



# Legal Developments in International Civil Aviation

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August 25, 2006

Congressional Research Service

7-....

[www.crs.gov](http://www.crs.gov)

RL33255

## Summary

Much of the law regarding civil aviation has been developed through a combination of domestic laws and international agreements between the United States and other nations. In 1992, the United States Department of Transportation (DOT) introduced the “Open Skies” initiative and began negotiating and entering into modern civil aviation agreements with foreign countries, as well as individual members of the European Union (EU). As a result of a 2002 European Court of Justice ruling that several portions of these “Open Skies” Agreements violated EU law, the United States and the EU have been negotiating a new Open Skies Agreement. A tentative agreement appears to exist between the parties that if enacted would, among other things, allow every EU and U.S. airline to fly between every city in the European Union and every city in the United States and would permit U.S. and EU airlines to determine the number of flights, their routes, and fares according to market demand.

Despite this development, there appears to remain several areas of international civil aviation law that the tentative agreement does not address. Among them are the issues of foreign ownership and control, participation in the Civil Reserve Air Fleet Program, and cabotage. Presently, U.S. law requires that to operate as an air carrier in the United States, an entity must be a citizen of the United States. To be considered a citizen for civil aviation purposes, an entity must be owned either by an individual U.S. citizen, a partnership of persons who are each U.S. citizens, or a corporation (1) whose president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, (2) that is under the actual control of U.S. citizens, and (3) has at least 75 percent of its stock owned or controlled by U.S. citizens. Recently, however, the DOT released a Notice of Proposed Rulemaking (NPRM) that would change its interpretation of what constitutes “actual control.” If adopted, this new interpretation could have major implications for U.S. and international civil aviation. Several issues relating to this NPRM are currently being debated, including the consistency with the operative statutes and the viability of the Civil Reserve Air Fleet Program (CRAF), should more extensive foreign ownership be permitted. In addition, Members of Congress have taken a significant interest in this DOT rulemaking, both through direct participation in the rulemaking process and by introducing legislation (H.R. 4542 and S. 2135) that would prohibit the adoption of a final rule for one year and require the DOT to submit reports and analysis on the impact of the new interpretation on the domestic industry and national security concerns. Furthermore, both the House and Senate have adopted amendments to the proposed Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia and Independent Agencies Appropriations Act of 2007 (H.R. 5576) that would effectively forestall the DOT from adopting a final rule.

U.S. law also contains a general restriction on cabotage, defined as the transportation of passengers or cargo by foreign air carriers from one point in the United States to another. This report provides background on U.S. civil aviation agreements, updates the current status of U.S. “Open Skies” negotiations with the EU, and addresses the legal debate concerning both the foreign ownership and control rules and the cabotage laws. It will be updated as events warrant.

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## Background

The legal framework for international civil aviation rights dates back to the 1919 Convention for the Regulation of Aerial Navigation (Paris Convention), which was a part of the Paris Peace Conference.<sup>1</sup> The hallmark aviation principle recognized by the Paris Convention is that every nation has absolute and exclusive sovereignty over the airspace above its defined territory.<sup>2</sup> This principle was reaffirmed in 1944 at the Chicago International Civil Aviation Conference, which produced the Chicago Convention.<sup>3</sup> The Chicago Convention resulted in an international framework based largely on national interests, favoring bilateral air transport agreements over multilateral accords with respect to issues such as routes, frequency and capacity.<sup>4</sup> The Chicago Convention's accomplishments included an agreement by the signatories to grant each other two of the so-called "five freedoms" of air transport,<sup>5</sup> specifically, the right to fly across other states without landing and the right to land for nontraffic purposes. In addition, the Chicago Convention established the International Civil Aviation Organization (ICAO) to regulate the safety, communications, and technological aspects of international civil aviation.<sup>6</sup>

Since the Chicago Convention, international civil aviation rights have developed primarily through a series of bilateral agreements between the United States and foreign countries. Most of these agreements have been "executive agreements" rather than treaties, thereby avoiding the advice and consent requirement of the Constitution,<sup>7</sup> and typically have contained language favorable to the United States. For example, prior agreements permitted the United States to designate both an unlimited number of gateway cities and an unlimited numbers of carriers.<sup>8</sup> In addition, the agreements provided the air carriers the right to determine capacity with only the vaguest of guidelines.<sup>9</sup> As the United States began to deregulate its domestic airline industry, administrations began to seek more liberal, free-market-based international agreements as well.<sup>10</sup>

Domestically, however, even as the United States began to adopt more liberal regulations for its aviation industry, several existing laws continue to have a strong impact on international civil

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<sup>1</sup> Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, Art. 1, 11 L.N.T.S. 173, 190.

<sup>2</sup> *Id.*

<sup>3</sup> Convention on International Civil Aviation, Dec. 7, 1944, Art. 44, 61 Stat. 1180, 15 U.N.T.S. 295, 296 [hereinafter Chicago Convention].

<sup>4</sup> See Andras Vamos-Goldman, *The Stagnation of Economic Regulation under Public International Air Law: Examining its Contribution to the Woeful State of the Airline Industry*, 23 TRANSP. L.J. 425, 431 (1996); see also Paul S. Dempsey, *Turbulence in the "Open Skies:" The Deregulation of International Air Transport*, 15 TRANSP. L.J. 305, 362 (1987) [hereinafter Dempsey].

<sup>5</sup> The remaining "five freedoms" of air transport consist of the right to put down passengers, mail, and cargo taken on in the territory of the state whose nationality the aircraft possesses; take on passengers, mail, and cargo destined for the territory of the state whose nationality the aircraft possesses; and take on passengers, mail, and cargo destined for the territory of any other state and the privilege to put down passengers, mail, and cargo coming from such territory. See Daniel C. Hellund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 265 (1994).

<sup>6</sup> See Chicago Convention, *supra* footnote 3, at Art. 44, 61 Stat. 1192-93, 15 U.N.T.S. 326.

<sup>7</sup> See Dempsey, *supra* footnote 4, at 316-17; see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 215 (2<sup>nd</sup> ed. 1996).

<sup>8</sup> *Id.* (citing United States Standard Form Bilateral Air Transport Agreement, Art. 3 (1953)).

<sup>9</sup> *Id.*

<sup>10</sup> See Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 441-42 (1994).

aviation. Currently, air transportation and air commerce are governed by the Federal Aviation Act of 1958.<sup>11</sup> Section 401(a)(1) of the Act states that “an air carrier may provide air transportation only if the air carrier holds a certificate issued under this chapter authorizing the air transportation.”<sup>12</sup> The statute authorizes the Secretary of Transportation to “issue a certificate of public convenience and necessity to a *citizen of the United States* ....”<sup>13</sup> Before issuing a certificate, however, the Secretary “must find that the citizen is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this part and the regulations of the Secretary.”<sup>14</sup> Stated another way, to operate in the United States as an air carrier, an entity must be a U.S. citizen and must be judged by the Secretary to comply with the statute and any other applicable regulations.

