charter, Inc., Violations of 49 U.S.C. § 41101 and 14 CFR Part 298, Order 2005-9-11 at 3, citing Air-Evac Air Ambulance Inc., Concerning U.S. Citizenship, Order 96-6-13)

- The Department has also looked behind organizational charts or delegations to find impermissible foreign control. In the case of Applications of Servicios Aeros Professionales, Inc. For Certificates to Engage in Interstate and

Foreign Scheduled Air Transportation Under 49 U.S.C. 41102, the Department found that the airline's General Manager, Jose Patin, a foreign citizen listed as being responsible for administration of the company's operations did not report to any other individual, but rather, that "Oscar Patin, the purported owner and President of SAP, reports directly to Jose Patin." (Order 2000-7-15, at 4)

- In its decision in Acquisition of Northwest Airlines by Wings Holdings, Inc., despite the fact that the parties had agreed to greatly reduce KLM's equity in Wings beyond the statutory maximum, the Department called for the dilution of a three person financial advisory committee and the recusal of a KLM representative on Wings' board of directors because "the committee would have access, presumably on a broad basis, to the senior management of Northwest concerning the airline's financial affairs," and "the representative on the board would provide KLM with the ability to participate at the highest level of decisionmaking in the company with respect to sensitive competitive and international aviation matters," respectively. (Order 89-9-51, at 5)

- The Department similarly found impermissible foreign control in the Premiere Airlines, Inc. Fitness Investigation, where an airline's founder, although a U.S. citizen, borrowed the money to buy the stock from his foreign employer and thus the employer "had a substantial interest in [the airline's] successful operation and was in a position to exert overriding influence and control" over the founder. (Order 82-5-11, at 2; see also Application of Airwest International, Inc, Order 85-8-90, at 8 (impermissible foreign control existed where 23.5 equity owner in airline borrowed $475,000 of $500,000 used to purchase his interest from a foreign national))

- Stressing that an investor's status as a foreign national dictated that it thoroughly examine the actual control it could potentially exert, CAB opined that, "[d]espite technical satisfaction of this standard, a corporation may be found not to be a citizen of the United States if in fact a foreign national has the power to exercise control over it. (Charlotte Aircraft Corporation, Intercontinental Airways, Inc., Application, Order 1981-9-64, at 6)

- In the face of citizenship questions arising out of ongoing merger of the acquirer, CAB relied on its holding on Willy Peter Daetwyler d/b/a Interamerican Freight Co., and reiterated that "even where the applicant's arrangements only result in meeting 'the bare minimum requirements set forth in the Act, it is the Board's view that the transaction must be closely scrutinized, and that the applicant bears the burden of establishing that the substance of the transaction is such as to be in accordance with the policy, as well as the literal terms of the specific statutory requirements.'" (International Utilities Corporation and International Utilities of the U.S.,

> Inc., Applications and Petitions, Order 1971-11-109, at 8, citing Order 1971-10-114, at 6)

The standards long enforced by the Department and adopted by Congress would now be turned topsy-turvy to support a finding of actual control by U.S. citizens despite clear foreign control through such mechanisms if the Foreign Control NPRM were adopted.

Although the Department may have tested the limits of the Congressionally-mandated control standard in DHL Airways, Inc. n/k/a Astar Air Cargo, it concluded, based on the specific facts of that extraordinary proceeding, that U.S. citizens in fact held actual control of Astar Air Cargo, the U.S. carrier examined in that proceeding. (See Order 2004-5-10 at 6-7, 8-10, 18-30) In that case, the Department said, "Under Department precedent, 'The control standard is a de facto one – we seek to discover whether a foreign interest may be in a position to exercise actual control over the airline, i.e., whether it will have a substantial ability to influence the carrier's activities.'" (Order 2004-5-10 at 8, citing Order 89-9-51 at 5) In concluding that ASTAR was "an independent enterprise" the Administrative Law Judge who conducted hearings on the issue found that ASTAR

> controls all employment decisions. . . . It also controls its own financial operations. It formulates its own budget and is responsible for its own financial statements. . . . . the carrier may acquire assets, recapitalize, restructure, or raise additional equity for growth and development of its business. . . . Only ASTAR makes strategic decisions.
>
> Astar is autonomous operationally, too, the Administrative Law Judge found. It decides its fleet mix. Decisions to add, change or retire aircraft are ASTAR's.

(See Recommended Decision, Docket OST-2002-13089, December 19, 2003 at 30-31)

In sharp contrast, under the Department's proposed guidelines, foreign interests could control all employment decisions, financial operations, budgets, financial statements, asset acquisition, recapitalization and restructuring, additional equity, strategic decisions, fleet mix and aircraft acquisition and disposal. The Foreign Control NPRM proposal would abandon the historic "actual control" standard recently codified by Congress in favor of a variable standard that would permit foreign interests, including foreign airlines, to control U.S. airlines if they are from "open skies" countries.

The plain language of the statute and years of precedent make clear that the issue is whether U.S. or foreign interests control the air carrier entity itself, not merely its CRAF commitments, security and safety. As the Department itself said just last year, Vision 100 "amended the statutory definition of 'citizen of the United States,' . . . by including the requirement that a carrier must be under the actual control of citizens of the United States." (Order 2004-5-10 at 10 (emphasis added) Accord, Order 2005-12-19 at 7 ("the applicant must be under the actual control of U.S. citizens").

Congress could have designated only certain functions to be under the actual control of U.S. citizens, such as security and safety, but did not choose to do so, making clear that the whole of the carrier must be under the actual control of U.S. citizens. Allowing foreigners to make the critical commercial decisions of a U.S.

airline clearly constitutes "actual control" of the carrier under the Department's precedents, common understanding, and control principles established by other agencies.

When Congress adopted the statutory requirement that a U.S. airline must be under the actual control of U.S. citizens, it had before it more than 60 years of precedent it sought -- for good and compelling reasons -- to require the Department to enforce. For example, under the Foreign Control NPRM standards, although U.S. citizens would be responsible for CRAF commitment and implementation, a commercial decision by foreign managers to eliminate all intercontinental aircraft would effectively preclude participation in CRAF. Moreover, the Department's Deputy Undersecretary has reportedly described the decision whether to participate in CRAF as "commercial" and subject to foreign control. Foreign-controlled airlines may not be so willing to participate in U.S. military ventures or agree with U.S. security and terrorist efforts, particularly if their home countries have different views from the U.S., and disagreements between U.S. managers assigned to security and safety responsibilities and foreign managers controlling employment and commercial decisions could paralyze an airline's operations, particularly in times of crisis. Similarly, outsourcing jobs to foreign countries would be of vital concern to U.S. employees and other stakeholders. For such reasons, among others, Congress adopted a statutory actual control standard for the Department to follow, and it is Congress, not the Department, that must consider whether any significant changes should be made to that standard.

Significantly, when a distinguished Working Group of the American Bar Association Air & Space Law Forum analyzed foreign ownership and control issues, it recommended "that Congress amend the statutory restriction on foreign ownership and control of U.S. airlines" subject to conditions that would require amendments to the aviation statutes regarding airline commercial decisions regarding international scheduling and capacity and establishment of a trans-national legal framework "containing fair procedures to regulate labor representation and collective bargaining on such multi-national airline systems" as well as specific provisions for mandatory CRAF commitments. (See Proposed Position Statement For Consideration by the ABA Air and Space Law Forum presented to the Forum on October 28, 2004) Unlike the ABA Working Group proposal, the Department's proposal would by-pass Congress and provide none of the restrictions on commercial decision making or labor/management relations proposed by the ABA Working Group to protect important public interests.

The Department's proposal would also put at risk the international operations of any U.S. airline whose commercial and financial decisions could be controlled by foreigners since virtually all bilateral aviation agreements have provisions requiring that substantial ownership and effective control of an airline designated by the United States rest in U.S. citizens. Indeed, even the ultra-liberal, multilateral U.S.-APEC agreement requires that "effective control" of a designated airline must be "vested in the designating Party, its nationals, or both" even though "ownership" by the designating party's nationals is not required.

The sharp contrast between the standards established by the Department prior to Congressional adoption of the Department's "actual control" standard and the Department's proposal to open the floodgates to foreign control demonstrates how radical the Department's proposed changes are. In KLM/Northwest, for example, the Department disapproved a 3-person financial advisory committee, precluded a "disproportionate number of foreign director representatives to important committees" and recused KLM representatives from matters which would have a direct and predictable effect on the financial interest of KLM's operations, actual or potential competition with KLM, or bilateral aviation negotiations to which the Netherlands was a party. No such conditions would apply to foreign representatives under the proposed standard. In the seminal Willye Peter Daetwyler case, U.S. owners and managers held other positions which made them impermissibly beholden to the foreign owner, and the U.S. air carrier would have been operated as part of the foreign owner's network, but the Department's new policy would neither prohibit U.S. airline managers from holding positions which make them beholden to foreign interests nor preclude operating the U.S. airline as part of the foreign minority owner's network.

Although the Department proposed legislation that would have increased the permissible foreign ownership percentage, it made no significant effort to pursue that legislation or to explore with Congress options for changing the foreign ownership and control provisions in the aviation statutes. Without successfully pursuing legislation expanding foreign voting stock ownership to 49% while

maintaining its policy that U.S. citizens must control U.S. airlines, the Department has reversed its scheme and proposed allowing de facto foreign control of U.S. airlines without expanding foreign voting stock ownership in an attempt to do an end-run around Congressional opposition to foreign ownership or control of U.S. airlines.

But for the intractable British Airways/U.K. opposition to opening up London Heathrow and providing slots and facilities there for new entrants to ensure effective competition and the Department's application of its current actual control standards, the former US Airways might today be part of the British Airways empire rather than having been merged into America West. Although the Department's proposed standard would require an "open skies" agreement and reciprocity for investment with the foreign owner's country, it would not require access by U.S. carriers to airports, slots and facilities from which they have historically been banned. If the Department's Foreign Control NPRM had been effective when the Shah of Iran sought an interest in Pan American World Airways, Pan American might be flying today, but there is no telling where control of Pan American might be. Although significant questions have been raised about the application of Virgin America in part because of its apparent control by Virgin Atlantic, a carrier from a non-open-skies country, Virgin Nigeria might well seek to start a new U.S. airline claiming, as it does in a recent application, that it is an airline from an open-skies country. By the same token, an Indonesian airline serving the one airport in the world for which security risk notices are currently

required for passengers could claim the right, as a carrier of an open-skies country, to start an Indonesian-controlled airline in the U.S.

The Foreign Control NPRM is unlawful because it places actual control of U.S. airlines in the hands of foreign persons in blatant disregard of the plain statutory language acknowledged by the Department and raises serious policy issues that must be addressed by Congress.

B. Other Agencies Recognize That "Control" Means What the Department Has Historically Recognized, Not What The Foreign Control NPRM Proposes

The Department's extraordinary proposal to define "actual control" by U.S. citizens to permit actual control by foreign citizens defies not only the plain meaning of the words and common sense but also decisions by other government agencies on what control means. Under Securities and Exchange Commission rules, for instance, "control" is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." (17 C.F.R. § 230.405) Under the Department's proposal, however, it appears that a foreign airline while limited to a 25% voting interest in a U.S. air carrier, would also be able to acquire 100% of the air carrier's non-voting shares, 100% of the air carrier's debt, contracts giving the foreign carrier extraordinary rights to endorse or veto the carrier's management decisions and the right to appoint foreign citizens to conduct all aspects of the air carrier's business except for

CRAF, security and safety, all in the name of "enhanced access to worldwide financial resources."

The Department's proposal is also at odds with "control" standards applied by other federal agencies. For example, the Department of Interior's rule defining "control or controller" includes "a person who has ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, a permittee, or an operator; or [a]ny other person who has the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a[n]. . . operation is conducted." (30 C.F.R. § 701.5(4)-(5)) Examples of persons presumed to meet this last criterion are those who contribute "capital or other working resources under conditions that allow that person to substantially influence the manner in which a[n] ... operation is or will be conducted." (Id. at (5)(vi)) The Department's conclusion in the Foreign Control NPRM that the ability of a foreign airline to "commit" or otherwise control aircraft and other assets of a U.S. airline cannot be reconciled with this presumption. As the U.S. Court of Appeals for the District of Columbia has recognized, "[t]he ability to control assets goes hand-in-hand with control." (National Mining Association v. U.S. Department of the Interior 177 F.3d 1, 7 (D.C. Cir. 1999) (citing University of R.I. v. A.W. Chesteron Co., 2 F.3d 1200, 1214 (1st Cir. 1993) ("The hand that holds all the purse strings presumably controls the dependent entity"))

Similarly, among the factors used by the Federal Communication Commission ("FCC") to determine when a party has de facto control of an FCC

license in violation of statutory restrictions on ownership and control, pursuant to 47 U.S.C. § 310, are: "(1) Does the licensee . . . have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision and dismissal of personnel? (5) Who is in charge of the payment of financing obligations, including expenses arising out of operation? and, (6) Who receives monies and profits derived from the operation of the facilities?" (In Re Applications of Brian L. O'Neill, 6 FCC Rcd. 2572 (1991) (citing Intermountain Microwave, 24 RR 983, 984 (1963)) Thus, under FCC precedent, the ability to control the types of operational and commercial decisions permitted by the Foreign Control NPRM would demonstrate unauthorized transfer of control under FCC's standards.

So, too, the proposed Foreign Control NPRM is inconsistent with Small Business Administration ("SBA") rules, which set forth factors for determining when disadvantaged individuals properly control an entity applying for or participating in the development program for small businesses owned by disadvantaged individuals pursuant to the Small Business Act, 15 U.S.C. § 631 et. seq. According to section 124.06 of the SBA regulations, "SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals," with certain enumerated exceptions. (13 C.F.R.

