

FAIR AND OPEN SKIES ACT

DECEMBER 20, 2022.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. DEFAZIO, from the Committee on Transportation and  
Infrastructure, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3095]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom  
was referred the bill (H.R. 3095) to ensure that authorizations  
issued by the Secretary of Transportation to foreign air carriers do  
not undermine labor rights or standards, and for other purposes,  
having considered the same, reports favorably thereon without  
amendment and recommends that the bill do pass.

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## PURPOSE OF LEGISLATION

The purpose of H.R. 3095 is to ensure that future foreign air carrier permits granted by the U.S. Department of Transportation (DOT), which allow foreign operators to conduct revenue air service to the United States, include additional DOT review and analysis in order to preserve fair competition and labor standards in international aviation.

## BACKGROUND AND NEED FOR LEGISLATION

On December 2, 2016, the DOT issued a foreign air carrier permit to Norwegian Air International (NAI). Numerous U.S. aviation stakeholders objected to the DOT decision, arguing, among other things, that NAI's business model was an attempt to subvert fair competition and labor standards. Specifically, although the majority of NAI's long-haul flights to the United States operate from Scandinavian countries and others in continental Europe, the carrier organized itself under the laws of Ireland, thereby permitting the carrier to hire crewmembers on short-term contracts governed under Singapore law.

Opponents of the issuance of a foreign air carrier permit to Norwegian contended that such an outsourcing practice runs contrary to U.S. labor laws and afoul of the fair labor principles of Norway, the European Union, and the United States incorporated by reference in the multilateral *United States-European Union-Norway-Iceland Air Transportation Agreement of April 2007* (as amended) (U.S.-EU Open Skies Agreement). This "flag of convenience" business model offered NAI an unfair competitive advantage in the transatlantic market, according to U.S. aviation stakeholders.

In addition to the threat posed by "flag of convenience" business models to U.S. aviation industry and labor interests, other foreign air carriers are similarly venturing into atypical employment models. For example, some foreign air carriers employ pilots and flight crew members under individual or temporary contracts, like NAI, which remove the direct relationship between the carrier and flight crew. Such business models undermine labor standards by allowing the carrier to exploit employees through a third party when negotiating employment terms, salaries, and benefits, according to U.S. aviation stakeholders.

H.R. 3095 precludes the DOT from permitting a future foreign air carrier to serve the United States under the U.S.-EU Open Skies Agreement unless the Secretary of Transportation determines the foreign air carrier permit or exemption is consistent with the fair labor standards and fair competition requirements of the U.S.-EU Open Skies Agreement and imposes on the permit any conditions necessary to ensure compliance with those standards and requirements. H.R. 3095 further requires the Secretary, when granting a permit to a future foreign air carrier, to find that the foreign air transportation to be provided under the permit will be in the public interest. H.R. 3095 provides that preventing entry into U.S. markets by a "flag of convenience" carrier—defined in the legislation as a carrier established in a country other than the home country of its majority owner to avoid regulations of its home country—or otherwise undermining labor standards is within the public interest.

This legislation is necessary because a foreign air carrier seeking to serve the United States under an existing international air transportation agreement, such as the U.S.-EU Open Skies Agreement, should not *per se* be deemed in the U.S. public interest, as the DOT determined when it granted the 2016 foreign air carrier permit to NAI. In fact, such determinations can incentivize other foreign air carriers to follow suit. A foreign air carrier, like NAI, that establishes itself in a location outside of its home country in order to take advantage of more permissive labor, tax, and safety laws than those of the United States and certain other countries poses a threat to U.S. aviation commercial, economic, and labor interests. This legislation seeks to help prevent market access opportunities created under the U.S.-EU Open Skies Agreement and other international air transport agreements from undermining and eroding the highest fair competition principles, labor and wage standards, and aviation safety rules.

#### HEARINGS

For the purposes of rule XIII, clause 3(c)(6)(A) of the 117th Congress, the following hearing was used to develop or consider H.R. 3095:

On Thursday, March 25, 2021, the Full Committee held a hearing titled “The Administration’s Priorities for Transportation Infrastructure.” The Committee received testimony from Secretary of DOT Pete Buttigieg. This hearing examined the administration’s priorities for transportation infrastructure, work to advance surface transportation authorization and infrastructure investment, future needs and America’s competitiveness, funding to provide greater local decision-making, foreign air carrier permits, the Federal Aviation Administration’s implementation of the bipartisan aircraft certification reform bill, and open mandates.