In addition to the citizenship requirements, U.S. law also contains a general prohibition against cabotage activity. Generally speaking, the term *cabotage* is defined as “the right of a foreign airline to carry passengers and/or cargo between airports of the same country.”<sup>15</sup> The prohibition states that “aircraft may take on for compensation, at a place in the United States, passengers or cargo destined for another place in the United States only if—(1) specifically authorized under section 40109(g) of this title; or (2) under regulations the Secretary prescribes authorizing air carriers to provide otherwise authorized air transportation with foreign registered aircraft under lease or charter to them without crew.”<sup>16</sup> If neither of those situations exists, foreign aircraft are not permitted to perform cabotage within the United States. In addition, the Secretary of Transportation has general discretionary authority to waive other economic-related statutory provisions listed in section 40109(c) “when the Secretary decides that the exemption is consistent with the public interest.”<sup>17</sup> The cabotage prohibition, however, is not among the regulations listed in section 40109(c).<sup>18</sup>

Finally, U.S. law has created an incentive program exclusively available to domestic air carriers; namely, the Civil Reserve Air Fleet Program (CRAF).<sup>19</sup> Under this program, domestic air carriers supply aircraft on a voluntary basis to increase the military’s airlift capacity. The CRAF allows the U.S. military, in times of need, to demand access to a selected percentage of the civil aircraft fleet to deliver troops and equipment to the battlefield.<sup>20</sup>

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<sup>11</sup> Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 740 (Aug. 23, 1958) (codified as amended at 49 U.S.C. § 40101 *et seq.*) [hereinafter Federal Aviation Act of 1958].

<sup>12</sup> 49 U.S.C. § 41101(a)(3) (2003).

<sup>13</sup> *Id.* at § 41102(a) (emphasis added).

<sup>14</sup> *Id.* at § 41102(b)(1).

<sup>15</sup> See BLACK’S LAW DICTIONARY 194 (7<sup>th</sup> Ed. 1999).

<sup>16</sup> 49 U.S.C. § 41703(c)(1)-(2) (2003). Section 40109(g) gives the Secretary of Transportation the authority to grant limited 30 day exemptions if it is determined that either there is an emergency, or it is necessary to avoid unreasonable hardship and no unreasonable advantage will be given to any party involved in a labor dispute. 49 U.S.C. § 40109(g) (2003).

<sup>17</sup> 49 U.S.C. § 40109(c) (2003).

<sup>18</sup> *Id.*

<sup>19</sup> See 10 U.S.C. § 9511 *et seq.* (2004).

<sup>20</sup> See 10 U.S.C. § 9512 (2004).

## “Open Skies” Agreements

In August of 1992, the Department of Transportation (DOT) announced its “Open Skies” initiative, which was intended to continue the trend of liberalizing international civil aviation. As defined by the DOT, “Open Skies” consists of the following 11 principles:

1) Open entry on all routes; 2) Unrestricted capacity and frequency on all routes; 3) The right to operate between any point in the U.S. and any point in the European Community without restriction, including service to intermediate and beyond points, and the right to transfer passengers to an unlimited number of smaller aircraft at the international gateway; 4) Flexibility in setting fares; 5) Liberal charter arrangements; 6) Liberal cargo arrangements; 7) The ability of carriers to convert earnings into hard currency and return those earnings to their homelands promptly and without restriction; 8) Open code-sharing opportunities; 9) The right of a carrier to perform its own ground handling in the other country; 10) The ability of carriers to freely enter into commercial transactions related to their flight operations; [and] 11) A commitment for nondiscriminatory operation of and access to computer reservation systems.<sup>21</sup>

The “Open Skies” initiative incorporated many elements of the previous bilateral agreements and was designed to be entered into with any country “willing to permit U.S. carriers essentially free access to their markets.”<sup>22</sup> However, because “Open Skies” is an executive branch initiative, policies that require legislative changes to U.S. law, such as foreign ownership and control, and cabotage<sup>23</sup> are not included within its principles.<sup>24</sup> Currently, the United States is a party to 74 “Open Skies” Agreements worldwide.<sup>25</sup>

In Europe, the first “Open Skies” Agreement was reached in October of 1992 with the Netherlands, and over the next several years, similar agreements were reached with other European countries, including Austria, Czech Republic, Belgium, Denmark, Finland, Germany, Luxembourg, Norway, Sweden, Switzerland, and Iceland.<sup>26</sup> As a result of these agreements, the United States enjoys what can be characterized as quasi-cabotage rights within the European Union (EU). In other words, although U.S. carriers still cannot operate truly domestic routes (e.g., Paris to Marseille), they have created so-called “hub and spoke networks” within Europe; for example, a hub in Frankfurt, Germany, with spokes to Paris and Marseille. On the other hand, it should be noted that U.S. law currently prevents European carriers from enjoying any type of cabotage rights within the U.S. domestic market.<sup>27</sup>

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<sup>21</sup> Defining “Open Skies,” D.O.T. Order No. 92-8-13, at App. 1 [hereinafter DOT Order].

<sup>22</sup> See 57 Fed. Reg. 19,323 (May 5, 1992).

<sup>23</sup> Cabotage is defined as “the right of a foreign airline to carry passengers and/or cargo between airports of the same country” See BLACK’S LAW DICTIONARY 194 (7<sup>th</sup> Ed. 1999).

<sup>24</sup> See DOT Order, *supra* note 21, at 6 (specifically noting the absence of cabotage and foreign ownership and control policies).

<sup>25</sup> See Open Skies Partners, U.S. Department of State, Bureau of Economic and Business Affairs, *available at* <http://www.state.gov/e/eb/rls/othr/2005/22281.htm> (providing a list of the “Open Skies” Agreements currently in effect).

<sup>26</sup> See Benoit M.J. Swinnen, *An Opportunity for Trans-Atlantic Civil Aviation: From Open Skies to Open Markets*, 63 J. AIR L. & COM. 249, 270 (1997).

<sup>27</sup> Federal Aviation Act of 1958, *supra* footnote 11.

The combination of the number of “Open Skies” Agreements between the United States and individual EU Members, and the growing dominance of U.S. air carriers throughout Europe, led the European Commission to seek a mandate to negotiate a bilateral aviation agreement between the United States and the EU. The Commission, however, was unable to obtain such a broad mandate and, in 2002, decided to bring legal action against those Member states that had independently negotiated and entered into “Open Skies” Agreements with the United States. While the European Court of Justice appeared to stop well short of invalidating the existing “Open Skies” Agreements, it did hold that certain specific provisions were discriminatory and therefore contrary to EU law. These included provisions relating to the allocation of airport slots and those governing pricing, fares, and rates of intra-European air services; agreements on computer reservation systems; and the “nationality clauses,” which permit the United States to deny access to carriers whose home state has not signed an agreement.<sup>28</sup> As a result of this decision, the legal status of the existing “Open Skies” Agreements has been questioned,<sup>29</sup> and the EU Members have granted the Commission a mandate to negotiate a civil aviation agreement with the United States.

Since the European Court of Justice ruling, the United States and the EU have committed to negotiations with respect to a comprehensive air transportation agreement often referred to as an “Open Aviation Area,” or the “Transatlantic Common Aviation Area” (TCAA).<sup>30</sup> Until recently, negotiations appeared to stall as the countries’ differences on key issues prevented them from moving forward.<sup>31</sup> In November 2005, however, the parties announced a negotiations breakthrough and the completion of text for a preliminary agreement. According to U.S. Transportation Secretary Norman Y. Mineta, the agreement “provides new opportunities for U.S. and European airlines, healthier competition for a growing travel market and greater connections between cities and towns on both sides of the Atlantic.”<sup>32</sup> Although a draft agreement is not yet publicly available, according to the State Department, the agreement, if implemented, would, *inter alia*, allow every EU and U.S. airline to fly between every city in the European Union and every city in the United States and would permit U.S. and EU airlines to determine the number of flights, their routes, and fares according to market demand.<sup>33</sup> In addition, the agreement would

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<sup>28</sup> See, e.g., Case C-469/98 *Commission of the European Communities v. Republic of Finland*, § 118-132. There were, eight independent cases in all, each with a separate opinion that for the purposes of this discussion can be considered substantively identical.

