

109TH CONGRESS  
1ST SESSION

# S. 2135

To direct the Secretary of Transportation to report to Congress concerning proposed changes to long-standing policies that prohibit foreign interests from exercising actual control over the economic, competitive, safety, and security decisions of United States airlines, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 16, 2005

Mr. INOUE (for himself and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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## A BILL

To direct the Secretary of Transportation to report to Congress concerning proposed changes to long-standing policies that prohibit foreign interests from exercising actual control over the economic, competitive, safety, and security decisions of United States airlines, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. FINDINGS.**

4       Congress finds the following:

5               (1)   Under   current   law   (49   U.S.C.  
6       40102(a)(15)), only an airline that qualifies as “a

1 citizen of the United States” (commonly referred to  
2 as a United States airline) may provide service be-  
3 tween cities in the United States or on international  
4 routes obtained by the United States through inter-  
5 national agreements. The law further provides that  
6 an airline will qualify as a citizen of the United  
7 States only if the airline is “a corporation or asso-  
8 ciation . . . which is under the actual control of citi-  
9 zens of the United States”.

10 (2) Throughout its 47-year history (1938–  
11 1985), the Civil Aeronautics Board interpreted the  
12 governing law as requiring that United States inter-  
13 ests be in “actual control” of all operations of the  
14 airline. The Department of Transportation contin-  
15 ued these policies when it took over the responsibil-  
16 ities of the Civil Aeronautics Board in 1985.

17 (3) To ensure that these long-standing policies  
18 remained in effect, Congress in 2003 passed an  
19 amendment specifically adding to the definition of  
20 “citizen of the United States” a requirement that  
21 the airline be “under the actual control of citizens  
22 of the United States”. When this “actual control”  
23 test was specifically added to the law, it clearly was  
24 intended to codify the policy developed by the Civil  
25 Aeronautics Board and the Department, which re-

1       quired that United States interests control economic  
2       and competitive decisions of the airline, as well as  
3       safety and security decisions.

4           (4) Congress has repeatedly refused the Depart-  
5       ment's requests to pass legislation to allow foreign  
6       interests to gain increased control of United States  
7       airlines by changing the statutory requirements that  
8       United States citizens must own 75 percent of the  
9       voting stock of United States airlines. The Depart-  
10      ment now seeks to accomplish increased foreign con-  
11      trol by other means.

12          (5) On November 7, 2005, the Department  
13      issued a Notice of Proposed Rulemaking (70 Fed.  
14      Reg. 67389) that proposes to change the Depart-  
15      ment's long-standing interpretation of "actual con-  
16      trol". Under the proposed rules, United States citi-  
17      zens would be required to control decisions of a  
18      United States airline concerning commitments to the  
19      Civil Reserve Air Fleet, transportation security, safe-  
20      ty, and organizational documents. However, United  
21      States citizens would not be required to control the  
22      airline's basic economic and competitive decisions,  
23      such as the cities to be served, the fares to be  
24      charged, the aircraft to be purchased, and the na-  
25      ture and size of the aircraft fleet.

1           (6) The proposal to review long-standing policy  
2           and law through a new interpretation of “actual con-  
3           trol” is contrary to the clear intent of Congress.

4           (7) The proposed new interpretation would  
5           change long-standing policies and legal interpreta-  
6           tions that “actual control” means control over all  
7           operations of the airline, not only decisions con-  
8           cerning security, safety, the Civil Reserve Air Fleet  
9           program, and organizational documents.

10          (8) The Department’s rulemaking is a major  
11          impairment of the policies and legal interpretation  
12          that Congress specifically required by statute in  
13          2003, and that have been followed for over 60 years.  
14          Any major change in the definition of “actual con-  
15          trol” should only be accomplished through the legis-  
16          lative process and should not be unilaterally imposed  
17          by the executive branch.

18          (9) The development of an equitable “open  
19          skies” agreement between the United states and Eu-  
20          rope is central to opening up markets, including ac-  
21          cess to Heathrow if commercially viable slots and fa-  
22          cilities are available there and key rights beyond  
23          Heathrow, and both entities will benefit by moving  
24          the world’s 2 largest aviation markets closer to-  
25          gether.