§ 124.106) A non-disadvantaged individual may not "[e]xercise actual control or have the power to control the applicant or Participant." (13 C.F.R. § 124.106(e)(1)) Among the indicia of such disqualifying control by non-disadvantaged individuals are: indirect control "where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals"; provision of "critical financial or bonding support or a critical license which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant"; non-disadvantaged control "through loan arrangements;" and control based on "business relationships with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk." (13 C.F.R. § 124.106(g)(1)-(4)) All of these types of "control" would be permitted under the Foreign Control NPRM.

If the Department's Foreign Control NPRM were adopted, the Department would be completely out of step with other agencies, a point that reviewing courts would consider critical. As a result, the Foreign Control NPRM would likely be struck down not only as contrary to the explicit statutory provisions enacted by Congress but also as an arbitrary and capricious interpretation since other agencies recognize that control over financial, employment, commercial and other management decisions constitute actual control of an entity.

III. The Foreign Control NPRM Would Discourage Investment in U.S. Airlines

Although the Department's Foreign Control NPRM is based on the claim that allowing foreign control of U.S. airlines would enhance access to worldwide capital markets, U.S. majority investors and foreign investors not part of a foreign control group could be discouraged by the Foreign Control NPRM from making investments in U.S. airlines. Because of uncertainties created by the potential that the Foreign Control NPRM would be overturned by Congress or the courts, foreign investors may be reluctant to invest in U.S. airlines. Promoting both U.S. and foreign investment in U.S. airlines should be the goal of both the Department and Congress, and the debate on how best to attract investment through potential changes to statutes governing ownership and control of U.S. airlines should be continued in Congress.

In fact, the Department's proposal might not enhance access to worldwide capital markets because the Foreign Control NPRM would allow foreign interests to hold control rights disproportionate to their ownership interests through supermajority rights, possibly creating a disincentive for U.S. investors.

The underlying concept in the Foreign Control NPRM is the establishment of a "dual-class" structure in U.S. airlines that would distinguish control rights from proportional share ownership. While "dual-class" structures are not illegal as a matter of corporate or securities law, U.S. investors, the SEC, the NYSE and other exchanges and courts all prefer single class structures and view "dual class" structures with some skepticism. For the Department to be proposing as a favored

business practice a structure that other U.S. government agencies and U.S. stock exchanges have worked to discourage is clearly inappropriate.

"Dual-class" structures have been used to entrench management as a defensive mechanism against a disfavored corporate suitor. Entrenching management both deprives shareholders of their right to exercise control over a company and makes management less responsive to shareholders.

The Foreign Control NPRM would permit foreign owners to gain the kind of control that could be used in a way contrary to shareholders interests.

The SEC spent a great deal of time and effort attempting to establish a rule that would bar certain "dual-class" structures. The SEC's rationale was simple – it believed that "dual-class" structures "disenfranchise" public shareholders and that public shareholders of existing companies are often coerced into accepting "dual-class" structures. The SEC ultimately adopted this rule as Rule 19c-4 under the Exchange Act of 1934. Although this rule was ultimately struck down by a federal appeals court on jurisdictional grounds, the SEC's concern over and dislike for "dual-class" structures was so great that, notwithstanding this reversal, it spent four more years getting U.S. stock exchanges to adopt rules (which are currently in effect) greatly limiting "dual-class structures." See NYSE Listed Company Manual, §313.

Courts also dislike "dual-class" structures. Although the standard of review for "dual-class" structures has varied, courts have often viewed these structures with their highest and strictest standard—the "intrinsic fairness" standard. The

reason for this review is simple: courts have tended to believe that "dual-class" structures entrench management and deprive shareholders of their right to control a company.

Investors prefer structures other than "dual-class" structures. As the SEC noted in its final release adopting a Rule 19c-4, more than 1,000 commentators, including all institutional investors that commented, supported the SEC's proposed rule because "(1) [t]he adoption of a minimum voting rights standard is necessary to ensure management accountability; (2) the Rule will protect shareholder interests in connection with contests for corporate control; [and,] (3) the Rule will protect shareholders from being disenfranchised." (53 Fed. Reg. 26376 (July 7, 1988)). Corporate governance rating services, such as Institutional Shareholder Services, penalize corporations that adopt "dual-class" structures. Proxy guidelines of many mutual funds also state that the mutual funds will oppose attempts to create "dual-class" structures

Studies find that a class of shares with lesser control rights (which the U.S. shareholders would hold under the Department's Foreign Control NPRM) may trade at a discount to shares with greater control rights. Thus, U.S. investors could be left with less valuable shares under the Department's proposal.

With control vested in foreign nationals, U.S. investors would recognize quickly that their investments are at risk of subordination to the goals of the foreign owners. When the foreign owner is an airline which could benefit from

subverting the interests of the U.S. carrier to the interests of the foreign carrier, the foreign control could be particularly insidious.

The Department appears to believe that existing shareholders at U.S. airlines would enter into a "dual-class" system only "if that is what the foreigners and the U.S. citizens who own at least 75% of the voting stock agree upon." (See Shane Ex Parte Memo at 2) This is incorrect as a practical matter because a U.S. airline and foreign partner could establish the foreign partner's control over the U.S. airline through contractual arrangements without the need for a shareholder vote. Even if the foreign investor were to take control via an investment, however, the foreign investor would be negotiating with management of the U.S. airline, not the widely dispersed U.S. shareholders. Management might have every incentive to strike a deal with the foreign investor, even if the deal disadvantaged existing U.S. shareholders. The U.S. shareholders would then face a coercive "yes or no" vote – and shareholder coercion was one of the reasons why the SEC adopted Rule 19c-4. (See 52 Fed. Reg. 23665 (June 22, 1987)) And even in this vote, under the laws of Delaware, which is the most common state of incorporation, a simple majority, not 75%, would be sufficient to approve the change.

In any event, the Department would apply a variable definition of "actual control," depending on the aviation relationship with the foreign investor's country, a standard that appears nowhere in the terms defining citizens of the United States. Although "control" is either "actual" or not without regard to the citizenship of the investor, the Department's variable standard would mean that the same

degree of "control" would constitute "actual control" for one investor but not another, based solely on the investors' nationalities. Moreover, given the obvious legal uncertainties surrounding the Department's proposed policy, not to mention the complexities of permitting "actual control" by foreign interests of some but not all of an airline's activities, the likelihood of substantial foreign investment resulting from the Department's proposal may well prove to be slim.

As a result, the Foreign Control NPRM may well discourage both U.S. and foreign investment in airlines despite its stated objective of enhancing investment in U.S. airlines. Among the issues to be explored by a Congressional review of ownership standards for U.S. airlines must be the impact of any statutory change on the prospects for investment in U.S. airlines and whether other legislative changes, including actions to reduce the excessive taxation and fee burdens of airlines or reduce the heavy financial burden imposed by exorbitant prices for fuel, can provide greater incentives for investment in U.S. airlines than expanded ownership and control by foreign interests.

IV. The Foreign Control Proposal Is So Poorly Crafted That It Fails To Meet the Statutory Standard or The Department's Objectives and Would Be Impossible To Implement Rationally

Despite the express statutory provision requiring that "actual control" of U.S. airlines must be vested in U.S. citizens, the Foreign Control NPRM would allow foreign interests, including foreign airlines, to control directly all of an airline's commercial decisions and to control indirectly all of an airline's decisions on CRAF, security requirements of the Transportation Security Administration, safety

requirements of the Federal Aviation Administration and organizational documents.[5] As explained above, by allowing such complete control by foreign interests, including foreign airlines, the Foreign Control NPRM, while retaining limits on the equity investments of foreign citizens, would be enshrining a minority foreign control over airlines owned primarily by U.S. citizens.

The Foreign Control NPRM would allow long-prohibited control via supermajority or disproportionate voting rights, negative control/power to veto, buy-out clauses, significant contracts providing explicitly or implicitly for foreign control, credit agreements and debt containing control provisions and control through webs of business relationships between U.S. airlines and foreign airlines, foreign manufacturers of aircraft, foreign labor or even foreign religious or governmental organizations. Moreover, changes to corporate governance or relationships transferring control to foreign entities could remain confidential and be resolved "informally" between the Department and the carrier with no opportunity for other parties to explore the scope of the control to be exercised or the potential impact of the control on the airline industry, safety and security, CRAF or employment. Indeed, the Department has suggested that it will provide non-public "guidance on the implementation of this policy in the context of actual cases, and we encourage consultation with the Department before any irrevocable decisions are made, as is customarily done now" (70 Fed. Reg. at 67393-94), leaving

[5] European stakeholders have reportedly been advised that foreign owners could directly make a commercial decision not to participate in CRAF.

wide open the Department's potential interpretations of its new policy statement. Although the stated goals of the Foreign Control NPRM include reducing governmental intrusion in commercial decision-making by airlines and providing access to global capital, the proposal would actually replace governmental intrusion with foreign intrusion and inhibit global investment in existing airlines by providing minority stakeholders, including foreign airlines, with the means to start new U.S. airlines to meet the objectives of minority foreign owners, diverting traffic and revenues from both domestic and international routes of U.S. airlines already struggling to achieve economic operations.

The Foreign Control NPRM's definition of "actual control" would vary from country to country. By limiting foreign control rights to countries with "open skies" agreements, the door would be open wide to citizens of up to 74 countries (see Appendix A), regardless of whether those countries have good or bad safety regulatory regimes, fail to provide adequate slots and facilities for U.S. airlines at their major airports or lack adequate safeguards for foreign investors. The proposal also fails to address the standard to apply when investors are from numerous countries, some with open skies agreements and some without.

The globalization of capital markets, the difficult financial condition of U.S. airlines (thanks in large measure to excessive government fees, taxes and regulatory policies) and Congressional directives deregulating the airline industry were all firmly in place two years ago when Congress explicitly directed the Department to ensure that actual control of U.S. airlines remains with U.S.

citizens. Thus, these factors do not support the Department's proposal to change the standard at all, much less as radically as the Foreign Control NPRM proposes.

As noted above, Congress has required that U.S. airlines be controlled by U.S. citizens, not that certain aspects of U.S. airline operations be controlled by U.S. citizens. The Department itself says, "The law requires U.S. control of U.S.-flag airlines. This has not changed." (70 Fed. Reg. at 67394) The Department then leaps to the non-sequitur that it proposes to "ensure that the application of an 'actual control' standard results in U.S. citizen control being exercised [only] in those areas of airline operations where there currently remains significant governmental involvement or regulation." (Id.) One problem with this formulation is that some of the greatest potential harms from minority control exercised by foreign interests would flow from commercial decisions made to favor the foreign owner's own commercial, employment or governmental interests. The other problem with this formulation is that having a U.S. citizen in charge of safety, security and CRAF participation would be meaningless because of the commercial decisions being made by foreign interests. Foreign interests could control budget amounts allocated for safety and determine the compensation and advancement prospects of the U.S. citizens responsible for safety even though U.S. citizens are nominally in charge of safety. Similarly, a foreign airline's decision to terminate the long-haul international flights of a U.S. airline it controls in favor of the foreign airline's flights would damage not only the interests of the U.S. airline's employees

but also terminate the U.S. airline's ability to participate in CRAF.[6] Moreover, safety and security standards applicable to the U.S. airline's flights on those routes would not apply to flights operated by the foreign minority shareholder.

Finally, the Foreign Control NPRM would require that U.S. citizens have control, defined as "the ability to make decisions that are not subject to substantial influence by foreign interests," over the "creation and amendment of the organizational documents (such as the charter, certificate of incorporation and by-laws, and/or membership agreement) of the governing entity." (70 Fed. Reg. at 67394) Although the "fundamental organization" documents may be controlled by U.S. citizens, the proposal would allow U.S. citizens to contract away control of the airline regardless of what the "organic" documents provide. Moreover, there is nothing in the Foreign Control NPRM that would prevent U.S. citizens from adopting organic documents that provide effective control to minority foreign shareholders.

Alternatively, if the Foreign Control NPRM were interpreted to preclude any foreign involvement in decisions affecting CRAF, security, safety or core corporate documents, as the proposal sometimes implies, then current policies on control, not those described in the Foreign Control NPRM, would have to continue to be applied.

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[6] The Foreign Control NPRM provides a specific example in which two foreign nominees would be in charge of both an airline's day-to-day operations and market entry strategy, with both nominees having "influence in the purchase of aircraft." (70 Fed. Reg. at 67395)

The Foreign Control NPRM has been described as a "bright-line" test, but the lines it would draw are obscure at best. After conceding that "most countries have strict rules governing the ownership and control of their airlines" the Department's Undersecretary for Policy recently said this:

> Our statute says that U.S. citizens must own at least 75 percent of the voting stock of an airline company, the president and two-thirds of the directors and other senior managers must be U.S. citizens, and that U.S. citizens must "actually control" the airline. If a partnership wishes to invest in a U.S. airline, the statute says that each and every partner must be a U.S. citizen or the entire partnership is deemed foreign.
>
> That's what the statute says, and it says it very briefly and clearly. Now you might think if U.S. citizens do indeed own 75 percent of the voting shares of a company, that those U.S. citizens are in actual control of the company. Occupying two-thirds of the seats on the board of directors and two-thirds of the senior management jobs, you might think, would be the clincher.
>
> And you would be right – unless the company is an airline.[7]

But the numerical tally of ownership, voting rights and officers, directors and key management personnel is not the standard established by Congress. Instead, Congress has affirmatively decided that U.S. airlines must remain under the actual control of U.S. citizens **in addition to** meeting the numerical standards.[8]

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[7] "Aviation Deregulation: A Work in Progress," Jeffrey N. Shane, Under Secretary for Policy, U.S. Department of Transportation, International Aviation Club of Washington, November 8, 2005 ("Shane Speech" hereafter) at 4.

