

Hearing to Review the Department of Transportation's  
Notice of Proposed Rulemaking That Clarifies the Rules  
Regarding Foreign Investment in U.S. Air Carriers

Written Testimony Of

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Before The

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION  
Subcommittee on Aviation

May 9, 2006

Good afternoon. My name is Jeff Smisek, and I am the President of Continental Airlines. On behalf of my 42,000 co-workers, I appreciate the opportunity to express our opposition to the Department of Transportation's supplemental notice of proposed rulemaking on foreign control.

Continental supports increasing U.S. airlines' access to foreign capital, and Continental supported legislation sent to Congress by this Administration to nearly double the level of permissible foreign investment in U.S. airlines. If Congress takes the leadership, access to foreign capital for U.S. airlines can be enhanced lawfully in accordance with clear and practical standards. In sharp contrast, the Department of Transportation's Supplemental Notice of Proposed Rulemaking and the original Notice of Proposed Rulemaking before it are unlawful under current statutory standards, totally unworkable in the real world of airline operations and likely to inhibit access to foreign capital by U.S. airlines. Although the Supplemental Notice of Proposed Rulemaking makes some changes in the Department of Transportation's description of what it intends to do, the proposed policy itself is virtually unchanged and is no more legal, workable or likely to encourage investment than the original proposal was. I have attached for your consideration the Continental press releases responding to issuance of these proposals.

As Continental's comments on the Department of Transportation's Notice of Proposed Rulemaking (copy attached) amply demonstrated, the Department's decision that "actual control" by U.S. citizens permits "actual control" by foreign

citizens over all commercial aspects of a U.S. airline is unlawful. Although the Supplemental Notice of Proposed Rulemaking relies on the Department of Transportation's discretion to interpret the aviation statutes, in an analogous situation the D. C. Circuit said this in reversing a decision of the Securities and Exchange Commission interpreting the Public Utility Holding Company Act (PUHCA):

The Commission may well be right that PUHCA's region requirement is outdated . . . . In view of the statute's plain language, however, only Congress can make that decision. . . . In the meantime, the Commission may not interpret the phrase 'single area or region' so flexibly as to read it out of the Act.

National Rural Elec. Co-op. Ass'n v. S.E.C., 276 F.3d 609, 618 (D. C. Cir. 2002)

Clearly, "actual control" by U.S. citizens means precisely what it says: actual control of an entire airline all the time. The statutory definition does not say "actual control sometimes," or "actual control of parts of an airline's operations," or "actual control only of areas already regulated by the government" or "actual control when foreign owners are citizens of some countries but not others." Neither the Notice of Proposed Rulemaking nor the Supplemental Notice of Proposed Rulemaking provides a shred of statutory analysis to suggest that the phrase "actual control" of U.S. airlines by U.S. citizens was intended to mean control of only certain aspects of an airline's operations, control only at certain times or control delegated but subject to revocation. Moreover, requiring that 75% of shareholders, the president and two-thirds of Board members and managing officers be U.S. citizens does not necessarily mean that U.S. citizens control an airline. If these requirements alone always satisfied the control test, there would have been

no need to impose the additional requirement that the airline be under the “actual control” of U.S. citizens.

Congress expressed its view that U.S. airlines must be entirely controlled by U.S. citizens when it added the “actual control” requirement to the aviation statutes in 2003, and over the last six months it has again expressed its view that “actual control” of U.S. airlines must be vested in U.S. citizens at all times. Beginning with a November 18 letter signed by 85 Congressional representatives saying that the Department’s proposal is “contrary to recent Congressional mandates,” including the requirement that U.S. interests “control economic and competitive decisions of the airlines, as well as safety and security decisions” and that the “Department has overstepped its authority in this proposal with its revised interpretation of ‘actual control,’” Congress has repeatedly expressed serious concerns about the Department’s unlawful proposal. With nearly 190 co-sponsors, H.R. 4542 reflects these Congressional concerns, notes that the Department’s proposal is “contrary to the plain language” of the aviation statutes, prohibits the Department from issuing its decision for a period of one year and requires a report from the Department regarding the impact of its proposal on U.S. airlines and the aviation industry and how the Department would implement its proposed policy. Similarly, the House Appropriations Committee unanimously adopted report language saying “the Committee believes that the U.S. aviation industry is part of our critical infrastructure as are the ports,” and “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” and therefore “directs the Secretary of Transportation to refrain from issuing a final rule for 120 days” because the “Committee is seriously concerned about the promulgation of any rule which would allow any minority foreign investor to exercise control or decision making authority over any aspect of a U.S. carrier operation.” More recently, the Senate Appropriations Subcommittee adopted legislation that would prohibit the Department from using any of its funds to issue or implement a decision in this proceeding or to make any fitness determinations based on new standards.