1 **SEC. 2. LIMITATION ON CERTAIN ACTIONS.**

2 (a) IN GENERAL.—For a period of one year after the  
3 date of enactment of this Act, the Secretary of Transpor-  
4 tation shall not issue a decision on the notice of proposed  
5 rulemaking referred to in section 1(a)(5), issue any final  
6 rule, or make any fitness determination under section  
7 41102 of title 49, United States Code, that would change  
8 the Department of Transportation’s long-standing inter-  
9 pretation concerning what constitutes “actual control” of  
10 an airline for purposes of section 40102(a)(15) of such  
11 title. The Secretary may not submit a final rule to the  
12 Congress under chapter 8 of title 5, United States Code,  
13 before the date that is 180 days after the date on which  
14 the Secretary submits the report required by subsection  
15 (c).

16 (b) CONGRESSIONAL REVIEW.—Any final rule de-  
17 scribed in subsection (a) issued by the Secretary shall be  
18 treated as a major rule for purposes of chapter 8 of title  
19 5, United States Code.

20 (c) REPORT.—Not later than 180 days after the date  
21 of enactment of this Act, the Secretary shall submit to  
22 Congress a report that assesses the impact of the proposed  
23 rules referred to in section 1(a)(5). At a minimum, the  
24 report shall include the following:

25 (1) An assessment of the consequences of per-  
26 mitting greater participation of foreign interests in

1 the direct operations of United States airlines, in-  
2 cluding the impact on national defense, competition  
3 between foreign and United States airlines, the  
4 growth of international air services performed by  
5 United States airlines and of the United States avia-  
6 tion industry manufacturers, and access of United  
7 States citizens, especially those living in rural com-  
8 munities, to aviation service.

9 (2) If the Department interprets the proposed  
10 rules as allowing foreign owners of 25 percent or  
11 less of a United States airline's stock to gain control  
12 of the airline through supermajority voting require-  
13 ments or other means, or as allowing agreements  
14 under which United States shareholders will vote  
15 their shares the same way as minority foreign share-  
16 holders, an analysis of the potential effects of such  
17 supermajority voting requirements or agreements  
18 on—

19 (A) national defense;

20 (B) competition between foreign and  
21 United States airlines and aviation industry  
22 manufacturers;

23 (C) access to domestic aviation services;

24 and

1 (D) whether such agreements would be  
2 consistent with the statutory requirement that  
3 permits an airline to qualify as a citizen of the  
4 United States only if at least 75 percent of the  
5 voting interest in the airline is owned or con-  
6 trolled by persons that are citizens of the  
7 United States.

8 (3) An analysis of how the Department will en-  
9 sure that United States citizens maintain control  
10 over matters having an impact on issues concerning  
11 Civil Reserve Air Fleet participation, safety, and se-  
12 curity if foreign interests are allowed to exercise con-  
13 trol over issues concerning a United States airline's  
14 day-to-day operations, market strategy, and fleet  
15 management.

16 (4) An analysis of the portion of the proposed  
17 rules that provides that the new interpretation of  
18 "actual control" would apply only in cases in which  
19 a foreign country grants United States interests "re-  
20 ciprocal access to investments in their carriers", and  
21 an analysis of—

22 (A) how the Department can adopt an in-  
23 terpretation that will permit a definition of "ac-  
24 tual control" to vary depending on policies fol-  
25 lowed by a foreign country;

1 (B) how the Department would define “re-  
2 ciprocal access”;

3 (C) how the Department would determine  
4 that the home country of a foreign airline does  
5 not deny United States citizens reciprocal ac-  
6 cess to investments in its own airlines; and

7 (D) whether, as part of “reciprocal ac-  
8 cess”, the Department would require control by  
9 United States interests over economic decisions  
10 by a foreign airline.

11 (5) An analysis of whether under the proposed  
12 rule the Federal Government will have adequate  
13 ability to review the source of foreign capital.

14 (6) An analysis of the effects the proposed rules  
15 would have on the wages, working conditions, and  
16 job opportunities of United States airline employees,  
17 including job opportunities in international air  
18 transportation.

19 (7) An analysis of whether under the proposed  
20 rules interested parties would be notified of and have  
21 an opportunity to comment on an application sub-  
22 mitted to the Department under which a foreign in-  
23 terest could gain effective control of a United States  
24 airline.

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