Pervasive Issues in the Airline Industry Affecting United States Aviation Law and Policy

Russell E. Tanguay Jr.

Follow this and additional works at: https://via.library.depaul.edu/bclj

Recommended Citation
Available at: https://via.library.depaul.edu/bclj/vol8/iss4/4
Pervasive Issues in the Airline Industry Affecting United States Aviation Law and Policy

Russell E. Tanguay, Jr.*

Introduction

The airline industry is a booming global industry that continues to evolve with advances in technology, growing consumer demand, and continuing change in regulatory affairs. Regulations in the United States and abroad affect domestic and international airlines. Various regulations evolve in conjunction with the advances of the airline industry, while others do not. The following three issues have a long-standing history within the airline industry: 1) antitrust immunity for both domestic and foreign airlines and their alliance systems; 2) the ownership of domestic airlines by foreign citizens; and 3) the inspection of foreign repair stations by United States ("U.S.") officials. These three issues are hotly debated among members of Congress, government departments, and actors in the airline industry. Legislation regarding these issues was also included in the most recent Federal Aviation Administration ("FAA") Reauthorization Act, which attempt to alter current regulations.

In 2009, the U.S. House of Representatives passed the FAA Reauthorization Act ("The Act"). The Act authorized appropriations for FAA programs for the years 2009 to 2012.1 The Senate passed its own version of the Act that now must be reconciled with the House version.2 Also included in the Act are past failed pieces of legislation pertaining to these pervasive issues, which attempt to alter various as-

---

* Russell E. Tanguay, Jr. is a Juris Doctor candidate at DePaul University College of Law, Chicago, expected December 2010. He received a Bachelor of Arts degree from The George Washington University, Washington, D.C., in May 2006. He wishes to express his gratitude to his father, Russell, for suggestions on drafts of this article.


pects of airline regulation. The current Senate version of the bill received consistent extensions because it is highly contested.

Under proposed legislation, three provisions are included that would significantly alter current regulations. These provisions attempt to change current regulations, laws, and processes that presently operate effectively and efficiently, and, therefore, should not be altered. If these three provisions remain unchanged, these issues will continue to resurface in the future and have a detrimental draining effect on the airline industry. Further, some of these provisions would not only affect the domestic airline market, but also diplomatic relations between the U.S. and European Union ("EU") Member States.

This Article will focus on the aforementioned three issues and provide general background information, discuss the relevant history of each issue, and state the detrimental effects these issues could have on the industry if altered. This article will also provide suggested solutions for each issue. Part one of this Article discusses the significance of aero-policy. Part two will provide general background of the 2009 FAA Reauthorization Act. Part three will discuss the first issue regarding antitrust immunity. Part four will discuss the second issue regarding foreign ownership of domestic airlines. The fifth part will discuss the issue pertaining to foreign repair stations. Finally, part six will provide a discussion on the future of aero-policy consistent with these issues.

I. SIGNIFICANCE OF AERO-POLICY

The airline industry is unique because it permeates beyond U.S. borders and into the global realm. Laws regulate airlines and affect the ways in which they operate. This Article refers to government-enacted policies for the airline industry as aero-policy. The world of aero-policy is an interconnected web influenced by many different factors in addition to these laws, including agreements with other countries, government agencies, and airlines. The provisions contained within the Act change current laws and policies, which in turn will

---


6. See discussion infra sections III - V.
alter airline business models, impact employees, and even impact diplomatic relationships with foreign countries. Modifications at any level create subtle ripple effects that affect the airline industry which often go unnoticed to those unfamiliar with the airline industry.

Further, aero-policy affects American and foreign consumers. The airline industry must be regulated to maintain current consumer demands, and these demands are radically different from as little as ten years ago. In 2005, 738 million consumers took to the skies on domestic carriers, compared to 570 million in 1995 and 395 million in 1985. The FAA expects this number to surpass the one billion threshold by 2015. In 2009, approximately 703 million passengers, both domestic and international, landed on American soil. The number of flights offered also increased with the number of passengers – with 13 million flights in 2005, compared to 11.9 million in 1995 and 9.1 million in 1985. An example of aero-policy that affects consumers and international regulations is the 2009 FAA Reauthorization Act.

II. BACKGROUND OF THE 2009 FAA REAUTHORIZATION ACT

The Congressional Budget Office ("CBO") submitted its final cost estimate to the House Committee on Transportation and Infrastructure for the Act on April 22, 2009. The $53.5 billion expenditure appropriates the necessary funds for the FAA to operate effectively and efficiently while meeting all safety regulations. The CBO and Joint Committee on Taxation estimated that implementing the Act would increase discretionary spending by $44 billion, increase net direct spending by $46 million, and reduce revenues by $14 million over the 2009-2014 period. Other aspects of the Act include implement-

8. Id.
9. Id.
10. Bureau of Transportation Statistics, Passengers: All Carriers-All Airports (2010), available at http://www.transtats.bts.gov/Data_Elements.aspx?Data=1 (The data table includes passenger data for the 2000-2009 time period obtained from the BOTS T100 Market data. Although there is a decrease in total domestic and international passenger service between 2008 and 2009 from 809mm to 766mm, it is probably due to the global economic crisis).
11. FAA statistics, supra note 7.
14. CBO, supra note 12.
ing a Next Generation ("Next Gen") Air Transportation System that modernizes air traffic control, creates an independent Aviation Safety Whistleblower Investigation Office within the FAA, funds runway improvement programs, hires additional aviation safety inspectors, and requires that the FAA update flight-crew fatigue regulations. Further, the Act proposes increasing the Passenger Facility Charge allowed on all airfares from $4.50 to $7.00 per passenger per segment. These are only a few of the examples contained in the highly complex piece of legislation.