#### LEGISLATIVE HISTORY AND CONSIDERATION

H.R. 3095 was introduced in the House on May 11, 2021, by Mr. DeFazio, Mr. Larsen of Washington, Ms. Davids of Kansas, Mr. Lamb, Mr. Kahele, Mr. Rodney Davis of Illinois, Mr. Ferguson, Mr. Bacon, Mr. Bergman, and Mr. Johnson of Ohio and referred to the Committee on Transportation and Infrastructure. Within the Committee, H.R. 3095 was referred to the Subcommittee on Aviation.

The Subcommittee on Aviation was discharged from further consideration of H.R. 3095 on July 28, 2021.

The Committee considered H.R. 3095 on July 28, 2021, and ordered the measure to be favorably reported to the House by voice vote.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against.

No recorded votes were requested during consideration of H.R. 3095.

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 3095 from the Director of the Congressional Budget Office:

<b>H.R. 3095, Fair and Open Skies Act</b>			
As ordered reported by the House Committee on Transportation and Infrastructure on July 28, 2021			
By Fiscal Year, Millions of Dollars	2022	2022-2026	2022-2031
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	*	2	not estimated
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

H.R. 3095 would amend the criteria that the Department of Transportation (DOT) must consider when processing permit applications for foreign air carriers to provide foreign air transportation in the United States. Specifically, the bill would prohibit DOT from issuing new permits to foreign air carriers unless the carrier adheres to labor standards reflected in the guidelines to the United States-European Union Air Transport Agreement of April 2007 (as amended).

H.R. 3095 would increase DOT's administrative costs related to processing and reviewing permit applications. The bill also could affect DOT's collections of permit filing fees if the legislation caused certain foreign air carriers to not apply for permits. However, most filing fees, which are treated as discretionary offsetting collections, are waived under current law as part of international agreements with approximately 80 countries. Using information

from DOT, CBO estimates that implementing H.R. 3095 would cost about \$2 million over the 2022–2026 period; any spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Aaron Krupkin. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to provide that when considering whether to grant a foreign air carrier permit to an applicant to perform revenue service to the United States, the DOT undertakes additional review and analysis to examine whether the applicant is undermining fair competition and labor standards and ensures the granting of a permit is in fact within the U.S. public interest.

#### DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee finds that no provision of H.R. 3095 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### CONGRESSIONAL EARMARKS, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, this bill, as reported, contains no congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of the rule XXI.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

#### PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee finds that H.R. 3095 does not preempt any state, local, or tribal law.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Short title*

This section provides that this bill may be cited as the “Fair and Open Skies Act”.

*Sec. 2. Foreign air transportation Under United-States-European Union Air Transport Agreement*

This section precludes the DOT from issuing a new foreign air carrier permit or exemption to a person seeking to provide foreign air transportation to the United States under the U.S.-EU Open Skies Agreement unless the DOT determines that issuance of such a permit or exemption is consistent with Article 17 *bis* of the U.S.-EU Open Skies Agreement—declaring that the “opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the [signatories’] respective laws”—and imposes on the permit or exemption such conditions necessary to ensure compliance with Article 17 *bis*.

*Sec. 3. Public interest test*

This section requires DOT, when issuing a foreign air carrier permit to a foreign airline to operate to and from the United States, to make a finding that the foreign air service will be in the U.S. public interest.

*Sec. 4. Public interest requirements*

This section establishes that preventing entry into U.S. markets by foreign airlines exploiting flags of convenience or undermining labor standards is in the U.S. public interest, which DOT is required to consider when conducting economic regulation of air transportation; requires labor standards be considered by DOT and the State Department when formulating U.S. policy regarding international air transportation as well as negotiating open skies agreements with other countries; and defines a “flag of convenience carrier” in statute as a foreign airline established in a country other than the home country of its majority owner(s) in order to avoid regulations of the home country.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**TITLE 49, UNITED STATES CODE**

\* \* \* \* \*

**SUBTITLE VII—AVIATION PROGRAMS**

\* \* \* \* \*

**PART A—AIR COMMERCE AND SAFETY**

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**SUBPART I—GENERAL**

\* \* \* \* \*

**CHAPTER 401—GENERAL PROVISIONS**

\* \* \* \* \*

**§ 40101. Policy**

(a) **ECONOMIC REGULATION.**—In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

(2) before authorizing new air transportation services, evaluating the safety implications of those services.

