737–28–1225, dated January 12, 2006. All applicable corrective actions and other specified actions must be done before further flight after the electrical resistance test.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Issued in Renton, Washington, on April 28, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–6795 Filed 5–4–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 204 and 399

[Docket No. OST–2003–15759]

RIN 2105–AD25

Actual Control of U.S. Air Carriers

AGENCY: Office of the Secretary, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Department is seeking additional comments on our proposal to clarify policies that it may use to evaluate air carriers' citizenship during initial and continuing fitness reviews. Our proposal would affect how we determine ''actual control'' of the carrier in situations where the foreign investor's home country has an open skies air services agreement with the United States, and permits reciprocal investment opportunities in its own national air carriers for U.S. investors. We continue to believe that our proposed policy would remove unnecessary restrictions on U.S. air carriers' access to the global capital market without compromising the statutory requirement that U.S. citizens remain in actual control of such carriers.

We are issuing a supplemental notice of proposed rulemaking (SNPRM) because, after reviewing comments submitted on the NPRM and in consultation with other Executive Branch agencies, we have decided to strengthen the proposal in several areas. We have revised the proposed rule further to ensure that U.S. citizens will have actual control of the air carrier. We are also mindful of the strong interest in this proposal expressed by members of Congress. This SNPRM will furnish Congress the opportunity to review the proposal in its refined form, and to undertake a more informed assessment of its likely consequences.

Our NPRM proposal would allow for delegation to foreign investors of decision-making authority regarding commercial issues, but in the areas of organizational documents, safety, security, and the Civil Reserve Air Fleet (CRAF) program the NPRM would not permit these delegations. In a key refinement of our original proposal, we now propose in this SNPRM to require that any such delegation of authority to foreign interests by the U.S. citizen majority owners be revocable. We are proposing this change to ensure that, notwithstanding their ability to delegate decision-making authority over certain commercial matters (as described in the NPRM) to foreign investor interests, the U.S. voting shareholders of a U.S. airline will retain actual control of the airline.

We originally proposed to reserve exclusively to U.S. citizens decisions relating to organizational documents, safety, security, and CRAF. In another refinement, in keeping with suggestions received from the Departments of Homeland Security and Defense as well as the Federal Aviation Administration, we are now proposing to broaden the scope of the decision-making that must remain under the actual control of U.S. citizens. The aspects of control of safety and security decisions would no longer be limited to those implementing FAA and TSA safety and security regulations, but would cover safety and security decisions generally. Similarly, the proposed control of CRAF decisions would be expanded to cover all national defense airlift commitments. Our proposed expansion of the coverage of these three areas will ensure that all critical elements of a carrier's decision-making that could impact safety, security, and national defense airlift are fully covered, and that our review of a carrier's compliance with these requirements will not be unduly narrow.

We tentatively conclude that, as modified, this proposal will eliminate unnecessary and anachronistic limitations on the ability of eligible foreign minority investors to participate in the commercial decision-making at a U.S. airline in which they have made an otherwise statutorily-permitted investment. At the same time, it should eliminate any doubt that the voting stockholders (75 percent of whom are U.S. citizens) and the board of directors (two-thirds of whom are U.S. citizens) will retain full control over decisions regarding safety, security, and contributions to our national defense airlift capability, and that those U.S. citizens also retain ''actual control'' of the carrier as a whole as required by statute.

DATES: Comments must be submitted on or before July 5, 2006.

ADDRESSES: You may submit comments identified by DMS Docket Number OST–2003–15759 using any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Operations; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices. We will consider late filed comments to the extent possible.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: William M. Bertram, Chief, Air Carrier Fitness Division (X–56), Office of Aviation Analysis, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590; (202) 366–9721.

SUPPLEMENTARY INFORMATION: Our proposed rule would refine the Department's interpretation of the term ''actual control,'' an element in the statutory definition of a citizen of the United States, 49 U.S.C. 40102(a)(15). Only citizens of the United States may obtain certificate authority under 49 U.S.C. 41102 or 41103 authorizing them to provide air transportation within the United States or operate as a U.S. carrier on international routes. The Department's proposal does not change the statutory requirements that at least 75 percent of the voting shares of a U.S. airline be owned and controlled by U.S. citizens and that two-thirds of the board of directors and officers be U.S. citizens. Moreover, the Department's proposal would not alter the statutory requirement that U.S. airlines be subject to the actual control of U.S. citizens. The Department will continue to enforce these statutory requirements vigorously. Our proposal would eliminate only certain additional citizenship restrictions established by case law precedent and imposed on U.S. carriers by current policy that, we conclude, have become unduly burdensome. It would thus eliminate the requirement that foreign investors not be able to exert any substantial influence on carrier commercial decisions (outside of organizational documents, safety, security, and national defense). It would eliminate that requirement, however, only in the case of investments made by foreign citizens whose home countries are willing to be comparably flexible.

Our proposal would grant U.S. carriers new flexibility to attract foreign investment. Subject to the proposed open-skies and investment reciprocity conditions, or as otherwise required by U.S. international obligations, a U.S. carrier could choose to involve foreign investors in the commercial decision-making and management of its business only provided that U.S. citizens retain actual control of the carrier. We tentatively conclude that the proposal would enable U.S. carriers to improve their financial condition and enhance their ability to respond to the demands of the global market for air transportation. Our proposed open-skies and investment reciprocity conditions, moreover, may well encourage foreign governments to liberalize their own rules, which would give U.S. carriers and investors additional opportunities to participate more comprehensively in foreign air transportation markets.

Our proposal would not affect existing requirements or policies in regard to the safety and security of U.S. carriers or foreign carriers operating in U.S. air space. All carriers would remain subject to the safety requirements issued by the Federal Aviation Administration (FAA), and the security requirements issued by the Department of Homeland Security (DHS) and the Transportation Security Administration (TSA). We will continue to work with FAA, DHS, TSA, and other agencies and departments to ensure the safety and security of U.S. air carriers and air travel within the United States. Similarly, this proposal will not affect existing relationships that U.S. carriers have with the Department of Defense (DOD) regarding CRAF and other national defense airlift commitments, and we will continue to work with DOD in that regard.

We are issuing this supplemental notice because we have revised our proposal in certain ways in response to our review of the comments. Moreover, in the interest of ensuring that the proposal would not inadvertently compromise aviation safety, aviation security, or the airlines' relationships with the DOD, we have engaged in productive consultations with our FAA, the DHS, and the DOD. Those conversations have led us to refinements that we believe enhance the rule further with respect to ensuring that safety, security, and national defense airlift commitments are not compromised. Given these refinements, we believe it is in the public interest to furnish interested parties with further clarity regarding the changes we propose and regarding our implementation of those changes consistent with the statutory citizenship requirements, and to entertain further comments on the proposal as clarified.

Background

Our proposed rule would establish the interpretation of the term ''actual control'' that would be used in fitness reviews when citizenship is at issue. An airline that is a corporation must be under the ''actual control'' of U.S. citizens to meet the citizenship standard. For many years, the meanings of ''actual control'' and ''citizen of the United States'' evolved through administrative case law dating back to 1940, first by the Civil Aeronautics Board (CAB or the Board) and then, after the CAB's sunset at the end of 1984, by the Department of Transportation. The controlling statute originally defined a corporation's citizenship exclusively in terms of the proportion of directors and officers who were U.S. citizens and the share of the voting interest held by U.S. citizens. Indeed, the CAB itself created the ''actual control'' requirement in its enforcement of the citizenship requirements. *Willye Peter Daetwyler, d.b.a. Interamerican Air Freight Co., Foreign Permit,* 58 CAB 118, 120–121 (1971).

In 2003, Congress incorporated the ''actual control'' requirement into the statutory definition of a citizen of the United States. A citizen of the United States is now defined in 49 U.S.C. 40102(a)(15) as:

(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 (emphasis added).

For purposes of this proposal, the relevant definition in the statute is the one found in 49 U.S.C. 40102(a)(15)(C), governing corporations and associations.

In its 2003 legislative amendment, Congress eliminated any claim that the Department lacked authority to require ''actual control,'' but it neither defined ''actual control'' nor required the Department to follow our past interpretations of the term. Vision 100—Century of Aviation Reauthorization Act, Pub. L. 108–176, § 807, 117 Stat. 2490 (2003). In our cases, we have not applied a fixed interpretation of ''actual control;'' instead, we have considered the totality of circumstances of an airline's organization, including its capital structure, management, and contractual relationships, in determining whether a carrier is actually controlled by U.S. citizens.

Normally, the Department examines a carrier's citizenship in the context of an initial fitness review, which is the process by which a firm becomes licensed as a U.S. carrier. Citizenship issues may also arise in a different context: The continuing fitness review. Under 14 CFR 204.5, certificated and commuter air carriers that undergo or propose to undergo a substantial change in operations, ownership, or management must submit certain updated fitness information to the Department. The carrier reports the information directly to the Chief of the Air Carrier Fitness Division, and the Department reviews it without a public

proceeding as part of an informal continuing fitness investigation. These reviews, both of initial applications and of carriers' continuing fitness, are composed of an evaluation of the following: Managerial competence, citizenship, financial condition, and compliance disposition. We also work with the FAA on all related safety matters and with the TSA on security matters. In some continuing fitness investigations, the Department may decide that a more formal, public proceeding is warranted, and that the carrier's authority should be modified, suspended, revoked, or subjected to an enforcement action if it no longer continues to satisfy all statutory citizenship tests, including the actual control test.

The Notice of Proposed Rulemaking

Last year, the Department issued a Notice of Proposed Rulemaking (NPRM) concerning its citizenship policies and procedures. 70 FR 67389, November 7, 2005. Regarding the fitness process, we evaluated our procedures for addressing citizenship issues that arise during fitness reviews, particularly in continuing fitness reviews. We proposed not to change our continuing fitness procedures by conducting public investigations whenever citizenship issues arose under 14 CFR 204.5. Regarding the ''actual control'' standard, we proposed to adopt a new interpretation refining Department practice. We wished to ensure that U.S. citizens control the carrier's organizational documents and those areas of airline operations currently requiring significant government involvement. Our proposed rule therefore provided that responsibility for a carrier's organizational documents and for safety, security, and Civil Reserve Air Fleet (CRAF) participation must remain under the control of U.S. citizens. On the other hand, we tentatively determined to eliminate other restrictions on foreign involvement that had become burdensome and unnecessarily interfered with the ability of U.S. carriers to obtain capital from foreign sources and to compete effectively in the global marketplace. These additional restrictions, developed through decisions in past administrative cases, appeared to be unnecessary for ensuring that U.S. citizens controlled each U.S. carrier when foreign governments provide comparable treatment for U.S. carriers and investors.

Furthermore, in order to foster greater liberalization that will provide greater economic opportunities to U.S. carriers and investors, we proposed to limit the application of the refined actual control standard to foreign investors whose homelands have an open-skies agreement with the United States and extend comparable investment opportunities in their airline industry to U.S. investors or where the United States' international obligations otherwise require the same approach.

Comments

The Department invited comments on the proposal. We received approximately 30 comments collectively from carriers, labor parties, and industry associations. We received over 3,000 other comments from state legislators, local government officials, airline employees, and other individuals. *See* Summary of Comments, below.

The Department received support for its proposed changes from the Air Carrier Association of America (ACAA), Airports Council International-Europe (ACI–Europe), Airports Council International-North America (ACI-North America), the Association of European Airlines (AEA), Airline Professionals Association, Asociación Internacional de Transporte Aéreo Latinoamericano (AITAL), Atlas and Polar, bmi, Boeing, Delta, Federal Express (FedEx), Hawaiian, the International Air Transport Association (IATA), United, USA–BIAS, and the Washington Airports Task Force. They generally argue that the proposal's adoption will give U.S. carriers a better ability to obtain capital, especially from strategic investors, will eliminate unnecessary restrictions on airline activities, will lead to further liberalization of airline and airline finance markets, and is within our statutory authority.

Other commenters—Alaska, Continental, U.S. Airways, the National Air Carrier Association (NACA), the Association of Flight Attendants (AFA), the Air Line Pilots Association (ALPA), the Aircraft Mechanics Fraternal Association (AMFA), the Allied Pilots Association (APA), the International Association of Machinists (IAM), the Independent Pilots Association (IPA), and the Transportation Trades Department—AFL–CIO (AFL–CIO TTD)—oppose our proposed change to the actual control standard. They generally argue that the proposed change is unnecessary and contrary to Congress' alleged intent to maintain the traditional interpretation of ''actual control,'' and will reduce the safety of airline operations, adversely affect the U.S. Department of Defense's (DOD) ability to operate CRAF, and harm airline labor.

Below, we address the concerns of commenters and further explain our proposed rule.