<sup>29</sup> The United States has publically asserted that “the current agreements would remain in force as the legal basis for air services between the United States and individual Member States.” See “U.S. Says ‘Open Skies’ Pact with E.U. Nations in Force,” *Agence France Presse*, Nov. 5, 2002 (quoting DOT spokesman Leonardo Alcivar). However, EU Vice President Loyola de Palacio subsequently reminded EU nations that “they should start procedures to terminate those agreements in order to ensure that they comply with their obligations under Community law.” See EU Press Release No. 116/04, “EU Commission Takes Action To Enforce ‘Open Skies’ Court Rulings,” July 20, 2004, available at <http://www.eurunion.org/news/press/2004/200400116.htm>.

<sup>30</sup> See Press Release, “European Union and The United States of America Agree on Opening Negotiations on Open Aviation Area,” June 25, 2003, available at <http://www.eurunion.org/partner/summit/Summit0306/OAANeg.htm>; see also The White House, “Aviation Agreement Fact Sheet,” June 25, 2003, available at <http://www.whitehouse.gov/news/releases/2003/06/20030625-3.html>.

<sup>31</sup> See Department of State, International Information Programs Press Release, “U.S. Remains Committed to Opening Transatlantic Aviation Markets,” June 14, 2004, available at <http://usinfo.state.gov/xarchives/>.

<sup>32</sup> See U.S., *EU On Track to Change Air Rules*, U.S.A. TODAY, Nov. 21, 2005, available at [http://www.usatoday.com/travel/news/2005-11-21-us-eu-open-skies\\_x.htm?csp=N009](http://www.usatoday.com/travel/news/2005-11-21-us-eu-open-skies_x.htm?csp=N009).

<sup>33</sup> See U.S. Department of State, Office of the Spokesman, *Fact Sheet: U.S., E.U. Air Transport Agreement*, November 18, 2005, available at <http://usinfo.state.gov/eur/Archive/2005/Nov/21-680403.html>.



allow carriers to freely enter into cooperative arrangements with other airlines, such as code-sharing and leasing.<sup>34</sup>

According to some commentators who appear to have seen a version of the text, as comprehensive as the draft agreement appears to be, there cannot be meaningful reform in the international aviation market until Congress repeals the so-called “citizenship test,” which limits foreign ownership and control of U.S. air carriers.<sup>35</sup> Based on the information currently available regarding the draft agreement, it does not appear that the proposed agreement addresses foreign ownership or control, thus it appears to be left to each party to determine its own rules and regulations independently.

## **Air Carrier Citizenship**

### **Current Law and Legal Precedent**

As previously mentioned, U.S. law requires that all air carriers be “citizens of the United States” before they are granted certificates to operate between domestic locations. The Federal Aviation Act specifically defines the phrase “Citizen of the United States” as the following:

(A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.<sup>36</sup>

This statutory language has existed in various forms since the Civil Aeronautics Act of 1938.<sup>37</sup> In 2003, Congress amended the statute so as to codify the Department of Transportation’s (DOT’s) long-standing precedent with respect to requiring actual control of an air carrier for citizenship purposes.<sup>38</sup> Developed primarily through its administrative decisions, the DOT and its predecessor, the Civil Aeronautics Board (CAB), have long interpreted the air carrier citizenship definition to include a requirement of “actual control” by U.S. citizens, even though the specific statutory language has only recently been added.<sup>39</sup>

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<sup>34</sup> *See id.*

<sup>35</sup> *See* Professor Brian F. Havel, Commentary at the Institute of Economic Affairs’ 13<sup>th</sup> Annual Conference “The Future of Air Transport,” (Nov. 29, 2005) (transcript available at [http://dmses.dot.gov/docimages/pdf95/378128\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/378128_web.pdf)).

<sup>36</sup> *See* 49 U.S.C. § 40102(a)(15)(A)-(C) (2004).

<sup>37</sup> Civil Aeronautics Act of 1938, P.L. 706 § 1(13)(c), 52 Stat. 973 (1938).

<sup>38</sup> *See* Vision 100—Century of Aviation Re-authorization Act § 807, P.L. 108-176, 117 Stat. 2490 (2003) (codified as amended at 49 U.S.C. § 40102(a)(15)(A)-(C) (2005)) (inserting the phrase “which is under the actual control of the United States”).

<sup>39</sup> *See Urbana, Medellin and Central Airways, Inc. - Certificate of Public Convenience and Necessity*, 2 C.A.B. 334 (1940); *Wille Peter Daetwyler, D.B.A. Interamerican Airfreight Co., Foreign Permit*, 58 C.A.B. 118 (1971); *In re the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, 1989 WL 256026 (D.O.T.) (1989).



One of the oldest and most frequently cited citizenship determinations occurred in 1940 when the CAB was asked to review Urbana, Medellin and Central Airways' application for a certificate of public convenience and necessity. This review was conducted pursuant to the Civil Aeronautics Act of 1938, which contained a citizenship requirement that was nearly identical in legislative language to the current statute.<sup>40</sup> After reviewing the corporate structure of the airlines, who the various stock holders were, and the citizenship of the corporate officers, the CAB turned its attention to the phrase "two thirds or more of the Board of Directors and other managing officers" contained in the statutory requirement for citizenship.<sup>41</sup> In its interpretation of this phrase, the CAB concluded that

[t]he apparent general intent of the statute is to insure that air carriers receiving economic support from the United States and seeking certificates of public convenience and necessity, under section 401 of the Act shall be citizens of the United States in fact, in purpose, and in management. The shadow of substantial foreign influence may not exist.<sup>42</sup>

The CAB further stated that "... it may be permissible to look behind the form to the substance of the management to determine whether in fact, as well as in law, it is under the control of citizens of the United States. ..."<sup>43</sup> This interpretation expanded the scope of the CAB's inquiry beyond an entity's apparent compliance with the language of the statute, and the agency announced its intention to conduct a close examination of the internal structure and operation of an airline seeking certification of U.S. citizenship to determine where actual control is vested. The CAB's holding and reading of the citizenship definition established a framework for future Board decisions.

With respect to the concept of control by a foreign citizen, in 1971, the CAB was asked to determine whether Interamerican Airfreight qualified as a citizen of the United States pursuant to the Federal Aviation Act. Although Interamerican met the formal requirements of the statute,<sup>44</sup> at issue in the proceeding was whether Wille Peter Daetwyler, a Swiss citizen, exercised sufficient control over the operations of the airline such that it would not qualify for U.S. citizenship.<sup>45</sup> The CAB expanded on the statutory interpretation in *Uruba, Medellin and Central Airways* and, despite a close examination of the transaction, remained concerned that future corporations would attempt to mask foreign control by arranging corporate structures simply to meet the statutory requirements.<sup>46</sup> In response, the CAB stated that in cases where an

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<sup>40</sup> Specifically, §1(13)(c) of the Civil Aeronautics Act of 1938 stated that "a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or one of its possessions." Civil Aeronautics Act of 1938, P.L. 706 § 1(13)(c), 52 Stat. 973 (1938).

<sup>41</sup> *Urbana, Medellin and Central Airways, Inc.—Certificate of Public Convenience and Necessity*, 2 C.A.B. 334, 336-37 (1940).

<sup>42</sup> *Id.* at 337.

<sup>43</sup> *Id.*

<sup>44</sup> *Wille Peter Daetwyler, D.B.A. Interamerican Airfreight Co., Foreign Permit*, 58 C.A.B. 118, 119 (1971) ("There is no dispute that 75 percent of the stock of Interamerican is nominally owned by U.S. citizens and that two-thirds of the board of directors and other managing officers of Interamerican are U.S. citizens.").