(3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

(5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.

(6) placing maximum reliance on competitive market forces and on actual and potential competition—

(A) to provide the needed air transportation system; and

- (B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.
- (7) developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of—
- (A) the commerce of the United States;
  - (B) the United States Postal Service; and
  - (C) the national defense.
- (8) encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities—
- (A) encouraging the transportation by air carriers that provide, in a specific market, transportation exclusively at those airports; and
  - (B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.
- (9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.
- (10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.
- (11) maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities and isolated areas with direct financial assistance from the United States Government when appropriate.
- (12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—
- (A) to provide efficiency, innovation, and low prices; and
  - (B) to decide on the variety and quality of, and determine prices for, air transportation services.
- (13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.
- (14) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.
- (15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.
- (16) ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.
- (17) preventing entry into United States markets by flag of convenience carriers.*
- (18) preventing the undermining of labor standards.*



(b) ALL-CARGO AIR TRANSPORTATION CONSIDERATIONS.—In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others and in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation:

(1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to—

- (A) the present and future needs of shippers;
- (B) the commerce of the United States; and
- (C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

(3) providing services without unreasonable discrimination, unfair or deceptive practices, or predatory pricing.

(c) GENERAL SAFETY CONSIDERATIONS.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator of the Federal Aviation Administration shall consider the following matters:

(1) the requirements of national defense and commercial and general aviation.

(2) the public right of freedom of transit through the navigable airspace.

(d) SAFETY CONSIDERATIONS IN PUBLIC INTEREST.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements.

(3) encouraging and developing civil aeronautics, including new aviation technology.

(4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

(5) consolidating research and development for air navigation facilities and the installation and operation of those facilities.

(6) developing and operating a common system of air traffic control and navigation for military and civil aircraft.

(7) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

(e) INTERNATIONAL AIR TRANSPORTATION.—In formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including the following:

(1) strengthening the competitive position of air carriers to ensure at least equality with foreign air carriers, including the

attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(2) freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand.

(3) the fewest possible restrictions on charter air transportation.

(4) the maximum degree of multiple and permissive international authority for air carriers so that they will be able to respond quickly to a shift in market demand.

(5) eliminating operational and marketing restrictions to the greatest extent possible.

(6) integrating domestic and international air transportation.

(7) increasing the number of nonstop United States gateway cities.

(8) opportunities for carriers of foreign countries to increase their access to places in the United States if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away.

(9) eliminating discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including—

- (A) excessive landing and user fees;
- (B) unreasonable ground handling requirements;
- (C) unreasonable restrictions on operations;
- (D) prohibitions against change of gauge; [and]
- (E) similar restrictive practices[.]; and
- (F) *undermining labor standards.*

(10) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(f) STRENGTHENING COMPETITION.—In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

#### § 40102. Definitions

(a) GENERAL DEFINITIONS.—In this part—

(1) “aeronautics” means the science and art of flight.

(2) “air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

(3) “air commerce” means foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.

(4) “air navigation facility” means a facility used, available for use, or designed for use, in aid of air navigation, including—

- (A) a landing area;