Other U.S. and foreign airlines also recognize the uncertainty resulting from the Department’s proposal and the need for Congressional action. As US Airways said, the Department’s proposal “could cause uncertainty and possible harm to the U.S. airline industry” (US Airways comments at 1), and Delta said, “Investor concerns about . . . the extent to which a statutory amendment may be required to provide legal certainty” and the “scant guidance” in the Department’s proposal on implementation of the control provisions separating “commercial” operations from security and safety areas with which they are inextricably intertwined would undermine the Department’s objectives. (Delta Comments at 8, 11) Alaska also said that Congress, not the Department, should address any changes to the control standards. (Alaska Comments at 1-2) As Virgin Atlantic put it, “the NPRM raises as many questions as it answers, creating an unacceptably high level of uncertainty

for would-be investors” (Virgin Atlantic Comments at 1) Similarly, British Airways said the Department’s “objectives would best be achieved through amendment or elimination of the existing statutory restrictions” and recognized that the Department’s proposal would be “subject to potential reversal or modification by Congress, the Federal Courts or the Department itself.” (British Airways comments at 1)

In the wake of these extraordinary public and Congressional concerns about the control of critical transportation facilities by foreign nationals and pending legislation, the Department should suspend its pending rulemaking proposal and instead seek legislation to make any potential changes to the definition of “actual control” in the aviation statutes.

Indeed, the very proceeding in which the Department now plans to abandon the unequivocal decades-long interpretation of the actual control requirements was begun because of Congressional concern about the lack of clear published standards for determining that actual control of airlines was held by U.S. citizens and the lack of transparency in the Department of Transportation’s procedures for reviewing citizenship determinations. Congress had even been forced to pass legislation requiring the Department of Transportation to institute a formal proceeding to investigate the citizenship of a cargo airline after years of complaints by Federal Express and United Parcel Service that the cargo airline was controlled by foreign interests. Despite these repeated Congressional criticisms, however, the Department of Transportation is proposing to publish only the most skeletal policy

statement and to continue making its foreign control determinations behind closed doors in negotiations with foreign investors and the airlines they seek to control.

Although the Department of Transportation has described its original and supplemental proposals as a “clarification” of its interpretation in the U.S., it has told foreigners that the proposals represent a “profound change” to the actual control standards. The proposals clearly represent a profound change since they are diametrically opposed to the standards historically applied and the actual words of the statute. They are anything but a “clarification.” They would be better described as a “reversal” and an “obfuscation” than a “clarification.”

The entire text of the proposed Department of Transportation policy is:

(b) *Policy.* In cases where there is significant involvement in investment by non-U.S. citizens and either where their home country does not deny citizens of the United States reciprocal access to investment in that country’s carriers and does not deny U.S. air carriers full and fair access to its air services market, as evidenced by an open-skies agreement, or where it is otherwise appropriate to ensure consistency with U.S. international legal obligations, the Department will consider the following when determining whether U.S. citizens are in “actual control” of the air carrier:

(1) All organizational documentations, including such documents as charter of incorporation, certificate of incorporation, by-laws, membership agreements, stockholder agreements, and other documents of similar nature. The documents will be reviewed to determine whether U.S. citizens have and will in fact retain actual control of the air carrier through such documents.

(2) The air carrier’s operational plans or actual operations to determine whether U.S. citizens have actual control with respect to:

(i) Decisions whether to make and/or continue Civil Reserve Air Fleet (CRAF) or other national defense airlift

commitments, and, once made, the implementation of such commitments with the Department of Defense;

(ii) Air carrier policies and implementation with respect to aviation security, including the transportation security requirements specified by the Transportation Security Administration; and

(iii) Air carrier policies and implementation with respect to aviation safety, including the requirements specified by the Federal Aviation Administration.

Clearly, these skeletal provisions raise more questions than answers, and not one of the “safeguards,” such as revocability, cited by the supplemental notice’s rationale is even mentioned in the policy itself. What is “significant involvement in investment” by non-U.S. citizens? What does “reciprocal access to investment” mean? In what situations would it be “otherwise appropriate to ensure consistency with U.S. international legal obligations” to permit foreign control by citizens of a country which neither permits reciprocal investment nor has an open-skies agreement with the U.S.? Although the proposed policy says the carrier’s “organizational documentation” will be reviewed “to determine whether U.S. citizens have and will in fact retain actual control of the air carrier through such documents,” the Department’s own statements make perfectly clear that the Department has no intention whatever of insuring that the air carrier is actually controlled by U.S. citizens. How could the Department of Transportation actually “consider” an “air carrier’s operational plans or actual operations” to determine whether U.S. citizens have actual control with respect to decisions on CRAF or other national defense commitments and implementation of those commitments, policies and implementation “with respect to aviation security” and “aviation

safety?” The standards that would apply to any of these decisions are totally absent from the proposed policy.

Just as importantly, no one will ever know what standards are being applied, or have been applied, to citizenship determinations since the decisions will be reached behind closed doors in negotiations between foreign investors, the airlines they are investing in and Department of Transportation officials who are not experts in corporate governance or airline operations.

Although the Supplemental Notice of Proposed Rulemaking purports to broaden the scope of U.S.-citizen control required for safety, security and national defense decisions, it fails to recognize the fundamental fact that corporate control of such decisions cannot be bifurcated. Clearly, every decision that affects budgets, personnel, promotions, wage rates, financing and investment affects safety, security and national defense. If indeed “all critical elements of a carrier’s decision-making that could impact safety, security and national defense airlift” must be made by U.S. citizens who are not beholden to foreign investors, then foreign citizens may not control aircraft acquisition, routes, financing, budgets, personnel or any other significant aspect of the U.S. airline’s management or operations. That may be what the Department of Transportation is telling its U.S. audience, but you can bet assurances will be given Europeans that such constraints will not be applied.