Discussion of Comments

Need for a Change in Policy

The Department has carefully reviewed the comments and continues to believe that our proposal to refine our interpretation of actual control would be beneficial. Nevertheless, because we have refined our proposal in a number of ways in response to comments received, we believe that it is in the public interest to furnish interested persons an additional opportunity to review and comment on the proposed change. The statute allows global investors to own up to 25 percent of the voting interest in a U.S. airline. We believe that our traditional approach may have unreasonably deterred some global investment, thereby thwarting the intent of the statute. Based on our experience, foreign investors often wish to have a more active role in the carrier, and/or various safeguards designed to protect their investment. Our refusal to permit this has, we believe, discouraged foreign investment, thereby effectively closing the global capital market to U.S. airlines.

We are tentatively persuaded that adopting our proposed interpretation would enhance the access of U.S. carriers to global capital markets by expanding the pool of potential investors, introducing new competition in capital markets to provide U.S. carriers with better terms of investment, and facilitating strategic and long-term investment in the U.S. airline industry—all potentially lowering the cost of capital and ensuring that U.S. airline asset values are not depressed by artificial and unnecessary constraints on competition among potential investors. These enhancements would enable U.S. carriers to respond better to the challenges and opportunities presented by the changing global air transportation marketplace and to pursue whatever strategies they believe will enhance their ubiquity, competitiveness, and profitability in the global airline industry. By providing favorable terms for capital-intensive projects to facilitate greater alliance integration, our proposed rule would potentially promote inter-alliance competition and allow U.S. carriers to continue their leadership role in the development of global alliances.

The NPRM cited three crucial characteristics of airline competition. First, airlines require significant capital investments in facilities, technology, and a variety of commercial

arrangements. 70 FR 67393. Second, airlines function in a virtually seamless global environment in virtually every aspect of their operations. 70 FR 67393. Third, the structure of global financial markets has changed, now offering pools of highly mobile capital. Innovations in the use of investment funds, new forms of aircraft financing, and the growing role of international aircraft leasing companies have changed the nature of airline financing. 70 FR 67392. In view of those characteristics, the NPRM proposed that U.S. air carriers should have the broadest access to the global capital markets permitted by law, so long as such access does not impinge on those areas of airline operations currently requiring significant government oversight. We tentatively found that our historical interpretation of ''actual control'' has failed to keep pace with changes in the global economy and evolving financial and operational realities in the airline industry itself, to the detriment of U.S. carriers. Our proposal sought to eliminate U.S. policies that unnecessarily restrict the operational and financial flexibility of U.S. carriers. The proposal also sought to continue our policy of allowing the market to operate with minimal regulation, and was consistent with our obligation to foster a safe, healthy, efficient, and competitive airline industry.

After reviewing the comments, we have tentatively concluded that our prior interpretation of actual control imposes unnecessary restrictions on participation in U.S. carrier operations by certain foreign investors which, in and of itself, limits U.S. carriers' access to foreign sources of capital and their ability to benefit from competition in the capital markets. We would apply our updated interpretation only in cases where the foreign investors' home countries have an open-skies agreement with the United States and offer U.S. carriers and other U.S. investors a comparable ability to invest in their own airline industries, or where it is otherwise appropriate to ensure consistency with U.S. legal obligations.

The limitations in our traditional interpretation appear to have a negative effect on U.S. carriers' access to strategic investment capital. Our proposed updated interpretation of the ''actual control'' test would eliminate restrictions on business activity that have unduly and unnecessarily limited airline access to foreign investment. Furthermore, the proposed rule's reciprocity condition should encourage market liberalization that would create new opportunities for U.S. airlines and other U.S. investors to take advantage of similar opportunities overseas. We also tentatively find that the benefits likely to result from our modified interpretation will substantially outweigh any hypothetical drawbacks that some commenters allege could occur. In this connection, we do not believe that our proposal would adversely affect U.S. carrier safety, security, and CRAF participation or harm U.S. airline employees. In addition, we believe that our existing authority to interpret the statutory citizenship requirements in the context of enforcement should allow us to update our interpretation of actual control in light of changing circumstances.

We should not maintain an interpretation that is more restrictive than necessary to meet statutory requirements. We believe that we should interpret the ''actual control'' requirement in light of the continuing globalization of the airline industry and Congress' decision that the airline industry should largely be deregulated (except, of course, for safety and security regulation). To be sure, deregulation is a work in progress. When industry developments make it unnecessary or counterproductive to maintain rules or policies that restrict airline business decisions, we should terminate them. We recently did so when we eliminated all of our rules governing computer reservations systems. 69 FR 976, January 7, 2004. The record in this proceeding thus far suggests that our past interpretations of the ''actual control'' standard have similarly become burdensome without providing significant benefits.

We are proposing this rule because we have tentatively concluded that the Department has in certain circumstances construed the citizenship requirement in a more restrictive manner than necessary, particularly in cases where the foreign investors' home countries have entered into open-skies bilaterals with the U.S. and are following more flexible foreign investment policies for their airline industries. We have long operated under the premise that relying on competition to solve regulatory problems is in part a reliance on managers and investors to act rationally in searching for opportunities to provide profitable air service. But competition itself will be thwarted, and thus the public interest disserved, if we were to restrict capital and management from flowing to the airline industry. There is correspondingly less justification for second-guessing investment decisions that bring fresh capital and management to the industry without threatening sound air transportation or antitrust objectives.

We believe that our past interpretations of the citizenship requirement have imposed unnecessary and harmful burdens on U.S. carrier access to investment capital. Indeed, we have recognized that by-product of our policy by informally liberalizing our past interpretation in some cases. For example, Hawaiian Airlines has benefited from a recent modification of our citizenship standards which enabled the carrier to successfully reorganize and obtain new financing. Hawaiian Comments at 1. However, in order to do so, Hawaiian had to satisfy significant regulatory concerns and undergo a substantial delay in its ability to obtain the new financing. Hawaiian maintains that our modified interpretation here ''will help ensure the economic viability of U.S. airlines by providing for unfettered access to worldwide capital markets'' without the need for these undue burdens. Hawaiian Comments at 2.

Adopting our proposed rule would make new sources of capital available to U.S. carriers, which has the potential to strengthen the U.S. airline industry. As United Air Lines notes:

> To remain competitive with these ever-strengthening foreign carriers, U.S. carriers must continue to expand and improve their own global networks rather than simply relying on their alliance partners. Such growth, however, is extremely capital intensive. Unfortunately, given the industry's historic economic performance, and continued governmental barriers to global integration, domestic carriers' ability to raise long-term equity capital is constrained. As a result, although capital continues to be available, it has generally been limited to speculative investments from venture capital funds, hedge funds, and other private investors looking to take advantage of the industry's depressed valuations. If the U.S. airline industry is to regain its global leadership position, artificial limitations on the ability of long-term strategic investors, regardless of nationality, to participate in the industry and earn adequate returns on their investment need to be removed.

United Comments at 4.

As United observes, strategic investors would likely be more concerned about a U.S. airline's product quality, market strategy, and its capital reinvestment plans than short-term investors who view airlines merely as trading vehicles. Foreign airline investors, for example, would be likely to take a long-term, strategic view of their capital investments and thereby provide additional economic benefits that support the long-term viability of the U.S. airlines in which they invest, such as network expansion, access to

new technology, and management and market experience in new markets.

As United and Hawaiian point out, the elimination of unnecessary barriers to the flow of capital from foreign investors to U.S. airlines should further ensure the competitive position of U.S. airlines in a globalizing economy. *See also* IATA Comments at 3. We have tentatively concluded that arguments made by some commenters (See, *e.g.*, U.S. Airways Comments at 4–5; AFL–CIO TTD Comments at 2) that it is unnecessary for U.S. airlines to have enhanced access to capital from foreign sources are not persuasive because, even if adequate capital were otherwise available, we expect that increasing the competitive sources of capital accessible by U.S. carriers should enable them to obtain better terms from investors. Such lower capital costs would benefit U.S. consumers, as well as the carriers' employees and shareholders.

Our proposed modified interpretation of ''actual control,'' moreover, would reflect the globalization of the international airline business and the increasing role of market forces in determining what services and fares will be offered in international airline markets. U.S. airlines are increasingly integrating their operations and services with the operations and services of foreign airlines. All U.S. passenger airlines with significant international operations have formed marketing alliances with several foreign airlines in order to offer more integrated worldwide services sought by many consumers—the arrangements between American Airlines and LAN Airlines, Continental and Emirates, and Delta and Air France are a few of many examples. We have found that these airline marketing alliances can benefit consumers by creating worldwide networks and strengthening the competitive position of the U.S. airline partners. *See, e.g.*, Order 2005–12–12 (Dec. 22, 2005) at 28. In order to remain competitive in the global marketplace, alliance partners seek to integrate their operations and increase the scale and scope of their respective networks. We believe that maintaining unnecessary limitations on the ability of U.S. airlines to quickly adapt to industry changes—particularly in international markets—would only serve to inhibit U.S. carriers from receiving increased revenues from alliance cooperation and deprive U.S. consumers of the potential economic benefits of global alliances. Enabling U.S. airlines to invest more readily in their strategic partners, and vice versa, should potentially promote the development of pro-competitive alliance relationships.

Labor Issues

We have carefully considered our proposal's impact on U.S. airline workers. We recognize that the financial challenges affecting U.S. carriers have had a severe impact on their employees. The airlines' struggle to reduce their costs has led to job losses, lower pay, and fewer benefits. Airline employees nonetheless have continued to provide safe and reliable transportation to airline customers. The labor parties, including AFA, AFL–CIO TTD, ALPA, AMFA, IAM, and IPA, generally oppose our proposal in the belief that it will lead to fewer and less desirable jobs at U.S. carriers. After carefully considering their comments and the record, we tentatively conclude that our proposed rule would not cause such harm.

First, U.S. carriers must comply with U.S. labor law whether or not we change our interpretation of actual control. All employees at any U.S. carrier would retain all of the protections created by the United States' labor laws. Further, the unionized employees of every U.S. airline would continue to enjoy their rights under their collective bargaining agreements.

Second, our proposed modified interpretation is designed to improve the financial position of U.S. carriers by giving them access to additional sources of capital. This enhancement would strengthen the carriers' competitive position overall, which should increase jobs for U.S. workers.

Third, by applying our proposed updated interpretation only in cases where the foreign investors' home countries have an open-skies agreement with the United States and offer U.S. carriers and investors a comparable ability to invest in their own airline industry, or where it is otherwise appropriate to ensure consistency with U.S. legal obligations, our modified interpretation would enable U.S. carriers to strengthen their competitive position by investing in foreign airlines (alone or as part of a group of investors), and forming enhanced business relationships with them that would be mutually beneficial. U.S. air carriers, and their employees, also benefit from open-skies agreements, in that the opportunities to expand and serve more countries without the impediment of restrictive bilateral agreements may lead to additional service by U.S. carriers providing additional revenue for the carrier and more job opportunities for its employees.

Fourth, we are not persuaded that foreign investment will lead to fewer desirable jobs at U.S. carriers. Under our proposal, just as now, U.S. carriers would be controlled by their shareholders and boards of directors, most of whom must be U.S. citizens, and those shareholders and directors would have every incentive to maximize the U.S. carrier's performance. Were a foreign carrier-investor to attempt to shift long-haul services to itself from a U.S. carrier in which it had invested, that could be contrary to the economic interest of the U.S. citizen shareholders who, even under this modified interpretation, will continue to retain actual control of the carrier. We tentatively conclude that the U.S. investors would withdraw their delegation of authority over commercial decisions were the foreign investor to exercise that authority contrary to the interest of the U.S. carrier and its U.S. citizen investors.

Several labor parties contend, however, that U.S. carriers have already chosen to outsource large parts of their operations, including much of their maintenance work. These commenters believe that any significant foreign citizen involvement in the management of any carrier operations will inevitably lead to the transfer of additional work overseas. *See, e.g.*, ALPA Comments at 8–9. We do not believe that this proposal will impact a carrier's incentive to outsource.

European Union Air Services Agreement

Negotiations between the United States and the European Union have produced a draft comprehensive air services agreement that will transform the framework for transatlantic air services if implemented. The European Union negotiators have made it clear that the European Union will consider the outcome of this proceeding in determining whether it will sign the draft agreement. *See* Statement of John R. Byerly, Deputy Assistant Secretary of State, before the Aviation Subcommittee of the House Committee on Transportation and Infrastructure (February 8, 2006), at 9. However, we have proposed our updated interpretation of the ''actual control'' standard because we tentatively determined that a reinterpretation of that standard would eliminate unnecessary restrictions on U.S. carrier business decisions, not because of its impact on an agreement with the European Union.

A number of commenters, including Delta, FedEx, United, and parties representing major airports in the United States and Europe, urge us to make our proposal final because, in addition to the proposal's own benefits, they believe that the European Union will then sign the agreement with the

United States. Other commenters, including many of the individual commenters, allege that we are planning to adopt the proposal only in order to secure the agreement with the European Union, which they assert will harm the United States and its airline industry. Continental, for example, alleges that the agreement fails to provide adequate access for U.S. carriers at London's Heathrow airport, and U.S. Airways contends that the agreement would not create a level playing field for U.S. carriers in transatlantic markets. Continental Comments at 34–38; U.S. Airways Comments at 6–9.