- (B) runway lighting and airport surface visual and other navigation aids;
  - (C) apparatus, equipment, software, or service for distributing aeronautical and meteorological information to air traffic control facilities or aircraft;
  - (D) communication, navigation, or surveillance equipment for air-to-ground or air-to-air applications;
  - (E) any structure, equipment, or mechanism for guiding or controlling flight in the air or the landing and takeoff of aircraft; and
  - (F) buildings, equipment, and systems dedicated to the national airspace system.
- (5) “air transportation” means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.
- (6) “aircraft” means any contrivance invented, used, or designed to navigate, or fly in, the air.
- (7) “aircraft engine” means an engine used, or intended to be used, to propel an aircraft, including a part, appurtenance, and accessory of the engine, except a propeller.
- (8) “airman” means an individual—
- (A) in command, or as pilot, mechanic, or member of the crew, who navigates aircraft when under way;
  - (B) except to the extent the Administrator of the Federal Aviation Administration may provide otherwise for individuals employed outside the United States, who is directly in charge of inspecting, maintaining, overhauling, or repairing aircraft, aircraft engines, propellers, or appliances; or
  - (C) who serves as an aircraft dispatcher or air traffic control-tower operator.
- (9) “airport” means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.
- (10) “all-cargo air transportation” means the transportation by aircraft in interstate air transportation of only property or only mail, or both.
- (11) “appliance” means an instrument, equipment, apparatus, a part, an appurtenance, or an accessory used, capable of being used, or intended to be used, in operating or controlling aircraft in flight, including a parachute, communication equipment, and another mechanism installed in or attached to aircraft during flight, and not a part of an aircraft, aircraft engine, or propeller.
- (12) “cargo” means property, mail, or both.
- (13) “charter air carrier” means an air carrier holding a certificate of public convenience and necessity that authorizes it to provide charter air transportation.
- (14) “charter air transportation” means charter trips in air transportation authorized under this part.
- (15) “citizen of the United States” means—
- (A) an individual who is a citizen of the United States;
  - (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
  - (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which

the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

(16) “civil aircraft” means an aircraft except a public aircraft.

(17) “civil aircraft of the United States” means an aircraft registered under chapter 441 of this title.

(18) “conditional sales contract” means a contract—

(A) for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part, under which the buyer takes possession of the property but title to the property vests in the buyer at a later time on—

- (i) paying any part of the purchase price;
- (ii) performing another condition; or
- (iii) the happening of a contingency; or

(B) to bail or lease an aircraft, aircraft engine, propeller, appliance, or spare part, under which the bailee or lessee—

- (i) agrees to pay an amount substantially equal to the value of the property; and
- (ii) is to become, or has the option of becoming, the owner of the property on complying with the contract.

(19) “conveyance” means an instrument, including a conditional sales contract, affecting title to, or an interest in, property.

(20) “Federal airway” means a part of the navigable airspace that the Administrator designates as a Federal airway.

(21) *“flag of convenience carrier” means a foreign air carrier that is established in a country other than the home country of its majority owner or owners in order to avoid regulations of the home country.*

[(21)] (22) “foreign air carrier” means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.

[(22)] (23) “foreign air commerce” means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation, between a place in the United States and a place outside the United States when any part of the transportation or operation is by aircraft.

[(23)] (24) “foreign air transportation” means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.

[(24)] (25) “interstate air commerce” means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation—

(A) between a place in—

- (i) a State, territory, or possession of the United States and a place in the District of Columbia or an

other State, territory, or possession of the United States;

(ii) a State and another place in the same State through the airspace over a place outside the State;

(iii) the District of Columbia and another place in the District of Columbia; or

(iv) a territory or possession of the United States and another place in the same territory or possession; and

(B) when any part of the transportation or operation is by aircraft.

**[(25)] (26)** “interstate air transportation” means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft—

(A) between a place in—

(i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States;

(ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii;

(iii) the District of Columbia and another place in the District of Columbia; or

(iv) a territory or possession of the United States and another place in the same territory or possession; and

(B) when any part of the transportation is by aircraft.

**[(26)] (27)** “intrastate air carrier” means a citizen of the United States undertaking by any means to provide only intrastate air transportation.

**[(27)] (28)** “intrastate air transportation” means the transportation by a common carrier of passengers or property for compensation, entirely in the same State, by turbojet-powered aircraft capable of carrying at least 30 passengers.

**[(28)] (29)** “landing area” means a place on land or water, including an airport or intermediate landing field, used, or intended to be used, for the takeoff and landing of aircraft, even when facilities are not provided for sheltering, servicing, or repairing aircraft, or for receiving or discharging passengers or cargo.

**[(29)] (30)** “large hub airport” means a commercial service airport (as defined in section 47102) that has at least 1.0 percent of the passenger boardings.