Although the Department of Transportation’s witness in House hearings testified that foreign citizens could contract with U.S. airlines to transfer control for all commercial aspects of an airline’s operation to foreign citizens, the Supplemental

Notice of Proposed Rulemaking raises even more questions about how control would be monitored and distributed. Although the supplemental proposal would require U.S. citizens to “control the carrier’s organizational documents,” it would not prevent those citizens from amending those organizational documents to turn control over to foreign citizens to facilitate the “greater alliance integration” and consolidation in the airline industry that the Department of Transportation supports.

Although super-majority, “golden share” and other control provisions are normally bargained for and exchanged for significant financial benefits, the Supplemental Notice of Proposed Rulemaking says that the board or voting shareholders must retain the power to revoke delegations of managerial responsibilities to foreign investors and that the ability to revoke the delegation could not be conditioned on terms that would make revocation “impracticable.” This requirement appears nowhere in the proposed policy, and constant monitoring by the Department of Transportation to ensure that agreements between the parties have not made revocation “impracticable” would require hiring airline, financial, legal and corporate governance experts. Would revocation be “impracticable” if the result would be termination of a codeshare or alliance with a foreign airline partner? Would refusing to make further foreign investments needed by the U.S. airline in the event of revocation render revocation “impracticable?” Would a mandatory redemption of equity securities or repayment of indebtedness render revocation “impracticable?” Once a U.S. airline had terminated its transatlantic

flights in favor of its foreign partner's flights, would revocation be "impracticable" because the U.S. airline would lose access to transatlantic traffic?

The Department's proposal to bifurcate a carrier's management and operations into foreign-controlled and U.S.-controlled segments is both naïve and totally unworkable. As Continental and other airlines have explained, safety, security and defense commitments are integral to an airline's entire operations and cannot be separated from "commercial" decisions. If, as the supplemental notice of proposed rulemaking indicates, foreign investors could not hire and fire corporate officers; all managing officers responsible for safety, security and national defense must have only U.S.-citizen supervision; and budgets and compensation for these areas must be determined only by U.S. citizens who may not be "appointed by or otherwise beholden to" foreign interests, then the scope of delegable foreign control would be extremely narrow since any significant financial, fleet, resource allocation or integrated budget could not be subject to foreign influence. Given the Department of Transportation's objective of offering foreign investors effective control to cement their alliances with U.S. airlines and protect their investments, however, it seems unlikely that the Department of Transportation would take the steps necessary to prevent foreign influence over these significant resource allocation decisions.

Beyond super-majority provisions that require concurrence for bankruptcy or dissolution, the Department says it cannot define what kind of super-majority provisions would violate the requirement that "actual control" remain with U.S.

citizens, providing no discernible standards by which to test proposed transactions and leaving all such decisions to the obscurity of private, closed door meetings between the Department of Transportation and foreign investors. Although the Department of Transportation says it would approve of “standard provisions obtained by minority shareholders,” it is unable to name any such provisions except for those related to bankruptcy or dissolution.

Although the Department’s original proposal indicated that foreign investors could control fleet decisions, the Supplemental Notice of Proposed Rulemaking says that a “carrier could not allow foreign investors to make decisions that would make participation in or other national defense airlift operations impossible as a practical matter,” in direct contradiction of advice given to European negotiators by the Department of Transportation’s Undersecretary that foreign investors could control the “commercial decision” whether to participate in CRAF or not as well as fleet decisions that would eliminate all CRAF-eligible aircraft from the U.S. airline’s fleet. Now, the Supplemental Notice of Proposed Rulemaking says that it “would likely investigate” if a U.S. carrier’s ability to contribute to CRAF or other national defense airlift operations were precluded by “decisions made or significantly influenced by foreign investors.” Apparently this “investigation” would occur after a U.S. carrier had already become unable to contribute to the U.S. airlift. But how would that preserve the ability of our Department of Defense to move the troops? Could the deed be “undone?” Would the Department of Transportation require that planes that have been sold, transferred or otherwise disposed of be brought back to

the U.S. carrier's fleet? Even if the Department of Transportation could unwind any transaction or series of transactions that created the problems for the Department of Defense as to military aircraft – could it possibly be done in the real time that the Department of Defense might need to move troops to a conflict in a timely manner? Of course not. Even worse, what is the likelihood that a U.S. airline controlled by a foreign government or an airline owned by a foreign government would volunteer for national defense missions enforcing U.S. policies the foreign government opposes?