This rulemaking was initiated, and is being pursued, based on its own merits. The goal of this proceeding is to realize the commercial and public benefits obtained by providing the airline industry with greater access to global capital markets, while ensuring that U.S. citizens remain in actual control. We are proposing to modify our interpretation of ''actual control'' because a change in the historic interpretation appears to be long overdue and in the best interests of the U.S. airline industry and the American public.

New Interpretation of ''Actual Control'

We are therefore proposing, as explained above, to further refine our proposed new interpretation of ''actual control.'' If we adopt our proposed rule, we would use the new interpretation of the ''actual control'' requirement in our future continuing fitness cases and our review of applications for initial certificate or commuter authority. We would ensure that each U.S. carrier remains under the actual control of U.S. citizens, as required by the statute. We would also continue to enforce the explicit statutory requirements that U.S. citizens hold at least seventy-five percent of the voting interest of each U.S. carrier, and that the president and at least two-thirds of the directors and of the managing officers be U.S. citizens.

Our Overall Application of the Rule

In this section, we explain in more detail the anticipated practical impact of our proposed rule, including its limits on foreign involvement, and respond to the requests for clarification. We would use our modified ''actual control'' standard only where the foreign investors' home countries offer reciprocal treatment to U.S. investors in their airline industry and have open-skies air service agreements with the United States, or where using the revised standard would otherwise be appropriate to ensure consistency with the United States' international legal obligations. This supplemental notice is designed to give interested parties an additional opportunity to comment on our proposed change in policy and our proposed implementation thereof.

Under our further modified interpretation, we would specifically require that U.S. citizens control the adoption of, and any changes to, the carrier's organizational documents (documents such as the articles of incorporation and by-laws that define the carrier's structure and governance). If the carrier met that requirement, we would only look to see whether U.S. citizens control the carrier's decisions in three operational areas: safety, security, and the provision of airlift to the Department of Defense, whether through CRAF or other arrangements. If these areas were controlled by U.S. citizens, the requirements of our citizenship review would have been met. We would not consider whether other relationships between a carrier and foreign investors or other foreign citizens give the latter influence at the carrier or management authority over some parts of the carrier's operations. Every U.S. carrier would be actually controlled by U.S. citizens because, under our further refined interpretation, we would be requiring all delegations to foreign interests ultimately to be revocable by the board of directors or the voting shareholders.

Our proposed updated interpretation of actual control would allow foreign firms and individuals to manage parts of a U.S. carrier's operations and business, but only when so authorized by the board of directors, two-thirds of whom must be U.S. citizens, and subject to the ultimate control of the shareholders, whose votes would be dominated by U.S. citizens. We would ensure, moreover, that the board of directors or the voting shareholders could ultimately revoke delegations of managerial responsibilities, as discussed below.

Furthermore, this rulemaking would not affect our policy that a U.S. citizen who acts as president, as a director, or as another managing officer would be treated as a foreign citizen for carrier citizenship purposes if our evaluation determined that the U.S. citizen was appointed or designated for that position by foreign citizens. Similarly, we would not view a U.S. citizen acting as president, director, or managing officer as being a U.S. citizen if, as a practical matter, the citizen's financial and business relationships with foreign citizens mean that the U.S. citizen is not likely to carry out his or her responsibilities independently.

Because our policy would ensure that U.S. citizens would continue to have actual control of each U.S. carrier under our proposal, every U.S. carrier would continue to be eligible to hold any route authority available to U.S. carriers under the United States' air services agreements with other countries. We have tentatively concluded that arguments made by some commenters (*See*, *e.g.*, Continental Comments at 13; ALPA Comments at 16) that the bilateral rights of U.S. carriers who took advantage of this proposal might be compromised are not persuasive because, under the Department's proposed rule U.S. citizens would continue to have substantial ownership and effective control of each U.S. carrier, consistent with the terms of the bilateral air services agreements, and therefore would clearly retain their authority to exercise international route rights enshrined in air services agreements to which the United States is a party.

While we would be requiring U.S. citizens to maintain control over core corporate decisions and the operational areas still subject to significant government oversight, a U.S. carrier's board (two-thirds of whom must be U.S. citizens) or the voting shareholders (in whom 75 percent of the voting interests are vested in U.S. citizens) could choose to delegate the management of other parts of the carrier's operations to foreign investors. AEA has asked whether a foreign investor could control such elements as ''definition and quality of the product, branding, fleet mix, origins and destinations, network issues defin[ing] the business of the company.'' AEA Comments, Annex at 1. Our proposal would allow a U.S. carrier to delegate management or decision-making regarding various commercial aspects of its business to foreign investors, or otherwise involve those foreign investors in its operations.

Of course, as noted above, these delegations could only occur with the continuing approval of the carrier's board of directors or voting shareholders. In addition, two-thirds of the directors must be U.S. citizens and seventy-five percent of the shareholders' voting interest must be vested in U.S. citizens. Under our proposed rule, a carrier could delegate the decision-making authority over the areas listed by AEA, or otherwise involve foreign investors in its operations, if the voting shareholders or directors first determined that doing so was in the carrier's best interests. Additionally, the board or voting shareholders would retain the ultimate power to revoke delegations of managerial responsibilities to foreign investors. The board's or shareholders' ability to

revoke the delegation under this proposal could not be conditioned on terms that would make revocation impracticable.

A number of commenters are requesting us to clarify our proposed rule in various respects and provide illustrative examples. We are providing as much information as practicable in this notice, and this notice's rationale for our proposed future interpretation of the statutory ''actual control'' requirement should provide substantial guidance to foreign citizens planning to invest in a U.S. carrier on the operation of our proposal. Some questions regarding the implementation of our modified interpretation can be resolved only through our review of specific transactions. Determining whether U.S. citizens control a carrier necessarily depends on each carrier's specific facts. We would also encourage carriers and investors to consult with us before making final decisions on the terms of any substantial foreign involvement in a carrier, as often occurs now, and as we noted in our proposal. 70 FR 67395.

British Airways asks whether our proposal would allow a carrier's board of directors to delegate to foreign investors the authority to hire and fire officers up to and including the carrier's president and executives in charge of safety, security, and CRAF participation matters. British Airways Comments at 9. We answer in the negative. By statute the president must be a U.S. citizen. By longstanding policy, we have construed this position as any corporate officer who effectively functions as president regardless of title. In addition to the president, two-thirds of managing officers must also be U.S. citizens, and neither the president nor those managing officers may be appointed by or otherwise beholden to foreign interests. Our proposed rule would not affect that policy. Under our proposal, the managing officers with direct, day-to-day responsibility for safety and security matters and contributions to military airlift requirements must be clearly and demonstrably subject to control by U.S. citizens. That would mean, among other things, that decisions involving the appointment of these managing officers, and involving their supervision, budgets, and compensation, must remain under the control of U.S. interests in accordance with current policy and therefore could not be delegated to foreign investors or managing officers in a management group appointed by foreign investors, if there were significant foreign investment and involvement in a U.S. carrier under this proposed rule. As indicated, however, our updated interpretation would allow a carrier to delegate to foreign investors a greater role in the carrier's commercial decision-making, if the carrier's board members or voting shareholders approved doing so. We accordingly would allow the foreign investors to hire and fire the managers responsible for day-to-day operations in those delegated areas (other than safety, security, and military airlift operations), so long as the delegations were ultimately revocable by the board of directors or the voting shareholders.

Commenters request information on whether we would maintain the limit on foreign ownership of a carrier's non-voting equity stock established in *Northwest Airlines Acquisition by Wings Holdings*, Order 91–1–41 (Jan. 23, 1991). Delta Comments at 13; Hawaiian Comments at 5. Neither our NPRM nor this supplemental notice propose any changes to our policy with regard to equity ownership requirements as established by the Northwest/Wings line of precedent, but only to the interpretation of ''actual control'' of the carrier. Consequently, this rulemaking would not alter that line of precedent.

Commenters ask what kinds of super-majority voting clauses could be obtained by foreign investors without placing the U.S. carrier's citizenship at risk. *See*, *e.g.*, AEA Comments, Annex at 1. Our notice of proposed rulemaking stated with respect to U.S. citizen control of the organizational documents, ''Foreign citizens may hold rights essential to protect their financial interests—for example, provisions requiring concurrence before a company may enter bankruptcy or be dissolved—but the fundamental organization of the company must remain in U.S. citizen hands.'' 70 FR 67394. Super-majority clauses are designed to protect minority shareholders, but do not give any affirmative rights to make decisions absent board members' or shareholders' consent. We cannot now further define which kinds of super-majority voting requirements obtained by foreign investors in a U.S. carrier would not violate the statutory ''actual control'' standard. The appropriateness of any particular super-majority voting clause under our proposed rule would depend on the precise terms of the clause, and the nature of the foreign investors' involvement in the carrier.

Continental asserts that our proposed revised interpretation of ''actual control'' would be unfair to U.S. shareholders by encouraging U.S. carriers to establish dual-class share structures to accommodate foreign investors: ''A class of shares with lesser control rights'' held by U.S. shareholders, and ''shares with greater control rights'' ''vested in foreign nationals.'' Continental Comments at 22. We do not anticipate such a result. Under our proposal, the U.S. shareholders, not the foreign shareholders, would have the shares with the greater rights by virtue of the statutory requirement that U.S. citizens hold 75 percent of the U.S. carrier's voting interest; U.S. shareholders will control the carrier, the board of directors, and any shareholder vote. The U.S. citizens controlling the carrier could decide to give foreign investors some voting rights for protecting their interests, but only if those U.S. citizens determined that doing so was in the carrier's best interests. Furthermore, Continental's argument assumes different classes of stock and voting rights are inherently unfair. A U.S. carrier's creation of different classes of stock for foreign investors and other investors with different needs instead would only duplicate a common U.S. practice. Many other U.S. corporations have created several classes of common and preferred stock in order to accommodate the interests of different types of investors, give the company more flexibility in obtaining capital, and lower its overall cost of capital.

We also wish to clarify our intent on our proposed requirement that U.S. citizens must control four specific matters at each U.S. carrier: The organizational documents, safety, security, and military airlift participation.

Organizational Documents

Under our proposed interpretation of the ''actual control'' requirement, U.S. citizens would control the carrier's structure, governance, and organization because they would control the carrier's organizational documents. Their control of those documents would ensure that U.S. citizens controlled any decisions affecting the fundamental nature of the carrier's overall structure, including its authorized capital structure, the rights and voting powers of its equity owners, the structure and selection of the board of directors, and the role and responsibilities of its senior officers. The governance of the carrier embodied in its core documents would remain under the actual control of U.S. citizens. 70 FR at 67394.

This proposed requirement that U.S. citizens must control the carrier's organizational documents would allow them, either directly or through their directors, to revoke delegations of management authority to foreign investors, and thus would ensure that U.S. citizens controlled the carrier's

fundamental decisions related to its corporate and organizational structure. As we stated in the NPRM, however, we are proposing that foreign investors could hold rights essential to protect their financial interests, such as provisions requiring their approval before a carrier may enter bankruptcy or be dissolved. 70 FR at 67394. The fundamental organization of the company must be in U.S. hands, even though foreign investors could in some cases have veto authority over certain types of corporate decisions.

British Airways' assertions that the proposed requirement relating to organizational documents would be unnecessary or counterproductive are not persuasive. British Airways fears that foreign investors would be unable to obtain super-majority voting provisions and similar contract provisions that would provide the foreign investors reasonable protection against actions by the majority of the carrier's shareholders or directors that would substantially prejudice the foreign citizens' investment interests. British Airways Comments at 5–6. British Airways' concern appears to be unjustified. As discussed above and in the notice of proposed rulemaking, we recognize that foreign investors, like other minority investors, may have a legitimate need for super-majority clauses that will protect their essential investment interests. We would not expect to block such clauses when they are similar to standard provisions obtained by minority shareholders and do not affect U.S. citizen control of safety, security, and military airlift matters. Whether such super-majority clauses would in fact be adopted and remain in place would be up to the board of directors or the voting shareholders.

Hawaiian asked us to identify which documents will be considered organizational documents that must be controlled by U.S. citizens. Hawaiian Comments at 3. Organizational documents would include the carrier's articles of incorporation (or corporate charter) and by-laws, and comparable documents (for example, shareholder agreements) as reflected in the text of the proposal. We wish to ensure that U.S. citizens control the adoption and amendment of the documents that determine the corporate structure, such as the classes of stock, the shareholders' voting rights, the structure and membership of the board of directors, and the selection, responsibilities, and powers of the president and other principal officers. We would consider as organizational documents any related agreements that modify the provisions set forth in the articles of incorporation or by-laws or that dictate the fundamental operational and capital structure of the airline.