**[(30)] (31)** “mail” means United States mail and foreign transit mail.

**[(31)] (32)** “medium hub airport” means a commercial service airport (as defined in section 47102) that has at least 0.25 percent but less than 1.0 percent of the passenger boardings.

**[(32)] (33)** “navigable airspace” means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

**[(33)] (34)** “navigate aircraft” and “navigation of aircraft” include piloting aircraft.

[(34)] (35) “nonhub airport” means a commercial service airport (as defined in section 47102) that has less than 0.05 percent of the passenger boardings.

[(35)] (36) “operate aircraft” and “operation of aircraft” mean using aircraft for the purposes of air navigation, including—

(A) the navigation of aircraft; and

(B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

[(36)] (37) “passenger boardings”—

(A) means, unless the context indicates otherwise, revenue passenger boardings in the United States in the prior calendar year on an aircraft in service in air commerce, as the Secretary determines under regulations the Secretary prescribes; and

(B) includes passengers who continue on an aircraft in international flight that stops at an airport in the 48 contiguous States, Alaska, or Hawaii for a nontraffic purpose.

[(37)] (38) “person”, in addition to its meaning under section 1 of title 1, includes a governmental authority and a trustee, receiver, assignee, and other similar representative.

[(38)] (39) “predatory” means a practice that violates the antitrust laws as defined in the first section of the Clayton Act (15 U.S.C. 12).

[(39)] (40) “price” means a rate, fare, or charge.

[(40)] (41) “propeller” includes a part, appurtenance, and accessory of a propeller.

[(41)] (42) “public aircraft” means any of the following:

(A) Except with respect to an aircraft described in subparagraph (E), an aircraft used only for the United States Government, except as provided in section 40125(b).

(B) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in section 40125(b).

(C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).

(D) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).

(E) An aircraft owned or operated by the armed forces or chartered to provide transportation or other commercial air service to the armed forces under the conditions specified by section 40125(c). In the preceding sentence, the term “other commercial air service” means an aircraft operation that (i) is within the United States territorial airspace; (ii) the Administrator of the Federal Aviation Administration determines is available for compensation or hire to the public, and (iii) must comply with all applicable

civil aircraft rules under title 14, Code of Federal Regulations.

(F) An unmanned aircraft that is owned and operated by, or exclusively leased for at least 90 continuous days by, an Indian Tribal government, as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122), except as provided in section 40125(b).

[(42)] (43) “small hub airport” means a commercial service airport (as defined in section 47102) that has at least 0.05 percent but less than 0.25 percent of the passenger boardings.

[(43)] (44) “spare part” means an accessory, appurtenance, or part of an aircraft (except an aircraft engine or propeller), aircraft engine (except a propeller), propeller, or appliance, that is to be installed at a later time in an aircraft, aircraft engine, propeller, or appliance.

[(44)] (45) “State authority” means an authority of a State designated under State law—

(A) to receive notice required to be given a State authority under subpart II of this part; or

(B) as the representative of the State before the Secretary of Transportation in any matter about which the Secretary is required to consult with or consider the views of a State authority under subpart II of this part.

[(45)] (46) “ticket agent” means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

[(46)] (47) “United States” means the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace.

[(47)] (48) “air traffic control system” means the combination of elements used to safely and efficiently monitor, direct, control, and guide aircraft in the United States and United States-assigned airspace, including—

(A) allocated electromagnetic spectrum and physical, real, personal, and intellectual property assets making up facilities, equipment, and systems employed to detect, track, and guide aircraft movement;

(B) laws, regulations, orders, directives, agreements, and licenses;

(C) published procedures that explain required actions, activities, and techniques used to ensure adequate aircraft separation; and

(D) trained personnel with specific technical capabilities to satisfy the operational, engineering, management, and planning requirements for air traffic control.

(b) LIMITED DEFINITION.—In subpart II of this part, “control” means control by any means.