[8] Significantly, the requirement that 75% of the voting control of a U.S. airline remain with U.S. citizens would become meaningless if foreign interests can arrange by contract or otherwise that no significant decisions could be made without an 80% majority vote or that any vote by the majority of shareholders could be vetoed by foreign shareholders.

V. Changes to the Statutory Prohibition on Foreign Control Must Be Adopted by Congress; the Prohibition Cannot Be Annulled By DOT Fiat

Even assuming that the Department's proposed "actual control" standard made sense, which it does not, the Department lacks the power to contort the statutory prohibition on foreign control of U.S. air carriers by adopting a so-called interpretation or clarification that would actually permit control of key U.S. airline operations and decision-making by foreign citizens. Such an interpretation would be unenforceable not only because it conflicts with the aviation statute's plain language "but it also rewrites [the statutory provision] itself." (Backcountry Against Dumps v. E.P.A., 100 F.3d 147, 150 (D.C. Cir. 1996). Accord, Alabama Power Co. v. U.S. E.P.A., 40 F.3d 450, 456 (D.C. Cir. 1994) ("Neither this court nor the agency is free to ignore the plain meaning of the statute and to substitute its format policy judgment for that of Congress", quoting Alabama Power Co. v. Costle, 636 f. 2d 323, 365 (D.C. Cir. 1979)) And no amount of deference requires the courts to "accept an agency interpretation that 'black means white'," such as the Department's topsy-turvy proposed redefinition of actual control. (Town of Boylston v. F.E.R.C., 21 F.3d 1130, 1134 (D.C. Cir. 1994, quoting National Fuel Gas Supply Corp. v. F.E.R.C., 811 F.2d 1563, 1572 (D.C. Cir. 1987))

So outlandish is the Department's attempt to turn back 60 years of policy and disregard the plain language of the statute that 85 members of Congress wrote to the Secretary of Transportation immediately after the proposed interpretation was published for comment, declaring that "this NPRM would make fundamental

changes to our nation's aviation system, is contrary to recent Congressional mandates in this area, and should not be unilaterally imposed by the Executive Branch." (Letter to Secretary of Transportation Norman Y. Mineta signed by 85 members of Congress, dated November 18, 2005 ("November 18 Letter"). Shortly thereafter, the Senate and the House of Representatives each introduced legislation directing the Secretary of Transportation to report to Congress on the proposed change to "long-standing policies and legal interpretations that 'actual control' means control over all operations of the airline, not only decisions concerning security, safety, the Civil Reserve Air Fleet Program, and organizational documents." (H.R. 4542, 109th Cong. § 1(7) (2005), introduced by Reps. Oberstar, Young and others on December 14, 2005. Accord, S.2135, 109th Cong. § 1(7)(2005) introduced by Sen. Inouye on December 16, 2005)

Only Congress can change U.S. law on foreign control of U.S. airlines from one prohibiting "actual control" of an entire airline to one permitting control of key aspects of an airline by foreign entities. The courts have not hesitated to invalidate similar attempts by agencies to stretch statutory language beyond recognition as the Department is attempting to do in the Foreign Control NPRM. (See, e.g., Brown v. Gardner, 513 U.S. 115, 120 (1994) (Veterans Administration interpretation of a statutory compensation requirement as covering an injury only if it resulted from negligent treatment by the VA or an accident occurring during treatment invalidated as a "poor fit" where the underlying statute imposed no such fault or accident requirement); American Bar Ass'n v. FTC, 430 F.3d. 457 (D.C. Cir. 2005)

(Case No. 04-5237, Slip op. at 24, 28) (D.C. Cir., December 6, 2005) (invalidating FTC's interpretation aimed at regulating the practice of law under the Gramm-Leach-Bliley Act where there was no indication in the statutory language of Congressional intent to empower the Commission to do so); National Mining Association v. U.S. Dept. of the Interior, 105 F.3d 691, 694-95 (D.C. Cir. 1997) and cases cited therein (ownership and control rule for permit applications for surface coal mining operations violated the first step of the test in Chevron USA, Inc. v. Natural Resources Defense Council, Inc. because it "sweeps much more broadly" than the Surface Mining Control and Reclamation Act; agency cannot "trump Congress's specific statutory directive in" that provision by stretching it to cover those outside the provision))

Further, the courts have recognized that when "Congress chooses a term that has a well-established meaning as some administrative agency. . . has previously defined it, the court should look at that agency in construing the meaning of the statute. In so doing, the court does not 'defer' to the agency's definition, but to Congress' intent in choosing that term." (Duckworth v. Pratt & Whitney, 152 F.3d 1, 6 n.6 (1st Cir. 1998)(internal citation omitted)) Under the legislative reenactment doctrine, "long standing court or agency interpretations of a statute have the force of law and can only be changed by Congress" when Congress enacts the terms of a statute in reliance on agency interpretations. (Ward v. Commissioner of Internal Revenue, 784 F.2d 1424, 1430 (9th Cir. 1986)) Congress' repetition of a well-established term carries the implication that Congress intended the term to be

construed in accordance with pre-existing regulatory interpretations." (Bragdon v. Abbott, 524 U.S. 624, 631 (1998))

There is no doubt that the Foreign Control NPRM rule contravenes the statutory language as well as Congressional intent. Thus a reviewing court would have no choice but to invalidate the Foreign Control Policy, if it were finalized, under traditional Chevron step one analysis.[9] The legislative history of the 2003 amendment itself suggests that, while DOT may retain the ability to interpret precisely what constitutes actual control, DOT had assured Congress that the amendment "will not in any way affect [DOT's] determination of what constitutes a citizen of the United States." (149 Cong. Rec. S7813 (June 12, 2003) (colloquy between Senators Stevens and McCain) At least some who voted in favor of the measure did so with the understanding that it was meant to reflect and adopt "current law" (Id., remarks of Sen. McCain), and 85 members of Congress wrote DOT less than two weeks after the proposed interpretation was published in the Federal Register pointing out that the Department's proposal is "contrary to recent Congressional mandates" which were "clearly . . . intended to codify the policy developed by CAB and the DOT" and criticizing DOT for "overstepp[ing] its authority . . . with its revised interpretation of 'actual control'" (November 18 Letter at 1, 2) In the judgment of these members of Congress, the Department's proposal

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[9] Moreover, even assuming the Final Policy could survive such Chevron step one analysis, it would be struck down under Chevron step two, since the interpretation is unreasonable as shown above. (See ABA v. FTC, Slip op. at 34)

"flies in the face of the 2003 legislation" and, "is a major impairment of the policy Congress required by statute in 2003 ... that has been followed for well-over 60 years." (Id. at 2. Accord, H.R. 4542 and S. 2135 at § 1(3)) Such [a] major change. . . should only be accomplished through the legislative process."(November 18 Letter at 2) Rather than pursuing an unlawful rulemaking process likely to be tied up in litigation for years to come, the Department should actively pursue changes to foreign ownership and control provisions in Congress rather than simply submitting a proposal to Congress and allowing it to languish.

VI. Perverting A Clear Statutory Standard And Turning Control of U.S. Airlines Over to Foreigners To Secure An Agreement With The European Union That Fails to Provide Competitive, Economically-Viable Slots and Facilities For New U.S. Entrants at London Heathrow Would Be A Travesty

Although the Foreign Control NPRM fails to mention ongoing negotiations with the European Union that are dependent upon European airlines securing the right to control U.S. airlines, ignoring the Department's motivation in making a foreign control proposal at this time would ignore reality. While the Department has claimed there is no link between the U.S.-EU negotiations and the Foreign Control NPRM, European Commission representatives have said, "a change of the ownership and control system at (the) U.S. side" is "for us a very important contextual element, which at the end of the negotiations, we will take into account to assess if there is a balanced package on the table" (Reuters, November 3, 2005), clearly tying the U.S.-EU negotiations to the Foreign Control NPRM. Moreover, the European Union transportation ministers have deferred voting on the acceptability

of the proposed U.S.-EU agreement pending completion of proceedings on the Foreign Control NPRM. (See "U.S., EU Reach First-Stage Aviation Agreement," Aviation Week & Space Technology, 11/27/05, 3:32:02 p.m. at 2) The Department's Undersecretary Shane has confirmed the relationship between negotiations with the European Union and the Foreign Control NPRM, saying "Everyone knows that the European Community . . . wants to see progress in the removal of U.S. restrictions on foreign investment in U.S. airlines, " and "I will not stand here and pretend that we don't care whether the proposal will have a positive impact on the U.S.-EU talks. Of course we do." (Shane Speech at 8) Clearly, the Department would not be rushing to judgment on foreign ownership without the impetus created by its longstanding desire to reach a multilateral "open skies" agreement with the European Union. The Department's desire to leverage the Foreign Control NPRM into a European Union agreement is so strong that the Department's Undersecretary for Policy took the extraordinary step of meeting privately on an ex parte basis with U.S.-EU negotiators to discuss the Foreign Control NPRM and potential interpretations of it. Although a vague summary of the discussions has belatedly been placed in the Foreign Control NPRM docket, the very fact of such an ex parte meeting underscores the linkage between the Foreign Control NPRM and the U.S.-EU negotiations. Significantly, U.S. stakeholders have not been given the same opportunity for give-and-take discussions with U.S. government officials as European stakeholders were given. As a further part of the effort to sell the Foreign Control NPRM to Europeans, the Director of the Department's Office of

International Aviation spoke to the Institute of Economic Affairs conference on "The Future of Air Transport" in London on November 29, 2005 and said the Foreign Control "NPRM proposes a profound change," that a foreign owner could "exercise control over the commercial aspects of airline operations" including "rates, routes, fleet structure, marketing, alliances, branding," direct an airline to buy foreign aircraft or have repairs done overseas if the "decision does not affect safety, security or national defense" and that a foreign investor could be given "by contract the right to dictate selection of aircraft, routes, frequency, classes of service, pricing, advertising, codeshare partnerships, etc." [10]

The right to control U.S. airlines would be given away for rights of little to no value for U.S. combination airlines and the passengers they serve. Since most European countries already have open skies agreements with the U.S., there are very few limitations on the rights of U.S. airlines to serve points throughout Europe. London Heathrow, Europe's largest and most significant airport for U.S.-Europe travel, is closed to entry by additional U.S. airlines by the U.S.-U.K. bilateral air transport agreement, and it would remain effectively closed to additional U.S. airlines even if the U.S.-Europe multilateral open skies agreement were signed because competitive slots and facilities will not be available at London Heathrow to remedy the effects of years of discrimination against Continental and

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[10] See Power Point Presentation: "Citizenship Requirements in a Global Marketplace," attached to Ex Parte Communication memorandum dated December 13, 2005, in the Foreign Control NPRM docket.

other U.S. airlines denied entry at London Heathrow. Absent the provision of competitive, economically-viable slots and facilities to Continental and other U.S. airlines historically excluded from London Heathrow, the greatest single impediment to free and fair U.S.-Europe competition will remain in place with or without a U.S.-EU multilateral agreement. The right to fly is meaningless without the right to land. Moreover, the multilateral agreement would do little to expand other meaningful opportunities for U.S. combination carriers and their passengers in Europe. Even if limitations resulting from the lack of open skies agreements in European countries such as Greece, Spain and Ireland may provide marginal increments in opportunities for new services, the likelihood of a significant number of new flights that could not be operated today is slim. Finally, the entire effort would be undertaken to resolve an illusory European problem since each and every European airline with a home country open skies agreement with the U.S. is now permitted by the U.S. open skies agreement to operate flights between any point worldwide, including points throughout Europe, and the United States so long as it also operates some "through" flights between its home country and the third country pursuant to "starburst" change of gauge provisions. Although allowing European airlines to operate between any point in Europe and any point in the U.S. has been touted as "the single most important concession ever made in the history of air services negotiations," the claim that "no EU carrier has the ability under the current bilateral agreements to do what every U.S. carrier can do: connect any point in the U.S. to any point in Europe" is simply incorrect. Thus, a European carrier of

country A can operate a single daily roundtrip flight between any point in its home country (Point 1) and a point in a third country (Point 2) and then operate an unlimited number of flights between Point 2 and any point in the U.S. under open skies starburst change of gauge provisions. The local flight between its home country and Point 2 would be supported in any event by local traffic, so its operation would impose no burden whatever on the airline seeking to operate a hub in a third country. Thus, as a practical matter, under the open skies agreements between European countries and the U.S., any European airline could today be offering service between any point in the U.S. and any point in Europe, and any consumer benefits flowing from such flights could be made available today if airlines believed third country-U.S. flights were economically feasible.

Usurping Congress's role in determining the scope of foreign control over U.S. airlines for the purpose of securing an agreement with the European Union for the meager benefits to combination carriers and the passengers they serve that might result from such an agreement would be a poor trade at best. Without competitive, economically-viable slots and facilities at London Heathrow – the primary bottleneck for effective U.S.-Europe competition – available to independent U.S. airlines such as Continental, reaching an agreement by standing the "actual control" standard on its head would be a travesty.

VII. The Foreign Control NPRM Departs Radically From The Objectives Of This Proceeding, And The Original Objectives Should Be Considered Instead.

The Department instituted this proceeding to consider a report by the Inspector General suggesting that the Department should list the considerations it evaluates in making determinations on whether airlines are U.S. citizens or not and should adopt procedures to make its evaluations more transparent and public.