<sup>45</sup> *Id.* While the CAB's decision does not fully explain Mr. Daetwyler's relationship with respect to Interamerican, the decision does conclude that "[t]he Daetwyler control is reflected by the fact that the corporation [Interamerican] is the direct successor of the Daetwyler forwarding company and [was] created wholly at the instance of Daetwyler." *Id.* at 120.

<sup>46</sup> *Id.* at 121.

applicant has arranged its affairs so as to meet 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.<sup>47</sup>

In this case, the CAB determined that Mr. Daetwyler was in a position to exert a significant amount of control over the operations of Interamerican.<sup>48</sup> The CAB found significant the fact that the company was created wholly at Mr. Daetwyler's insistence and that Mr. Daetwyler retained "25 percent stock ownership and represents one-third of the board of directors," the maximum amount of control allowed under the statute.<sup>49</sup> In addition, the CAB concluded that foreign control existed because Interamerican was to continue to do business under the Daetwyler system of companies and there was evidence of close personal relationships between Mr. Daetwyler and the Interamerican stock holders.<sup>50</sup>

In 1989, the DOT was asked to review the merger between Northwest Airlines and Wings Holdings, Inc.<sup>51</sup> Although both companies were U.S. controlled and operated, a citizenship issue existed because the merger's largest equity holder, with approximately \$400 million or 56.74 percent, was KLM, Inc., a Dutch company and foreign air carrier.<sup>52</sup> In addition, KLM's interest provided it with substantial power with respect to numerous stock-related decisions.<sup>53</sup>

In discussing the citizenship test, the DOT cited the *Daetwyler* decision favorably, stating that the control test "has traditionally been a complex matter in past cases."<sup>54</sup> The DOT declined to enumerate specific factors to determine the existence of control, saying instead that the analysis with respect to control "has always necessarily been on a case-by-case basis, as there are a myriad potential avenues to control."<sup>55</sup>

The DOT pointed to three specific factors that led it to conclude that this merger resulted in a company that was not a U.S. citizen. First was the equity interest in the new company held by KLM. Although a majority of KLM's interest was held in nonvoting stock, the DOT concluded that it "represent[ed] a genuine ownership interest" and, therefore, significantly increased KLM's incentive to participate in Northwest's business decisions.<sup>56</sup> Second, the corporate structure of the new company, according to DOT, would have allowed KLM to exert influence even without voting rights.<sup>57</sup> Finally, the DOT pointed to the fact that KLM was an actual competitor with Northwest in various markets, and had stated an intention to become involved in the decisions of

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 120.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *In re the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, 1989 WL 256026, \*1 (D.O.T.) (1989).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* For example, KLM's position as an equity holder gave the corporation the ability to prevent issuance for liquidation, dissolution or dividends, as well as the ability to block amendments to the certificates of incorporation that would allow for changes in stock designations or the special rights of preferred stock holders. *See id.*

<sup>54</sup> *Id.* at \* 3.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at \*4.

<sup>57</sup> *Id.* at \*4-5.

the new corporation.<sup>58</sup> Taken together, these factors resulted in a finding that, as presented at the time, Wings Holdings, Inc., was not a U.S. citizen as defined by the Federal Aviation Act.<sup>59</sup> Upon review of this decision, the DOT commented on an additional foreign control factor. With respect to equity/debt relationships, the DOT held that “absent a default, unless the loan agreement provides special rights to the debt holder that imply control, we do not anticipate treating debt as a foreign control issue.”<sup>60</sup>

In sum, these precedents establish DOT’s methodology of looking behind the corporate structure or transaction for the purpose of determining whether “actual control” is held by U.S. citizens. With respect to factors that can be utilized in determining actual control, the DOT has specifically considered equity ownership, business and personal relationships, control over the voting rights of stock, veto power, equity/debt agreements, competitive status, and other features of corporate transactions.<sup>61</sup>

Most recently, the issue of foreign ownership and control was considered in a case involving DHL Airways, also known as ASTAR Air Cargo. At issue in this case was whether the level of control exerted by DHL Worldwide Express, a foreign company owned in part by Deutsche Post, Germany’s national postal service, was sufficient to consider ASTAR not a U.S. citizen. The specific mechanism through which it was alleged that DHL Worldwide exercised control was an agreement between ASTAR and DHL Worldwide Express known as an Aircraft, Crews, Maintenance, and Insurance Agreement (ACMI). Broadly defined, the ACMI agreement was a “wet lease,” in which ASTAR agreed to provide DHL Worldwide Express with aircraft, crews, maintenance, and insurance for the purpose of allowing DHL Worldwide to legally transport air cargo within the United States.<sup>62</sup> According to the challengers of ASTAR’s citizenship status, the ACMI agreement provided for more than 90% of ASTAR’s revenues, contained payment provisions that were integral to both ASTAR’s financing and working capital, and shifted all of ASTAR’s risks to DHL Worldwide.<sup>63</sup> In addition, the ACMI agreement allegedly gave Deutsche Post/DHL Worldwide the power to veto changes in corporate control, limit third-party business, and audit ASTAR’s financial records.<sup>64</sup>

The ASTAR case was decided by an Administrative Law Judge (ALJ) who concluded that “[f]rom the record taken as a whole ... ASTAR is a citizen of the United States.”<sup>65</sup> Specifically,

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<sup>58</sup> *Id.* at \*5.

<sup>59</sup> The companies reached an agreement with the DOT for a series of corporate adjustments that if implemented would bring them into compliance with the citizenship statute. *Id.* at \*7-8. Fifteen months later, the DOT reviewed the application a second time and granted the petition for citizenship. *See In re the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, 1991 WL 247884, \*4 (D.O.T.) (1991).

<sup>60</sup> *See In re the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, 1991 WL 247884, \*6 (D.O.T.) (1991).

<sup>61</sup> *See* Thomas Lehigh and Jennifer Thibodeau, *Citizenship Requirements and Why Branson Can’t Save United*, 18 SUM AIR & SPACE LAW 8, 9-10 (2003); *see also* Constantine G. Alexandrakis, *Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change*, 4 U. MIAMI BUS.L.J. 71, 76-91 (1994) (providing additional summaries and analysis of DOT precedent with respect to air carrier citizenship requirements).

<sup>62</sup> *See* Proposed Findings of Fact and Conclusions of Law of Federal Express Co. and United Parcel Service, Co., No. OST-2002-13089-580, 40-43 *available at* [http://dmses.dot.gov/docimages/pdf88/259142\\_web.pdf](http://dmses.dot.gov/docimages/pdf88/259142_web.pdf).

<sup>63</sup> *Id.* at 82-90.

<sup>64</sup> *Id.* at 90-94.

