REMARKS OF THE
THE HONORABLE JAMES L. OBERSTAR, M.C.
RANKING DEMOCRATIC MEMBER, HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
BEFORE THE
SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
HEARING TO REVIEW THE DEPARTMENT OF TRANSPORTATION'S
NOTICE OF PROPOSED RULEMAKING THAT CLARIFIES THE RULES
REGARDING FOREIGN INVESTMENT IN U.S. AIR CARRIERS
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Chairman Burns, Ranking Member Rockefeller, you are holding this hearing because you recognize that our government is engaged in one of the most important aviation policy decisions since de-regulation was enacted in 1978: the DOT's proposal on foreign ownership.

The NPRM on foreign ownership in effect would trade away the crown jewel of American transportation -- our nation's airlines – at their most vulnerable moment, to their foreign competitors. This would be done to conclude an Open Skies agreement with the European Union, an agreement which State and DOT describe as a major breakthrough, but which in reality, would provide only limited benefits for United States' airlines, given the difficulty of getting slots to implement the new rights that our carriers will get at Heathrow.

Our negotiations team will likely tell you, as they have said in other venues: "If we don't conclude this agreement now, this opportunity will be the last." Don't fall for that siren song – I've heard it before – at Bermuda, during the Carter Presidency. I heard it during the Reagan Administration, in negotiations on cargo rights with South Korea and Japan. I said, "Go back and do better; we can wait." The U.S. accounts for two-thirds of the world's aviation market. Foreign carriers are dying to get in – they can enter our market when we enter theirs, on terms that balance the benefits -- value for value, rights for rights.

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

Under DOT's proposed new standard, foreign investors would be allowed to exercise control over all *commercial aspects* of U.S. airline operations, including fleet mix, routes, frequencies, classes of service, and pricing etc. U.S. citizens would be required

to control only decisions affecting the Civil Reserve Air Fleet (CRAF), transportation security, safety and organizational documents.

It is clear to me that the Department does not have the legal authority to limit the requirement of "actual control," to a requirement of control over only safety, security and CRAF decisions (and not over other economic decisions). Our courts have held that although an executive branch agency has discretion to interpret a statute, an agency does not have discretion to make interpretations that conflict with the "plain meaning" of the law.

I do not see how it can be consistent with the plain meaning of "actual control" to limit that term to a requirement of control over some policies of an airline, but not control over many important decisions, such as the rates to be charged and the service to be operated.

Moreover, the proposed new interpretation of "actual control" is inconsistent with the requirement in the law that "the President" of a U.S. airline must be a citizen of the United States. DOT has correctly ruled that not only must the President be a U.S. citizen in the technical sense, but he must also be independent of foreign control. This means that if an airline decided to allow foreign interests to control commercial decisions, the President of the airline could not carry out the policies of the foreign investors, because he would then lose his status as a U.S. citizen. The President, then, would have to be divorced from all commercial decisions. Surely, when the law required that the President of an airline must be a U.S. citizen, it meant a President who ran the entire airline, not just safety, security and the CRAF program.

I would note that one of your witnesses today, Federal Express, stated in its initial comments in October 2003 on the foreign control issue that "while the issue of citizenship is the center of noisy debate among aviation law pundits, the Department presently has no legal authority, nor any mandate from Congress, to make changes to its implementation of the U.S. citizenship requirements of 49 U.S.C. 40102(a)(15)." I agree with Fed Ex's assessment of the legal limitations on DOT's authority.

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

There could also be effects on national security: A foreign investor could decide to

take an airline out of the CRAF program, or it could accomplish this indirectly by changing the fleet mix of a U.S. airline to reduce the number of large, wide-body civilian aircraft that the Department of Defense relies on to supplement its military fleet in times of national emergencies.

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

The Department's Supplemental Notice of Proposed Rulemaking (SNPRM), issued last week, does not change the fact that DOT has stretched its interpretation of "actual control" well beyond the plain meaning of the statute.

The SNPRM proposes several new limitations on foreign control, such as a requirement that an airline's stockholders must retain the right to revoke a delegation of control to foreign investors. These "requirements" are not part of the actual proposed regulation, but are "obiter-dicta" discussed in the preamble. Even the discussion of this and other requirements is vague, and would leave the Department with virtually unlimited discretion as to the exact limitation that will be required when the Department is asked to approve a specific proposal for foreign control.

To make matters worse, the SNPRM indicates that the DOT will not use public procedures to decide upon most proposals for foreign control. The exact limitations will be worked out in private negotiations between DOT and the foreign investors.

If the SNPRM becomes final, it is certain that prospective foreign investors will not want to run the risk that their right to control might be revoked. They will propose limitations on the process for revocation to ensure that it will never be exercised. Since DOT strongly supports foreign investment, it will have every incentive to accept limitations that undermine the right to revoke.

Let's be honest with ourselves, in the real world, it is not realistic to rely on shareholder action as a check on foreign control. They don't do it even in domestic affairs. Shareholders of major corporations do not ordinarily vote on policy issues. A corporate law expert has advised me that getting a shareholder vote to revoke a delegation of control to foreign investors would be about as difficult as passing an amendment to the U.S. Constitution!

Whatever the specifics of the power to revoke, it will be meaningless in most cases. How likely is it that shareholders will exercise a power to revoke when the

consequences might be the withdrawal of the foreign investor's financial support, or expensive litigation over whether the power to revoke was properly exercised?

I have been deeply concerned, as have many of my House colleagues, that under the DOT's proposal, the foreign interests that controlled an airline would also control safety, security, and the CRAF program. The SNPRM attempts to meet our concerns by claiming that under the proposal, foreign interests would not be allowed to supervise the managers responsible for safety, security or CRAF, or to control their budgets, and compensation. This seems unrealistic. Does this mean that a Vice President for Security would have unlimited budget authority and unfettered authority to set his or her compensation? In reality, when it comes to a specific case, a foreign investor is likely to insist on conditions that do not isolate it from all decisions affecting safety, security or CRAF.

Late last year, 189 of my colleagues, including Chairman Don Young, joined me to introduce H.R. 4542, which prohibits the DOT, for one year, from issuing any final decision or final rule on the NPRM that would change its interpretation of what constitutes "actual control" of a U.S. airline.

I urge the Senate to preserve the language in the Defense supplemental appropriations that would prohibit the DOT from implementing this rule for the rest of the fiscal year. We must ensure that any changes in the law will come from Congress – not by administrative fiat.

If, in the unfortunate circumstance that the DOT proposal is made final before Congress can act, I strongly believe that the final rule will have a short life span. The new policy is certain to be challenged in court. I cannot imagine a court agreeing with the Department that it is consistent with the "plain meaning" of the requirement of "actual control" to only require control of an airline's decisions on safety, security and the CRAF program. Nor would a court accept the DOT's argument that the requirement that the President of an airline must be a U.S. citizen can be satisfied by a President in name-only, with no authority over commercial decisions.

Thank you very much for this opportunity today to discuss this very important issue.