Hawaiian further requested that we announce that any review of a carrier's citizenship would be limited to these documents. Hawaiian Comments at 3. We doubt that we could state in this proceeding which other documents we would need to review as part of a citizenship investigation, but we expect that our review would not necessarily be limited to the organizational documents identified above. For example, to ensure that U.S. citizens actually control the carrier's corporate structure and the selection of the board of directors, we would need to review any contractual agreement between U.S. shareholders and a foreign investor.

Safety

The FAA is responsible for determining that every U.S. air carrier meets appropriate safety standards. Because safety is one of our highest priorities, however, we wish to make certain that U.S. carrier decisions on safety policies are made by U.S. citizen interests, even if a U.S. carrier has chosen to delegate the management of other parts of its operations to foreign investors. Security and military airlift participation are also matters of great concern to us. Our proposed interpretation of the ''actual control'' requirement therefore would require that U.S. citizens control decision-making on safety and, as discussed in the next sections, security and defense-related matters.

We traditionally review issues related to safety in our broader fitness review. We work closely with the FAA in a variety of contexts, including determining the competence of key safety officials, and whether the carrier currently meets and complies with the Federal Aviation Regulations. We review where and with whom the key safety officials work, and are alerted by the FAA when that agency discovers a potential problem.

In our review of the air carrier's operations to ensure U.S. citizen control over safety decisions, we would consider whether deviations from current industry practices and staffing at key business locations might adversely affect the FAA's ability to oversee the air carrier's operational safety. To determine whether U.S. citizens control safety decisions under the proposed rule, we would evaluate the accessibility of required safety managers and required safety records to the FAA. For example, today the key safety officials of U.S. carriers are located within the United States at one of the carriers' key business locations. They are available for frequent, regular meetings with FAA inspectors responsible for oversight of the carrier. Records that are necessary to determine regulatory compliance are also accessible at these same key locations. To meet our definition of actual control, we would expect key safety officials and necessary records to be as easily accessible as they are today. Should the Department become aware of any unusual circumstances, we would reserve the right to initiate a continuing fitness review to address these safety issues.

Several commenters expressed opinions on our safety proposal. FedEx and NACA agree with the proposal requiring that U.S. citizens retain actual control over safety decisions, and none of the airlines that submitted comments suggested that our proposal would compromise the safety of its operations. ALPA, AMFA, AFL–CIO TTD, and IAM, however, argue that the proposal would allow foreign investors to make decisions on economic and operational issues that affect safety.

Several commenters seek clarification about the chain of command for safety matters. They ask, for example, whether every manager in the chain of command for safety matters must be a U.S. citizen. Polar & Atlas Comments at 7; AEA Comments at 4. That would not be required by our proposal. In cases where there would be significant foreign investment and involvement under this proposed new rule, we would require only that decisions relating to safety be clearly and demonstrably subject to actual control by U.S. citizens. Our past decisions under the ''actual control'' standard have never required every manager and executive to be a U.S. citizen. The statute defining citizenship similarly requires that at least two-thirds of the carrier's managing officers must be a U.S. citizen, not that every such officer must be a U.S. citizen. As stated above, decisions involving the appointment of managing officers with direct, day-to-day responsibility for safety, and involving their supervision, budgets, and compensation, would remain under the control of U.S. interests in accordance with current policy and therefore cannot be delegated to foreign investors or managing officers in a management group appointed by foreign investors.

Furthermore, because the statute requires that the president and two-thirds of the board of directors and the managing officers must also be U.S. citizens, the persons with ultimate responsibility for the carriers operations

would be U.S. citizens, not foreign investors. This would further guarantee that U.S. citizens control the decision-making on safety matters. ALPA itself recognizes that those officers and the directors control safety: ''It is thus inevitable that whoever controls the operation of the airline as a whole will also ultimately control its safety policies and their implementation.'' ALPA Comments at 15. We therefore are not convinced by the contention by some commenters that our proposal would be ineffective, because many operational issues, not just those directly related to safety requirements, affect safety. ALPA Comments at 11–14; Virgin Atlantic Comments at 6–7.

We tentatively do not accept the related contention that our proposal would be impracticable because safety matters cannot be separated from other operational matters. *See, e.g.,* AFL–CIO TTD Comments at 3; ALPA Comments at 15. Different executives at every carrier already have responsibilities that overlap to some extent, but that does not make efficient operations impossible. The officers responsible for marketing and route development, for example, make decisions that affect each other's responsibilities. Our experience in examining U.S. corporate organizational and financial structures suggests that decision-making authority for various airline functions within the corporate structure, despite their interrelationships, can be explicitly and satisfactorily tied to U.S. citizen interests within the company to ensure compliance with the fundamental application of our ''actual control'' test. For example, in cases where the Department has granted antitrust immunity for alliance agreements between a U.S. airline and its foreign airline partner, both airlines have been able to comply with Department conditions that exclude cooperation on very specific overlap routes while still cooperating on all other routes throughout their combined networks. Ultimately, the carrier's controlling U.S. shareholders, board and principal officers are responsible for ensuring that safety is the highest priority of the carrier and that it remains so, no matter what the nature of the foreign investment in the carrier.

In response to ALPA's comments, we propose to further revise the rule's text to better reflect our intent. The preamble suggested that U.S. citizens must control all safety and security matters, not just compliance with FAA and Transportation Security Administration (TSA) requirements (''responsibility for * * * policies and procedures related to safety''). 70 FR 67394. The original text of our proposed rule, however, stated that U.S. citizens must control each U.S. carrier's compliance with FAA safety requirements. 70 FR 67396. We agree with ALPA that the wording of the proposed rule was unduly narrow. ALPA asserts that safety programs created by the FAA include voluntary programs and that our proposal could allow foreign citizens to determine whether a carrier would participate in such programs. ALPA Comments at 12–14. We are revising the language of the proposed rule to clarify that U.S. citizens must control the carrier's overall safety and security programs and policies, not just the carrier's compliance with the requirements of the FAA and the TSA.

Finally, the contentions of AMFA and IAM that carriers already rely too much on domestic and foreign repair stations for maintenance work have not persuaded us that our rule would harm safety. The FAA is responsible for overseeing the carriers' use of repair stations and other maintenance operations not handled directly by a carrier's own personnel and must ensure that any such facility's operations will not impair safety.

In sum, we have tentatively concluded that prohibiting delegation of decision-making authority for safety policies and requirements and their implementation to foreign investors, together with the other requirements for U.S. citizen control prescribed by our ''actual control'' policy and the statute, and the FAA's continuing oversight of U.S. carrier safety, would ensure the safety of every U.S. carrier's operations.

Security

Security issues, especially since September 11, are a paramount concern. The Department of Homeland Security, through the Transportation Security Administration (TSA), is responsible for determining that U.S. and foreign carriers meet appropriate security standards and policies. Because security, like safety, is one of our highest priorities, our proposed interpretation would require that U.S. carrier decisions on security matters not be delegated to foreign investors, if there were significant foreign investment and involvement under this new rule.

Moreover, establishing aviation security standards and enforcing those standards is essentially a government function. Aviation security is overseen and administered, both operationally and with respect to the protection of physical infrastructure, by TSA and other U.S. Government agencies. These agencies set and enforce security standards for passenger, cargo, baggage and employee screening, as well as for the physical protection of aircraft and airport infrastructure within the parameters of their legislative authority, and as directed by law. Also by law, TSA and other U.S. agencies are obligated to ensure that all airlines operating in U.S. airspace, regardless of ownership and whether U.S. or foreign, must comply with U.S. security standards. These current roles and responsibilities of the U.S. Government to maintain security would continue completely unaffected and unchanged by the provisions of our proposal.

As with safety, this Department traditionally reviews issues related to security in our broader fitness review. The Department works closely with the TSA in a variety of contexts, including whether the carrier meets and complies with security laws and regulations. We review where and with whom the key security officials work, and are alerted by the TSA when that agency discovers a potential problem. It is important to note once more that TSA's authority and practices would be unchanged by this proposal. For example, TSA would continue its practice of reviewing and approving the security plans of every U.S. and foreign carrier that serves the United States.

We recognize that access to key security officials is essential. In our review of the air carrier's operations to ensure U.S. citizen control over security decisions, we would consider whether deviations from current industry practices and staffing at key business locations may adversely affect the TSA's ability to oversee the air carrier's security operations and plans. To determine whether U.S. citizens control security decisions under this proposed rule, we would evaluate the accessibility of required security managers and required security records to the TSA. For example, today the key security officials of U.S. carriers are located within the United States at one of the carriers' key business locations. They are available for frequent, regular meetings with TSA inspectors responsible for oversight of the carrier. Records that are necessary to determine regulatory compliance are also accessible at these same key locations. To meet our definition of actual control, we would expect key security officials and necessary records to be as easily accessible as they are today. Just as now, TSA may raise access or other security-related issues by communicating directly with us. Should we become aware of any unusual circumstances, we would reserve the right to initiate a continuing fitness review to address these security issues.

Our response to the requests by several commenters for clarification on the chain of command for safety matters covers the management of security matters as well. Thus, we answer that question again in the negative, with the same explanation. In cases where there would be significant foreign investment and involvement under this proposed new rule, we would require only that decisions relating to security be clearly and demonstrably subject to actual control by U.S. citizens.

Continental wrongly implies that our proposal would undermine security by allowing foreign investors from countries whose security measures may not be adequate to operate U.S. airlines. Continental thus suggests that ''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.'' Continental Comments at 15–16. Our proposed rule would not allow any foreign investors to operate a foreign-controlled airline in the United States. In addition, the president and two-thirds of the board and other managing officers must be U.S. citizens, and 75 percent of the shareholders' voting interests must be vested in U.S. citizens.

We have tentatively determined that our interpretation's requirements would ensure U.S. citizen control of security matters. That, together with the U.S. government's, and in particular TSA's, continuing oversight of the security of carrier operations to/from and over the United States, would ensure security for every U.S. carrier, whether or not it had foreign investors or managers. TSA, after all, imposes extensive security requirements on foreign carriers using U.S. airspace and flying to U.S. gateways, not just U.S. carriers. TSA would continue to enforce these requirements on both U.S. and foreign carriers regardless of whether foreign investors or managers were allowed a role at a U.S. carrier in other areas.

CRAF and Other Contributions to Military Airlift

The Department of Defense relies on U.S. commercial air carriers to meet a great many of its airlift requirements. Our proposed updated interpretation would not diminish in any way the availability to DOD of U.S. carrier airlift capacity. As in the case of safety and security, however, we have tentatively concluded that our definition of what is required in the area of defense airlift should also be broadened.

Our proposal would have required that U.S. citizens retain actual control of all decisions relating to the Civil Reserve Air Fleet program. The vital national defense airlift provided by U.S. carriers, however, occurs in a broader context than just the CRAF program. U.S. airlines furnish essential airlift capacity to our military through a variety of contractual arrangements. We are therefore proposing to revise the language of the proposed rule to clarify that U.S. citizens must control the carrier's overall participation in national defense airlift operations, not only the carrier's participation in CRAF.

Nothing in the comments received in response to the NPRM has persuaded us that our proposal, even in its original form, would have any negative implications for CRAF. The CRAF program is a voluntary, quid pro quo arrangement by which airlines agree to commit aircraft for military airlift, and in return, gain access to U.S. Government business. DOD can adjust the economic incentives of the program in order to better ensure sufficient military airlift capacity. Because each carrier's participation in CRAF and other national defense airlift operations is voluntary, we wished to ensure that U.S. citizens control each U.S. carrier's decision on whether to participate. In formulating this position of protecting national defense airlift, we consulted with DOD, and DOD expressed no concern about our proposal. *See* December 21, 2005, Letters from Secretary Mineta to Chairmen Don Young and John Mica.

Nor would our proposal have any negative effect on the participation of U.S. airlines in military airlift operations generally. As we stated in our NPRM, our rule would not permit foreign investors to control U.S. carrier decisions on CRAF or other national defense airlift participation, even if the foreign investors became more involved in other areas of the carrier's operations under our proposal. We would require such decisions to be clearly and demonstrably subject to actual control by U.S. citizens. This would mean that the carrier could not allow foreign investors to make decisions that would make participation in CRAF or other national defense airlift operations impossible as a practical matter. Because participation in military airlift operations has been and will continue to be voluntary, each carrier will continue to choose whether it would participate in CRAF or other national defense airlift operations. In making those decisions, carriers take into account the economic incentives offered by DOD. Our proposed interpretation would require that U.S. citizens control those decisions because each carrier's participation in these programs remains a matter of great importance to the United States. We conclude that our rule would not hinder the DOD's ability to obtain sufficient aircraft from U.S. carriers.