III. ANTI TRUST IMMUNITY

Section 426 of the Act’s proposed language would sunset antitrust immunity ("ATI") that the airlines and their alliances currently enjoy, thus essentially terminating ATI. The Government Accountability Office ("GAO"), which is the "investigative arm of Congress" and "congressional watchdog," is charged with conducting a study to review the standards for granting ATI to domestic and foreign airlines. ATI essentially creates an exception to U.S. antitrust laws, as it permits the airlines to operate as if they were one company while still maintaining individual businesses. Under current regulation, immunity is granted to three major alliances: the Star Alliance, oneworld, and SkyTeam.

In order to receive ATI, the Department of Transportation ("DOT") must approve an application for ATI when it deems it is "required by the public interest." The DOT also considers whether granting ATI is required to meet a substantial transportation need. However, as proposed, Section 426 of the Act would permit current ATI for airlines and their alliances to expire within three years.

Consequently, the following detrimental effects would occur if ATI was removed: 1) airline alliances and their business models would disappear; 2) all airlines would have to reapply simultaneously for ATI, leaving the airlines unorganized and searching for a new business

15. Oberstar website, supra note 13.
20. Oberstar speech, supra note 3, at 3.
24. CBO, supra note 12, at 16; Oberstar speech, supra note 3, at 5-6.
structure; 3) diplomatic relationships with the EU would deteriorate due to EU concerns with being able to operate openly and freely in a liberalized U.S.-EU market; and 4) the many options, features, and benefits made available to consumers from the alliance system would disappear.

A. Airlines and Their Business Models Would Disappear Through the Termination of the Alliances as a Result of the ATI Termination

Airlines create alliances to serve many purposes and structure their business models and operations upon having these alliances. Airlines and their alliance partners align their schedules, coordinate fares, and provide larger global networks to customers around the world. Additionally, airlines coordinate gate location and baggage handling while offering a wider and more efficient network. The proposed legislation requires the GAO to review the current policies enacted with respect to the granting of current ATI for airlines and their alliances. From this review, the GAO would recommend policy changes and new procedures to the Department of Justice (“DOJ”) and DOT. Under the re-application process, the DOJ, DOT, and the airlines would be required to adopt the updated and revised policies and procedures recommended by the GAO prior to ATI being granted. All of the business operations would change if Congress enacted regulatory changes.

Representative James Oberstar of Minnesota referred to alliances as a “de facto merger.” This is why he incorporated what was originally a separate piece of legislation, H.R. 831, which required the GAO to conduct the aforementioned policy review of ATI grants, into the current Act. The airlines, both domestic and foreign, are ex-

25. James Reitzes & Diana Moss, Airline Alliances and Systems Competition, 45 Hous. L. Rev. 293, 305 (2008) (This article provides a description of the origins of alliances and their purposes. “Many networked and non-networked systems also display demand-side economies or network effects. These economies occur when the value to any given user increases as additional users join the system. Apart from air transportation, network effects are evident in, among other industries, telephony and software/hardware. For example, when an airline adds service between its hub and a new location to accommodate passengers at that location, it also creates new service offerings between that location and all other locations that can be reached through its hub. This benefit, which is fundamental to hub-and-spoke airline networks, enhances the value of the network for many other types of passengers.”)
26. Id.
27. CBO, supra note 12, at 16.
28. Id.
29. Id.
30. Oberstar speech, supra note 3, at 3.
31. Id. at 5.
tremely dependent upon the alliance system in order to provide their services. Oberstar indicated that terminating ATI does not mean it is the end for alliances, as the DOT could still grant ATI to the airlines after they complete the re-application process and if they can prove the alliance is beneficial to the public.32 While Oberstar’s proposition suggests some opportunity for flexibility, this cannot negate the fact that proponents of this provision encouraged what they deem “more sound” antitrust policy.33 Of course, implementing “more sound” antitrust policy means stricter policies that result in making it more difficult for the airlines to qualify for ATI from the DOT. The suggestion of flexibility is only a softened sell for the benefits of winning a vote. The more sound antitrust policy ensures that customers “receive the full benefits of a competitive marketplace;”34 however, customers currently receive strong benefits from a competitive marketplace under the current Act.