<sup>65</sup> *See* Recommended Decision of Administrative Law Judge, Dec. 19, 2003, No. OST-2002-13089-594, 2 *available at* [http://dmses.dot.gov/docimages/pdf88/262152\\_web.pdf](http://dmses.dot.gov/docimages/pdf88/262152_web.pdf). The Vision 100 Bill, *see supra* note 5, was signed into law on December 12, 2003, one week prior to the Administrative Law Judge’s recommended decision in this case.

with respect to the fact that the ACMI agreement produced approximately 90% of ASTAR's revenues, the ALJ provided a two-step analysis for determining if, in fact, such control exists. According to the ALJ, it must first be established that the predominant customer is in a position to control the carrier by threatening to withdraw their business and then that the carrier would believe the threat to be creditable.<sup>66</sup> In ASTAR, the ALJ concluded that because the threats were only available in very limited circumstances and most were controlled by ASTAR, the second prong of the test, credibility of the threats, could not be satisfied; therefore, control by DHL Worldwide on the grounds that they are a predominate customer can not be established.<sup>67</sup>

Regarding whether ASTAR is a "captive supplier" because of the ACMI's restrictions on pursuing third-party business, the ALJ held that while the success of ASTAR's expansion of third-party business is not relevant to its citizenship, ASTAR's ability to pursue such business independent of its agreement with DHL Worldwide is crucial.<sup>68</sup> The ALJ concluded that the agreement provided ASTAR with significant incentives to expand its business.<sup>69</sup> For example, the ALJ cited the guaranteed payment of \$15 million from DHL Worldwide to ASTAR,<sup>70</sup> which arguably put ASTAR in a better position than if it were to do business elsewhere.<sup>71</sup>

Finally, with regard to DHL Worldwide's alleged veto power over administrative and operational functions, as well as the ability to perform audits with respect to reimbursable costs, the ALJ concluded that while there were administrative provisions in the ACMI, ASTAR retained control over all the carrier's essential decisions, as well as the day-to-day operations.<sup>72</sup>

## **The Department of Transportation's Proposed "Actual Control" Rule**

On November 7, 2005, the DOT published a Notice of Proposed Rulemaking (NPRM) seeking comments on a proposal to clarify the policy with respect to when "actual control" rests with a citizen of the United States.<sup>73</sup> The DOT has proposed that the "actual control" requirement be interpreted in two ways. The first interpretation involves cases where the foreign investor's home country provides U.S. citizens reciprocal investment access and U.S. air carriers full and fair market access, as evidenced by having entered into an "Open Skies" Agreement with the United States, or where it is necessary for compliance with U.S. international obligations. In these situations, air carriers seeking to be considered U.S. citizens will have to demonstrate that U.S. citizens exercise "actual control" only with respect to (1) organizational documentation, including

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<sup>66</sup> *Id.* at 23-24.

<sup>67</sup> *Id.* at 24.

<sup>68</sup> *Id.* at 25.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (stating that the guaranteed payment "encourages the carrier to pursue opportunities and take chances it might not otherwise take—including exposing itself to a downside risk by way of enlarging the business.").

<sup>71</sup> *Id.* at 28 (stating that "ASTAR would be in a better position if DHL [Worldwide] elected to take its business elsewhere; ASTAR could then charter the formerly dedicated aircraft to other air freight forwarders and still collect on the DHL [Worldwide's] guarantee.").

<sup>72</sup> *Id.* at 30 (holding that "[t]he structure of ASTAR is consistent with an independent enterprise. It controls all employment decisions. The carrier hires and fires its own employees—executive, managerial, and otherwise—and sets their responsibilities and compensation.").

<sup>73</sup> See 70 Fed. Reg. 67,389 (Nov. 7, 2005)

such things as incorporation charters, corporate by-laws, stockholder agreements and other documents of a similar nature; (2) Civil Reserve Air Fleet (CRAF) commitments; (3) transportation security requirements as implemented by the Transportation Security Administration; and (4) safety requirements as implemented by the Federal Aviation Administration.<sup>74</sup> The second scenario involves situations where the foreign investor's home country refuses to extend reciprocal investment and/or market access rights to U.S. citizens and carriers and there are no other relevant international obligations. In these cases, the traditional case-by-case actual control analysis as determined by DOT precedent would control the citizenship inquiry.<sup>75</sup>

In asserting a justification for its new interpretation of the "actual control" requirements, the DOT relies primarily on nonlegal or policy grounds. For example, the DOT asserts that the present interpretation of the actual control requirement "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. carriers."<sup>76</sup> As a result of these changing global economic demands, "U.S. air carriers seeking to enter the market should similarly be able to obtain the financial capital necessary to launch their businesses. We tentatively do not believe that 'actual control' should be interpreted in a way that needlessly restricts the commercial opportunities of U.S. air carriers and their ability to compete." Legally, it appears that the DOT recognizes that Congress has established objective statutory requirements that an air carrier must satisfy to be considered a U.S. citizen; however, they assert that nothing in this NPRM would alter or in any way circumvent those statutory requirements.<sup>77</sup>

Given DOT's assertion that this new interpretation of the actual control requirement is a legitimate exercise of its legal authority, it would appear that should a challenge be brought against this proposal becoming a final rule, a reviewing court would likely address the issue pursuant to the standards delineated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council (Chevron)*.<sup>78</sup> In *Chevron*, the Supreme Court established a two-part test for judicial review of agency statutory interpretations. First, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue."<sup>79</sup> If a court finds that there has been an express congressional statement, the inquiry is concluded, as the court "must give effect to the unambiguously expressed intent of Congress."<sup>80</sup> In the event that Congress has not unequivocally addressed the issue, a reviewing court must respect an agency's interpretation, so long as it is permissible.<sup>81</sup> The Court further stated that

[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to that agency to elucidate a specific provision of the statute by regulation.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of

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<sup>74</sup> See *id.* at 67,396.

<sup>75</sup> See *id.* at 67,395.

<sup>76</sup> *Id.* at 67,393.

<sup>77</sup> See *id.* at 67,394.

<sup>78</sup> 467 U.S. 837 (1984).

<sup>79</sup> *Id.* at 842.

<sup>80</sup> *Id.* at 843.

<sup>81</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).



a statutory provision for a reasonable interpretation made by the administrator of an agency.<sup>82</sup>

The Court went on to note that “[j]udges are not experts in the [technical] field, and are not part of either political branch of the Government,” while agencies, as part of the executive branch, appropriately make “policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”<sup>83</sup> Thus, the rationale for this deference is predicated on the notion that it is not the role of the judiciary to “assess the wisdom” of policy choices and resolve the “struggle between competing views of the public interest,” as well as an agency’s greater expertise regarding the subject matter of the regulations.<sup>84</sup>

The DOT received numerous comments to its NPRM, representing almost every segment of the aviation industry. Many of the comments have focused specifically on the DOT’s legal authority to reinterpret the “actual control” requirement. Supporters of the DOT’s action generally assert that the phrase “actual control,” though it appears in the statute, is vague and undefined. As a result, the language is arguably ambiguous and, therefore, subject to departmental interpretation. Thus, pursuant to *Chevron*, the DOT has wide latitude and is entitled to substantial deference when rendering an interpretation, provided that it does so reasonably and in a manner that is consistent with the plain meaning of the statute.<sup>85</sup>

Conversely, opponents of the NPRM assert that when Congress specifically added the phrase “actual control” to the statute, they were in effect codifying the DOT’s long-standing precedent and not granting any additional authority over the interpretation of the phrase than previously existed.<sup>86</sup> In addition, opponents of the NPRM assert that the DOT’s interpretation is contrary to

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<sup>82</sup> *Chevron*, 467 U.S. at 843-44.

<sup>83</sup> *Chevron*, 467 U.S. at 865. In *Cablevision Sys. Dev. v. Motion Picture Ass’n*, 836 F.2d 599, 608-609 (D.C. Cir. 1988), the court noted that, “*Chevron’s* rationale for deference is based on more than agency expertise.” Elaborating, the court stated: “Like the Court in *Chevron*, we are faced with several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose. We see no reason to deny the Copyright Office’s legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable.” *Id.* at 609.