The proposal contained in the Foreign Control NPRM is contrary to the stated objectives of the Department's March 4, 2003, Advanced Notice of Proposed Rulemaking ("ANPRM") in this docket, which was issued to address issues raised in a report by the Department's Inspector General which had identified a list of criteria the Department typically uses to determine actual control of an air carrier in continuing fitness cases and questioned the process used in such cases. The Department sought comments on two issues. First, the Department sought "comments on whether there are any other factors or criteria the Department routinely considers in its evaluations that should be added to this list; and, "[s]econd, the Department [sought] comments on the need for a regulatory change to the requirements of 14 CFR part 204 applicable to certificated and commuter air carriers proposing to undergo a substantial change in operations, ownership, or management that may impact their U.S. citizenship." (68 Fed. Reg. 44675, 44677, emphasis added)

There was no hint in the ANPRM that the Department should or would consider reducing the number of factors or radically changing the criteria applied in

citizenship cases. Some commenters recommended more transparency and more criteria or more factors. For example, as the NPRM recognizes, "FedEx, Robyn/Gelband, and UPS commented on other factors that we should consider in the preparation of any list for publication." (70 Fed. Reg. at 67391) These included FedEx's suggestion of adding the foreign revenue test applicable to air carriers applying for Department of Defense airline contracts; the Robyn/Gelband recommendation for including the impact on competition, specifically the bilateral relations between the U.S. and the foreign investor's homeland; and a UPS recommendation for including the foreigner's power to cause reorganization of the air carrier. (Id. at 67391) No commenters suggested the radical approach the Department has taken in the Foreign Control NPRM.

The Foreign Control NPRM raises more questions than it answers since varying interpretations could range from the status quo if true U.S. control over everything affecting safety, security, national defense and corporate documentation must be maintained or total foreign control if foreign interests could effectively control an airline's entire operations. Because the issues raised by effective control available to foreign interests through provisions giving their minority shareholdings majority control are by nature complex and controversial, the Department should, as suggested by its own Inspector General and various commenters responding to the ANPRM, adopt a more transparent and formal process for evaluating foreign control issues if the Foreign Control NPRM, or anything resembling it, is actually adopted. As UPS suggested, there should be a public notice in the Federal Register

summarizing the facts of the proposed changes to an airline's ownership and control and an opportunity to review and comment upon the materials submitted. Major policy changes involving foreign control should be neither adopted nor implemented behind closed doors, much less the subject of private meetings with foreign negotiators.

VIII. Conclusion

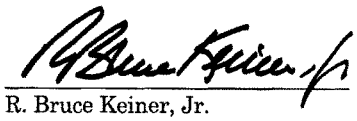
Rather than turning the concept of "actual control by U.S. citizens" on its head, the Department should be approaching Congress to make the critical public policy choices involved in allowing foreign control – and ownership – of U.S. airlines. Congress, not the Department, must decide whether the government "has a legitimate interest" (Shane Speech at 5) in foreign control of commercial decisions by U.S. airlines and what steps should be taken to encourage further investment in U.S. airlines – whether from home or abroad. Giving foreign airlines the right to "protect their investments" in U.S. airlines while potentially depriving U.S. citizens with majority ownership in U.S. airlines of the right to protect their investments is not a legitimate trade-off.

Continental would welcome the opportunity for Congressional review of foreign ownership and control issues as part of a comprehensive review of the citizenship provisions of the aviation statutes and the pros and cons of changing the current statutory provisions. The most important governmental actions to expand investment in U.S. airlines would require reductions in excessive taxes, fees and other charges imposed on airlines by governmental agencies, actions to deal with

the extraordinarily high price of fuel and ensuring a modern, effective air traffic control system without burdening airlines to pay more than their fair share. In sharp contrast, however, adoption of the Department's unlawful Foreign Control NPRM would create disincentives for investment, legal uncertainties that would take years to resolve resulting in reversal of the decision to adopt the Foreign Control NPRM, and opportunities for European airlines to exploit control rights in U.S. airlines while keeping London Heathrow, the primary European airport, effectively closed to new entry by independent airlines such as Continental. For these reasons, the Department should withdraw its Foreign Control NPRM and pursue the issues raised in Congress, where they belong.

Respectfully submitted,

CROWELL & MORING LLP



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Counsel for
Continental Airlines, Inc.

January 6, 2006
DCIWDMS: 2691837_2

Open Skies Partners

Released by the Bureau of Economic and Business Affairs
Updated November 22, 2005

Partner	Application	Date Concluded	All-cargo 7ths	MALIAT Membership
1. Netherlands	In Force	10/14/92	--	--
2. Belgium	Provisional	3/1/95	--	--
3. Finland	In Force	3/24/95	--	--
4. Denmark	In Force	4/26/95	--	--
5. Norway	In Force	4/26/95	--	--
6. Sweden	In Force	4/26/95	--	--
7. Luxembourg	In Force	6/6/95	Yes	--
8. Austria	In Force	6/14/95	--	--
9. Iceland	In Force	6/14/95	Yes	--
10. Switzerland	In Force	6/15/95	--	--
11. Czech Repub.	In Force	12/8/95	Yes	--
12. Germany	Provisional	2/29/96	Yes	--
13. Jordan	In Force	11/10/96	--	--
14. Singapore	In Force	1/22/97	Yes	Yes
15. Taiwan	In Force	2/28/97	--	--
16. Costa Rica	In Force	5/8/97	--	--
17. El Salvador	In Force	5/8/97	Yes	--
18. Guatemala	In Force	5/8/97	Yes	--
19. Honduras	Provisional	5/8/97	Yes	--
20. Nicaragua	In Force	5/8/97	Chart Only	--
21. Panama	In Force	5/8/97	Yes	--
22. New Zealand	In Force	5/29/97	Yes	Yes
23. Brunei	In Force	6/20/97	Yes	Yes
24. Malaysia	In Force	6/21/97	Yes	--
25. Aruba	In Force	9/18/97	Yes	--
26. Chile	In Force	10/28/97	Yes	Yes
27. Uzbekistan	In Force	2/27/98	Yes	--
28. Korea	In Force	4/23/98	--	--
29. Peru	In Force	6/10/98	Yes	--
30. Neth. Antil.	In Force	7/14/98	Yes	--
31. Romania	In Force	7/15/98	--	--
32. Italy	C&R	11/11/98	--	--

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33. U.A.E.	In Force	4/13/99	Yes	--
34. Pakistan	In Force	4/29/99	Yes	--
35. Bahrain	In Force	5/24/99	Yes	--
36. Argentina	N/A	8/12/99	Yes	--
37. Qatar	Provisional	10/21/99	Yes	--
38. Tanzania	Provisional	11/3/99	Yes	--
39. Dom. Repub.	N/A	12/16/99	Yes	--
40. Portugal	In Force	12/22/99	Yes	--
41. Slov. Repub.	In Force	1/7/00	Yes	--
42. Namibia	C&R	2/4/00	--	--
43. Burkina Faso	In Force	2/9/00	Yes	--
44. Ghana	In Force	3/16/00	Yes	--
45. Turkey	In Force	3/22/00	--	--
46. Gambia	In Force	5/2/00	Yes	--
47. Nigeria	Provisional	8/26/00	Yes	--
48. Morocco	In Force	10/5/00	Yes	--
49. Rwanda	N/A	10/11/00	Yes	--
50. Malta	In Force	10/12/00	Yes	--
51. Benin	N/A	11/28/00	Yes	--
52. Senegal	C&R	12/15/00	Yes	--
53. Poland	In Force	5/31/01	Yes	--
54. Oman	C&R	9/16/01	Yes	--
55. France	In Force	10/19/01	Yes	--
56. Sri Lanka	In Force	11/1/01	--	--
57. Uganda	C&R	6/04/02	Yes	--
58. Cape Verde	In Force	6/21/02	Yes	--
59. Samoa	In Force	7/4/02	Yes	Yes
60. Jamaica	C&R	10/30/02	--	--
61. Tonga	In Force	9/19/03	Yes	Yes
62. Albania	In Force	9/24/03	Yes	--
63. Madagascar	Provisional	3/10/04	Yes	--
64. Gabon	In Force	5/26/04	Yes	--
65. Indonesia	C&R	7/26/04	Yes	--
66. Uruguay	Provisional	10/20/04	Yes	--
67. India	In Force	1/15/05	Yes	--
68. Paraguay	Provisional	5/2/05	Yes	--
69. Maldives	In Force	5/5/05	Yes	--
70. Ethiopia	Provisional	5/17/05	Yes	--
71. Thailand	In Force	9/9/05	Yes	--
72. Mali	In Force	10/17/05	Yes	--
73. Canada	N/A	11/01/05	Yes	--
74. Bosnia and Herzegovina	In Force	11/22/05	Yes	--

TESTIMONY OF

MICHAEL G. WHITAKER

VICE PRESIDENT, ALLIANCES

INTERNATIONAL AND REGULATORY AFFAIRS,

UNITED AIRLINES

SUBMITTED TO

HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

SUBCOMMITTEE ON AVIATION

WASHINGTON, DC

February 8, 2005

U.S. - E.U. Open Skies Agreement: with a focus on DOT's NPRM regarding 'actual control' of U.S. air carriers

TESTIMONY OF MICHAEL G. WHITAKER
VICE PRESIDENT, ALLIANCES
INTERNATIONAL AND REGULATORY AFFAIRS,
UNITED AIRLINES

Mr. Chairman, Members of the Committee, thank you for the opportunity to present the views of United Airlines on reducing regulatory barriers and expanding investment opportunities for U.S. and foreign carriers in the global aviation market. While we acknowledge the concerns of some of our colleagues and competitors in the U.S. aviation sector, as the nation's largest international airline, we take a very different view – one we believe is shared with many, if not most, U.S. aviation interests.

We applaud the dedicated and sustained work of the Departments of Transportation (DOT) and State (DOS) to reduce barriers to international aviation. Through several Administrations, Republican and Democratic, both Departments have made great strides in opening international aviation to market forces and eliminating anachronistic regulatory barriers to trade and competition. Over the last 15 years, the Departments of Transportation and State have led a remarkably successful global campaign for open skies -- enabling U.S. and foreign airlines to traverse the globe with increasingly fewer restrictions on where, when, and how often they can fly, what they can charge, or how they can market their international services.

The proposed rulemaking on investment that is the subject of today's hearing represents another step – if only a limited one – in the same right direction. Indeed, we would prefer that the U.S. go further and, on a reciprocal basis with other key aviation

countries, eliminate all constraints on foreign ownership and control, except only as they relate to national security oversight.

Restricting cross-border investment in the airline sector is one vestige of a pre-deregulation mindset that continues to inhibit U.S. aviation, treating it differently from virtually any other U.S. industry in the global economy. The same approach gave rise to the largely now-forgotten government restrictions on routes, pricing, marketing, and other services that beset the U.S. industry for a half century, from the inception of commercial aviation to its deregulation in 1978. Indeed, the so-called "foreign ownership" rule itself originated in the Commerce Act of 1926 -- before Lindbergh's transatlantic solo flight, and well before the development of any significant U.S. commercial airline industry.

Rather than labor under these anachronistic government economic constraints, U.S. airlines should be allowed to function just like other global businesses, driven by the dictates of a free market, not government economic edict. In a world where our international passengers can readily access their multinational bank accounts, stay in international hotel chains, and connect with worldwide communications networks on a global basis, it makes little sense for U.S. international airlines -- the quintessential infrastructure of the global marketplace -- to stay bound by restrictions of a bygone era.

U.S. airlines have undergone tremendous financial stress over the last five years, and it is hardly necessary to recite the litany of woes – from SARS to fuel costs to

terrorism – that have beset nearly every major airline. But numerous U.S. airlines have proven far more resilient than some predicted.

At United, we have just come through a complex and difficult bankruptcy – one of the largest ever in the U.S. The process required contributions by and adjustment for thousands of employees and business partners across the country. We have emerged, though, with a new sense of optimism. Our unit costs have dropped by 20 percent, excluding fuel, and we anticipate an annual average cost savings of $7 billion through 2010. We have also increased productivity by 27 percent, reducing duplication and waste. Today we are confident in our ability to compete effectively and efficiently not only throughout the U.S., but also in the critical international arena.

Let me stress, Mr. Chairman, that we are intensely focused on competing, expanding, and succeeding in that international marketplace. Compared to the relatively mature U.S. domestic market, the demand for international air service is rapidly accelerating. While North America's share of world air traffic is projected by Boeing to shrink from 25 percent to 20 percent over the next two decades, the share of intra-Asia markets will grow from 16 percent to 20 percent. And while domestic air traffic is forecast to grow only 3.5 percent annually during that period, transatlantic traffic is projected to grow by 4.6 percent annually, while traffic to Southeast Asia and China jumps every year by 7.3 percent and 8.0 percent respectively -- more than double the rate of North American growth.

It is not just that international markets are growing faster than the domestic market that leads us to focus on international service; it is also the fact of our growing competitive strength in those foreign markets. Where United once significantly lagged its European competitors in operating and cost efficiency, today we have achieved a vastly improved competitive position in important transatlantic markets. With these factors in mind, we have greatly expanded United international services over the last three years. Not only have we begun service to 12 new foreign cities, we have increased the number of foreign routes we serve by 44 percent and our overall international departures by 31 percent, and hope to expand in other international growth markets, including in China.

Simply put, we at United are looking for opportunities to compete in an open international aviation market -- not for regulatory protection from foreign competition or foreign investment. In the long run, the enduring path to aviation industry success is to become more competitive, embracing opportunities for international growth, integration, and inter-carrier cooperation and consolidation, including through investing in foreign carriers.