Oberstar also mentioned that the top three airlines in the U.S.-EU market made up thirty-seven percent of all passengers in the market, whereas, in 2007, the three major alliances made up eighty-five percent of all passengers in that same market.35 There are eleven airlines in the oneworld alliance,36 thirteen in the SkyTeam alliance,37 and twenty-eight in the Star Alliance.38 Now that the DOT approved the remaining ATI applications,39 Oberstar opined that the top three alliances would control over ninety-five percent of the market in their U.S.-European route pairings.40 Alliances are not anticompetitive and do provide the airlines’ alleged benefits (e.g. lower fares). Competition still exists among the alliances. While competition could exist between forty-eight individual airlines, three major alliances could effectively operate more competitively because of utilization efficiencies, a result which ultimately benefits passengers.

The three major alliances collectively market themselves in order to attract passengers to their member airlines and provide the lowest

32. Id. at 6-7.
34. Id.
35. Oberstar speech, supra note 3, at 4.
40. Oberstar speech, supra note 3, at 4.
possible fare on any given route pair. The airlines created these alliances in order to align themselves, provide a larger network to their customers, and ensure maximum capacity on each airline’s planes. Consumers benefit from the alliances because of the combined frequent flyer programs, global markets, and lower fares resulting from increased “passenger efficiency.”

Further, the airlines’ business models would cease to be interdependent upon each other. The lack in dependency would require each airline to reassess its individual operations in all regards: airfares, gate locations, baggage handling, city network options, and financial status. An airline must determine the most innovative method to transport its passengers to cities that it does not directly serve. If airlines have to reconfigure their route maps, the process of applying to new cities would be very cumbersome. In order to apply for this access, an airline must obtain a certificate of public convenience from the DOT, a lengthy and time-consuming process due to overtaxed and inefficient bureaucratic resources.

Revenues that were once derived from the coordinated selling of seats on an alliance partner’s airplane will no longer be a part of an airline’s profits. This depletion in revenue weakens the air carriers’ financial performance and competitive position. An airline must create innovative ways to maximize its profits when it is not able to rely on its partners to sell seats on its planes. Studies demonstrate that the alliances provide more competitive fares than non-alliance airlines. Airlines would be inclined to increase their fares in anticipation of any future loss if the alliances were dismantled.

Further, the entire ATI re-application process and subsequent altering of the airlines’ business models would be ineffective and inefficient. This process could inflict millions of dollars in legal costs for the airlines to ensure that the application meets all standards. Instead of growing its business and ensuring it provides the most efficient network, competitive prices, and options for its customers, an airline would be preoccupied by this re-application process alone. This will add costs, which would be passed to customers in the form of increased fares. The process results in an irrational allocation of an airline’s resources and is counter-productive in protecting consumer interests. The airlines need to focus on how to maximize their profits, especially since many airlines have suffered million and billion dollar

quarterly and annual total losses.\textsuperscript{44} It does not make sense for the government to impose stricter ATI requirements at this time, or in the foreseeable future.

\textbf{B. All Airlines Would Have to Reapply for ATI, Leaving the Carriers with Much Uncertainty}

The airlines would struggle with uncertainty once ATI sunsets and the re-application process starts. The "more sound" policy that supporters encouraged could result in stricter guidelines and in the DOT granting airline ATI less frequently. The CBO even indicated that it is unaware of what business practices and opportunities the airlines may have to forgo with the new policy.\textsuperscript{45}

Furthermore, if alliance ATI ever sunsets, this uncertainty would even exist for future re-application processes. There is no indication as to whether or not the DOJ and DOT will revamp the ATI policies every few years. This uncertainty again results in the airlines having to re-apply for ATI every few years as well. The airlines' application costs, as well as possible legal costs, could be overwhelming. It takes a substantial amount of time and resources to ensure that all the airlines are in compliance with the requirements and policies laid out for ATI applications. Consequently, the process is excessive for businesses affected by the DOJ and DOT policies to comply with such requirements. Moreover, it becomes burdensome for the airlines and their upper-management to be up-to-date with all regulations on a constant basis if those regulations continually change. Airlines model their businesses around regulations. If these regulations change with each re-application process, the airlines must constantly readjust their business models to conform to these new policies and regulations.

Further, uncertainty leads the airlines into uncharted territory. This territory leaves open the possibility that an airline could be denied future ATI, essentially dissolving the alliance system for some, or even the system in its entirety. The likelihood of a few airlines (versus the many) surviving in an alliance would be greatly diminished; if not impossible. Airlines would have no confidence in their likelihood of achieving future approvals, as the new rules would terminate present ATI status every three years. Long term planning would be a thing of the past. If the DOT denied one airline's application, this airline in


\textsuperscript{45} CBO, \textit{supra} note 12, at 16.
particular would operate alone and no longer enjoy the benefits of streamlining reservations, route systems, and frequent flyer programs. Moreover, once one airline falls out of an alliance system, its former partners are likely to follow, because alliance airlines are dependent upon one another. These concerns are too much for the airlines to bear.