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**SUBPART II—ECONOMIC REGULATION**

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**CHAPTER 413—FOREIGN AIR TRANSPORTATION**

\* \* \* \* \*

**§ 41302. Permits of foreign air carriers**

The Secretary of Transportation may issue a permit to a person (except a citizen of the United States) authorizing the person to provide foreign air transportation as a foreign air carrier if the Secretary finds that—

(1) the person is fit, willing, and able to provide the foreign air transportation to be authorized by the permit and to comply with this part and regulations of the Secretary; and

(2)(A) the person is qualified, and has been designated by the government of its country, to provide the foreign air transportation [under an agreement with the United States Government; or]; *and*

(B) [the foreign air transportation] *after considering the totality of the circumstances, including the factors set forth in section 40101(a), the foreign air transportation to be provided under the permit will be in the public interest.*

\* \* \* \* \*



## ADDITIONAL VIEWS

While we there is support for the intent behind H.R. 3095, the *Fair and Open Skies Act*, we are concerned about the unintended consequences of the legislation as reported out of the Committee on July 28, 2021. During Committee mark-up, the Chair was asked for and gave his commitment to attempt to work through stakeholder concerns, including those from the United States Department of Transportation (DOT) under the Biden Administration, to achieve a balanced approach before going to the House floor with this bill. The importance of and need for achieving a more balanced approach is described in greater detail below.

### I. BACKGROUND INFORMATION

#### *Open Skies Agreements*

Open Skies agreements are bilateral agreements that the United States government negotiates with other countries to provide rights for airlines to offer international passenger and cargo services.<sup>1</sup> Since 1992, the United States has entered into Open Skies agreements with over 120 countries.<sup>2</sup> “These liberalized air service agreements have led to lower fares and increased travel choices for consumers, more robust and seamless U.S. trade, and more American jobs.”<sup>3</sup>

According to the United States Department of State, the following are some of the impacts of Open Skies Agreements:<sup>4</sup>

- “The business model for the international package delivery sector, employing over half a million people, depends on Open Skies to operate competitively in foreign markets. U.S. air freight services to fast-growing regions like the Middle East, Indian Subcontinent, and Africa exceeded \$1 billion in 2013 and contributed over \$3 billion to the U.S. trade balance in the last five years.
- The Brookings Institution estimates that Open Skies agreements add approximately \$4 billion in annual economic gains to consumers.
- U.S. Airlines for Open Skies estimates that full liberalization through Open Skies agreements would lead to a 16-percent increase in air traffic and support 9 million jobs in aviation and related industries.
- Open Skies has dramatically expanded direct international connections to cities like Dallas-Fort Worth, Denver, Detroit,

<sup>1</sup>See UNITED STATES DEPARTMENT OF STATE, OPEN SKIES PARTNERSHIPS: EXPANDING THE BENEFITS OF FREER COMMERCIAL AVIATION (2016), available at <https://2009-2017.state.gov/documents/organization/262234.pdf> [hereinafter UNITED STATES DEPARTMENT OF STATE OPEN SKIES].

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

<sup>3</sup>Doug Lavin, *Don't Close Open Skies*, AVIATION DAILY, September 13, 2019, available at <https://aviationweek.com/air-transport/op-ed-don-t-close-open-skies>.

<sup>4</sup>See UNITED STATES DEPARTMENT OF STATE OPEN SKIES, *supra* note 1.

Las Vegas, Memphis, Minneapolis, Orlando, Portland, and Salt Lake City.

- A private study found that new direct service between a U.S. city and a point in the European Union generates up to \$720 million annually in new economic activity for the U.S. city and its local region, depending on the size of the markets.
- Portland International Airport estimates that its direct international flights to Tokyo, Amsterdam, and Frankfurt generate over \$240 million in airport and visitor revenue.
- The Greater Orlando Aviation Authority estimates that aviation liberalization with Brazil helped increase the number of visitors from Brazil to Orlando from 74,000 in 2004 to 768,000 in 2013, and that Emirates' service from Dubai will add \$100 million in new economic activity in Central Florida and create 1,500 jobs.”<sup>5</sup>

#### *Norwegian Air International*

In December 2013, Norwegian Air International (NAI), an Ireland-based subsidiary of Norwegian Air Shuttle, filed an initial application with the DOT for a foreign air carrier permit and exemption authority to begin service to the United States. NAI met fierce opposition from United States and European aviation labor groups because of its business model. American, Delta, and United also filed in opposition to NAI's application. In response, NAI stated that it was based in Ireland to benefit from the United States-European Union (U.S.-E.U.) Open Skies Agreement, and that it was not trying to avoid Norwegian labor laws. Rather, NAI stated it would comply with U.S. labor laws and intended to hire U.S. crew and flight attendants for all flights operating to and from the United States.