Historic U.S. leadership of global aviation -- and scores of other global industries -- is built on forward-looking, risk-taking competitive zeal, not on economic protection of U.S. flag companies. Removing constraints on cross-border investment and ownership limits may remove a degree of economic protection of U.S. firms and interests, but it also unleashes U.S. competitive strengths and entrepreneurial resilience. This trade-off,

reflected in DOT's proposal, remains the philosophical basis for bipartisan liberal U.S. trade policy.

Today, U.S. leadership of international aviation – virtually unchallenged since the dawn of commercial flight – is seriously threatened. The world's largest airline by revenues is no longer a U.S. airline, but rather the Air France/ KLM combination in Europe. Similarly, U.S. carriers are no longer the major purchasers of long-haul aircraft, but rather lag far behind their Asian and European competitors in the acquisition of the newest technologically-advanced long-haul jets. In fact, no U.S passenger airline has committed to purchase the super-jumbo Airbus 380, and only a very few high-efficiency Boeing 787 or Airbus 350 aircraft have been ordered by U.S. carriers.

Mr. Chairman, in today's competitive international airline industry, we think the only path that makes sense is the one that leads toward full deregulation, and the elimination of restrictions that continue to hold back U.S. carriers. DOT's rulemaking proposal is a good one, as far as it goes, as it would open investment opportunities for competitive U.S. carriers, while also enabling greater integration of U.S. airlines with their foreign carrier partners. At the same time, it respects the U.S. statutory foreign share ownership and governance requirements and responds to concerns about U.S. safety, security, and Civil Reserve Air Fleet (CRAF) needs.

More open foreign investment opportunities will also benefit international air travelers, who today already enjoy the benefits of inter-airline integration provided by the

global airline alliances. Today, our Star Alliance joins together 16 global airlines in the largest international air carrier network. This Alliance offers passengers from across the globe a significantly more seamless international travel experience – through more convenient connecting flights on multi-segment journeys, common airport lounge facilities, reciprocal frequent flyer programs, coordinated and proximate gate locations, one-stop ticketing on multi-carrier trips, and other services and conveniences. DOT has repeatedly acknowledged the importance of these significant, alliance-related consumer benefits.

Expanded foreign investment opportunities made possible by the DOT proposal would enhance the scope and level of this consumer-friendly inter-carrier integration. Specifically, it would enable airlines to take today's alliance-based inter-airline integration to the next level by facilitating cross-carrier equity investment and participation in business decision-making. Such investment and financial commitments would cement and strengthen the inter-carrier relationships that today rest solely on contractual agreements, albeit in some cases enhanced by DOT-granted antitrust immunity.

U.S. communities would also benefit from a more open investment regime, as strategic investment could support struggling U.S. carriers and associated jobs. And, while the proposed rule stands on its own merits, it is also a fact that our European aviation partners view the proposed investment liberalization as a sine qua non of any open market transatlantic agreement. Such a US-EU agreement, the text of which has

already been negotiated, would bring new competitive service options for many U.S. cities seeking transatlantic service, since it would enable any EU carrier to serve any U.S. city, regardless of its country of origin, just as any U.S. carrier could serve any EU city. Not surprisingly, the Airports Council International North America– the major U.S. body for airports – has strongly endorsed the DOT proposal.

From the U.S. airline perspective, the proposed DOT rule would encourage all-important strategic investment in U.S. airlines. U.S. carriers already appear to have adequate access to capital through investments from venture capital and hedge funds, and from private investors attracted by the industry's depressed valuations. The recent and rapid subscription of United's post-bankruptcy financing by major financial players reflects this availability, as does the financing readily provided to US Airways as it emerged from bankruptcy earlier this year.

But the proposed DOT rule would encourage long-term, strategic investment from those interested in building and maintaining airline businesses, not just transitory investment gains. This kind of strategic industry investment – whether by foreign investors in the U.S. or by U.S. airlines in foreign carriers – can play an important role in stabilizing the volatile airline sector.

Substantial cross-investment among international airlines can enable carriers in one region to broaden their financial exposure to other regions where growth and demand may be relatively strong – and so help flatten the often drastic and cyclical peaks and

valleys of airline operations and profitability. Conversely, global equity-based financial exposure can help spread risk – and so avoid the potential catastrophic impact of what has become for aviation the expectation of the unexpected – from SARS to terrorism to avian flu. Strategic cross-border investment can also help normalize the structure of the airline industry, eliminating some of the inefficient and destructive fragmentation of the international airline market.

Mr. Chairman, while the DOT investment initiative has merit on its own, it should also be considered in the broader context of the pending agreement that would create a full open skies aviation market between the U.S. and Europe. As noted earlier, the Europeans make no secret of the fact that they view relaxation of airline investment restrictions as essential to such an agreement. While we would not support a bad DOT policy rule simply to gain European approval of the pending agreement, we do wish to make clear that we endorse the US-EU agreement. We do so in light of the open skies and operational flexibility benefits the agreement would offer the U.S. and our airline – even though it will also expose United to significant new competition from major European airlines, as well as from U.S. competitors on certain key routes.

The proposed US-EU agreement would enable any European airline, regardless of its nationality, to fly to anywhere in the U.S. from any city in Europe, not just from the airline's homeland. Together with the new investment rules, this agreement will mean more competition for United – including in particular more competition from foreign airlines serving key U.S. markets from London's Heathrow airport. A new transatlantic

open market agreement would also open Heathrow service to other U.S. airlines as a matter of law. Recognizing that reality, United is prepared to accept this commercial challenge and pay this competitive price because, in the long run, we will only succeed if we can compete in a truly open global market. United and other U.S. airlines can do so, and can reassert U.S. aviation leadership, but only if we are prepared to compete efficiently and effectively as normal businesses on a global playing field.

To be frank, Mr. Chairman, we are surprised at the degree of concern that this relatively modest DOT proposal appears to have generated. Looked at closely, it is essentially an incremental step – albeit an important one -- along an extended path to a fully-deregulated, market-based, global industry. The proposal does nothing to affect the actual foreign ownership statutory requirements – that U.S. citizens own 75 percent of voting stock and serve as President and two-thirds of every U.S. airline's Board and managing officers; rather, it would relax only the interpretation of the regulatory control requirement.

And of course foreign investment liberalization is itself only a small part of a broader and essential deregulation agenda that DOT has pledged to pursue. In that vein, we appreciate the Department's recognition that airline deregulation is still unfinished business -- a work in progress, and we strongly urge it to maintain its focus on achieving the many critical, remaining deregulation goals.

Given the circumscribed nature of this foreign investment regulatory step, it is regrettable that some have chosen to mount such high-pitched opposition to it. DOT's critics focus on exaggerated fears of foreign investment in the U.S., while virtually ignoring the benefits of U.S. investment in foreign airlines, and the broader benefits of showing consistent support for open aviation markets, free trade, and investment freedom. Regrettably, these objections are not entirely unexpected. Virtually every significant step toward aviation liberalization has met unwarranted opposition – from the 1978 deregulation of the U.S. domestic industry, to the pursuit of global open skies policy more than a decade later.

The DOT proposal to facilitate cross-border airline investment within the limits of the current statute, together with the transatlantic open market agreement it will encourage, signals a hopeful new direction for U.S. and international aviation – and one that will work to the benefit of a resilient U.S. airline industry. Especially as the proposal moves toward freeing airlines from anachronistic marketplace distortions, and in the direction of enabling U.S. airlines to compete like other global businesses, it can help bring about a more fully deregulated environment in which U.S. carriers can regain their historic global aviation leadership.

Thank you again for the opportunity to appear and present the views of United Airlines. I would be pleased to respond to any questions of the Committee.

STATEMENT OF

CAPTAIN DUANE WOERTH, PRESIDENT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

BEFORE THE

SUBCOMMITTEE ON AVIATION

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

FEBRUARY 8, 2006

United States-European Union Air Services
And DOT's NPRM on Foreign Control of U.S. Airlines

Air Line Pilots Association, Int'l
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Statement of
Captain Duane Woerth, President
Air Line Pilots Association

Before the
Subcommittee on Aviation
Committee on Transportation and Infrastructure

United States House of Representatives
February 8, 2006

United States-European Union Air Services
And DOT's NPRM on Foreign Control of U.S. Airlines

Good morning. I am Duane Woerth, the President of the Air Line Pilots Association. ALPA represents over 62,000 pilots at 39 airlines in the United States and Canada. We appreciate the opportunity to appear before this Subcommittee today to present our views on the initialed text of a possible air services agreement between the United States and the European Union and on the U.S. Department of Transportation's proposed policy on foreign control of U.S. airlines that is linked to that text. We have deep reservations about both the initialed text and DOT's proposal. We also fully support H.R. 4542, which is designed to ensure that Congress has an opportunity for meaningful review of DOT's proposal and its implications.

The Proposed U.S. – EU Text

With respect to the initialed text, ALPA believes that it offers little to U.S. airlines, but much to their EU counterparts. That text would allow any European airline to fly from any point in Europe to any point in the U.S. and beyond. For

example, Lufthansa could fly from Paris to Atlanta; Air France could fly from Munich to Chicago. Thus, the initialed text would solve the problems raised for the Member States of the European Union by the December 2002 European Court of Justice decision that found that the ownership and control clauses in the bilateral agreements between the United States and individual European Member States were illegal because they violated the right of establishment provisions of the EU's organizational statutes. The text would also facilitate the consolidation of European airlines, potentially allowing them to be more efficient and effective competitors vis a vis U.S. carriers. In addition, under the initialed text EU carriers would receive the right to provide aircraft and crew to U.S. airlines on international routes, a right they have long sought, but which appears to be in square violation of the Federal Aviation Regulations and directly threatens the jobs of U.S. airline pilots. Clearly the initialed text provides substantial benefits to EU carriers.

What would U.S. carriers get if the initialed text were to go into effect? Apart from some additional routes beyond European gateway points that our cargo carriers might use, not much. In June 2004, the U.S. Government Accountability Office issued a report titled "Transatlantic Aviation: Effects of Easing Restrictions on U.S.-European Markets." That report contained an assessment of what U.S. carriers and consumers stood to gain if the U.S. entered into an "open skies" agreement with the EU that eliminated, as does the initialed text, the nationality restrictions on EU carriers. The

GAO concluded that whatever benefit U.S. carriers and consumers would eventually gain from such an agreement would not be realized for several years. This, according to the GAO, is because the U.S. already has open access to the vast majority of European traffic and the only significant restricted market -- London -- is subject to significant airport capacity constraints that would not be eliminated by a liberalized agreement. In other words, in the GAO's view, U.S. carriers were not likely to benefit in the short term and possibly only to a small extent even in the longer term by a US-EU "open skies" agreement similar to the initialed text.

But as favorable as the initialed text is for European carriers, they want more. Throughout the negotiations the European carriers sought the inclusion in any new agreement of the right for them to own and control U.S. airlines. Although that right was not included in the initialed text, at the end of the negotiations the Commission expressly linked the outcome of DOT's rulemaking process to the EU's decision to finally accept or reject that text.

The Foreign Control Rulemaking

So let me turn to that rulemaking process and DOT's proposed policy change.

The Department's proposal, which was issued on the eve of the last round of the negotiations that resulted in the initialed text, would permit foreign interests to exercise actual control over all the commercial elements of a U.S. air carrier's business, including such fundamental matters as "choice of markets, type of equipment, and rate-setting."

Under the proposal U.S. citizens would have to maintain actual control of only four areas:

1. The carrier's "organizational documentation, including such documents as charter of incorporation, certificate of incorporation, by-laws, membership agreements, stockholder agreements, and other documents of similar nature;"

2. The carrier's "[d]ecisions whether to make or continue Civil Reserve Air Fleet (CRAF) commitments, and, once made, the implementation of such commitments with the Department of Defense;"

3. The carrier's "policies and implementation with respect to transportation security requirements specified by the Transportation Security Administration;" and

4. The carrier's "policies and implementation with respect to safety requirements specified by the Federal Aviation Administration."

As long as these four areas remain under U.S. control -- and the other requirements of the statute relating to place of incorporation, ownership of voting stock, and the citizenship of managers and directors, are met -- the Department would permit foreign citizens to control all other parts of the carrier's business and operations, including rates, routes, fleet structure, marketing, alliances and branding. As United Airlines CEO Glenn Tilton put it in a recent speech to the UK Aviation Club, the proposal "would allow foreign investors in U.S. airlines to effectively control the bulk of the airline's commercial operations."

We believe there are a number of flaws in the Department's proposal.

The Statutory Issue

First, DOT's proposal is simply at odds with Congress's determination that actual control of a U.S. air carrier must be in the hands of U.S. citizens. While the four areas over which the Department would continue to require U.S. citizen control may have their importance, they are ultimately peripheral to an airline's core business operations and strategy. Control over the four narrowly defined areas simply does not add up to the "actual control" of the entire air carrier as required by Congress. The most critical issues that managers of a U.S. airline must address are such matters as the markets to be served, the type of aircraft to be flown, the alliances to participate in, the extent to which the carrier out-sources maintenance and other services, the carrier's schedules, fares, etc. These are the fundamental economic decisions that determine the very nature of an airline's operations, and its role in the air transportation system. To permit these matters to be controlled by foreign citizens, as the Department proposes to do, simply cannot be reconciled with the statutory requirement that U.S. citizens retain "actual control" of the airline.