C. Terminating ATI is Inconsistent with the Global Market in Respect to a U.S.-EU Open Skies Market

On May 25, 2007, the United States and twenty-seven European Union Member States signed an Air Transport Agreement, otherwise known as the U.S.-EU Open Skies Agreement (“Agreement”). The Agreement superseded all previous bilateral aviation agreements between the U.S. and the individual EU Member States. This Agreement allowed for airlines from both regions to operate flights in a more liberalized market with fewer restrictions. Article 21 of the first stage Agreement outlined the requirements for second stage negotiations, which occurred in March 2008 and March 2010. As a result of second stage negotiations, both sides deleted Article 21 from the Agreement. According to Lawrence J. Kelly, “[t]his pro-growth, pro-competition, pro-consumer [A]greement is a major breakthrough in transatlantic economic relations.” Inconsistencies with international agreements, like this Agreement, lead to possible difficulties operating in a free and open market, potential trade wars, and limitations on airline traffic rights.

The proposed termination of current ATI for both domestic and foreign airlines is problematic since EU carriers will cease to possess the ATI classification that is essential in order to operate openly and

47. Id.
48. Id.
49. Id. (Article 3 of the Treaty outlines the rights granted by both the U.S. and EU to each other including the right to fly across their territories without landing, making non-traffic stops in the country, and serve behind, intermediate, and beyond points in the territories).
50. Id.
freely in a liberalized U.S.-EU market. The U.S. initially granted ATI to foreign airlines in order for them to be able to enter into the Agreement. Akin to domestic airlines, foreign airline business models would have to transform if they are not granted ATI, because they would no longer be able to coordinate schedules and integrate their systems with the domestic airlines, which is especially important when it concerns the transport of customers originating from foreign destinations into cities within the U.S.

A second issue with the termination of current ATI for both domestic and foreign airlines was the possibility of a trade war. This could have occurred if the EU found U.S. policy to be inconsistent with the Agreement in respect to ATI. This trade war would have encompassed further restrictions for the airlines. For example, if the EU had retaliated by restricting or suspending traffic rights, then the U.S. would have likely reciprocated. This constant struggle between the U.S. and EU would have ultimately resulted in losses for the airlines and, obviously, U.S. and EU citizens.

One example of plausible traffic right restrictions is the limitation of cabotage rights. Cabotage rights include the importation and exportation of goods to and from both regions. Any suspension could affect this trade system and subsequently create a ripple effect across the country. Any deviation by the U.S. from the forward moving direction would give the EU every right to renounce traffic rights. This strains not just the airline industry, but diplomatic relationships between both regions as well. U.S. negotiators have been “more concerned to threaten the Europeans with termination of the existing flawed paradigm of ‘open skies plus immunity.’” These threats by the U.S. are essentially a “catch-22,” because if the U.S. revoked ATI for foreign airlines, the EU would revoke traffic rights, which would result in the domestic airlines losing significant access to the EU market.

While it is extremely doubtful that these restrictions would, or would have, ever reached the point of non-existent traffic rights (e.g., France restricting traffic from any U.S. airlines and vice versa), domestic airlines would have experienced pressures from the restrictions. These pressures could have meant less profitable airlines, as the airlines would have been restricted from flying into once lucrative cities. Furthermore, if the EU had restricted an airline from flying into a

54. Cabotage rights with respect to the airline industry allow foreign airlines to operate a leg of its travel from two points from within the same region (e.g., United Airlines can fly from Los Angeles to Sydney and on to Melbourne with the same plane and flight number).
city that the airline relies heavily upon to move its customers further into the EU system with an EU alliance partner, it may have no longer have been able to do so. This not only prohibits access to the target city, but could also further deteriorate cooperation between the two airlines; both would no longer have the capability to sustain the present business relationships, and each airline would no longer continue to garner the benefits that alliances provide (i.e., profits and larger global networks).

Antitrust immunity is generally recognized by the airlines as essential and required in order to complete any open skies agreement.56 The U.S. is in negotiations with Japan to finalize an open skies agreement, but Japan demands ATI for two of its airlines before it will agree to the final terms.57 If the U.S. fails to grant ATI to airlines without regard for the airlines' national affiliation, an airline in a foreign state would have leverage to threaten not to abide by the Agreement. Essentially, all open skies agreements could disintegrate as a result of a U.S. decision to either make ATI more stringent or potentially eliminate it in its entirety.

D. Alliance Termination Precludes Consumers From Enjoying the Many Options, Competitive Prices, and Services Made Available to Them

Alliances offer more than just a broad global network; they also coordinate reservations and ticketing processes, check-in, flight connections, and baggage transfers.58 Alliances offer very similar perks for personal and business travelers, including around-the-world package fares,59 access to airline lounges,60 and centralized business solutions for corporate travel and events.61 Without the granting of ATI,
services such as these would subside along with the alliance models, eliminating these benefits in the short term and perhaps permanently.