On April 15, 2016, the DOT, under the Obama Administration, issued a tentative decision to grant NAI a foreign air carrier permit. The two-and-a-half-year review process for this permit is believed to be the longest ever processing time. Prior to issuing its decision, DOT took the “unprecedented step” of consulting with both the Departments of Justice and State regarding the interpretation of international law. After the consultations, DOT concluded that Article 17 *bis* is simply a recognition of the value of “high labor standards” but an insufficient basis to deny a permit to NAI under the U.S.-E.U. Open Skies Agreement. On December 6, 2016, DOT, again under the Obama Administration, issued a final order approving NAI's foreign air carrier permit, days after the European Commission formally requested arbitration over the delay in approval. The controversy continued and in January 2017, the Air Line Pilots Association (ALPA) and three other airline employee unions filed suit against DOT to block approval of the permit. On May 11, 2018, the United States Court of Appeals for the D.C. Circuit ruled that although the potential loss of union jobs was a sufficient injury to grant the unions standing in court, there was no Federal or international legal basis to challenge DOT's decision.<sup>6</sup>

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

<sup>6</sup>*Air Line Pilots Ass'n Int'l, et al. v. Elaine L. Chao*, No. 17-1012 (D.C. Cir. 2018).

On August 14, 2019, NAI announced that it will stop flying routes between Ireland and North America. The decision, effective September 15, 2019, was made after the airline concluded the routes were not commercially viable.

## II. BILL SUMMARY

H.R. 3095 would prohibit the Secretary of Transportation (Secretary) from issuing a permit or an exemption authorizing a person to provide foreign air transportation as a foreign air carrier under the United States-European Union (U.S.-E.U.) Air Transport Agreement of April 2007 (as amended), unless the Secretary—(1) finds that issuing the permit or exemption would be consistent with Article 17 *bis* of the Agreement; and (2) imposes on the permit or exemption such conditions as may be necessary to ensure that the person complies with Article 17 *bis*. Article 17 *bis* expresses that both the U.S. and E.U. “recognize the importance of the social dimension agreement and the benefits that arise when open markets are accompanied by high labor standards” and that the agreement was not intended to undermine labor standards.<sup>7</sup> Article 17 *bis* was added three years after the initial signing of the agreement.

H.R. 3095 also would amend the statutory public interest test applied by the Secretary of Transportation when determining whether to issue a permit to a foreign air carrier. Additionally, the bill would add to the list of matters under section 40101 of title 49, United States Code, to be considered by the Secretary “as being in the public interest and consistent with public convenience and necessity” the following two additional matters—(1) preventing entry into United States markets by flag of convenience carriers; and (2) preventing the undermining of labor standards.

Lastly, H.R. 3095 would define the term “*flag of convenience carrier*” to mean “a foreign air carrier that is established in a country other than the home country of its majority owner or owners in order to avoid regulations of the home country.”

## III. CONCERNS ABOUT UNINTENDED CONSEQUENCES OF H.R. 3095

The issues underlying this bill are complicated and controversial, dividing the aviation industry. H.R. 3095 is intended to prevent any foreign air carrier seeking a permit to operate in the United States from employing a business model that many feel is unfair. But, in addressing that issue, there is great concern that the bill will cause the United States to violate various international aviation agreements and risk harmful retaliation by other countries. Ultimately, H.R. 3095 could harm U.S. industry more than help it. Given this, a more balanced approach is needed.

While we are not advocating that aircraft registration and airline certification operate like the maritime sector; where ships are registered in a few, small countries with minimal regulation, allowing foreign air carriers using legal loopholes to arbitrarily relocate and directly compete against U.S. carriers while paying pennies on the

<sup>7</sup> Article 17 *Bis* of the Air Transp. Agreement with the European Union, 40 Op. O.L.C. 26, 29 (2016) available at <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/04/21/2016-04-14-ata-article-17.pdf>.

dollar to their pilots, flight attendants, and maintenance personnel, puts the U.S. carriers at a competitive disadvantage. However, a significant portion of the diverse aviation industry has raised serious issues that Congress should explore more thoroughly before legislating a solution.