Because our rule thus would bar foreign investors from controlling decisions regarding if and when any U.S. carrier can participate in CRAF or other national defense airlift operations, Continental's assertion that ''[f]oreign-controlled airlines may not be so willing to participate in U.S. military ventures or agree with U.S. security and terrorist efforts,'' Continental Comments at 12, is irrelevant. Our proposal would not result in U.S. carriers becoming ''foreign-controlled airlines,'' and the views of foreign investors would play no part in U.S. carriers' decisions relating to military airlift operations.

Some commenters assert that our proposed interpretation would not adequately guarantee that U.S. citizens would control decisions on military airlift participation, because the proposal would allow foreign investors to make decisions on operational matters that could preclude the carrier's participation in such flying. They contend that foreign citizens can undermine a U.S. carrier's ability to participate effectively in the CRAF program. For example, because CRAF primarily needs long-haul aircraft, commercial decisions by foreign citizens to divest such aircraft could render the carrier useless to CRAF. Continental Comments at 12; Delta Comments at 10. We disagree. First, we would expect each carrier to continue to make its fleet decisions based on its perceptions of the fleet mix best suited to a successful commercial operation. Foreign investors, if permitted by the airline's U.S. citizen majority owners to affect fleet decisions, would be motivated by the same commercial incentives. Moreover, 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, we would likely investigate whether the carrier is living up to its obligation under our revised rule to ensure that decisions relating to military airlift participation are wholly controlled by U.S. citizens. Because a failure to comply with that obligation would call into question the carrier's eligibility to retain its operating certificate, airline management can be expected to take those obligations very seriously.

Open Skies and Reciprocity

An important element of our proposal is our goal of reciprocal market access and investment opportunity. In order to foster greater liberalization that would provide greater economic opportunities to U.S. carriers and investors, we propose to limit the application of the refined actual control standard to foreign investors whose homelands have an open-skies agreement with the United States and extend comparable investment opportunities in their airline industry to U.S. investors, or where the United States' international obligations otherwise require the same approach. We explained, 70 FR 67394:

> [M]ore latitude with respect to foreign investment should be allowed for a foreign interest whose homeland has both an Open Skies relationship with the U.S. and extends reciprocal investment opportunities with respect to its own airlines to U.S. sources of capital'' We think it generally inappropriate to extend such latitude to nationals of countries that resist similar openness in access to aviation markets and in investment opportunities in their own airlines.

The comments that addressed the open-skies and reciprocity conditions generally supported our proposal. Some commenters asked us to define what we meant by reciprocity, and other commenters asked that we use public proceedings to decide whether a foreign country's investment restrictions satisfied our reciprocity condition. *See*, *e.g.*, Delta Comments at 11; ALPA Comments at 21. U.S. Airways urges us to additionally restrict the availability of the liberalized actual control standard as a means of obtaining commercially-meaningful access to European markets. U.S. Airways Comments at 6–7.

We have tentatively concluded that our proposal should include the open-skies and investment reciprocity conditions. The two conditions would foster greater liberalization, and would provide additional opportunities for U.S. carriers and U.S. investors. The Department anticipates that U.S. airlines would identify new opportunities to invest capital and expand further into international markets, to the ultimate benefit of the traveling public. In addition, the reciprocity condition would ensure that foreign airlines and investors did not obtain additional access into United States markets unless U.S. carriers and investors have equivalent access into the markets of foreign countries.

The comments submitted by some parties suggest that we should clarify what evidence and standards would be used to determine whether a foreign country meets the conditions. The existence of the open-skies agreement is objectively verifiable. The Department maintains a list of open-skies partners based on our established definition of the ''open skies'' label. *See http://ostpxweb.dot.gov/aviation/X-40%20Role_Files/bilatosagreement.htm.*

As for the reciprocity condition, the Department has a long history of regulatory practice on administering reciprocity standards. Our approach typically has not been to demand ''mirror image'' reciprocity or ''economically equivalent'' reciprocity. Rather, we have adopted a flexible approach that focuses on whether U.S. carriers or parties that might want to pursue opportunities abroad comparable to those being pursued by a foreign carrier or party here would be prevented by the foreign government in question from doing so. Evidence that a foreign government had turned down a U.S. carrier's request for comparable authority typically would carry compelling weight that adequate reciprocity was lacking. Similarly, evidence that foreign laws or regulations would be applied to bar U.S. carriers from securing approval for comparable activities usually would lead us to find inadequate reciprocity.

On the other hand, where we have no evidence before us—whether in the form of past practice or of laws and regulations—specifically pointing to the likelihood that a foreign party's homeland would preclude comparable activities on the part of a U.S. party, and where, furthermore, we also have a current statement from a responsible official of that government certifying that the government will give U.S. parties reciprocal treatment, we normally regard our reciprocity standard as being satisfied. We accordingly have seen no need in such circumstances to further pursue the matter. We tentatively plan to implement this proposal by applying the same approach to reciprocity determinations that we typically follow in other contexts.

In terms of process, again we would intend to do no more than apply longstanding Department practice. The process for meeting the investment reciprocity condition would be the same as it is for all other fitness requirements. Applicants and holders of existing authority would have the burden of submitting evidence to establish reciprocity. *See* 14 CFR 204.3 (requiring applicants for new authority to file certain data and any additional data necessary for the Department to reach an informed judgment about the applicant's fitness); 14 CFR 204.5 (requiring carriers that propose a substantial change in ownership to file the data set forth in 204.3). We are confident that applicants would be aware of our established practices in resolving reciprocity issues and of the type of evidence that we have typically relied upon and that they would know which materials would be most likely to advance their interests in the proceeding. To the extent that they need additional guidance, we would be fully prepared to provide it in response to specific inquiries.

Some commenters have raised the question of this reciprocity policy's applicability to an investment made by several foreign citizens if not all of those investors come from countries that meet the open-skies and reciprocity conditions. *See*, *e.g.*, Hawaiian Comments at 5. We have faced similar questions in applying the 49 percent total equity for open-skies country nationals/25 percent for non-open skies policy of the Northwest/Wings line of cases. Generally, we have allowed a mixed group to hold up to 49 percent of total equity so long as the non-open skies investors did not exceed 25 percent of voting or total equity. Similarly, under this proposal, we might allow the open-skies and investment reciprocity foreign investors in a mixed group to influence commercial decisions outside of the safety/security/national defense airlift areas, but not those from countries that did not have open-skies agreements and investment reciprocity.

We tentatively do not agree with ALPA that our reciprocity inquiry should be routinely subject to notice and comment. If an applicant submits evidence in the course of an initial fitness review, qualified interested parties would be able to review that evidence either in the public docket or pursuant to the Department's confidentiality procedures (Rule 12). If the submission was part of a continuing fitness investigation, and in the event that the Department's determination did not become public information, we believe that ALPA and other prospective parties have other sufficient means to air their potential concerns. For example, in other failure of reciprocity contexts, adversely affected airlines or other U.S. parties have shown no reluctance to keep DOT apprised of incidents of a failure of reciprocity even in the absence of a pending application, and we would expect to be kept informed of such failures in this new arena as well if we adopt our proposal. Further, if ALPA has evidence that an air carrier is not complying with the citizenship requirement, it would have the right to submit that material and request an investigation.

Procedures for Fitness Reviews

Citizenship matters arising in continuing fitness reviews are usually adjudicated informally by Department staff on a case-by-case basis, pursuant to 49 U.S.C. 41102 and 14 CFR 204.5 of the Department's procedural regulations. In the NPRM, we invited comment on our proposal to maintain these established procedures. 70 FR 67392. We tentatively concluded that we have various means at our disposal to initiate more formal proceedings when we believe such procedures to be appropriate. We stated that requiring public notification every time there is a citizenship question resulting from a substantial change of ownership will not only hinder our ability to obtain confidential information and resolve issues informally with the carrier before a proposed transaction is finalized, but also may serve to deter investment or ownership changes because of the uncertainty surrounding a timely decision by the Department. We stated further that such procedures could become extremely burdensome on the affected air carriers. 70 FR 67392.

We received few comments on this procedural issue. Atlas and Polar, Delta, and the Airline Professionals Association support the current procedures. AEA, bmi, and Hawaiian suggest that the Department should further explain the process and estimate the time required for a continuing fitness review where the liberalized actual control standard is applied. ALPA and the Airline Professionals Association argue that we should subject all substantial foreign investment cases to public notice and comment. Atlas and Polar suggest that we could maintain the current informal, confidential procedures, while placing significant decisions into the public realm, as we did in the recent substantial change of ownership case involving Hawaiian.

In line with most of the comments we received, we have tentatively decided to make no changes to our continuing review procedures, for the reasons expressed in the NPRM. We believe significant potential harm could occur if we subjected all substantial foreign investment cases to public notice and comment, as ALPA and the Airline Professionals Association request. The potential chilling effect to foreign investment, and to cooperation with the Department, would be counterproductive. On the other hand, requiring public notice and comment in all significant cases appears to be unnecessary for the protection of interested persons. If a carrier's pilots, for example, became aware of significant changes in their employer's ownership and management structure, they would have the right to submit evidence showing that the U.S. air carrier might not be complying with the citizenship requirement, as do other interested persons. Where a public proceeding might be beneficial, however, we would retain the option of using it.

Part 204 Modifications

Consistent with the NPRM, the Department would make minor changes to Part 204 that correct typographical errors and update sections in compliance with the prevailing statutory language. In 204.1, we would add a sentence to reference the new Part 399 language so that air carriers would be directed to the new rule. In 204.2, we would amend the definition of ''citizen of the United States'' to mirror the language that is now contained in 49 U.S.C. 40102(a)(15). We believe that the regulations should mirror the text of the statute as it is currently written. Finally, we would include minor changes to 204.5 to clarify language in paragraph (a)(2); delete a typographical error in paragraph (b); revise the address in paragraph (c); and add a new paragraph, (d), that would replace the last sentence of paragraph (c). These amendments to Part 204 should make the regulations easier to understand for carriers consulting the sections.

Legal Authority

Summary

We have tentatively determined that we may adopt our modified interpretation of the statutory ''actual control'' requirement. We believe that we have the authority to interpret the statute, because we are responsible for administering it; that we have the authority to modify our past interpretation when changing industry conditions and policies require such modifications because Congress has not prescribed a definition of ''actual control''; and that our proposed modified interpretation would be consistent with the language and purpose of the statute. We think that we have an obligation to change our interpretation with commercial developments and the public policy goals set by our statute, 49 U.S.C. 40101(a). *See* 70 FR 67394. As shown by the legislative history of our statute, Congress never intended to freeze for all time our earlier interpretation of actual control.

Authority To Interpret the Statute

Our responsibility for enforcing the statutory citizenship requirement gives us the authority to interpret that requirement to the extent that it is not specifically defined. As the Supreme Court has stated, ''The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'' *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). In a case involving our interpretation of another aviation statute, the Court of Appeals similarly stated, ''Naturally, the administration and enforcement of a statute call upon the agency charged with its execution to interpret it.'' *Continental Air Lines* v. *DOT*, 843 F.2d 1444, 1449 (D.C. Cir. 1988).

Congress has given the Secretary the responsibility for administering and enforcing the statutory provisions governing the economic regulation of the airline industry, including the citizenship requirement. 49 U.S.C. 40113(a) *See also Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366–367 (1994).

In carrying out these responsibilities, we routinely interpret the statutory provisions governing air transportation, and the courts defer to our interpretations when deemed reasonable. *See*, *e.g.*, *Sabre, Inc.* v. *DOT*, 429 F.3d 1113 (D.C. Cir. 2005); *Federal Express Corp.* v. *Mineta*, 373 F.3d 112 (D.C. Cir. 2004); *American Airlines* v. *DOT*, 202 F.3d 788 (5th Cir. 2000); *Continental Air Lines* v. *DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

Administering the statute defining citizenship has long required us to interpret its provisions. The Board itself originally created the actual control requirement—a requirement not then set out in express statutory language—due to its judgment that the express statutory requirements required supplementation in order to prevent evasion of the congressional policy. *Willye Peter Daetwyler, d.b.a. Interamerican Air Freight Co., Foreign Permit*, 58 CAB 118, 120–121 (1971).

While eliminating uncertainty about whether the ''actual control'' test was lawful, Congress itself recognized that we would need to interpret the applicability of the ''actual control'' standard in specific cases. Congress made the ''actual control'' test part of the statute when it enacted Vision 100—Century of Aviation Reauthorization Act, Pub. L. 108–176, 117 Stat. 2490

(2003). The sponsor of the amendment incorporating the actual control test into the statute stated that his amendment ''leaves the interpretation of effective control up to DOT, but the department can draw upon its decades of precedents to reach these conclusions.'' *Congressional Record*, S7813 (June 12, 2003). The amendment's sponsor thus understood that his amendment necessarily would require us continue to interpret ''actual control.''

Authority To Modify Our Interpretation

We are proposing to modify our past interpretation of the ''actual control'' standard, as we have done in the past. Some commenters contend, however, that we must strictly follow our past interpretation unless and until Congress amends the statute. *See*, *e.g.*, Alaska Comments; Continental Comments at 30–34; ALPA Comments at 5. Many of the individual commenters similarly argue that Congress has codified that interpretation. We tentatively disagree.