United Airlines’ Mark Schwab stated that Continental Airlines’ recent move from the SkyTeam Alliance to the Star Alliance created many “efficiencies to help both [airlines] compete more effectively for international traffic in an increasingly global air travel market.” An especially business savvy move for both airlines includes the “Metal-Neutral” network, which includes United, Continental, Lufthansa and Air Canada. This pseudo-network allows these airlines to “pool revenues while integrating their scheduling, inventory, management, pricing, frequent flyer and sales activities on itineraries that include transatlantic segments.” This Network allows for better service and significantly more competitive pricing to and from the European market.

Networks like the alliance programs and partnerships like the “Metal-Neutral” program are only possible as a result of ATI. Allowing the airlines to coordinate their businesses in a manner such as this makes traveling seamless for the customer. Customers rely heavily on the options that connect them from origin to destination. It becomes disadvantageous to the customer if he or she must connect the dots in his or her itinerary when airlines and their partners are already capable of doing so for the customer (i.e., when a customer must purchase separate itineraries on different airlines in order to reach his final destination).

Individual airlines within alliances compete with other airlines and alliances to offer the best possible price to and from every city route pair. When airlines are capable of offering service to more cities, they are able to offer competitive prices to attract customers onto their planes. If the DOT lifts ATI, airlines would be forced to raise prices and would be unable to partner with one another easily, if at all. Since there would be fewer city options offered to the customer, an airline would have to make up lost revenue in other places, because it would be unable to rely on revenue from partner airlines and would be limited in its service. One way the airlines would try to make up lost revenue would be to offer higher fares on their traditional routes.

---

63. Id.
64. Id.
65. Id.
66. Id.
The DOT grants ATI to allow airlines to create alliances. Critics argue alliances are contrary to antitrust policy and fail to provide the many benefits that are presumed when granting immunity; however, one study suggests that fares are actually lower when dealing with allied partners as compared to non-allied partners. Further, increased service availability means additional competition. When more airlines compete in a particular route pair, more competition exists to attract customers and fill their planes to capacity. Airlines would try to lower their prices to attract the most customers. For example, airfares would be significantly lower if ten airlines offered service between New York and Chicago, since an airline would have a lower probability of attracting customers if it offered a higher airfare compared to its nine competitors. Additionally, the lack of service on any alliance or airline increases the likelihood that a customer would switch to a competitor that offers service to the customer’s final destination. Not only does the customer suffer due to higher prices and lack of service, but the alliances and airlines see the reciprocal effect of customers giving business to their competitors as well. Customers deserve to enjoy the options, competitive prices, and services made available to them by the alliance systems.

E. Possible Solutions for ATI

It is unnecessary to sunset ATI for all airlines and require them to reapply for ATI. The DOT and DOJ should conduct a review of the current situation and determine if there is anything significantly anticompetitive about the airlines’ and alliances’ current business practices. Anticompetitive effects could result from price-fixing, collusion amongst the airlines, or predatory pricing – three issues at the heart of U.S. antitrust regulations. The purpose of the Sherman Antitrust Act is to prohibit these anticompetitive practices in order to prevent a restraint on trade and encourage competition. Visible anticompetitive effects are generally in existence in the airline industry; however, the benefits of the alliances outweigh the alleged anticompetitive effects. Greater amounts of features and benefits, as well as less costly airfares for customers, are significant advantages for the American consumer.

Even though Oberstar referred to alliances as a “de facto” merger, alliances are the closest form of a “global” airline that the

67. Brueckner & Whalen, supra note 43.
69. Id.
70. Oberstar speech, supra note 3, at 3.
U.S. is willing to entertain at the present time. An opportunity exists for the U.S. to collaborate with foreign states to create a true global airline. Alliances provide similar, if not the same, benefits that consumers would receive from an actual global airline. The U.S. should move in the direction of liberally granting antitrust immunity to permit alliances to operate, or create an actual global airline that would provide benefits similar to the alliances. While the alliances currently operate under ATI immunity, the creation of a global airline is years away.

Further, Congress should not include legislation pertaining to ATI in a proposed bill as complex as an FAA Reauthorization Act. Antitrust immunity is extremely complex by itself. Including ATI as a small portion of a vast sea of legislation is highly irresponsible on the House’s part. The review of ATI regulations should encompass a bipartisan committee from the House of Representatives and Senate, as well as the DOT and FAA. Congress should also conduct an analysis of the anticompetitive effects and genuine benefits from the currently immune airlines and alliances. The bipartisan committee should try to discover a way to balance liberal and conservative proposals of ATI practices. Under the proposed legislation, ATI would essentially cease to exist. Rather than lift ATI altogether, a revamped policy should, at a minimum, include fair and straightforward regulations that would still allow the airlines to continue to conduct business under the current alliance systems.