<sup>84</sup> *Chevron*, 467 U.S. at 866; *Rust v. Sullivan*, 500 U.S. 173, 187 (1991). It should be mentioned that the Supreme Court revisited *Chevron* in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), declaring that the Food & Drug Administration lacks jurisdictional authority to regulate tobacco products. In reaching this determination, the Court discussed the first prong of *Chevron*, declaring that the proper analysis is to focus not only on the statutory clause, but rather to consider the structure, function, and history of all relevant provisions, interpreting a statute “as a symmetrical and coherent regulatory scheme.” *Id.* at 1294. Upon concluding that Congress “squarely rejected proposals to give the FDA jurisdiction over tobacco,” the Court stated that it was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.” *Id.* at 1315. This reasoning centers on an analysis of the unique regulatory scheme created for tobacco products under the first prong of the *Chevron* test, and, as such, does not appear to impact the traditional inquiry as it applies to the issue at hand. The Supreme Court further clarified the limits of the *Chevron* standard in *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), ruling that deference applies only in instances when Congress has delegated authority to an agency to make rules carrying the force of law, and when the agency interpretation claiming deference was promulgated pursuant to that authority.

<sup>85</sup> See Comments of United Airlines, Docket OST-2003-15759, 7-9 available at [http://dmses.dot.gov/docimages/pdf95/380696\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380696_web.pdf) (Jan. 6, 2006); see also Comments of Delta Airlines, Docket OST-2003-15759, 9 available at [http://dmses.dot.gov/docimages/pdf95/380757\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380757_web.pdf) (Jan. 6, 2006); Comments of Federal Express Corporation, Docket OST-2003-15759, 9 available at [http://dmses.dot.gov/docimages/pdf95/380710\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380710_web.pdf) (Jan. 6, 2006).

<sup>86</sup> See Comments of Continental Airlines, Docket OST-2003-15759, 5-6 available at [http://dmses.dot.gov/docimages/pdf95/381133\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/381133_web.pdf) (Jan. 6, 2006) (citing 149 Cong. Rec. S7813 (June 12, 2003) (stating that the DOT assured the (continued...))

the express language of the statute. Specifically, they argue that unlike the four narrow areas of control defined by the DOT, actual control of an air carrier rests with the entity that makes the fundamental economic decisions that determine the nature of the airlines' operations.<sup>87</sup> These decisions include, but are not limited to, the types of airplane flown, markets to be served, flight schedules, fares, and aircraft maintenance and other services.<sup>88</sup> Thus, according to opponents of the NPRM, relinquishing control over these elements of an air carrier renders any other statutory requirements "pointless."<sup>89</sup>

Finally, opponents of the proposed NPRM cite the military's continued reliance on the Civil Reserve Air Fleet Program (CRAF). Under this program, domestic air carriers supply aircraft on a voluntary basis to increase the military's airlift capacity. CRAF allows the U.S. military, in times of need, to demand access to a selected percentage of the civil aircraft fleet to deliver troops and equipment to the battlefield.<sup>90</sup> Concern with respect to CRAF is not new; prior to the NPRM, several commentators had noted that changes to the U.S. civil aviation ownership and control requirements could substantially hinder or even destroy CRAF, as aircraft that move from domestic to foreign ownership would not be under any legal obligation to remain available to the program.<sup>91</sup> The NPRM specifically states that for an air carrier to be considered a U.S. citizen, decisions with respect to CRAF are to remain under the control of U.S. citizens; however, at least one commentator has questioned how the DOT will ensure that U.S. citizens are not pressured by their foreign partners to either modify or eliminate their participation in this voluntary program.<sup>92</sup> In addition, both Continental Airlines and Delta Airlines noted that new foreign owners might, as a result of their control over other commercial aspects of an airline, divest the use, upkeep, and maintenance of "long-haul" aircraft that are useful to the CRAF.<sup>93</sup> Divestitures of this type would,

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(...continued)

Congress that the amendment "will not in any way affect [DOT's existing] determination of what constitutes a citizen of the United States"))).

<sup>87</sup> See Comments of Airline Pilots Association International, Docket OST-2003-15759, 4-5 available at [http://dmses.dot.gov/docimages/pdf95/380514\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380514_web.pdf) (Jan. 6, 2006).

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at 5.

<sup>90</sup> See 10 U.S.C. § 9512 (2004). CRAF has only been used twice in our nation's history. The first use occurred during the 1991 Gulf War, when approximately two-thirds of the available aircraft were deployed. See William G. Palmby, "Enhancement of the Civil Reserve Air Fleet: An Alternative for Bridging the Airlift Gap," 53-54, available at <http://www.fas.org/man/eprint/palmby.htm> (noting that the CRAF is activated in three stages, and that during the 1991 Gulf War the aircraft in the third stage were not activated). More recently, on February 8, 2003, the Department of Defense activated 47 civilian aircraft for service in Iraq, representing approximately five percent of CRAF's total capability. See "DOD Activates Commercial Airlift Reserves for Troops, Regulatory Intelligence Data," Feb. 10, 2003; see also "Defense Dept. Activates First Stage of Civil Aircraft Fleet," *Aviation Daily*, Feb. 11, 2003, at 3.

<sup>91</sup> See Stephen D. Reynerson, *Everybody Wants to go to Heaven, but Nobody Wants to Die: The Story of the Transatlantic Common Aviation Area*, 30 DENV. J. INT'L L. & POL'Y 421, 456 (2002) (estimating that the cost of replacing the transport capacity of the CRAF "would be approximately fifty billion dollars and maintenance costs of one to three billion dollars a year thereafter."); see also Jacob A. Warden, "Open Skies" at a Crossroads: How the United States and European Union Should use the EJC Transport Cases to Reconstruct the Transatlantic Aviation Regime, 24 NW. J. INT'L L. & BUS. 227, 250 (2003).

<sup>92</sup> See Comments of the Transportation Trades Department, AFL-CIO, Docket OST-2003-15759, 3 available at [http://dmses.dot.gov/docimages/pdf95/380680\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380680_web.pdf) (Jan. 6, 2006).

<sup>93</sup> See Comments of Continental Airlines, Docket OST-2003-15759, 12, available at [http://dmses.dot.gov/docimages/pdf95/381133\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/381133_web.pdf) (Jan. 6, 2006); see also Comments of Delta Airlines, Docket OST-2003-15759, 10, available at [http://dmses.dot.gov/docimages/pdf95/380757\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/380757_web.pdf) (Jan. 6, 2006).



argued the commentators, render those airlines of no effective use to CRAF and, therefore, could potentially result in a diminished air fleet from which DOD could call upon.<sup>94</sup>

## Recent Developments

In response to the numerous comments on the NPRM and to the spate of legislative responses from Members of Congress discussed below, on May 5, 2006, the DOT issued a “Supplemental Notice of Proposed Rulemaking” (SNPR) that attempts to clarify the Department’s position on several of the major issues raised by the initial NPRM.<sup>95</sup> In light of the fact that several critical comments revolved around the influence that foreign investors may have, the DOT clarified its proposed interpretation by stating that it “would be requiring all delegations to foreign interests ultimately to be revocable by the board of directors or the voting shareholders.”<sup>96</sup> According to the DOT, requiring that any delegations of authority to foreign investors be revocable ensures that “actual control” is retained by U.S. citizens, as the Federal Aviation Act requires that both the board of directors and the voting shareholders be controlled by super-majorities of U.S. citizens (2/3 of the board and/or 75% of the shareholders must be U.S. citizens).<sup>97</sup>