Both the original proposal and the supplemental proposal assume that corporate decisions can be separated into distinct compartments and that boards and shareholders can and will undertake the Department's responsibility to ensure that U.S. citizens actually control the airline regardless of the economic interests of the directors and shareholders themselves. As the supplemental notice itself points out, "strategic investors" in U.S. airlines do not invest to maximize shareholder value per se but to maximize integration between the strategic investor and the airline being invested in. That integration may well enhance shareholder value, but it could do so at the expense of airline employees and other vital interests of the U.S. airline and its stakeholders. Formation of a new U.S. airline to feed traffic between major U.S. cities and a foreign investor airline's U.S. gateways may well enhance the foreign investor's interests and the U.S. airline's profitability while draining traffic and revenue from U.S. airlines that today provide comprehensive network service including small cities throughout rural America as well as the

major cities served by the foreign-controlled airline. The network airline may be forced to terminate services at smaller cities to survive the onslaught of new foreign-controlled airlines on major U.S. routes feeding traffic to international foreign-airline competitors. And a nominally U.S. airline owned or subsidized by a foreign government would create an even greater threat to U.S. owned, operated and controlled airlines.

The ultimate responsibility for directing the affairs of any corporation resides with the board of directors, where one-third of the members could be appointed by the foreign investor. Although the boards meet only four to eight times a year and do not manage day-to-day affairs of a company, they appoint a company's executive officers and exercise their authority by hiring, firing, demoting or promoting senior corporate officers, setting overall corporate policy and monitoring corporate results. Lacking sufficient time, power or information to manage a company, corporate boards rely on a corporation's management for information about what and how a company is doing, and management ties to a foreign investor who may well be the largest single shareholder in the company will clearly influence what management does and what it reports to the board. Under standards recognized by virtually every government agency that has considered "control," it is clear that an investor holding a significant share of voting stock exceeding 10% of the total voting shares can possess control: "the power to direct or cause the direction of the management and policies of" a company "whether through the ownership of voting securities, by contract, or otherwise."

The likelihood that individual, disparate smaller shareholders who collectively own a majority of the voting stock would be able to counteract the power of a large, focused minority investor and the company's management would be exceedingly slim. Although shareholders, like creditors and minority investors, may have specific rights to vote on extraordinary matters such as mergers, bankruptcy or dissolution and recapitalizations, their only recourse otherwise is engaging in an extremely difficult, expensive and rarely successful proxy fight to nominate their own slate of directors. Other than the replacement of directors, shareholders have no practical way to affect directly how a corporation operates or to have a voice in a corporation's management. As a practical matter, shareholders have about as much practical ability to affect corporate policies by vote as the U.S. public has to repeal acts of Congress by amending the Constitution. And those actions happen with about the same frequency – practically never.

As the DOT neither explains how revocation might work nor includes it in the actual proposed rule, let's think about how it might work in a "real world" example. Let's say Senator Inouye would like to invest in the Commerce Committee but only if he can chair it. So, he offers the Committee, through Senator Stevens, \$1 billion as long as Senator Inouye gets to "control" or chair the Committee to make sure his investment is protected. Senator Stevens and enough of the Republicans agree, because without the \$1 billion investment, the Committee will be merged with the Government Affairs Committee and everyone would lose their seniority –clearly not acceptable! So, the Republicans say, "we'll take your \$1

billion but we need to retain the right to revoke your Chairmanship at any time we want to do so!”

Does Senator Inouye say – fine – the Republicans can revoke my right to chair and still keep the \$1 billion? No, of course not! Senator Inouye may say ok – but if you ever revoke my control you have to give me back my \$1 billion plus the amount I would have made on it had I invested the money elsewhere – say \$1.2 billion total.

Now, Senator Stevens and the Republicans (think of them as the Board of Directors) have the theoretical right to take the Chair back – but only if they can cough up \$1.2 billion in cash. But, if they had \$1.2 billion sitting around in cash they wouldn’t have turned over the Chair in the first place! So the likelihood that the Republicans are actually ever going to be able to revoke Senator Inouye’s right to chair the Commerce Committee is zero.

But wait, maybe the voters (the Commerce Committee Shareholders) will throw out their Republican Senator/ Directors because they turned over control to the Democrats? Well, as Senators know, voters (like shareholders) have nothing to do with the day to day operations of Senate Committees and no real way to change them except to throw out the Senators on the Committee. So, the likelihood that the voters in multiple states are going to get together and organize a recall is zero.

Senators may think this example is laughable, but this absurd construct is exactly what the DOT relies on to assure the Congress that U.S. citizens will maintain control of U.S. airlines as required by law.

The Department of Transportation claims that control of fundamental, pervasive, inter-related fleet, pricing, marketing, financing, “commercial” and safety, security and defense management and operating decisions can be separated because antitrust-immunized airlines have apparently been able to avoid colluding on specific full fares on a few specific international routes. While extremely-limited carveouts may be possible for a few airline fares on a few routes or for such one-time major issues as mergers, bankruptcy/dissolution and recapitalization, separating control of some pervasive operating issues from other pervasive operating issues is no more possible than unscrambling eggs. Since all of an airline’s decisions are “commercial” and have effects throughout the organization, separation of control of specific items is impossible. Moreover, this is nowhere more true than in the area of legal and regulatory compliance. Everyone may be in favor of safety and security compliance, but the real issue is what resources, both financial and human, will be devoted to those areas rather than to more commercially-beneficial areas. Time and again, the root cause of a compliance failure is unwillingness to spend the money necessary to create and maintain an effective compliance infrastructure. Although U.S. citizens controlling U.S. airlines are aware of the extraordinary importance of optimizing safety and security, foreign investors may not be. Compliance generates costs, not sales, and a company facing criticism from analysts and falling stock prices as well as marketing or customer service issues may well find that its foreign investors insist on allocating resources to priorities other than safety and security.