The courts have long recognized that agencies whose responsibilities require them to interpret their governing statutes necessarily have the authority to change their interpretations over time. In *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967), for example, the Supreme Court explained,

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Accord, Chevron U.S.A. v. *Natural Res. Def. Council*, 467 U.S. at 863–864; *Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Serv.*, 125 S.Ct. 2688, 2699–2700 (2005).

Just recently, moreover, the Court of Appeals affirmed a Department interpretation of a longstanding statutory provision that took into account industry changes and therefore went beyond our past interpretation of that provision. *Sabre, Inc.* v. *DOT*, 429 F.3d 1113 (D.C. Cir. 2005). The Court held that we had acted reasonably in updating our interpretation of the statutory term at issue in light of changes in the airline distribution industry. 429 F.3d at 1124.

Furthermore, when Congress amended the statute to add the ''actual control'' test originally developed by the Board, in our view Congress did not direct us to follow the past interpretations. A Senator introduced the amendment in the context of a pending citizenship case involving a U.S. carrier that depended on a foreign firm for almost all of its business. At that time, the statute did not expressly require U.S. carriers to be under the actual control of U.S. citizens, even though we and the Board had long read such a requirement into the statute, and the carrier was defending its citizenship in part by arguing that the ''actual control'' requirement was invalid because it was not in the statute. The amendment ensured that the carrier's citizenship would be judged under the ''actual control'' requirement and that no carrier could challenge the legality of that requirement. *Congressional Record*, S7813 (June 12, 2003).

That Congress did not seek to end the Secretary's discretion to modify as appropriate the traditional interpretation of actual control is suggested by the colloquy between the amendment's sponsor and the floor manager of the underlying Senate bill. The amendment's sponsor specifically stated that his amendment ''leaves the interpretation of effective control up to DOT, but the department can draw upon its decades of precedents to reach these conclusions.'' *Congressional Record*, S7813 (June 12, 2003). He thus recognized that his amendment would not compel us to maintain our past interpretation of the statute. In response, the floor manager stated his understanding that the amendment ''was simply a reflection of existing law'' and that the amendment ''will not in any way affect [the Department's] determination of what constitutes a citizen of the United States.'' *Congressional Record*, S7813 (June 12, 2003).

Our proposed reinterpretation of the ''actual control'' standard would be consistent with our past willingness to revise the standard in light of changing conditions. We thus determined in the *Northwest Airlines/Wings Holdings* case that Northwest would remain a U.S. citizen if no more than 49 percent of its equity was held by foreigners. That determination substantially liberalized the original decision on the Northwest/Wings Holdings transaction, which had held that no more than 25 percent of the equity could be held by foreigners. *Northwest Airlines Acquisition by Wings Holdings*, Order 91–1–41 (Jan. 23, 1991). And a year ago we modified our implementation of the citizenship standard in a way that allowed Hawaiian to complete its reorganization with some foreign investment. *See* 70 FR 67393; Hawaiian Comments at 1.

Furthermore, we were not following a rigid and unchanging interpretation of ''actual control'' when Congress adopted the amendment. We have not had a fixed definition of ''actual control.'' Instead we based each citizenship determination on the facts of each individual case, as we explained when we began this proceeding. 68 FR 44675, 44676, July 30, 2003. *See also Alas de Transporte Int'l, S.A.* v. *Challenge Air Cargo*, Order 93–7–25 (July 15, 1993) at 6.

Even if we had established a fixed interpretation of ''actual control,'' Continental's claim that Congress' adoption of the phrase ''actual control'' meant that it was adopting our interpretation of that phrase and that our interpretation could never change appears to be incorrect. Continental Comments at 32–33. The colloquy on the Senate floor when the amendment was introduced, as shown, does not support Continental's position. The three cases cited by Continental in support of its argument also appear to be inapplicable. Both *Duckworth* v. *Pratt & Whitney*, 152 F.3d 1, 6, n. 6 (1st Cir. 1998), and *Ward* v. *Comm'r of Internal Revenue*, 784 F.2d 1424, 1430 (9th Cir. 1986), stated as a general principle that a longstanding agency statutory interpretation could be incorporated by Congress into a statute, but neither held that an agency was in fact bound by a past statutory interpretation. In *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998), the Court stated that a statute using a term that had been defined by a regulatory agency implied that Congress wished to adopt the agency's definition. Here, however, we had never precisely defined ''actual control.''

Our proposed modified interpretation, moreover, would not affect other elements of the traditional ''actual control'' standard. For example, when we review whether the statutory numerical tests are satisfied (*e.g.*, the requirement that at least two-thirds of the directors must be U.S. citizens), we consider a U.S. citizen as a foreign citizen if the U.S. citizen as a practical matter has financial or business relationships with foreign citizens that will enable the foreign citizens to control the U.S. citizen's actions as shareholder, officer, or director. We have also held that U.S. carriers met the ''actual control'' test when it was argued that foreign citizens potentially had

significant influence over the U.S. carrier. *See, e.g., Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Order 92–11–27 (Nov. 16, 1992) at 1, 20–22 (an alliance relationship between a U.S. and foreign carrier does not constitute foreign control).

We believe that we may modify our interpretation of ''actual control'' even though Congress did not act on our earlier request for legislation changing the percentage of voting stock that non-U.S. citizens could own. *See, e.g.*, Alaska Comments at 2. Neither our request nor Congress' failure to act on that request suggest that we do not have the authority to reexamine our interpretation or that Congress wished to maintain the past interpretation without change. *See, e.g., American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. at 417–419.

We appreciate the statements made by a number of members of Congress stating their belief that we should not change our interpretation without express congressional approval. *See, e.g.*, Continental Comments at 30–31; AFL–CIO TTD Comments at 5–6. However, as shown, we have an obligation to administer the citizenship requirements, and we have tentatively concluded that maintaining the old interpretation in all circumstances would not be in the best interests of U.S. carriers, their employees and shareholders, and U.S. consumers. We believe that to do so would unnecessarily prevent potentially beneficial foreign investment in U.S. airlines and deny us the opportunity to modify our interpretation in ways that should give U.S. airlines and other U.S. investors attractive investment opportunities in foreign countries. At the same time, on balance we have not been persuaded that our modified interpretation would cause significant harm to any U.S. interests. Finally, as shown, in our view Congress did not compel us to follow specific interpretations of ''actual control'' when it adopted the amendment adding the test to the statute.

Lawfulness of Our Modified Interpretation

Any interpretation of our governing statute, of course, must be consistent with the statutory language and congressional intent. We have considered the arguments made by several commenters that our proposed updated interpretation of actual control would be contrary to the statute. As discussed below, we tentatively find that our modified interpretation of the actual control test would meet this consistency test. The statute, as indicated, states that the carrier must be ''under the actual control of citizens of the United States.'' 49 U.S.C. 40102(a)(15)(C). In most cases, a carrier's compliance with the numerical requirements for the board of directors and managing officers and ownership of the voting interest would ensure that the carrier meets these requirements. However, in certain cases, we may require more to ensure strict compliance with the statutory standard. The Board originally developed the actual control test because in some cases foreign citizens had business ties with the carrier or its officers or shareholders that as a practical matter would enable the foreign citizens to make key decisions, even though the U.S. members of the board of directors and the U.S. shareholders nominally controlled the carrier. Current policy, which would be unaffected by this rulemaking, continues the Board's efforts by treating U.S. citizens as non-U.S. citizens if they were appointed to positions as directors or managing officers by foreign citizens, and treating U.S. citizens as non-U.S. citizens if foreign citizens have the ability to control their actions as shareholders, directors, or officers.

Because U.S. citizens would control the adoption and amendment of any U.S. carrier's organizational documents, U.S. citizens, not foreign citizens, would control the carrier's structure and the rights and powers of its shareholders. We would also require that U.S. citizens control the three other operational areas subject to significant government involvement: safety, security, and the carrier's participation in CRAF and other national defense airlift operations.

We think that our interpretation would be consistent with the statutory language. As amended, the citizenship definition states that a carrier will be a U.S. citizen if it is ''a corporation or association * * * which is under the actual control of citizens of the United States.'' 49 U.S.C. 40102(a)(15)(C). Our modified interpretation would continue to ensure that, as urged by Continental, U.S. citizens ''control the air carrier entity itself,'' Continental Comments at 11, because U.S. citizens would control core carrier decisions on its organizational structure.

Our modified interpretation of the ''actual control'' requirement would reflect the standard definitions of ''control.'' ''Control'' means ''power or authority to guide or manage: directing or restraining domination.'' *Webster's Third New International Dictionary* (1971). Under our proposal, no foreign citizen would have dominating power—the board of directors (two-thirds of whom must be U.S. citizens) or the voting shareholders (in whom 75 percent of the voting interest must be vested in U.S. citizens) would have the power to run the carrier, including the power to decide whether to delegate any management authority over parts of the air carrier's business to someone else (and to revoke any such delegation). We conclude that our interpretation would match the statutory text.

British Airways argues that our proposed interpretation should not impose any requirements beyond the objective tests established by the statute, that is, the requirements that the president be a U.S. citizen, that U.S. citizens make up at least two-thirds of the board of directors and the other managing officers, and that U.S. citizens hold at least three-quarters of the voting interest. British Airways Comments at 3–4. This argument misconstrues the statute, because ''actual control'' is also required.

Continental argues that our revised interpretation of the ''actual control'' standard is necessarily incorrect because it is allegedly inconsistent with the definitions of ''control'' adopted by such other agencies as the U.S. Department of the Interior, the Securities and Exchange Commission, the Federal Communications Commission, and the Small Business Administration. Continental Comments at 16–19. *But see* IATA Comments at 5, alleging that our proposal is consistent with the FCC's interpretation of a similar citizenship requirement.

We think any differences between our revised interpretation and the interpretations followed by other agencies should be irrelevant. Congress has enacted citizenship requirements and control tests for different industries at different times for different purposes. The control provisions enacted for one industry thus should not dictate the implementation of a control provision applicable to a different industry.

Lawfulness of Reciprocity and Open-Skies Conditions

Our liberalization of our ''actual control'' standard would cover only investors from countries that provide reciprocal airline investment opportunities for U.S. investors and that have an open-skies agreement with the United States (or where appropriate to meet the United States' international legal obligations). This proposed condition should encourage market liberalization that would create investment and management opportunities for U.S. carriers and investors.

Adopting a revised interpretation that would apply in the context of our policy of seeking to open markets for U.S. carriers would reflect the changing environment in which citizenship is assessed. The Government Accountability Office, then the General Accounting Office, suggested that Congress established the initial citizenship requirement for U.S. carriers in order to protect the heavily subsidized domestic airline industry, to enforce the limits on foreign carrier rights created by bilateral air services agreements, to restrict access by foreign aircraft to U.S. airspace, and to promote the military's ability to use aircraft from U.S. carriers to supplement its airlift capability. United States General Accounting Office, *Airline Competition: Impact of Changing Foreign Investment and Control Limits on U.S. Airlines,* GAO/RCED–93–7 (Dec. 1992), at 12–13. Some of these reasons are no longer valid—U.S. carriers no longer receive routine subsidy mail rate payments for their operations, and the growth in international airline flights by foreign carriers means that foreign-owned aircraft are flying over all regions of the United States every day.

However, the need to ensure that U.S. carriers obtain comparable treatment with foreign carriers remains an important policy consideration, and our proposal to adopt the reciprocity condition as part of our rule seems reasonable. As we stated in our proposal, ''[W]e also have a basic duty to ensure that our airlines, and indirectly consumers, are not placed at an unfair competitive disadvantage by extending benefits to foreign interests where such benefits are not available to U.S. interests abroad.'' 70 FR 67394. The reciprocity condition would allow greater investment and involvement by foreign investors in U.S. carriers only when U.S. investors can obtain comparable treatment in the airline industry of the foreign investors' home countries and when those countries have open-skies agreements with the United States. Our use of this reciprocity condition should encourage foreign countries to eliminate restrictions on U.S. investment and involvement in their airline industries and to sign open-skies agreements with the United States.

Our proposed application of somewhat different ''actual control'' standards based on the openness of the foreign investors' home countries would be consistent with our statute and past practice, because it would reflect the statute's public interest goals and provisions requiring us to consider foreign government policies. One of the public interest goals established by the statute is the goal of ''strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers * * *'' 49 U.S.C. 40101(a)(15). This provision would support a policy of creating investment opportunities for foreign citizens only if U.S. airlines are entitled to reciprocal treatment.