Concerns have been raised about H.R. 3095 related to the United States' standing in the international community and the bill's impact on the United States industry. According to technical assistance received by the Committee from the DOT under both the Trump and Biden administrations, H.R. 3095 would put the United States in the position of taking actions that foreign countries would perceive as violating our international agreements with them.<sup>8</sup> The bill would also require the DOT to determine the intent of commercial decisions made by foreign air carriers in deciding where to establish their operations. This is an impossible mandate.

Additionally, concerns have been raised about whether foreign governments would feel likewise entitled to examine the intent behind commercial decisions made by U.S. companies. The risk of retaliation against U.S. air carriers is very real. In a letter to the leadership of this Committee (which is included with our additional views), the E.U. made it clear that it intended to take necessary measures to protect its right under the U.S.-E.U. Air Transport Agreement if this law is enacted.<sup>9</sup> Finally, there are concerns about how this legislation might impact the United States' standing in future trade negotiations, particularly if trade agreements have the potential to be nullified at any future date by Congressional action. Rather than summarily dismiss these concerns, we believe it appropriate to thoroughly consider and review such concerns prior to taking legislative action, something that the Committee has not yet done.

Last Congress, the DOT summarized its position on H.R. 3632 (the 116th Congress version of H.R. 3095—text is identical) as follows: “In short, implementation of H.R. 3632 could result in retaliatory action by foreign governments that would harm U.S. carriers, their employees, and U.S. travelers and shippers. It would place DOT in the untenable position of having to execute inconsistent statutory mandates and potentially, act inconsistently with obligations undertaken by the U.S. in international agreements. H.R. 3632 should not be adopted.”<sup>10</sup>

#### *Concerns of those supporting H.R. 3095*

- The NAI business model, which ultimately failed, is allegedly intended to skirt the costs of complying with “home country” laws and regulations, including labor laws.
- Avoiding such costs both undermines labor standards and provides an unfair competitive advantage.

<sup>8</sup> E-mail to Republican Staff, H. Comm on Transp. and Infrastructure from DOT Congressional Affairs Staff (Sept. 11, 2019); E-mail to Republican Staff, H. Comm on Transp. and Infrastructure from DOT Congressional Affairs Staff (July 23, 2021) (on file with Committee).

<sup>9</sup> Letter from Henrik Hololei, Director-General European Commission's Department for Mobility and Transport to Rep. Peter DeFazio, Chair, H. Comm on Transp. and Infrastructure, et al., July 22, 2021.

<sup>10</sup> E-mail to Republican Staff, H. Comm on Transp. and Infrastructure from DOT Congressional Affairs Staff (Sept. 11, 2019).

*Concerns of those opposed to H.R. 3095*

- The bill would place the U.S. in violation of its Open Skies agreements with the E.U. and other countries by imposing additional criteria on the approval of foreign air carrier permits that were not agreed to in negotiations.
- One of the purposes of the E.U. is to allow the free movement of companies and persons within a common market. Just as there is no difference between a carrier incorporated in one state but based in another in the United States, there is no difference between a carrier based in Norway, Ireland, Germany, or Greece for purposes of the U.S.-EU Open Skies Agreement.
- There is a real danger of the E.U. or other countries retaliating against the U.S. in ways that further degrade existing Open Skies agreements.
- U.S. airports serving as international ports of entry are concerned that any tit-for-tat escalation could depress lucrative international air travel, placing downward pressures on airport enplanements and impacting local economies.

## IV. CONCLUSION

While we support for the intent behind H.R. 3095, it must be done in a way that Congress ensures a level playing field for the global aviation industry while avoiding violations of our country's existing international agreements. As noted above, during Committee mark-up, the Chair was asked for and gave his commitment to attempt to work through stakeholder concerns to achieve a balanced approach before going to the House floor with this bill. To date, this has not occurred.

The concerns raised by those on both sides of the "flag of convenience" issue have merit. As the bill moves forward, we believe the Chair's willingness to address those concerns will result in a balanced and fair approach to the complicated and controversial issues behind H.R. 3095.

SAM GRAVES,  
*Ranking Member.*  
 GARRET GRAVES,  
*Ranking Member, Sub-*  
*committee on Aviation.*

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