Because “control” is a practical test which cannot be measured by share ownership and management numbers, the Civil Aeronautics Board, the Department of Transportation and Congress have all recognized that “actual control” by U.S. citizens must be maintained in addition to the numerical standards in the aviation statutes. In addition to super-majority voting requirements, classes of shares with different voting rights, contractual arrangements in debt, equity or management agreements, voting agreements among shareholders, agreements as to composition of key board committees and the practical effects of a concentrated holding of up to 25% with a widely-dispersed holding of up to 75% can readily and effectively hand control of a U.S. airline over to foreign interests.

The current proceedings before the Department of Transportation to reconsider foreign control standards began as an effort to strengthen the standards to ensure U.S. control of U.S. airlines and to make the process more public and transparent. Only when the prospect of a U.S.-EU deal entered the picture did the proposal make a 180 degree turn and become a proposal to permit near total foreign domination and control of U.S. airlines and retain the clandestine procedures previously followed. Disclaimers to the contrary notwithstanding, it is perfectly clear that the Department of Transportation is pursuing its effort to allow foreign control of U.S. airlines to secure a multilateral “open skies” agreement with the European Union. The U.S. already has open skies agreements with The Netherlands, Belgium, Finland, Denmark, Norway, Sweden, Luxembourg, Austria, Switzerland, the Czech Republic, Germany, Romania, Italy, Portugal, Poland,

France, Albania, and Bosnia and Herzegovina, and those agreements permit airlines of those countries to offer service between any point in Europe (or the world) and any point in the U.S. as well as permitting all U.S. airlines to offer service between any point in the U.S. and any points in one or more of those countries. Moreover, in other European countries that have not yet signed open skies agreements, U.S. airlines are already offering substantial amounts of services and have been freely able to expand, with one primary exception: access to London Heathrow.

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 other U.S. airlines denied entry at London Heathrow. (See the attached report by the London Heathrow slot coordinator.) 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.

Usurping Congress's role in determining the scope of permitted 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.

We believe the Department of Transportation should go back to the drawing board on its proposed rule and on the EU treaty. As to foreign ownership, the Department of Transportation should stop trying to take the law into its own hands and should instead persuade the Congress to change the law in a way that opens additional access to capital markets while meeting the national needs. As to the EU deal, the U.S. should go back to the bargaining table and insist on fair access to slots and facilities at London Heathrow so U.S. carriers like Continental will be able to compete, from day one, on a level playing field.

Thank you for this opportunity. I am happy to answer the Committee's questions.

## **Continental Airlines Says D.O.T. Proposal on Foreign Control of U.S. Airlines Ignores Congress**

WASHINGTON, Nov. 3 /PRNewswire-FirstCall/ -- Continental Airlines (NYSE: CAL) said today that the U.S. Department of Transportation (DOT) proposal to allow foreign control of U.S. airlines is a blatant attempt to circumvent the law that the DOT has been unable to convince Congress to change.

Less than two years ago Congress made its statutory ban on foreign control even more restrictive by forbidding any "actual control" of U.S. airlines by foreign citizens. Nonetheless, DOT is attempting to gut the definition of "actual control" despite the clear Congressional intent to bolster it and to ensure only U.S. citizens can control U.S. airlines.

This attempt to change the law outside the legislative process will not withstand judicial scrutiny, and the uncertainty over its legitimacy will discourage the very investment the DOT is trying to encourage.

Continental believes that the foreign ownership restrictions should be reviewed and encourages a debate of all reasonable viewpoints on foreign control of U.S. airlines, but that debate should be heard in the chambers of Congress.

"DOT proposes to unilaterally limit the application of the law to only certain aspects of airline management, while the statute requires that U.S. citizens have actual control over all aspects of airline operations," a Continental spokesman said. "This shows that either the DOT has misinterpreted the law or has ignored the realities of internal airline management and how airlines operate. Actual control over day-to-day operations, including scheduling, pricing, employment and labor decisions and financing, provides foreign citizens actual control of the very areas DOT is trying to carve out. Airline operations cannot be split in the manner DOT is suggesting."

The foreign control proposed by DOT is also tantamount to allowing foreign airlines to operate domestic flights within the U.S., Continental said, which is clearly prohibited by U.S. aviation law. Any attempt to change this law is also the responsibility of Congress.

Continental said the DOT proposal is intended to satisfy the European Union that its citizens will be allowed to control U.S. airlines. DOT seems blinded by the desire to finalize a U.S.-E.U. aviation agreement that does not provide true open access for U.S. carriers and DOT therefore has hastily committed to this proposal, as it has been unable to convince Congress to even consider a change to the current statute. European control of U.S. airlines has been demanded by the E.U. as a prerequisite to a new aviation agreement, Continental said. U.S.-E.U. negotiations are scheduled to resume on November 14 in Washington.

Continental agrees with the DOT objective to assist airlines and calls on DOT to focus on the true fundamental problem -- the excessive tax, fee, and regulatory burdens placed on the airlines and their customers by the U.S. government and runaway fuel costs. Changes in these areas will do more to attract airline investment than this proposal could possibly achieve. The DOT's immediate and limited policy objective of reaching a new agreement with the E.U. does not justify ignoring U.S. law or terminating the continuing public debate on this issue.