Our proposed approach of allowing more liberal standards when U.S. investors are given reciprocal treatment and U.S. airlines operate under an open-skies agreement would build on past practice. We modified our original restrictions on Wings Holdings' investment in Northwest in part because the principal foreign investors came from the Netherlands, which had a relatively liberal air services agreement with the United States. *Northwest Airlines Acquisition by Wings Holdings,* Order 91–1–41 (Jan. 23, 1991) at 4, 6. And in *Intera Arctic Serv., Inc.,* we examined the alleged U.S. firm's citizenship with great care because of the lack of reciprocity for comparable U.S. firms in Canada. Order 87–8–43 (Aug. 24, 1987), at 6. *See also Alas de Transporte Int'l, S.A.* v. *Challenge Air Cargo,* Order 91–4–32 (Apr. 22, 1991), at 5.

Procedural Issues

We would be adopting our proposed modified interpretation of the ''actual control'' requirement after publishing our initial and supplemental proposals and giving all interested persons an opportunity to comment on those proposals.

Continental, however, complains that our proposal departed ''radically'' from the issues raised in the advance notice of proposed rulemaking that initiated this proceeding. Continental Comments at 39, citing 68 FR 44675, July 30, 2003. Our advance notice of proposed rulemaking, however, asked for comments on whether we should change our criteria for determining whether a U.S. carrier was controlled by U.S. citizens. 68 FR 44677. While the proposal did represent a change in direction from the advance notice of proposed rulemaking's focus, that does not matter. We acted reasonably by thereafter issuing a notice of proposed rulemaking asking for comments on whether we should relax to some extent our interpretation of the ''actual control'' standard, because our further consideration of the issue made us tentatively believe that we should modify our traditional interpretation of ''actual control.'' Continental submitted comments opposing that proposal, we are now issuing this supplemental notice of proposed rulemaking which will enable Continental to comment again on our proposal, and we will decide whether to adopt the proposal only after considering the arguments made by all commenters.

The Airline Professionals Association, Teamsters Local 1224, suggests that a one-day public hearing would be useful. Airline Professionals Association Comments at 6. We believe that the notice-and-comment process used in this proceeding will give all interested persons ample opportunity to present their views. No hearing should be needed to protect their right to comment on our proposal. By reviewing all of the written comments, we conclude that we will understand their position on the issues.

ALPA asserts that the FAA career staff was not consulted on the preparation of the notice of proposed rulemaking and that we should ask the FAA to submit its own views to the docket on the safety issues. ALPA Comments at 16. We did consult with FAA officials before issuing our notice of proposed rulemaking, and we have continued to consult with them on the proposal's safety issues. The FAA is an agency within DOT, so we see no reason to ask the FAA to formally submit comments.

Noting that we are proposing to place the proposed rule in the policy statement section of our regulations, 14 CFR part 399, and that the Administrative Procedure Act allows agencies to change policy statements without advance notice to the public, British Airways urges us to make a commitment that we will not amend this policy statement in the future without first providing an opportunity for notice and comment. British Airways Comments at 2. *But see* bmi Comments at 2.

We do not believe that we could make a binding commitment that this Department would not change the interpretation in the future, or that any future change in this interpretive rule would be made only after an opportunity for public comment. We doubt that the Department would reverse this interpretation, because our proposal would be consistent with the ongoing process of deregulation and with the globalization trends that will continue to reshape the international airline business.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the Department to assess both the costs and

the benefits of a significant regulatory change. This rulemaking is considered significant under DOT Policies and Procedures and E.O. 12866 because of public interest. In the NPRM, we made an assessment of this rulemaking indicating that its economic impact would be minimal because the rule would not impose any new costs on the affected certificated and commuter air carriers. 70 FR 67389, 67395. Commenters had an opportunity to submit comments on our assessment. We received no comments.

The Department tentatively concludes that the benefits of our proposed rule would be important, although non-quantifiable, and that those benefits would outweigh the costs, which should be minimal. We believe that the proposed rule would not impose any new costs on the affected certificated and commuter air carriers. We are clarifying our plans to implement the proposed policy if we adopt it, for example, by stating that the shareholders or board of directors must be able to revoke any delegation to foreign citizens of management authority over some parts of the carrier's operations and by providing more detail on our proposal that U.S. citizens must control the organizational documents, safety and security matters, and decisions on CRAF and other national defense airlift programs. Our clarification of our proposal should not materially affect the proposal's costs and benefits.

We request interested persons to provide us with information on our tentative regulatory evaluation, including the potential benefits and costs of this proposal.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires federal agencies, as part of each rulemaking, to consider regulatory alternatives that minimize the impact on small entities while achieving the objectives of the rulemaking. Our proposed rule would modify the Department's interpretation of ''actual control'' in determining air carrier fitness/citizenship to receive or retain a certificate of public convenience and necessity or commuter authority. In our NPRM we tentatively concluded that it would reduce the burden of compliance with citizenship requirements for small entities that are air carriers. The revisions to our proposal do not affect that conclusion. We certify that this proposed action would not have a significant economic impact on a substantial number of small entities.

Trade Impact Assessments

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that U.S. standards be compatible. In the NPRM the Department assessed the potential effect of this rulemaking and determined that it would have no effect on any trade-sensitive activity. The revisions to our proposal do not affect that determination.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is the Department's policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. In the NPRM the Department has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations. The revisions to our proposal do not affect that determination.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1955 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' This proposed rule, including the revisions made by this notice, does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

Executive Order 13132, Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255). Our proposed rule would not have a substantial direct effect on, or significant federalism implications for the States, nor would it limit the policymaking discretion of the States.

Our proposed rule would not directly preempt any State law or regulation, nor impose burdens on the States. It would have not a significant effect on the States' ability to execute traditional State governmental functions. In the NPRM the agency therefore determined that this proposal would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. The revisions proposed by this notice do not affect that determination.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires federal agencies to obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulation. The agency stated in the NPRM that it determined that the proposed rule would not impose any additional requirements, but rather serve to codify our existing procedures. The revisions made by this notice do not affect that determination. Thus, there would be no change in the paperwork collection as currently exists.

Summary of Comments

The Department invited comments on the proposal. We received approximately 30 comments collectively from carriers, labor parties, and industry associations. We received over 3,000 other comments from state legislators, local government officials, airline employees, and other individuals.

Commenters were divided on the need for and the desirability of a policy change. The Department received general support for its proposed changes from Air Carrier Association of America (ACAA), Airports Council International-Europe (ACI-Europe), Airports Council International-North America (ACI–NA), the Association of European Airlines (AEA), Airline Professionals Association (APA, Teamsters), Asociación Internacional de Transporte Aéreo Latinoamericano (AITAL), Atlas/Polar, bmi, Boeing, Federal Express (FedEx), Greater Orlando Aviation Authority, Hawaiian, the International Air Transport Association (IATA), United, United States Airports for Better International Air Service (USA–BIAS), and the Washington Airports Task Force. Atlas/Polar, Hawaiian, and United voiced support for the proposal as a way of obtaining additional capital for the U.S. airline industry on more attractive terms. Hawaiian and United—recently in bankruptcy proceedings—

and Atlas/Polar point out that the Department's proposal will help attract strategic investors. Hawaiian noted that the airline industry currently operates at a disadvantage compared to other industrial sectors that carriers compete against for financial resources. United added that the current policy limits U.S. carriers to speculative investments from venture capital funds, hedge funds, and other private investors looking to take advantage of the industry's depressed valuations. Both USA–BIAS and Washington Airports Task Force believe that the proposal will help to preserve the low fares passengers enjoy today.

Other commenters—notably the Association of Flight Attendants (AFA), the Air Line Pilots Association (ALPA), the Aircraft Mechanics Fraternal Association (AMFA), the Allied Pilots Association (APA), the International Association of Machinists (IAM), the National Air Carrier Association (NACA), the Independent Pilots Association (IPA), the Transportation Trades Department—AFL–CIO (AFL–CIO TTD), British Airways, Virgin Atlantic, Alaska Airlines, Continental Airlines, and U.S. Airways—do not support the proposal. Continental and U.S. Airways support the liberalization of foreign investment rules, but disagree with the Department's approach in the proposal. U.S. Airways—also recently emerged from bankruptcy—sees no urgent and immediate need to attract more global capital to the industry. AFA, ALPA, APA, IAM, and AFL–CIO TTD agree.

Delta supports liberalization policies and the proposal's objectives but believes that more explanation and guidance are needed from the Department. British Airways and Virgin Atlantic favor greater liberalization policies than those set forth in our proposal.

Other concerns raised by the commenters include the legal uncertainty of the bifurcated activities and of the Department's statutory authority, the reciprocal market access standards and what is considered to be investment reciprocity, and the impact of the NPRM on foreign control and governance. Many commenters, including a large number of the individuals who submitted comments, assert that only Congress, not the Department, may modify the interpretation of the Department's aviation investment rules. Various state leaders and associations from New Jersey, Ohio, and Texas agree with Alaska Airlines, and view the reciprocal benefits deriving from the NPRM as disfavoring the U.S. Continental claims that our proposal will be unfair to U.S. shareholders by encouraging U.S. carriers to establish dual-class share structures to accommodate foreign investors, thereby creating ''a class of shares with lesser control rights'' held by U.S. shareholders, and ''shares with greater control rights'' ''vested in foreign nationals.''

Many commenters request clarification of matters raised in the NPRM. ALPA questions whether U.S. carriers actually require additional capital sources. British Airways asks whether the carrier's board of directors could delegate to foreign investors the authority to hire and fire officers up to and including the carrier's president and directors of safety, security, and CRAF participation matters. Delta, Hawaiian, and NACA request information on whether we plan to maintain the limit on foreign ownership of a carrier's non-voting equity stock established in *Northwest Airlines Acquisition by Wings Holdings*, Order 91–1–41 (Jan. 23, 1991). NACA also asks what kinds of super-majority voting clauses could be obtained by foreign investors without placing the U.S. carrier's citizenship at risk.

Comments on Need for a Change in Policy

Hawaiian noted that it has benefited from a recent modification of the actual control test, which enabled the airline to successfully reorganize and obtain new financing. According to Hawaiian, the NPRM ''will help ensure the economic viability of U.S. airlines by providing for unfettered access to worldwide capital markets.'' United similarly contended that modifying the actual control test is essential for strengthening the competitive position of U.S. carriers in global markets.

ALPA expressed the concern that the Department has failed to substantiate its claim that the U.S. airline industry is in need of foreign investment. AFA, APA, IAM, and AFL–CIO TTD also assert that the proposal failed to support that claim. ALPA noted that United and U.S. Airways were able to obtain exit financing after restructuring. Similarly, U.S. Airways does not see an immediate need for additional global capital for the U.S. airline industry. It believes that the journey towards ''a single, unified international aviation marketplace'' should move forward, but believes that the proposal moves the U.S airline industry forward too fast at what it views as a fragile time. U.S. Airways points to its own recent reorganization experience of obtaining domestic and foreign funds, United's ability to emerge from bankruptcy, the ability of newcomers like MaxJet and Eos to successfully access the global capital market for funds, and proposed new entrant Virgin America's claim to have obtained adequate capital from U.S. sources. AFL–CIO TTD states that the DOT has not met the burden of showing that allowing foreign interests to control U.S. airlines is in the best interest of the U.S. aviation industry.

FedEx believes that the timing of the NPRM is good, because the market needs ''a fresh wind of competition.'' According to United, the aftermath of 9/11 left the industry in a difficult financial environment and the U.S. has lost its hold as the leader in international aviation. Foreign governments, such as the European Union, have been deregulating their own domestic airline industries, and the United States now has many open-skies agreements with other countries that have essentially eliminated route and rate regulation. In addition, globalization has had a major impact on the structure and operations of the airline industry. IATA mentions that the European Union, Australia, and New Zealand have begun liberalizing their foreign ownership and control rules. United also points to carriers in India and China that are also expanding rapidly to take advantage of the local deregulation policies that previously limited their opportunity to participate in the global aviation market. In order for the U.S. to regain its leadership position, United says ''artificial limitations on the ability of long-term strategic investors, regardless of nationality, to participate in the industry and earn adequate returns on their investment need to be removed.''

Comments on Labor Issues

AFA, AFL–CIO TTD, ALPA, AMFA, IAM, and IPA oppose our proposed policy in part because of labor protection concerns. Of concern to ALPA is that foreign airlines are not subject to the same labor laws as the U.S carriers, thereby putting U.S. employees ''at a severe disadvantage.'' AMFA states that over fifty percent of aircraft maintenance is already outsourced to both foreign and domestic repair stations. AFA alleges that foreign investors are likely to be foreign airlines that will seek to convert U.S. carriers into feeder carriers that will support the foreign carriers' long-haul operations. AFL–CIO TTD raises a similar concern. A reduction or elimination of long-haul flights operated by U.S. carriers would deny U.S. employees the opportunity to work on long-haul services, which can offer the most desirable jobs, especially for pilots.

APA, Teamsters has a differing view from the other labor organizations. ''At a time when thousands of airline employees have been furloughed, and thousands more are employed by airlines that are in bankruptcy, it is crucial for the economic well-being of the U.S. airline industry that impediments to international investment be removed.''