DOT's NPRM acknowledges that, unless Congress changes them, the Department cannot alter the statutory standards that define a carrier's U.S. citizenship -- i.e., the requirements relating to place of incorporation, ownership of the voting stock, and the citizenship of managing officers and directors -- because they are mandated by

law. The same is true of the "actual control" requirement. Indeed, the underlying purpose of all the statutory requirements is to ensure that U.S. citizens retain actual control of a U.S. airline. Without "actual control," the other statutory requirements are meaningless.

Application of the "actual control" standard does require analysis of the specific facts and circumstances of each particular case and thus the Department does have some discretion to define the criteria for determining whether U.S. citizens have "actual control" of a carrier. That discretion, however, does not give the Department authority to change the plain meaning of the term "actual control" itself, so that control over such basic matters as a carrier's route selection, fare structure, or choice of aircraft is simply excluded from the definition of "actual control." This is not interpretation but legislation, and it is the province of Congress, not the Department.

Apart from the legal issues there are a number of policy issues raised by the Department's proposal.

The Impact on U.S. Airlines and Jobs

A key policy issue, in our view, is whether foreign air carriers should be permitted to acquire or exercise the kind of control over the basic business decisions and strategy of U.S. air carriers that the proposed rule change would permit.

Remarkably, the NPRM does not address this issue at all. Rather, it speaks throughout of hypothetical foreign investors in U.S. carriers, without any effort to

distinguish between investments by foreign air carriers and other potential sources of foreign capital. But the distinction is of crucial importance.

When one air carrier seeks to acquire control of another, the goal of the acquisition is almost always to combine the operations of the two carriers so as to create an integrated network. Since foreign carriers cannot operate domestically, the reason a foreign carrier would seek control of a U.S. carrier would normally be to combine the U.S. carrier's domestic services with the foreign carrier's international services. While this also occurs when U.S. and foreign carriers form alliances, an acquisition of control is very different from an alliance. In an alliance each carrier remains autonomous and able to protect its own economic interests. A very different situation would be created if a foreign carrier is permitted to acquire control of the key economic elements of a U.S. carrier's business strategy -- such as route structure, schedules, fleet type, and the like. In such a situation, it is inevitable that the foreign carrier would exercise its control to maximize its own interests, not those of the U.S. carrier.

What would likely happen when a foreign carrier acquires control of a U.S. carrier is that the foreign carrier would use the U.S. carrier to create a domestic network that would support and feed traffic to the foreign carrier's international operations. As a result, any pre-existing international operations of the U.S. carrier would diminish or disappear, while those of the international carrier would be expanded.

Such a result is fundamentally inconsistent with 49 U.S.C. § 40101(a)(15), which sets forth as a U.S. policy goal:

> strengthening the competitive position of [U.S.] air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for [U.S.] air carriers to maintain and increase their profitability in foreign air transportation. [Emphasis added.]

This goal simply could not be accomplished if foreign carriers are permitted to control the basic operations and business strategy of U.S. carriers.

The decline in international operations by U.S. carriers that would result from foreign control would also undermine the CRAF program, because it would necessarily cause a reduction in the number of long-range wide-bodied aircraft in the U.S. carrier's fleet. Although the Department's proposed rule attempts to protect the CRAF program by ensuring that U.S. citizens retain control of a carrier's CRAF commitments, the fact is that a foreign carrier that has economic control of a U.S. carrier would be able to determine how many CRAF-eligible aircraft the U.S. carrier has in its fleet. And it is predictable, for the reasons stated, that the foreign carrier's business strategy would cause that number to diminish over time.

The decline in international operations by U.S. carriers would also be injurious to U.S. airline workers, including in particular the pilots. International flying of wide-bodied aircraft is the most remunerative, and therefore the most desired, flying performed by pilots; pilots spend their entire careers accumulating the seniority required to gain access to such flying opportunities. In an era when the career

expectations of pilots and other airline workers have already been repeatedly frustrated by airline bankruptcies, furloughs, wage concessions, pension plan terminations, and the like, it would be a crowning blow for the U.S. government now to adopt a policy that would tend to eliminate international flying by U.S. carriers.

U.S. workers would also suffer injury because U.S. labor laws do not apply to foreign air carriers. When two or more U.S. carriers are commonly controlled, the employees of all of them are subject to the Railway Labor Act and therefore have the same collective bargaining rights and opportunities. This allows the employees on all the affiliated carriers to try to equalize their wages and working conditions, thereby preventing the carriers from playing one employee group against another. When one of the affiliated carriers is foreign and therefore not subject to the same labor law, the employees of all the affiliates are placed at a severe disadvantage and face the prospect of being bid against each other without effective recourse against the entity (perhaps a foreign holding company) that is allocating the work. These are not hypothetical concerns. In the early 1990s when British Airways bought into US Airways, and KLM bought into Northwest, flight crew jobs were either moved to or grew disproportionately at the foreign partner.

The validity of these concerns was recognized recently by a Working Group appointed by the American Bar Association's Air and Space Forum to study the issue of whether the statutory restriction on ownership and control of U.S. airlines. The

Working Group issued a Proposed Position Statement (attached hereto) which, despite being favorably disposed to lifting the restrictions on foreign ownership and control of U.S. carriers, clearly recognized that ownership or control by foreign airlines should not be permitted until and unless special safeguards are enacted. The Working Group therefore recommended adoption of two important restrictions on foreign air-carrier control of a U.S. carrier. The first of these restrictions would require any foreign carrier that acquired control of a U.S. carrier to:

> ensure that the U.S. airline maintains at least the percentage of the combined total ASMs operated by both the U.S. airline and the foreign affiliates between the United States and any country or region that it had as of a date six months prior to the announcement of the acquisition. This condition ensures that the CRAF program has access both to a sufficient number of the appropriate (i.e., long-haul wide-body) aircraft and to the crew necessary to fly them in a military emergency. It simultaneously ensures that U.S. jobs are not transferred to foreign entities.

The second restriction proposed by the ABA Working Group would require that "[t]he U.S. government and the appropriate foreign government(s) . . . establish in advance a legal framework containing fair procedures to regulate labor representation and collective bargaining on such multinational airline systems." The purpose of this recommendation, of course, is to eliminate the unfair advantage that would otherwise result if the U.S. carrier and the foreign carrier were subject to different rules relating to labor representation and collective bargaining.

While ALPA does not endorse the Proposed Position Statement of the ABA Working Group, we do believe the statement has at least identified the basic concerns that must be addressed if any change is to be made in existing rules relating to foreign ownership or control of U.S. air carriers. The Department's NPRM has notably failed to address any of these concerns. Moreover, it seems apparent that the issues identified in the Proposed Position Statement cannot be dealt with by rulemaking. They would require basic statutory changes that only Congress can make.

The Impact on Safety

ALPA also believes that the proposed rule would not preserve U.S. citizen control of safety matters, because an airline's safety depends more on discretionary operational decisions than on compliance with minimum mandatory government regulations.

While the NPRM asserts in its preamble that "responsibility for . . . policies and procedures related to safety . . . must still be under the control of U.S. citizens to the extent that they are today," the proposed rule is written much more narrowly: it merely requires that U.S. citizens retain control of "[c]arrier policies and implementation with respect to safety requirements specified by the Federal Aviation Administration." Nothing in the proposed rule would prevent foreign investors from controlling all other safety-related

decisions, so long as they do not impinge on the carrier's compliance with mandatory government regulations. There are, however, any number of economic and operational decisions that an airline's management makes that directly affect safety, even though they do not involve any issue of compliance with mandatory regulations. Safety of an airline starts at the top with those who decide business strategy and control the resources. For this very reason, the FAA has long recognized that mere compliance with minimum safety regulations does not make an airline truly safe. Rather, the FAA has been working diligently to develop and implement systems to promote and manage safety that go well beyond the minimum mandatory safety regulations.

For example, the FAA has established two major airline safety programs that are completely voluntary: the Aviation Safety Action Program (ASAP) and Flight Operational Quality Assurance (FOQA). See FAA Advisory Circular No. 120-66B, dated 11/15/02 (ASAP); FAA Advisory Circular No. 120-82, dated 4/12/04 (FOQA). The following is a brief description of each of these programs, taken from the respective FAA Advisory Circulars that establish them:

> The objective of the ASAP is to encourage air carrier and repair station employees to voluntarily report safety information that may be critical to identifying potential precursors to accidents. The Federal Aviation Administration (FAA) has determined that identifying these precursors is essential to further reducing the already low accident rate. Under an ASAP, safety issues are resolved through corrective action rather than through punishment or discipline. The ASAP provides for collection, analysis, and retention of the safety data that is obtained. ASAP safety

> data, much of which would otherwise be unobtainable, is used to develop corrective actions for identified safety concerns, and to educate the appropriate parties to prevent a reoccurrence of the same type of safety event. An ASAP is based on a safety partnership that will include the FAA and the certificate holder, and may include a third party, such as the employee's labor organization.
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> * * * * *
>
> FOQA is a voluntary safety program that is designed to make commercial aviation safer by allowing commercial airlines and pilots to share de-identified aggregate information with the FAA so that the FAA can monitor national trends in aircraft operations and target its resources to address operational risk issues (e.g., flight operations, air traffic control (ATC), airports). The fundamental objective of this FAA/pilot/carrier partnership is to allow all three parties to identify and reduce or eliminate safety risks, as well as minimize deviations from the regulations. To achieve this objective and obtain valuable safety information, the airlines, pilots, and the FAA are voluntarily agreeing to participate in this program so that all three organizations can achieve a mutual goal of making air travel safer.

As the above descriptions make clear, ASAP and FOQA are voluntary programs. To participate, an airline voluntarily enters into a formal agreement with FAA and the relevant employee groups. Such agreements involve significant commitments of the airline's resources, both financial and human. For example, they require the establishment of special committees to perform specified functions set out in the agreements, they require the collection and reporting in prescribed ways of numerous types of data, they require that specific employee policies must be implemented, etc.

Under DOT's NPRM, the decision to enter into an ASAP or FOQA agreement would not have to be under U.S. citizen control, since the proposed rule provides only

that U.S. citizens must control the carrier's "policies and implementation with respect to requirements specified by the Federal Aviation Administration." As previously noted, ASAP and FOQA are voluntary programs, not FAA requirements. They are, however, an important part of the FAA's continuing effort to maintain and improve the safety of U.S. airlines.

Aside from these specific programs, it is now commonly accepted by safety regulators and experts, both in the U.S. and internationally, that responsibility for safety must be shared across the entire airline, and not just relegated to a specific safety department or official. This principle has come to be known as Safety Management System (SMS). The ICAO Air Navigation Commission is currently drafting a formal SMS policy to be incorporated into Annex 6 of the Convention on International Civil Aviation, which will define the safety accountability of every element of an airline, including in particular its senior management. A similar policy is being developed in the U.S. under the aegis of the FAA's Next Generation Air Transportation System (NGATS). The NPRM's approach to the issue of safety, which presumes that responsibility for safety can be isolated from the general management of an airline, is in square conflict with the core principles of SMS programs that are being adopted by airline managements and regulators worldwide.

The fact is that all kinds of economic and operational decisions have an impact on safety. A few examples are: the decision whether or not to out-source aircraft

maintenance; the selection of a specific maintenance provider; the policies concerning pilot flight and duty time; the airline's policy concerning what types and the number of replacement parts to have available in excess of the minimum FAA requirement. Thus, the very premise of DOT's proposal -- that safety management can somehow be separated from the general operational management of an airline -- is untenable, and is not accepted by safety experts or regulators.

Finally, even if it were possible and prudent -- which it is not -- to place all safety responsibilities in the hands of one individual or management group within an airline, it would be totally unrealistic to expect that such an individual or group could operate autonomously, and not be under the ultimate influence of the airline's senior management. Senior management would necessarily be responsible for hiring and firing the safety personnel, and for setting their compensation and other terms and conditions of their employment. In any such employment relationship, the subordinate employees necessarily try to please their senior management, and are alert to even the most subtle signals as to the actions and decisions that senior management would approve or disapprove. It is thus inevitable that whoever controls the operation of the airline as a whole will also ultimately control its safety policies and their implementation.

We understand that the FAA career staff was not consulted, and has therefore had no input, in connection with the preparation of the NPRM. That may account for

the fact that DOT's proposal reflects so little understanding of how an airline's safety practices and policies are actually determined and managed. We believe that these matters must be given full exploration before any change in the actual control rule is considered.

The Impact on Existing Air Service Agreements

The Department's proposed policy change is also at odds with the control provisions in the United States' Air Service Agreements. The vast majority, if not all, of the air service agreements between the United States and foreign countries have provisions that require "effective control" of airlines designated by the U.S. to be vested in the U.S. or its nationals. In these agreements the control requirement applies to the airline as an entity, not to discrete elements or components of the airline. Should the Department permit foreign persons to control the operational and economic aspects of a U.S. carrier, a bilateral partner could assert that the carrier is no longer entitled to conduct international air transportation under the pertinent air services agreement. Thus, every U.S. carrier that availed itself of the proposed control policy would subject its eligibility to conduct international operations to challenge.

The Lack of Supporting Data

Finally, the Department has presented no data either to support its claim that the U.S. airline industry is in need of more foreign investment, or its claim that such investment is not available absent a change in the foreign control rules. We believe that

the fundamental premise on which the NPRM appears to be based -- that the U.S. airline industry is in need of "enhanced access to worldwide financial resources," and that such access to foreign capital cannot be achieved without granting foreign investors substantial control of U.S. carriers -- is erroneous. Certainly, the NPRM contains no hard data to substantiate these propositions, and we are not aware that any such data are available.