Congress should carefully consider and debate all aspects of foreign control, including the serious and far-reaching effects on U.S. jobs, national defense, homeland security and the future of the U.S. airline industry.

Continental also urged the Congress to require the DOT to withdraw its proposal to avoid erosion of confidence in U.S. law while the debate over foreign control continues in Congress. The DOT's "end run" around Congress could seriously jeopardize the legitimacy of the aviation laws, Continental said.

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11/03/2005

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6523 11/03/2005 16:40 EST <http://www.prnewswire.com>

# Continental Airlines Statement on D.O.T. Proposal to Allow Foreign Control Of U.S. Airlines

HOUSTON, May 3, 2006 /PRNewswire-FirstCall via COMTEX News Network/ -- Continental Airlines (NYSE: CAL) said today that, based on its initial review, the supplemental proposed rule allowing foreign control of U.S. airlines issued today by the Department of Transportation fails to resolve the significant legal and policy concerns raised by Congress, industry and labor.

While the revised DOT proposal purports to allow a U.S. shareholder majority to revoke foreign control of airline operations, this proposal makes it clear that foreign investors will be allowed to control all significant decisions at a U.S. air carrier and highlights the unworkable nature of bifurcating control of a corporation.

"The DOT has abdicated its responsibility to ensure actual control by U.S. citizens, relying instead on the unreasonable hope that U.S. shareholders and directors might reassert the very control DOT is unwilling to require," said a Continental spokesperson, pointing out that "U.S. citizen shareholders are even less likely to revoke control held by foreign owners than U.S. voters are to amend the Constitution."

The proposed rule, even as now supplemented by DOT, is still unlawful and will not withstand either Congressional scrutiny or the expected court challenges.

Only Congress can change the law regarding foreign control of U.S. airlines. Over the last six months, the Congressional message could not be clearer. The law requiring "actual control" of U.S. airlines by U.S. citizens means exactly what it says.

Congress has made its concerns abundantly clear to the DOT. The message is unmistakable and is coming from both sides of the Capitol and from Republicans and Democrats alike. Nearly 190 Members of the House of Representatives have introduced legislation which states that DOT's proposals are contrary to the "plain language" of aviation statutes and prohibits DOT from issuing a final ruling for a period of one year. The House Appropriations Committee unanimously adopted report language directing the Secretary of Transportation to refrain from issuing a final rule for 120 days and expressing serious concerns about "any rule which would allow any minority foreign investor to exercise control or decision-making authority over any aspect of a U.S. carrier's operation." Finally, the Senate Appropriations Committee recently passed statutory language prohibiting DOT from using any money to make final a foreign control rule making.

While Members of Congress have been willing to give DOT a chance to rewrite the proposed rule in a manner consistent with the law, it is clear that Congress will not be mollified with the ineffectual changes proposed today.

The DOT's supplemental proposed rule is a bad rule designed to clench a bad deal between the European Union and the U.S. DOT has previously admitted that it is promulgating the proposed rule because the EU has demanded that it do so as a condition to signing the proposed U.S.-EU "open skies" treaty. DOT's dogged defiance of Congress, as well as industry and labor critics, shows how far DOT will go to appease the EU. The "open skies" deal is anything but open, as neither it nor the DOT have provided for effective U.S. airline competition in the EU's most important business aviation market, London Heathrow. Under the treaty, Continental will be permitted to fly to Heathrow, but it won't be permitted to land there, as daily slots at commercially reasonable times are simply not available, nor are adequate facilities.

SOURCE Continental Airlines

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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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ACTUAL CONTROL OF U.S. AIR CARRIERS

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: Docket OST-2003-15759  
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COMMENTS OF  
CONTINENTAL AIRLINES, INC.

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January 6, 2005

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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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ACTUAL CONTROL OF U.S. AIR CARRIERS

:  
Docket OST-2005-15759  
:

COMMENTS OF  
CONTINENTAL AIRLINES, INC.

**I. Introduction**

Continental<sup>1</sup> 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

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<sup>1</sup> 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.'<sup>2</sup>

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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<sup>2</sup> 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.<sup>3</sup> 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 the applicant must be under the actual control of U.S. citizens.

(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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<sup>3</sup> 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”<sup>4</sup> 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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<sup>4</sup> 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 Profesionales, 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 Willie 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.<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup> 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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<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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<sup>7</sup> “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.

<sup>8</sup> 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, 109<sup>th</sup> Cong. § 1(7) (2005), introduced by Reps. Oberstar, Young and others on December 14, 2005. Accord, S.2135, 109<sup>th</sup> 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 (1<sup>st</sup> 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 (9<sup>th</sup> 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.<sup>9</sup> 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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<sup>9</sup> 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." <sup>10</sup>

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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<sup>10</sup> 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**

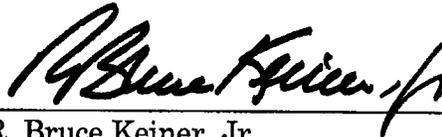
Rather than turning the concept of "actual control by U.S. citizens" on its head, the Department should be approaching Congress to make the critical public policy choices involved in allowing foreign control – and ownership – of U.S. airlines. Congress, not the Department, must decide whether the government "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,

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## 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	--	--

Open Skies Partners

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	8/28/00	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	8/04/02	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	--



## BRIEFING NOTE: EU-US OPEN SKIES AND ACCESS TO HEATHROW AIRPORT

The EU-US 'Open Skies' Air Transport Agreement of 18 November 2005, if approved, would authorise every EU and US carrier to fly between any EU and US city pair. The current Bermuda II limitations on transatlantic operations at Heathrow Airport would be removed.