Comments on European Union Agreement

Many commenters, including Delta, FedEx, United, and USA–BIAS, believe that the Department's efforts to liberalize the actual control standard complement multilateral liberalization efforts. Other commenters, including Virgin Atlantic, Continental, U.S. Airways, ACAA, and AFL–CIO TTD, said that the Department is liberalizing its actual control standard in order to secure a U.S.–EU agreement. AFL–CIO TTD urges us to clarify whether the NPRM is a component of a U.S.–EU deal, and if so, to encourage a broader debate on citizenship issues. Continental argued that the Department seeks to reinterpret the actual control standard in order to secure a U.S.–EU agreement that, Continental believes, fails to provide ''commercially-viable slots and facilities at London Heathrow to bring effective competition to U.S.-London travelers.'' U.S. Airways expressed similar concern about practical access to slot and facility-constrained European airports.

Comments on Overall Application of the Policy

Several of the opposing commenters believe that our proposal fails to retain control in the hands of U.S. citizens. Continental argues that the proposed redefinition of ''actual control'' defies common sense and ignores the definitions followed by several other agencies.

Other commenters, including Virgin Atlantic, FedEx, bmi, Continental, APA Teamsters, ACI-Europe and ACI–NA ask for clarification of when the Department will apply the new policy when evaluating the citizenship of a U.S. carrier.

ALPA notes that the control prong of the citizenship test is applied to the carrier as a whole, not in certain discrete elements. AFL–CIO TTD asserts that the ''actual control'' requirement would not be met ''if U.S. citizens only controlled four specific areas of the carrier's operation.'' IPA believes the proposal indicated that U.S. citizens would only need to be in actual control of safety, security and CRAF. Continental predicts that the proposal would place in jeopardy the international operations of an air carrier whose economic decisions could be controlled by foreign citizens because our bilateral agreements require that airlines the Department designates for U.S. service be owned and controlled by U.S. citizens.

The AEA asks whether a foreign investor could control such elements as ''definition and quality of the product, branding, fleet mix, origins and destinations, network issues defin[ing] the business of the company.''

Comments on Organizational Documents

British Airways states that our requirement on organizational documents is unnecessary and will be counterproductive. It views the criterion for organizational documents as replacing ''one uncertainty for another,'' and believes that foreign investors will be unable to obtain supermajority voting provisions and similar contract provisions that would provide the foreign investors reasonable protection against actions by the majority of the carrier's shareholders or directors that would substantially prejudice the foreign citizens' investment interests.

Hawaiian asks us to identify specifically the documents to be considered organizational documents that must continue to be controlled by U.S. citizens. It further requests that we state in the final rule that any review of a carrier's citizenship would be limited to these documents.

Comments on Safety and Security Issues

AFL–CIO TTD comments that safety and security concerns are not areas that can be separated and singled out in day-to-day operations. Several commenters seek clarification about how to identify the chain of command for safety matters. Atlas/Polar and AEA, for example, ask whether every manager in the chain of command for safety matters must be a U.S. citizen. ACI-Europe asks whether ''a U.S. carrier controlled by non-U.S. citizens might be subject to greater security and safety scrutiny than would a U.S. carrier owned and controlled by U.S. citizens.''

APA, Teamsters believes that safety and security concerns are adequately addressed by the Federal Aviation Administration (''FAA'') and the Department. It does not see a negative impact on safety. FedEx and NACA both agree with the Department's approach to ensure that U.S. citizens retain actual control over safety decisions.

Alaska believes that the modified tests apply only to safety and security laws and the proposal is a substantial change from the Department's longstanding aviation policy. ALPA and Virgin Atlantic assert that our proposal will be ineffective, because many operational issues, not just those directly related to safety and security requirements, affect any carrier's ability to operate safely. ALPA stated, for example, that issues of safety exist throughout all aspects of operational decisionmaking. ALPA, AFL–CIO TTD, and Virgin Atlantic believe that the bifurcated approach will be ineffective because many operational issues, directly and indirectly, relate to safety and security requirements. ALPA hypothesizes that, under the NPRM, the economic and operational decisions made by airline management to enter voluntary FAA programs may not be under U.S. control. ALPA also expressed concern that the FAA staff was not consulted as preparation of the proposal evolved in the Department. Virgin Atlantic requested that the Department clarify how the bifurcation of operations will apply in practice.

ALPA, AMFA, and IAM argue that the proposal could harm safety enforcement. ALPA stated that the proposed rule would not preserve U.S. citizen control over safety matters because an airline's safety depends upon more than compliance with government requirements. ALPA believes that nothing in the proposal would prevent foreign investors from controlling safety-related decisions because those decisions may be interrelated with economic and operational decisions. ALPA and AFL–CIO TTD stated that responsibility for safety must be shared across the entire airline, and not relegated to a specific safety department or official, as ALPA believes the NPRM would do.

Echoing similar concerns, AMFA argues that increased foreign investment in U.S. airlines could place additional burdens on the safety oversight system. Both AMFA and IAM believe that the NPRM could increase the use of foreign repair stations, which raises a safety issue insofar as employees of the foreign repair stations may not have the same training or substance abuse testing requirements, and the FAA may not have the resources to inspect all foreign facilities. AMFA, IPA, and IAM view the proposal to liberalize the actual control standard as affecting the safety of operations conducted by U.S. carriers who utilize foreign repair stations.

Comments on CRAF

Continental believes that a foreign air carrier may be less willing to participate in the U.S. military program, because the foreign investors' home countries may not support the United States'

foreign policy. ACI-Europe asks whether foreign-controlled U.S. carriers could choose not to participate in the CRAF program. Continental and Delta express concern that our proposal may enable foreign citizens to undermine a U.S. carrier's ability to participate effectively in the CRAF program, because CRAF primarily needs long-haul aircraft and decisions by foreign citizens on aircraft acquisitions and dispositions could make a carrier's participation in CRAF meaningless, if they disposed of the carrier's long-range aircraft. ALPA and NACA express concern that our proposal will cause a reduction in the use of long-haul aircraft by U.S. carriers, potentially weakening the military's long-haul airlift capability and reducing CRAF commitments. AEA seeks clarification that participation in CRAF will remain voluntary after issuance of this rule.

Comments on Open Skies and Reciprocity

We received comments concerning our open-skies condition from Continental, FedEx, Delta, Virgin Atlantic, and U.S. Airways. FedEx supports the open-skies condition and believes that the proposal ''will create new opportunities for U.S. airlines [and] aviation workers and will greatly benefit travelers, shippers and consumers.'' The AEA strongly supports open aviation area (OAA) agreements, and the goal that airlines ''in the territories of parties to the OAA should be owned and controlled by parties to the OAA or nationals of parties to the OAA.'' It states that the proposal falls short of this goal.

Virgin Atlantic does not support the open-skies requirement, suggesting that a more relevant inquiry is whether the foreign investor's homeland would allow U.S. interests to invest in that country's airlines.

We received many comments concerning our investment reciprocity condition. FedEx supports the condition. ALPA, bmi, and Delta requested that the Department clarify the process for verifying reciprocity, including details about any substantive measure that would be used to determine whether a foreign country accords reciprocal treatment in airline ownership and control matters. Delta asked for a definition of ''open commercial access'' and a standard for rendering decisions regarding market access reciprocity. US Airways urges the Department to use the liberalized actual control standard to insist upon practical, commercially-meaningful access to European markets and key international airports, including facility-constrained and slot-constrained airports such as London Heathrow.

Atlas/Polar believe that the reciprocity requirement should be applied flexibly to ensure that a foreign entity does not obtain greater ability to influence U.S. airline decisions than U.S. interests have with respect to decisions of airlines of that foreign entity's homeland. ALPA believes that any substantial foreign investment in a U.S. carrier should be subject to notice and comment, including the question of whether U.S. investors would have reciprocal access to investment opportunities in foreign airlines. British Airways believes that the DOT should ensure that ''any future modifications would be subject to notice and comment procedures.''

British Airways, Continental, Delta, and FedEx raised the question of this reciprocity policy's applicability to an investment made by several foreign citizens if not all of those investors come from countries that meet the open-skies and reciprocity conditions. Hawaiian and AEA also wanted clarification on the Department's policy on U.S. carriers having third-country traffic rights, and the impact that having U.S. carriers with foreign participation will have on the carriers' ability to exercise those traffic rights.

Comments on Congressional Authority

Nearly all of the commenters who oppose the proposal assert that Congress, not the Department, has the legal authority to make such a change. They assert that, under the existing statute, the Department lacks the requisite authority to interpret ''actual control.'' APA, Teamsters, bmi, Atlas/Polar, FedEx. IATA, and United—all who support the proposal—believe that the Department's interpretation is consistent with U.S. legislation, congressional intent, and/or the direction of previous policy changes. Atlas/Polar, FedEx, and United cite court cases that provide legal support for their belief that the DOT may reinterpret ''actual control.'' British Airways, Continental, Virgin Atlantic, and Delta all fear that the NPRM is legally uncertain, and potentially may be subject to reversal or modification by the courts or Congress. Virgin Atlantic states that the NPRM offers little protection for foreign investors, given this legal uncertainty.

List of Subjects

14 CFR Part 204

Air carriers, Reporting and recordkeeping requirements.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

For the reasons stated in the preamble, the Department of Transportation proposes to amend 14 CFR part 204 and 14 CFR part 399 as set forth below:

PART 204—DATA TO SUPPORT FITNESS DETERMINATIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 49 U.S.C. Chapters 401, 411, 417.

2. Revise § 204.1 to read as follows:

§ 204.1 Purpose.

This part sets forth the fitness data that must be submitted by applicants for certificate authority, by applicants for authority to provide service as a commuter air carrier to an eligible place, by carriers proposing to provide essential air transportation, and by certificated air carriers and commuter air carriers proposing a substantial change in operations, ownership, or management. This part also contains the procedures and filing requirements applicable to carriers that hold dormant authority. See § 399.88 for policy statements concerning ''actual control'' of air carriers.

3. Revise § 204.2(c)(3) to read as follows:

§ 204.2 Definitions.

* * * * *

(c) *Citizen of the United States* means:

* * * * *

(3) 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.

* * * * *

4. Amend § 204.5 as follows:

A. Revise paragraph (a)(2) to read as set forth below;

B. Amend paragraph (b) to remove the ''s'' after ''Carrier'' in the third sentence in the reference to ''Air Carrier Fitness Division'';

C. Revise paragraph (c) to read as set forth below; and

D. Add a new paragraph (d) to read as set forth below.

The revisions read as follows:

§ 204.5 Certificated and commuter air carriers undergoing or proposing to undergo a substantial change in operations, ownership, or management.

(a) * * *

(2) The change substantially alters the factors upon which its latest fitness finding is based, even if no new authority is required.

* * * * *

(c) Information filings pursuant to this section made to support an application for new or amended certificate authority shall be filed with the application and addressed to Docket Operations, M–30, U.S. Department of Transportation, 400 Seventh Street, SW., PL–401, Washington, DC 20590, or by electronic submission at [*http://dms.dot.gov*].

(d) Information filed in support of a certificated or commuter air carrier's continuing fitness to operate under its existing authority in light of substantial changes in its operations, management, or ownership, including changes that may affect the air carrier's citizenship, shall be addressed to the Chief, Air Carrier Fitness Division, Office of the Secretary, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

* * * * *

PART 399—STATEMENTS OF GENERAL POLICY

5. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. 40101 *et seq.*

6. Add a new § 399.88 to read as set forth below:

§ 399.88 Actual control of U.S. air carriers.

(a) *Applicability.* This policy shall apply to each direct air carrier submitting information to the Air Carrier Fitness Division under part 204 of this title, with respect to its status as a ''Citizen of the United States'' as defined in 49 U.S.C. 40102(a)(15), of the Act. This policy shall only apply to the interpretation of ''actual control'' contained in 49 U.S.C. 40102(a)(15)(C) in determining air carrier fitness/citizenship to receive or retain a certificate of public convenience and necessity.

(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 documentation, 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.

Issued in Washington, DC, on May 1, 2006.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. 06–4227 Filed 5–3–06; 1 pm]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Andrews' Dune Scarab Beetle as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Andrews' dune scarab beetle (*Pseudocotalpa andrewsi*) as threatened or endangered under the Endangered Species Act of 1973, as amended. We find the petition does not provide substantial information indicating that listing the Andrews' dune scarab beetle may be warranted. Therefore, we will not be initiating a status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of the species or threats to it or its habitat at any time.

DATES: The finding announced in this document was made on May 5, 2006.

ADDRESSES: The complete file for this finding is available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92011. New information, materials, comments, or questions concerning this species may be submitted to us at any time at the above address.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above), by telephone at 760–431–9440, or by facsimile to 760–431–9624.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish a notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species.

In making this finding, we relied on information provided by the petitioners and information otherwise available in