The DOT also responded at length to the legal arguments presented by the commentators, especially with respect to the agency’s legal authority to adopt such an interpretation of the underlying statute. The DOT, in making its arguments, appears to rely on well-established principles of administrative law, especially with respect to its ability to effectively interpret and administer the statute.<sup>98</sup> DOT argues that they have often interpreted the citizenship statute and, in fact, developed the “actual control” test prior to its inclusion in the statute by Congress.<sup>99</sup> In addition, DOT asserts that Congress, in adopting the “actual control” language into the statute, recognized the need for continued agency interpretation and “did not direct us to follow the past interpretations.”<sup>100</sup> DOT’s position appears to be that the amendment to the Federal Aviation Act, which inserted the phrase “actual control,” did not in any way amend or alter the agency’s discretionary authority to modify its interpretation as appropriate.<sup>101</sup> In support of its position, the DOT extensively cites the amendment’s legislative sponsor and floor manager, who, at the time the Vision—100 legislation<sup>102</sup> was being considered, stated that the amendment “leaves the interpretation of effective control up to DOT, but the department can draw upon its decades of precedents to reach these conclusions.”<sup>103</sup> Further, DOT cites to the floor manager’s assertion that the amendment “was simply a reflection of existing law” and that the inclusion of the actual

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<sup>94</sup> See *id.*

<sup>95</sup> See 71 Fed. Reg. 26,425 (May 7, 2006).

<sup>96</sup> *Id.* at 26,430.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 26, 436 (stating that “[o]ur responsibility for enforcing the statutory citizenship requirement gives us the authority to interpret that requirement to the extent that it is not specifically defined” (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); see also *Continental Air Lines v. DOT*, 843 F.2d 1444, 1449 (D.C. Cir. 1988)).

<sup>99</sup> *Id.* (citing *Wille Peter Daetwyler, D.B.A. Interamerican Airfreight Co., Foreign Permit*, 58 C.A.B. 118, 120-21 (1971)).

<sup>100</sup> *Id.* at 26,436-437.

<sup>101</sup> *Id.*; see also *supra*, notes 36-38 and accompanying text.

<sup>102</sup> See *supra*, note 38 and accompanying text.

<sup>103</sup> 71 Fed. Reg. 26,425, 26,436-437 (May 7, 2006) (citing Congressional Record, S7813 (June 12, 2003)).

control language “will not in any way affect [the Department’s] determination of what constitutes a citizen of the United States.”<sup>104</sup>

In addition to addressing the numerous other legal and policy arguments made by opposition comments, the SNPR specifically addressed the concerns raised with respect to CRAF commitments. First, DOT clarifies and expands its proposal to require that not only CRAF commitments be actually controlled by U.S. citizens, but also that overall airline participation in “national defense airlift operations” be in the actual control of only U.S. citizens.<sup>105</sup> According to the DOT, this requirement means that “the carrier could not allow foreign investors to make decisions that would make participation in CRAF or other national defense airlift operations impossible as a practical matter.”<sup>106</sup> Moreover, if there was suspicion that national defense airlift operations were precluded or impaired by decisions of the foreign investor(s), the SNPR indicates that DOT would investigate to determine if the requirements for the actual control test was being satisfied by the carrier.<sup>107</sup> The DOT responds to the concerns about the proposal’s potential negative impact on CRAF commitments by noting that participation in the CRAF is a voluntary commercial arraignment in which the airlines commit aircraft in return for access to U.S. government contracts. According to the DOT, because nothing in the NPRM changes or alters that dynamic “DOD can adjust the economic incentives of the program in order to better ensure sufficient military airlift capacity” and, thus, maintaining adequate participation levels.<sup>108</sup> Finally, in direct response to some of the commentators concerns about fleet divestment, DOT argues that because domestic carriers make their fleet decisions based on what is best to ensure a successful commercial operation, foreign owners would “be motivated by the same commercial incentives” and, therefore, in DOT’s opinion, there should be no significant changes to CRAF commitment levels.<sup>109</sup>

The DOT and DOD have entered into a Memorandum of Understanding (MOU) that appears to be intended to provide a procedural framework for DOD’s participation in DOT’s consideration of air carrier citizenship issues as they relate to CRAF commitments.<sup>110</sup> This MOU will become effective on the date that the final actual control rule goes into effect.<sup>111</sup> The MOU applies in situations that involve (1) citizenship issues in which the proposed actual control rules may apply and (2) airlines that have existing CRAF commitments or have aircraft that could be operated as part of the “Long-Range International Segment of the CRAF program.”<sup>112</sup> According to the MOU, DOT agrees to notify DOD of all air carrier fitness requests and, upon request from DOD, will share with DOD all documents relating to fitness reviews that implicate CRAF

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<sup>104</sup> *Id.* (citing Congressional Record, S7813 (June 12, 2003)).

<sup>105</sup> *See id.* at 26, 434.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (stating that “[DOT] would likely investigate whether the carrier is living up to its obligation under our revised rule to ensure that decisions relating to military airlift participation are wholly controlled by U.S. citizens. Because a failure to comply with that obligation would call into question the carrier’s eligibility to retain its operating certificate, airline management can be expected to take those obligations very seriously”).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See Memorandum of Understanding Between the Department of Transportation and the Department of Defense Concerning United States Air Carrier Citizenship Reviews*, 2, (July 17, 2006) (copies on file with author).

<sup>111</sup> *Id.* at 6.

<sup>112</sup> *Id.* at 2.

commitments.<sup>113</sup> DOT further agrees to consult with DOD with respect to an ultimate disposition in those reviews where DOD has expressed an interest.<sup>114</sup> In cases where DOT and DOD disagree, and DOD so requests, meetings can be arranged to discuss and solicit input prior to a final decision.<sup>115</sup> Moreover, in situations where DOD can demonstrate “good cause,” which, while not specifically defined, appears to include “a significant reduction or proposed significant reduction in a carrier’s capability to meet its CRAF commitments,” DOT agrees to “commence a review to determine the continuing fitness of an identified air carrier within the scope of this agreement....”<sup>116</sup> In cases where DOD requests a continuing fitness review, it agrees to provide all information and documents, necessary to support its position, in a manner that can be provided to the air carrier so that it may properly respond.<sup>117</sup> Finally, DOD agrees to “expeditiously provide any input to DOT so as not to delay DOT’s processing of the case....”<sup>118</sup>

## Legislative Responses

Several Members of Congress have taken an interest in this rulemaking and have even filed written comments with DOT expressing concerns with respect to CRAF commitments, airline employees, and consumer protection issues.<sup>119</sup> In addition, companion House and Senate bills have been introduced in the 109<sup>th</sup> Congress to address this issue. H.R. 4542 and S. 2135 both contain provisions that would prevent the DOT from issuing a decision on the NPRM for a period of one year after the date of enactment.<sup>120</sup> The House and Senate bills both require that at least 180 days prior to issuing a final decision, the DOT shall submit to Congress a report assessing the impact of the proposed rule on various aspects of domestic and international aviation law.<sup>121</sup> In addition, both the House and Senate attempted to address this issue by adopting language in their respective versions of the 2006 Emergency Supplemental Appropriations Bill.<sup>122</sup> While the House of Representatives’ version did not contain any legislative language with respect to the DOT rulemaking, the committee report made express mention of the issue.<sup>123</sup> According to the committee’s report, the committee considers airlines to be part of the United States’ critical infrastructure and, as such, believes that it is “critical that any final rule regarding foreign control of U.S. airlines not only comply with current laws regarding foreign ownership, but also comply with statutes recently passed by the Congress which require that all U.S. airlines be under the ‘actual control’ of U.S. citizens.”<sup>124</sup> The committee, therefore, inserted language directing the

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<sup>113</sup> *Id.* at 2-3.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3-4 (stating that “DOD will also provide unclassified information to DOT that can be released to the carrier, so that the air carrier can effectively respond”).