ACL is the independent coordinator, appointed in accordance with the EU Slot Regulation, with sole responsibility for the allocation of Heathrow slots. We have received a number of inquiries about the availability of Heathrow slots and the process of slot allocation. We are issuing this briefing note in the interests of openness and transparency and to provide all interested parties with a common set of information and advice.

### **Slot Availability**

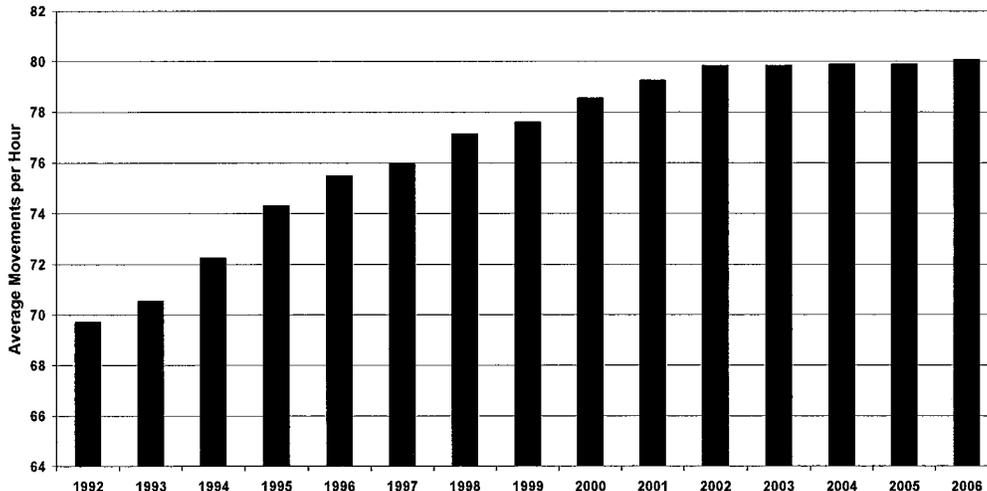
Heathrow is the world's busiest international airport, with 68 million passengers and 472,000 air transport movements in 2005. Its facilities are also very constrained. There are physical constraints on runway, terminal, and apron capacities, and environmental limits on the number of night flights and air transport movements.

Heathrow slots are highly scarce and demand far outstrips supply. Incumbent carriers have grandfather rights to about 97% of the airport's capacity. Grandfather rights are subject to a use-it-or-lose-it rule, but the failure rate is less than 0.5% each season.

There has been little increase in runway capacity since 2002, after a decade of steady improvement. Slots are particularly scarce during the morning period. Capacity is reviewed in advance of each season, but no new landing slots have been added between 0600 – 1259 (local time) since 1998.

### **Heathrow Runway Capacity**

(Summer seasons, 0600 – 2259 local time)



The UK Government places strict limits on flights during the night quota period (2330-0600 local time). Heathrow's quota equates to about 15 flights per night and is fully allocated to established air services.

The UK Government also introduced a limit on the annual number of air transport movements as a condition of approval to build Terminal 5. The limit is fixed at 480,000 annual ATMs, which is only 1.7% higher than current traffic levels. The ATM Cap will become the dominant scheduling constraint within the next 18 to 24 months.

### ***Future Capacity***

Terminal 5, due to open in Spring 2008, provides the terminal and apron capacity necessary for Heathrow to grow to over 80 million passengers per annum. It does not address the shortage of runway capacity, however, and brings with it the ATM Cap condition.

The UK Department for Transport plans to consult this year on the possibility of *mixed mode* operations at Heathrow. Currently the two runways at Heathrow are operated in *segregated mode*: one runway is used for takeoff and one for landing, and the runway use is alternated each afternoon to provide noise relief for the local community. Operating in mixed mode (using both runways for takeoff and landing at the same time) would provide additional runway capacity but, if approved, is unlikely to be available before 2010. Government permission to lift the ATM Cap is also necessary if the new capacity is to be used for growth.

The UK Government's *Future of Air Transport* White Paper, published in December 2003, supported the development of a 3<sup>rd</sup> runway at Heathrow, but not before 2015 and only if stringent environmental limits can be met.

### ***Allocation Priority***

The liberalisation of a bilateral agreement does not make airport slots available or confer any special allocation priority. Some carriers, such as the US carriers currently restricted to Gatwick under Bermuda II, will qualify as 'new entrants' to Heathrow. This gives them priority in the allocation of 50% of pool slots. However, the lack of pool slots at viable times for transatlantic services means that new entrant status is of little practical value.