IV. FOREIGN OWNERSHIP OF U.S. AIRLINE CARRIERS

Section 801 of H.R. 915 contains language that requires U.S. airline carriers to be under the actual control of U.S. citizens. U.S. citizens must make all decisions with respect to the “marketing, branding, fleet composition, route selection, pricing, and labor relations.” This is problematic because EU Member States could view this policy as contradictory to the fact that the U.S. prefers to have open skies agreements with other countries. Furthermore, disallowing foreign ownership precludes any foreign citizens from occupying upper- and middle-management roles within domestic airlines. This cuts off the possibility of having the best and brightest employees in administrative positions making the best possible decisions and creating effective solutions to problems affecting the airlines. Precluding foreign ownership also prevents domestic carriers from accessing global capital.

72. Id.
A. Further Limitations on Foreign Ownership is Contradictory to a Globalized Market

The EU and U.S. are both interested in creating a more liberalized and globalized market for the airline industry. Implementing further limitations to foreign ownership is contradictory to the creation of a more global airline market. In order for the Open Skies Agreement to flourish and be most effective, the U.S. must be consistent with its aviation policies. Current U.S. policy allows foreign investors to control, at a maximum, twenty-five percent of the equity in an airline, but allows a higher percentage of non-voting equity. If Congress enacted statutory language that implemented further limitations on foreign investment, then it would be implementing policy contradictory to current and future agreements between the U.S. and EU.

Foreign investment is a fundamental aspect of a globalized market. If the U.S. failed to relax its limitations and instead enacted further limitations, the EU could have countered with its own restrictions if it was unsatisfied with the terms of the Agreement. This result could have been a catalyst for a trade war and renouncement of traffic rights. In order for the U.S., EU, and other regions of the world to experience a truly global market, every participating country or region must make exceptions.

An open skies market requires more than granting liberal traffic rights to foreign countries within their own borders – it must relax its foreign ownership restrictions. It is likely that the U.S. will eventually relax restrictions while reducing concerns that domestic airlines will succumb to foreign control. Traditional U.S. airlines would still be considered domestic airlines even if any of them are majority-controlled by foreign investors. The U.S. would still require foreign investors to make decisions for the U.S.-based airline that are consistent with domestic law and policy.

An airline would be considered under the “actual control” of U.S. citizens “[s]o long as U.S. citizens retain the authority to make final decisions on all matters pertaining to the business and the structure of the carrier.” There is no significant difference between a U.S. citizen and a foreign citizen making a final decision affecting the airline’s business model and structure so long as decisions by foreign citizens...

73. Air Transport Agreement, supra note 46.
75. See discussion supra section III regarding the detrimental impact of sunsetting ATI.
76. Oberstar speech, supra note 3, at 10.
are discussed and consistent with current U.S. policy. Additionally, it would be appropriate to validate decisions made by foreign employees. Not only would this validation requirement relax U.S. trepidation of foreign influence and takeover, it also would be policy consistent with achieving a true open skies globalized market.

B. Disallowing Foreign Ownership Limits Airlines From Selecting Quality Employees

U.S. policy that requires domestic airlines to be under the "actual control" of American citizens limits the airlines' capacity to employ individuals at their discretion. This limitation prevents airlines from employing people that they consider to be the greatest asset to airline management and most trustworthy in making pertinent decisions with respect to the business. Disallowing foreign ownership potentially precludes any foreign employees from occupying the upper and middle-management roles of an airline and cuts off the capacity for the airline to have the best and brightest employees making the airlines' most significant decisions.

Representative Oberstar claimed that Section 801 permits airlines to hire any foreign employee, in both middle- and upper-management roles, only if the individuals making the final business decisions are U.S. citizens. This statement does not comprehend that airlines would not put forth the effort to even consider hiring foreign citizens if these individuals would have no authority to make any decisions for the company. This provision essentially limits the airlines from hiring particular individuals. Furthermore, it prevents the airlines access to a wider range of potential management personnel.

Permitting foreign citizens to hold middle- and upper-management roles is also a positive move for domestic airlines. Introducing new business methods and ideas gleaned from foreign influences allows the domestic airlines to evolve and discover new methods in a competitive, and struggling, industry. Allowing foreign citizens to act as decision-making personnel is the perfect first step in being able to profitably evolve.

Allowing foreign citizens to hold these positions would not preclude U.S. citizens from obtaining these positions. Qualified individuals making decisions for billion dollar airline corporations are far few and

77. Finan, supra note 74.

78. Oberstar speech, supra note 3, at 10 (Oberstar stated that "[t]he provision does not prevent a U.S. airline from employing foreign citizens, including middle and upper management, in any area of operations so long as U.S. citizens retain the authority to make final decisions on all matters pertaining to the business and the structure of the carrier.").
far between. This is a very specialized position, and thousands of U.S. citizens are not competing for middle- and upper-management airline positions. Since the applicant pool is by no means teeming, the U.S. government would be doing a disservice to its domestic corporations if it ever implemented further limitations on foreign investment.

C. U.S. Access to Global Capital Through Foreign Establishment Rights

Preventing foreign ownership also prohibits U.S. access to global capital through foreign establishment rights. The current nationality clause restricts foreign companies from establishing subsidiaries in the U.S. air carrier market and taking advantage of American consumer spending. The nationality clause is present in all multilateral agreements between the U.S. and its foreign counterparts. It also rules out the possibility of mergers and acquisitions across borders between separate nations. Economists refer to such a nationality clause as "output-restricting." "It has trapped the air[line] industry inside an impenetrable commercial bubble, unable to provide services . . . with the operation and structural flexibility that is automatically assumed in virtually all other major industries and services." 