In fact, there is evidence that when a U.S. airline shows some significant promise of profitability, it is able to find the capital it needs. For example, United Airlines, after engaging in extensive restructuring, cost-cutting and changes in operations and services while in Chapter 11, was able to obtain $3 billion in debt exit financing on terms that pleased United's management. The airline's own press release stated that it had received offers of subscription for more than twice the capital necessary to support the financing it sought and that the money was provided at rates better than it had expected to receive. Similarly, US Airways, after going through its own Chapter 11 restructuring and merging with America West, obtained $1.5 billion in exit financing, of which $350 million was in the form of equity commitments. Moreover, $75 million of the equity was foreign investment provided by ACE Aviation Holdings, the parent of Air Canada. These major financings strongly indicate

that both foreign and domestic capital is available to U.S. airlines if they appear to offer a reasonable return to the investor.

If there is hard evidence that the U.S. airline industry is seriously suffering from a dearth of capital, and that the existing rules relating to foreign control are somehow responsible for the problem, that evidence has yet to be produced. Before lack of capital is used as a rationale for considering dramatic changes in the foreign control rules, there should be a thorough and systematic study to determine whether the problem it is attempting to cure actually exists.

Conclusion

In sum, DOT's proposed rule essentially rewrites the statutory rule on "actual control" recently enacted by Congress. The Department's proposal would have broad, potentially negative effects on the competitive posture of US airlines and their employees and raises a number of key public policy issues that have not been adequately addressed by the Department. Consideration of changes of this magnitude should be undertaken not by an administering agency but by Congress. H.R. 4542 is thoughtfully designed both to afford time for Congress to consider whether a change to the control rules is appropriate and to help develop a record on which that consideration can be based. We urge this subcommittee to support this measure and to ensure that the DOT does not unilaterally impose changes to the longstanding rules on "actual control" of U.S. airlines.

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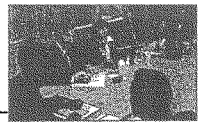
Working Group Position Statement on Relaxing Airline Foreign Ownership Restrictions



The Position Statement presented herein is a composition of the various forces that must be addressed if meaningful change is going to be made to foreign ownership of U.S. airlines. This proposal, which contains suggested changes to the law on foreign ownership and control, grew out of the efforts of the individuals whose names appear below the statement. The group met as part of and in preparation for a presentation to the Forum on Air & Space Law's Fall Meeting in Santa Monica, California, on October 28, 2004. The ex officio members participated in the deliberations leading up to the final draft but did not vote on approval of the final draft. Each participant may have personal views that vary from the consensus statement, but all were able to agree on the statement to reach a consensus. The consensus views do not necessarily reflect the views of any individual participants or their employers and/or clients.

Nor does the statement represent the views of the ABA or the Forum. The value of the proposal is less in its details (all of which are worthy of serious consideration) than in demonstrating the methodology/process by which competing interests may need to be accommodated. The Position Statement reflects the summation of research papers on various related subjects, including legislative history,

continued on page 20

ATTACHMENT TO COMMENTS OF ALPA (DOCKET 05-126-15779)

Position Statement on Relaxing Airline Foreign Ownership Restrictions

continued from page 1

maritime law as it applies to foreign ownership of U.S. shipping interests, the Omnibus Trade and Competitiveness Act of 1988 (Exon-Florio) legislation and the operation of the Committee on Foreign Investments in the United States (CFIUS), Civil Reserve Air Fleet (CRAF) issues, and labor-related issues.

A principal objective of the deliberations was to critically examine the original justifications for the restrictions on foreign ownership and control and to determine what, if anything, about the airline industry might require the continuation of special rules that apply to almost no other industry.

Only one of the original justifications, as reflected in the legislative history, held validity—the national security concern. Specifically, how can we ensure that the Department of Defense (DOD) has access to sufficient lift with crews in times of national emergency? A second area of concern identified was that a change in the ownership and control rules could give rise to labor-management issues not adequately addressed by the current laws of the United States and other countries.

The Position Statement appears below:

Proposed Position Statement for Consideration by the ABA Air and Space Law Forum[1]

It is the recommendation of the Working Group that Congress amend the statutory restrictions on foreign ownership and control of airlines subject to the conditions set forth below. Congress first restricted foreign ownership of U.S. airlines in the 1926 Civil Aeronautics Act. In 1938, the Civil Aeronautics Act of 1938 included the Federal Aviation Act of 1958, and it retained the current prohibition on sales to foreign ownership or control, to protect the 1938 subsidized, dedicated defense industry and to provide for the national defense. That prohibition, enforced by years of regulatory interpretation by the Civil Aeronautics Board and the Department of Transportation (DOT), has served to strictly limit foreign ownership and control, and largely exclude foreign equity capital. It is the Working Group's judgment that, if certain safeguards are put in place, the statutory prohibition is no longer needed to protect our aviation industry or provide for the national defense.

It is the Working Group's judgment that, if certain safeguards are put in place, the statutory prohibition is no longer needed to protect our aviation industry or provide for the national defense.

Under our proposal, there would be no restriction on the ability of a foreign entity that is not an airline or an airline affiliate to invest in a U.S. air carrier, except for the following statutory safeguard to protect national defense:

(1) Congress should amend the Transportation Code (49 U.S.C.) to require a foreign-owned U.S. air carrier to enter into a binding contract with the DOD that includes for participation in CRAF, and ensure compliance, a carrier must agree to [illegible] the DOD's objective of [illegible] [illegible] carrier has [illegible] [illegible] certificate of public convenience and necessity issued pursuant to [illegible] by the DOT.

Moreover, a foreign airline or its affiliate would have the same opportunity to invest in a U.S. carrier subject to two additional conditions:

(2) 50 percent or any greater minimal flying to and from the United States must be flown by the U.S. carrier, as measured by available seat miles (ASMs). In addition, the U.S. carrier must maintain a sufficient level of capacity on any major long-haul U.S. international routes (e.g., the transatlantic or the U.S.-Asia/Pacific). Specifically, the foreign-owned airline(s) controlling the U.S. airline shall ensure that the U.S. airline maintains at least the percentage of the combined total ASMs operated by both the U.S. airline and the foreign affiliates between the United States and any country or region that it [illegible]

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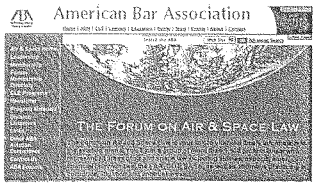

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had as of a date six months prior to the announcement of the acquisition. This condition ensures that the CRAF program has access both to a sufficient number of the appropriate (i.e., long-haul wide-body) aircraft and to the crew necessary to fly them in a military emergency. It simultaneously ensures that U.S. jobs are not transferred to foreign entities.

(5) The U.S. government and the appropriate foreign government(s) would have to establish the outlines of a legal framework containing fair procedures to regulate labor representation and collective bargaining on such multinational airline systems.

Whether or not the foreign owner is an airline, a U.S. carrier that has foreign ownership or control, as a "U.S. air carrier," will be organized under U.S. law and operated subject to all U.S. laws and regulations (e.g., safety, security, labor relations, environment) as if it were fully owned by U.S. citizens. The current provisions of the statute with respect to the citizenship of U.S. airline officers and directors would remain in place. The current control and voting tests would be modified as set forth herein.

Any foreign entity seeking to control a U.S. air carrier (like any prospective U.S. air service provider) would have to apply to the DOT for a certificate of public convenience and necessity. If the (DOT-approved) foreign owner is an airline or its affiliate, conditions 1 and 2 would be incorporated into the certificates of both the foreign airline owner and the U.S. air carrier. (The DOD should participate in the DOT certificate-approval process to ensure that national defense is adequately considered.) If the applicant is a foreign airline that is owned in whole or in part by a foreign government, DOT would need to make a finding on the record that such investment by a government-owned entity would not harm competition or otherwise be contrary to the public interest.

Lastly, the rights provided for in our proposal extend only to nationals of those countries or regional entities that provide U.S. citizens with investment rights of comparable value.

Jonathan B. Hill, Chairman

Russell Bailey
Jonathan Blank
Richard Magurno
Jeffrey Manley
Dorothy Robyn

Marie Dayton, ex officio
Dwight Moore, ex officio

Notes

1. The proposed Position Statement reflects the consensus views of the individuals whose names appear below the statement. These individuals participated in the deliberations leading up to the final draft, but did not vote on approval of the final draft. The views expressed in the Position Statement reflect the consensus views of those who fully participated and do not necessarily reflect the views of any individual participants or of their employers and/or clients.

2. Consideration was given to amending the so-called Exon-Florio provision of the Defense Production Act to *require* notification of the Committee on Foreign Investments in the United States (CFIUS) if a foreign entity seeks to own more than 25 percent of the voting equity in a U.S. air carrier that operates long-haul wide-body aircraft suitable for the Civil Reserve Air Fleet (CRAF). This change (CFIUS notification is now voluntary in most cases) would ensure that the Department of Defense (DOD) and other U.S. government agencies have the opportunity to block or condition a proposed airline acquisition on national security grounds, if appropriate. Because we are unaware of any instance where failure to notify has had a demonstrated detrimental impact on national security, we have determined not to recommend any changes in this area.

3. That is, the foreign airline owner may operate, with its own aircraft and crews, no more than 50 percent of any incremental flying by the combined entity on U.S. international routes, as measured by ASMs. If the foreign airline owner reduces the amount of flying by the U.S.-based carrier on U.S. international routes, it must reduce its own flying on U.S. international routes by the same amount, as measured by percent of ASMs.

STATEMENT OF
EDWARD WYTKIND, PRESIDENT
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
HOUSE AVIATION SUBCOMMITTEE
ON THE
U.S.-E.U. OPEN SKIES AGREEMENT
and the
"ACTUAL CONTROL" OF U.S. AIR CARRIERS
NOTICE OF PROPOSED RULEMAKING

February 8, 2006

Let me first thank you Mr. Chairman and Ranking Member Costello for holding this hearing and for inviting us to testify on the Department of Transportation's (Department or DOT) proposal to make significant and fundamental changes to the rules governing foreign control of U.S. airlines. The Transportation Trades Department, AFL-CIO (TTD) [1] and our affiliated unions, including the Air Line Pilots Association, who's President, Captain Duane Woerth is also testifying today, have a vested and direct interest in the Department's notice of proposed rulemaking (NPRM). For reasons I will expand on in a moment, TTD is opposed to this NPRM and we are already on record with the Department urging that this proposal be withdrawn. Hopefully, the Department will heed the bi-partisan warnings that Members of Congress have clearly sent and not finalize the dramatic changes it proposed just a few months ago.

Bipartisan Legislation Gaining Momentum

On this point, I want to thank Mr. Oberstar, the Ranking Member of the full Committee, and Mr. LoBiondo, a distinguished member of this Subcommittee, for introducing legislation (H.R. 4542) that would bar the Department from moving to a final rule on foreign control for one year after enactment. And I want to thank Chairman Young and the Ranking Member of the Subcommittee, Rep. Costello, for supporting and co-sponsoring this legislation. The bill would also require the DOT to submit a report to Congress 90 days after enactment on the consequences of allowing greater foreign control over U.S. airlines. This legislation now has 115 cosponsors including 22 Members of this Subcommittee.

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[1] TTD is the transportation umbrella organization for the AFL-CIO and represents 29 affiliated unions. Specifically, our aviation affiliates are the: Air Line Pilots Association; Association of Flight Attendants-CWA; Communications Workers of America; International Association of Machinists and Aerospace Workers; International Federation of Professional and Technical Engineers; National Air Traffic Controllers Association; Professional Airways Systems Specialists; and the Transport Workers Union of America.

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Similar legislation (S. 2135) has been introduced in the Senate by Senator Daniel Inouye (D-HI), the Co-Chair of the Senate Commerce Committee.

Separate from the legislation, 85 Members of the House have voiced their "strong opposition" to the NPRM, specifically asking the Secretary to withdraw the proposal and noting that the "Department has overstepped its authority." A similar letter has been sent by United States Senators Frank Lautenberg, George Voinovich, Daniel Inouye, John Corzine and Mike DeWine.

The growing bipartisan opposition to the Administration's proposal is indeed warranted and quite frankly not surprising given Congress's traditional role in shaping aviation policy. More to the point, and as explained below, this proposal is directly contrary to the statute and goes beyond the authority Congress has granted to DOT.

NPRM Threatens Industry, Jobs

From a policy perspective, implementation of the NPRM would weaken the aviation industry at the worst possible time. It would directly threaten the jobs and rights of the hundreds of thousands of workers we represent as companies are given yet another tool to seek out and utilize the lowest cost labor available. National security concerns, despite the DOT's claims to the contrary, remain unaddressed and there is a real question of whether carriers controlled by foreign interests will be as willing to do their share in meeting the nation's national defense priorities. The proposal itself appears unworkable. Splitting control of an airline between U.S. and foreign citizens not only has no support in the law, but creates a multitude of operational problems that raise a number of questions that the DOT should be forced to answer.

And let me just echo the frustrations of several Members of Congress that this proposal was drafted and introduced with no apparent input from Congress and specifically this Committee. While we are pleased the Subcommittee has made it a priority to hold this hearing, it does not serve as a substitute for the substantive input and consultation that DOT should have pursued as it sought to undertake such a significant change in aviation policy. Given the upheaval and dislocation we have seen in the industry over the past several years, workers cannot be asked to simply accept this dramatic departure from longstanding rules that from our perspective would only create additional problems for U.S. aviation.