### ***Slot Mobility***

Slots are not route specific, so incumbent operators could add new transatlantic services using their existing slots. British Airways and Virgin Atlantic could add transatlantic frequencies; American Airlines and United Airlines could operate to new US gateways; and other EU carriers such as BMI, Lufthansa or Air France could enter the Heathrow-US market.

Slots may be exchanged, one for one, between air carriers. Slots may also be transferred between air carriers by way of a slot exchange. Carriers like Continental, Delta, Northwest and US Airways could use this mechanism to acquire Heathrow slots from alliance partners or from the secondary market more generally.

All transfers and exchanges are subject to confirmation of feasibility by the coordinator, in particular that the change of use does not cause prejudice to airport operations. For example, there may be insufficient terminal or apron capacity to accommodate a change from shorthaul to transatlantic operations using a larger aircraft.

Prior to the opening of Terminal 5 in 2008, shortages of terminal and apron capacity will limit the number of new transatlantic services that can be accommodated. The number of feasible new services will depend critically on the exact slot times, aircraft size, and terminal of operation. It will also depend on how rapidly new services are introduced and how flexible carriers can be to fit within the airport's constraints.

### ***Winter 2006/07 Coordination***

The EU-US Air Transport Agreement will require approval by the EU Transport Council of Ministers, which meets on 8-9 June 2006. The agreement could be applied from the start of the Winter 2006/07 season. However, carriers must submit their winter slot requests by 11 May 2006 and the initial allocation of slots must be complete by 1 June 2006.

ACL will accept slot requests for new transatlantic services in advance of approval of the agreement. Given the lack of suitable slots at Heathrow, we do not expect to be able to make any slot offers from the pool. Any new transatlantic services are likely to be sourced from carriers' existing slot portfolios and the secondary market.

**James Cole**

Director of Coordination  
6 February 2006

# HEATHROW SLOT AVAILABILITY

All times UTC

## Winter 2005/06 (Typical week)

ARRIVALS							
Time	MON	TUE	WED	THU	FRI	SAT	SUN
0600	0	0	0	0	0	0	0
0700	0	0	0	0	0	1	2
0800	0	0	0	0	0	0	4
0900	0	0	0	0	0	0	1
1000	0	0	0	0	0	0	0
1100	0	0	0	0	0	0	0
1200	0	0	0	0	0	0	0
1300	0	0	0	0	0	0	0
1400	0	0	0	0	0	0	2
1500	0	0	0	0	0	0	0
1600	0	0	0	0	0	3	0
1700	0	0	0	0	0	0	0
1800	0	0	0	0	0	0	0
1900	0	0	0	0	0	6	0
2000	0	0	0	0	0	9	0
2100	3	1	0	0	2	13	2
2200	1	2	2	1	2	12	0

DEPARTURES							
Time	MON	TUE	WED	THU	FRI	SAT	SUN
0600	0	0	0	0	0	0	0
0700	0	0	0	0	0	3	8
0800	0	0	0	0	0	0	1
0900	0	0	0	0	0	0	0
1000	0	0	0	0	0	0	0
1100	0	0	0	0	0	0	0
1200	0	0	0	0	0	0	0
1300	0	0	0	0	0	0	0
1400	0	0	0	0	0	0	0
1500	0	0	0	0	0	3	0
1600	0	0	0	0	0	3	0
1700	0	0	0	0	0	2	0
1800	0	0	0	0	0	9	0
1900	0	0	0	0	0	6	0
2000	0	0	0	0	0	9	0
2100	3	0	6	3	1	6	0
2200	4	5	3	2	3	0	1

## Summer 2006 (Typical week)

ARRIVALS							
Time	MON	TUE	WED	THU	FRI	SAT	SUN
0500	0	0	0	0	0	1	1
0600	0	0	0	0	0	0	2
0700	0	0	0	0	0	2	1
0800	0	0	0	0	0	0	1
0900	0	0	0	0	0	0	0
1000	0	0	0	0	0	0	0
1100	0	0	0	0	0	3	0
1200	0	0	0	0	0	0	1
1300	0	0	0	0	0	0	0
1400	0	0	0	0	0	0	1
1500	0	0	0	0	0	0	0
1600	0	0	0	0	0	0	0
1700	0	0	0	0	0	0	0
1800	0	0	0	0	0	3	0
1900	0	0	0	0	0	6	0
2000	6	2	2	4	5	20	5
2100	4	3	4	4	2	18	3

DEPARTURES							
Time	MON	TUE	WED	THU	FRI	SAT	SUN
0500	0	0	0	0	0	6	1
0600	0	0	0	0	0	2	3
0700	0	0	0	0	0	2	2
0800	0	0	0	0	0	0	0
0900	0	0	0	0	0	0	0
1000	0	0	0	0	0	0	0
1100	0	0	0	0	0	0	0
1200	0	0	0	0	0	0	0
1300	0	0	0	0	0	0	0
1400	0	0	0	0	0	0	0
1500	0	0	0	0	0	1	0
1600	0	0	0	0	0	1	0
1700	0	0	0	0	0	1	0
1800	0	0	0	0	0	2	0
1900	0	0	0	0	0	6	0
2000	3	0	4	1	0	9	1
2100	3	2	2	2	2	4	3