The United States makes waiver determinations based on whether a change in the ownership/control composition of a foreign airline affects [U.S.] aviation policy or interests (it typically will not). If the Act makes foreign establishment restrictions even stricter, it would solidify the impossibility of the nationality clause ever being waived by the U.S.

To some, airline alliances are merely "artificial" mergers between the airlines, as the nationality clause incapacitates the airlines from engaging in such a practice. The U.S. could benefit in many ways if it permitted establishment rights to foreign companies and granted the

79. Brian F. Havel, White Paper: A New Approach to Foreign Ownership of National Airlines, at 15 (copy available with author) (Havel states that the nationality clause is still in place "even though many airlines are no longer state-owned, which in the past created concerns that they were kept aloft unfairly by the public treasury and not because of any commercial acumen. Some privatized carriers are actually approaching the point where homeland nationals hold only a bare majority of shares. In this context, the nationality restriction imposes the additional burden of monitoring and turning back any threat of rising foreign dominance, even if the foreign-owned shareholdings are diffuse and deeply fragmented.").
82. Id. at 15.
83. Id.
84. Id. at 13 (citing Allan I. Mendelsohn, The United States, the European Union and the Ownership and Control of Airlines, ISSUES IN AV. L. & POL'Y (CCH), ¶ 25,151, 13, 172 (2003).
85. Id. at 17.
EU access to the gigantic U.S. domestic market. Policy contrary to this is only detrimental for the U.S. Similar to foreign investment, access to global capital could only rejuvenate U.S. and foreign economies. The possibility always exists for the U.S. to garner benefits from profits derived from foreign subsidiaries. It also means more competitors in the marketplace, resulting in cost and feature benefits to the consumer.

The Director of External Affairs and Route Development for Virgin Atlantic Airways, Barry Humphreys, in 2003 asked: "[w]hat is so special about air transport that it requires to be treated so differently from most other businesses?" This was in reference to the restrictions set forth by the U.S. concerning airlines while so many other businesses are set up within U.S. borders and backed by foreign investors. Humphreys provided a strong example that the Virgin Group invests in American retail stores, cellular services, ground transportation, and other business outlets, yet the corporation faces much more scrutiny when it wants to set up an airline on U.S. soil. As the airline industry is treated differently, the U.S. airline industry is restricted from access to any type of global capital that could normally enter the U.S. economy.

D. Solutions

Potential legislation attempts to make foreign ownership of U.S. carriers more stringent. If anything, a practical solution that harmonizes with a more liberal market would be to either increase the foreign ownership percentage, or to scrap the requirement altogether. The DOT and DOJ could still scrutinize airlines just as before, notwithstanding if the airlines are under domestic or foreign control. As one scholar suggests, the scrapping the foreign ownership percentage requirement is highly recommended since, "the benefits [of scrapping the provision] . . . appear to far outweigh the losses."

The U.S. should relax its foreign ownership restrictions in the future. As noted, the U.S. could require all individuals with decision-making power to make decisions for the airlines consistent with U.S.

---

87. Id.
law regardless of citizenship affiliation. All aspects of the airline industry, including security and labor, would be regulated by U.S. law. The airline industry is completely different from what it was even ten years ago. This is an opportunity for the U.S. to cease its normal practices with respect to nationality restrictions and be innovative with its domestic and global airline markets.\textsuperscript{90} As times change, the industry should continue to strive to be more efficiently competitive, and the laws and restrictions should be a motivator to do so, with customers reaping the benefits.

V. Inspections of Foreign Repair Stations by U.S. Officials

The U.S. first promulgated regulations for foreign repair stations in 1949, when domestic airlines began flying international routes.\textsuperscript{91} Section 303 of the Act's proposed legislation requires inspection of the 325 certified foreign repair stations across the EU twice per year by FAA officials.\textsuperscript{92} Foreign repair stations are facilities certified by the FAA to perform various tasks, including maintenance, repairs, overhauls, or alterations on a domestic aircraft and its components.\textsuperscript{93} Section 303 also requires drug and alcohol testing for individuals conducting safety reviews and repairs at such stations.\textsuperscript{94} Further, the repair stations are regulated by the Federal Aviation Regulations,

\textsuperscript{90} Matt Vella, \textit{Lift U.S. Airlines Via Foreign Ownership: Overseas carriers should be permitted to buy U.S. airlines in full. Pro or con?}, \textit{BusinessWeek}, Apr. 28, 2008 (Vella's commentary stated that "[f]oreign ownership of U.S. strategic assets is a debate-worth topic, but our domestic airlines have long ceased to fall into the 'strategic' category. Instead, they have degenerated into an embarrassment of tortured inefficiency. Greater overseas ownership—and the ebullience that relaxing of current rules would bring with it—would give the U.S. airline industry a second wind, full of market-based incentives to innovate.").