<sup>118</sup> *Id.* at 4.

<sup>119</sup> See Letter from The Honorable Don Young, Chairman of the House Committee on Transportation and Infrastructure and The Honorable John L. Mica, Chairman of the Subcommittee on Aviation to The Honorable Norman Y. Mineta, Secretary of the U.S. Department of Transportation 2-3 (Dec. 8, 2005) available at [http://dmses.dot.gov/docimages/pdf95/378411\\_web.pdf](http://dmses.dot.gov/docimages/pdf95/378411_web.pdf).

<sup>120</sup> See H.R. 4542, 109<sup>th</sup> Cong. (2005); see also S. 2135, 109<sup>th</sup> Cong. (2005).

<sup>121</sup> See *id.* at § 2.

<sup>122</sup> See H.R. 4939, 109<sup>th</sup> Cong. (2006).

<sup>123</sup> See H.Rept. 109-388, at 68.

<sup>124</sup> *Id.*

Secretary of Transportation “to refrain from issuing a final rule for 120 days.”<sup>125</sup> While this suggestion is a clear expression of the views of the House Appropriations Committee, it would not have been legally binding on the DOT and, absent some other legislative action, would likely not have prevented the promulgation of a final rule with respect to foreign ownership. The Senate version, on the other hand, did contain explicit legislative language that would have effectively prevented the DOT from promulgating a final rule.<sup>126</sup> Ultimately, however, neither version was included in the final bill.

Subsequently, both the House of Representatives and the Senate have included the following identical language into the Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia Appropriations Bill (H.R. 5576):

None of the funds made available in this Act may be used by the Department of Transportation to finalize or implement the policy proposed in the notice of proposed rulemaking published in the Federal Register on November 7, 2005 (70 Fed. Reg. 67389), or the supplemental notice of proposed rulemaking published in the Federal Register on May 5, 2006 (71 Fed. Reg. 26425), in Docket No. OST-2003-15759.<sup>127</sup>

This language, if included in the final appropriations measure, would appear to prohibit the DOT from promulgating the final rule using any funds made available for fiscal year (FY) 2007. In addition, if DOT were to issue a final rule prior to the enactment of this language, it would appear to prevent the use of any FY2007 funds from being used to implement the rule’s provisions. While it is difficult to conceive of any statutory interpretation arguments that DOT could use to avoid the plain meaning of this language, it is important to note that the language does not contain any independent enforcement mechanism. As such, to ensure compliance, Congress would likely have to rely on its oversight functions or other general laws governing the use of appropriated funds, such as the Anti-Deficiency Act.<sup>128</sup>

## Cabotage

Another major issue facing international civil aviation law is cabotage. As previously mentioned, cabotage is the right of a foreign airline to carry passengers and/or cargo between airports of the same country (e.g., from New York to Los Angeles).<sup>129</sup> Currently, the Federal Aviation Act contains a general prohibition against cabotage activity by foreign air carriers. The prohibition states that “aircraft may take on for compensation, at a place in the United States, passengers or cargo destined for another place in the United States only if—(1) specifically authorized under

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<sup>125</sup> *Id.*

<sup>126</sup> See John Crawley, *US Senate Panel Votes to Block Air Ownership Change*, REUTERS, April 5, 2006, available at <http://www.redorbit.com/modules/news/tools.php?tool=print&id=457830>; see also Michael Posner, *Appropriators Clear \$107 Billion War Supplemental*, NATIONAL JOURNAL, April 5, 2006, available at [http://nationaljournal.com/members/markups/2006/04/mr\\_20060404\\_1.htm](http://nationaljournal.com/members/markups/2006/04/mr_20060404_1.htm).

<sup>127</sup> Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia and Independent Agencies Appropriations Act, 2007, H.R. 5576 § 952, 109<sup>th</sup> Cong. 2d Sess. (2006) (as adopted by the House); see also Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia and Independent Agencies Appropriations Act, 2007, H.R. 5576 § 104, 109<sup>th</sup> Cong. 2d Sess. (2006) (as passed by the Senate Appropriations Committee and currently pending before the full Senate).

<sup>128</sup> See 31 U.S.C. § 1301(a) (2000) (prohibiting officers of the United States from utilizing funds specifically authorized by Congress for other than their intended purpose).

<sup>129</sup> See *supra* footnote 15.

section 40109(g) of this title; or (2) under regulations the Secretary prescribes authorizing air carriers to provide otherwise authorized air transportation with foreign registered aircraft under lease or charter to them without crew.”<sup>130</sup> If neither of those situations exists, foreign aircraft are not permitted to perform cabotage within the United States. In addition, the Secretary of Transportation has general discretionary authority to waive other economic-related statutory provisions listed in section 40109(c) “when the Secretary decides that the exemption is consistent with the public interest.”<sup>131</sup> The cabotage prohibition, however, is not among the regulations listed in section 40109(c).<sup>132</sup>

Congress last amended the cabotage laws as part of the Vision—100 Century of Aviation Authorization Act.<sup>133</sup> The enacted changes permit “eligible cargo” to be removed from aircraft, including foreign aircraft, in Alaska and “not be deemed to have broken its international journey in, be taken on in, or be destined for Alaska.”<sup>134</sup> The statute defines “eligible cargo” as cargo “transported between Alaska and any other place in the United States on a foreign air carrier (having been transported from, or thereafter being transported to, a place outside the United States on a different air carrier or foreign air carrier) that is carried—(A) under the code of a United States air carrier providing air transportation to Alaska; (B) on an air carrier way bill of an air carrier providing air transportation to Alaska; (C) under a term arrangement or block space agreement with an air carrier; or (D) under the code of a United States air carrier for purposes of transportation within the United States.”<sup>135</sup> These provisions provide for a very limited statutory exception to the general prohibition against cabotage activities.

While it does not appear that the current draft “Open Skies” Agreement with the European Union requires the granting of more cabotage rights to foreign-owned or controlled carriers, it appears to remain a major issue in international civil aviation. It appears, however, that statutory changes would be required before the executive branch can enter into any sort of agreement purporting to liberalize the cabotage rules. Although foreign aircraft are allowed to navigate within U.S. airspace, unless specifically authorized either by statute or DOT regulations, they are not permitted to perform any form of cabotage within the United States.<sup>136</sup> While it is unclear what, if any, economic effect a more liberal cabotage policy would have on the domestic airline industry, only Congress has the legal authority to amend the Federal Aviation Act and permit foreign carriers to have cabotage rights.

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<sup>130</sup> 49 U.S.C. § 41703(c)(1)-(2) (2003). Section 40109(g) gives the Secretary of Transportation the authority to grant limited 30 day exemptions if it is determined that either there is an emergency, or it is necessary to avoid unreasonable hardship and no unreasonable advantage will be given to any party involved in a labor dispute. 49 U.S.C. § 40109(g) (2003).

<sup>131</sup> 49 U.S.C. § 40109(c) (2003).

<sup>132</sup> *Id.*

<sup>133</sup> Vision 100—Century of Aviation Re-authorization Act, P.L. 108-176, § 808 117 Stat. 2588 (Dec. 12, 2003).

<sup>134</sup> *Id.* (codified at 49 U.S.C. § 41703(e)(1)).

<sup>135</sup> *Id.* (codified at 49 U.S.C. § 41703(e)(2)).

<sup>136</sup> 49 U.S.C. § 41703(c)(1)-(2) (2004).

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