The burden is on the Administration to make the case that allowing foreign entities to control U.S. airlines serves the best interests of the aviation industry, its employees and our nation. We respectfully submit that to date the Department has not met this burden and instead has simply asserted an unsupported and flawed argument that relaxing foreign involvement rules will spur foreign investments in U.S. airlines that in turn will somehow save the industry. The problem with the Department's stated rationale is that it is not supported by any real and persuasive evidence. The financial challenges confronting the industry are well known – fuel prices have skyrocketed, pension obligations must be met, security costs and fees have increased, a system capacity crisis is looming, and air carriers have largely been unable to price their product at a level sufficient to achieve and maintain profitability. It is hard to understand how allowing foreign interests, including foreign airlines, to control U.S. carriers would solve any of these problems.

The fact is that U.S. markets are well positioned to offer capital to U.S. airlines and existing rules allow for significant foreign participation and investment. There has been no demonstration that U.S. airlines with a workable business plan have not been able to secure adequate capital under the current ownership and control rules. In fact, United Airlines and U.S. Airways were both able to exit bankruptcy with significant financing without needing a change to the current foreign ownership rules as the Administration has proposed. While DOT may well be trying to provide a benefit to foreign interests, that should obviously not be the objective that drives the Department's international aviation policy.

I do find the Administration's supposed concern for ensuring that U.S. airlines have sufficient capital a bit odd. After all, this is the same Administration that did everything it could to block the emergency cash assistance Congress passed to reimburse the air carriers after they were grounded by our government in the days following the September 11 terrorist attacks. Then the Administration did everything it could to refuse to approve federal loan guarantees that this Committee specifically authorized in the wake of September 11. As you know, over White House objections the Committee provided these badly needed loan guarantees to deal with the longer term economic consequences that the attacks had on our nation's airlines. In the end, of the $10 billion authorized for this program, only $1.6 billion was actually approved by the Administration's Air Transportation Stabilization Board. Finally, Congress had to step in again over Administration opposition to provide extended jobless benefits for the more than 100,000 airline, Boeing and other related industry employees who, through no fault of their own, were among the first economic victims of the September 11 attacks. This record of intransigence and inaction calls into question the true motives behind the Administration's NPRM since its record of assisting the airlines and their employees is suspect at best.

Real Motives Behind NPRM

The real motivation behind this proposal is simple, but quite frankly has been obfuscated by the DOT: to placate the European Union in an attempt to secure a new aviation services agreement. In short, the Administration is giving away too much with this NPRM and is on the verge of making yet another bad trade deal that does not serve the long-term interest of the industry and its workers.

While there is nothing inherently wrong with a new open skies pact, and we have supported sound agreements in the past, the DOT should acknowledge the motivations for issuing this NPRM and have an open debate on whether the proposed agreement with the EU merits allowing foreign entities to control U.S. airlines. Instead the DOT insists that this change would have been proposed regardless of the status of the EU-U.S. talks. I guess the Administration would have us believe it was just coincidental that the NPRM was issued at a critical time in the negotiations – just as the EU delegation team was to return to Washington for final talks. [2]

[2] It is also significant that according to a submission in this docket, Jeffery Shane, Under Secretary for Policy, briefed members of the U.S. and European delegations negotiating the agreement on the NPRM during a "break-out" session from the negotiations. This briefing occurred the same day that the NPRM was published in *the Federal Register* and apparently these negotiators were the first to receive a formal briefing on the proposal.

The Department wants to have it both ways: putting foreign control on the negotiating table as a "carrot" to the EU, but then seeking to hide this reality by claiming altruistic policy motives. This is simply rhetorical fiction and interferes with a realistic evaluation of the NPRM and an honest determination of what is truly at stake. If this proposal is, as most strongly believe, a sop to the EU in an effort to secure an aviation deal, than Administration officials should "come clean" and explain what our country is getting from the EU in return.[3] Even if we were wrong on this point – and we're certain we are not – the NPRM fails on the simple merits for the many reasons we have pointed out in our testimony.

NPRM Runs Afoul of Statute

The fact is, and putting aside for a moment the broader policy problems with this proposal, the Department's NPRM runs directly counter to the plain language and meaning of the statute. The mandate is very clear: **U.S. carriers must be "under the actual control of citizens of the United States."** 49 U.S.C. § 40102(15)(C).

The purpose of the NPRM is equally clear: to allow foreign interests to control the core commercial components of a U.S. carrier's business. This would encompass key areas of a carrier's operation including "choice of markets, type of equipment and rate-setting." 70 Fed. Reg. 67394. It is those decisions and those areas that define what a carrier is and how it operates. To be considered a U.S. airline, U.S. citizens must only retain actual control of four specific areas:

(1) The carrier's organizational documents;
(2) The carrier's decisions regarding participating in the Civil Reserve Air Fleet (CRAF);
(3) The carrier's compliance with security requirements specified by the Transportation Security Administration; and
(4) The carrier's adherence to safety requirements imposed by the Federal Aviation Administration. 70 Fed. Reg. 67396.

In short, the Department is suggesting that carriers can be bifurcated; the commercial part of the company controlled by foreign interests and the safety, security, and CRAF areas supposedly controlled by U.S. citizens. The problem with this approach (in addition to the operational problems discussed below) is that it isn't supported in statute. Again, the law requires carriers to be under the "actual control" of U.S. citizens – the statute does not say that only safety, security and CRAF decisions must be under the actual control of U.S. citizens and the rest directed by foreign citizens.

[3] It is also significant that shortly after this proposal was issued, some European interests claimed that the proposal did not go far enough and urged DOT to institute broader modifications to U.S. foreign control and ownership limits. Obviously, we are urging Congress and the DOT to go in the opposite direction.

Congress Codifies Control Standard

It is also relevant that in 2003, Congress, as part of the Vision 100 – Century of Aviation Reauthorization Act (P.L. 108-176), specifically amended the statute to specify and reaffirm that U.S. citizens must exercise "actual control" over U.S. airlines. The Conference Report accompanying the legislation states that the amendment ensures that **"to qualify as a U.S. airline, it must be under the actual control of citizens of the U.S."** H.R. Conf. Rep. No. 108-334, at 139 (2003). There is nothing in legislative history, let alone the statute, suggesting that the requirement of actual control could be satisfied if U.S. citizens only controlled four specific areas of the carrier's operation. In other words, the DOT is ignoring the plain meaning of the statute and doing so with little regard for the role of Congress in shaping U.S. aviation policy.

The DOT is attempting to characterize this proposal as simply a change in how it interprets what constitutes "actual control." In reality, the NPRM goes significantly further than that approach by permitting foreign interests to exercise actual control over core economic aspects of a U.S. carrier. We urge Congress to reject the Administration's blatant attempt to circumvent the law.

This separation of responsibility scheme embodied in the NPRM is simply a facade the Department is using to deflect expected criticism its proposal has garnered. The fact is that under this proposal the individuals responsible for the specified areas could have to report to, and could be terminated by, a foreign executive. One has to wonder how much "control" these individuals would in fact exercise if their decisions are opposed by their foreign superiors. It is absolute folly to think that a U.S. carrier will make decisions that are contrary to the views asserted by its controlling foreign investor. This phony firewall between a U.S. carrier and its chief foreign investor is an attempt by our government officials to tell both Congress and the EU, respectively, what they need to hear. I suspect there are few in Congress who truly believe that a foreign investor who obtains control over the commercial aspects of a U.S. airline would passively stand back and not assert authority and control over other key areas.

Safety & Security Concerns

Furthermore, safety and security concerns are not issues that can or should be parceled out and separated from the day-to-day commercial activities of the carrier. As ALPA correctly points out, these matters must be integrated and accounted for in all aspects of a carrier. It is simply unrealistic, and quite frankly counterproductive, to ask a carrier to operate with some of the senior executives (because they are foreign citizens) not allowed to make decisions that affect safety and security.

For similar reasons we question how U.S. citizens would in reality control decisions regarding whether and how to participate in the Civil Reserve Aviation Fleet (CRAF) program, which has long been relied upon by the Pentagon for the transport of military personnel and supplies during military conflicts and wars. U.S. air carriers participate in this program to ensure our military has the airlift capabilities it needs. Under the proposed control rules, the decision regarding CRAF participation may technically be left to a U.S. citizen, but a foreign citizen deciding what aircraft to purchase could have a direct impact on whether the carrier will be able to participate in the CRAF program thus undermining national security. It does not take a great deal of

imagination to foresee situations where foreign interests, who control key operational or economic aspects of a U.S. airline, would not want that airline to aid the U.S. military. Given this reality, we question how the DOT will ensure that U.S. citizens are not pressured by their foreign citizen superiors into not participating or otherwise modifying their CRAF participation. Given the importance of the CRAF program to our national security, it makes little sense for the DOT to unilaterally adopt a proposal that could undermine the program's effectiveness and capability.

Finally, let me note that the FAA has made an aggressive push over the years to delegate certain safety inspections and other responsibilities to the private sector. While we have voiced our concern about this practice in the past, as international aviation expands, this concern only intensifies. Specifically, allowing foreign airlines to control U.S. carriers could act to further push this delegation of authority further down the global supply chain and weaken the connection the FAA has to the industry. This is obviously unacceptable and DOT must explain how any change in the foreign control and ownership standards would protect against this trend.

NPRM May Accelerate Outsourcing

We are concerned that the NPRM will only accelerate the troubling trend in the aviation industry to outsource critical jobs to foreign countries, often at the expense of safety and security. The fact is that carriers have often used the global nature of aviation to undercut U.S. wages, standards and collective bargaining rights.

In particular, TTD has long voiced opposition to the practice of U.S. carriers outsourcing critical maintenance work to foreign aircraft repair facilities that are not required by the FAA to meet the same safety standards as U.S. stations performing the same type of work. In the wake of the September 11, 2001, attacks, security concerns inherent in third-party maintenance have also been raised but have not been addressed by this Administration.

I should note that in the last FAA Reauthorization bill, this Committee recognized the potential security vulnerabilities of foreign repair stations working on U.S. aircraft. For this reason, this Committee included in its version of the bill a provision designed to begin to address this issue. In the final Conference Report for Vision 100, this provision, with some modifications, was retained. Specifically, Section 611 required the Transportation Security Administration (TSA), in consultation with the FAA, to conduct security reviews and audits of foreign repair stations certified under 14 CFR part 145. The TSA was also required to complete a final rule imposing security rules on foreign and domestic stations by August 8, 2004, or 16 months ago. It is an outrage that to date, these regulations have not even been proposed, let alone completed as required by law. Under the final bill, the TSA was given 18 months after the regulations are finalized to complete the security audits of foreign stations. But since TSA has failed to complete the regulations and the FAA continues to be an apologist for its inadequate surveillance of foreign repair facilities, the time-line for the audits has not even started.

In short, over two years after this Committee identified security risks at foreign stations as an issue that needed to be addressed, TSA and the FAA have done nothing to meet this challenge. To make matters worse, the DOT's Inspector General recently came out with a scathing report

condemning the lack of FAA and carrier oversight of non-certified third party stations. And now the Administration wants to unilaterally allow foreign airlines and other interests to control U.S. airlines. One would have thought that the Administration would get a handle on the outsourcing that occurs under the current regime before it offered a proposal that will actually make this situation worse.

The flight attendant profession is also at increased risk as at least one major air carrier has proposed filling key positions on international routes with foreign citizens. Specifically, Northwest Airlines testified last week in its bankruptcy proceeding that it wants to replace 30 percent of its flight attendants on international routes with non-U.S. workers. This proposal alone would mean the elimination of 800 jobs. In addition, we question how security threat assessments, required of U.S. workers, will be adequately conducted if this proposal is actually implemented.

We have also seen a move to outsource aircraft manufacturing and related work and there has been a significant decline in U.S. employment in this critical industry. Outsourcing not only means the loss of employment opportunities, but also weakens our economy and national security by, among other things, transferring production and technology expertise to other countries. The economic battle between domestic and foreign-based aircraft manufacturers is well-known and will not be re-told in this submission. We would simply note that as foreign interests are allowed to control U.S. airlines, the pressure to utilize non-U.S. companies will only increase, thus further tilting the balance away from domestic production and ultimately harming U.S. economic interests and threatening jobs.

Bargaining Rights at Risk

Carriers have argued in the past that U.S. workers based overseas are not covered by the Railway Labor Act (RLA) and thus are not protected by the applicable collective bargaining agreements. In addition, and as pointed out by ALPA, when two or more U.S. carriers are commonly controlled, the RLA covers the entire workforce and allows employees at the affiliated carriers an opportunity to equalize wages and working conditions. This serves to prevent a carrier from playing one group of workers against the other. But when one of the affiliates is a foreign carrier, and thus not covered by the RLA, all of the employees are placed at a disadvantage.

Under this proposal, foreign airlines that control U.S. airlines could structure their operations so that the U.S. carrier serves as a feeder to the foreign airline. This in turn would allow the transfer of at least some of the jobs to a foreign airline outside the coverage of the RLA, potentially creating a lower wage and benefit scheme and eviscerating the bargaining rights and protections of employees in this nation.

In summary, the Administration's proposal to dramatically alter aviation policy by permitting foreign control of U.S. airlines threatens U.S. aviation and aerospace jobs, undermines bargaining rights, is contrary to our national security and defense interests, poses a risk to aviation safety and security, and violates the plain meaning of the current statute as re-codified by Congress in 2003.

Simply because the DOT and the Department of State are anxious to finalize a new aviation services pact with the EU does not relieve our government of the duty to protect American interests including the interests of aviation employees. We urge Congress to place the burden of proof on this Administration to demonstrate why America's foreign control rules should be changed. The NPRM as constructed fails this most basic test and we urge this Committee to pass H.R. 4542 and ensure that our international aviation policies are used to promote, and not harm, the U.S. aviation industry and its workers.

Thank you for the opportunity to express our views and concerns on the Administration's proposal. I would be happy to answer any questions the Committee may have.

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