\textsuperscript{91} Guy S. Gardner, Assoc. Adm'r for Regulation and Certification, FAA, Statement Before the Senate Comm. on Commerce, Science, and Transp. (May 7, 1998), \textit{available at} http://testimony.ost.dot.gov/test/past testimony/Gardner1.htm. Gardner further stated that the purpose behind repair stations was to provide U.S. carriers and operators of U.S.-registered aircraft with an avenue for obtaining maintenance outside U.S. territory. Any aircraft that required work outside of U.S. territory would receive maintenance at these facilities and this maintenance work required an exemption issued by the FAA.

\textsuperscript{92} FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 303 (2009); see also Cindy Farkus, Assistant Adm'r, Office of Global Strategies, Statement Before the Subcomm. on Transp. Sec. and Infrastructure Protection (Nov. 18, 2009), \textit{available at} http://www.tsa.gov/assets/pdf/111809_repair_stations.pdf (Farkus notes that there are 712 repair stations certificated by the FAA globally, and two-thirds of the repair stations are located in the EU alone); 2009 FAA Reauthorization Act, H.R. 915, 111th Cong., § 303.

\textsuperscript{93} Farkus speech, \textit{supra} note 92. Farkus further explains that components consist of "engines, hydraulics, avionics, safety equipment, airframes, or interiors."

\textsuperscript{94} \textit{Id.}
which provide that these facilities are responsible for the airworthiness of the airplanes they inspect.\textsuperscript{95}

Inspection reciprocity is up for consideration. Without a reciprocity agreement between the EU and U.S., the EU states, by law, must also conduct independent inspections of the repair stations themselves. These inspections are costly, burdensome, and strewn with inefficiencies. However, reciprocity means that Americans could face job losses, and reciprocity could harm small businesses. Representative Oberstar claimed that these concerns of "[a]larmism [are] premature and speculative at best;" however, they are nonetheless true.\textsuperscript{96} This section of the Article discusses this more in depth the reciprocal burden on the EU, potential job loss for Americans, and the burden for the FAA and DOT.

A. Foreign Repair Stations Have a Proven Positive Safety Record

It can be argued that current safety regulations are sufficient considering the low accident rate among U.S. airlines. As a common practice, airlines contract with repair stations both domestically and abroad, and the airlines rely heavily upon these stations to independently conduct safety inspections.\textsuperscript{97} No significant safety issues have surfaced under current regulations; therefore, there is no need to alter current regulations with respect to foreign repair stations.

Some of the incentives for contracting with independent repair stations include the "optimization of flight schedules around customer demand instead of maintenance infrastructure availability" and "exceptional quality at a reduced cost."\textsuperscript{98} The industry's reliance on contracted repair stations has significantly increased since 2001,\textsuperscript{99} and during this time the accident rate decreased exponentially.\textsuperscript{100} Less

\textsuperscript{95} Responsibility for Airworthiness, 14 C.F.R. § 121.363 (2010) (the regulation for the "responsibility for airworthiness" provides: (a) Each certificate holder is primarily responsible for—(1) The airworthiness of its aircraft, including airframes, aircraft engines, propellers, appliances, and parts thereof; and (2) The performance of the maintenance, preventive maintenance, and alteration of its aircraft, including airframes, aircraft engines, propellers, appliances, emergency equipment, and parts thereof, in accordance with its manual and the regulations of this chapter.(b) A certificate holder may make arrangements with another person for the performance of any maintenance, preventive maintenance, or alterations. However, this does not relieve the certificate holder of the responsibility specified in paragraph (a) of this section.).

\textsuperscript{96} Oberstar speech, supra note 3, at 9.


\textsuperscript{98} Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id.
than .5 fatal accidents per one million scheduled departures occurred since deregulation of the airline industry.\textsuperscript{101} Airlines put forth safety regulations as their number one priority, because they fear the loss of business from both loyal and transient customers as a result of safety violations and accidents.

B. \textit{EU Member States Could Demand Reciprocity of Inspecting U.S. Repair Stations, Which Is Impossible for the EU Because It Lacks Sufficient Numbers in Personnel and Financials}

The EU is not hesitant to retaliate against the U.S. when laws and requirements are enacted that are inconsistent with agreements relating to a more liberalized airline market. One retaliatory measure involves demanding the reciprocity of two annual inspections of repair stations located in the U.S. and certified by the European Aviation Safety Agency ("EASA").\textsuperscript{102} The EU already commenced preliminary steps to institute such retaliatory measures. The Director for Energy and Transport, a division of the European Commission ("EC"), initiated the preliminary stages in response to the language set forth in the Reauthorization Act. He stated that "Europe needs to have \textit{urgently} a set of draft measures which can be quickly put in place to ensure that, if the US legislation obliges the US administration to proceed twice yearly with inspections which cannot be delegated to its contractual partners, we will be \textit{reciprocating in full."}\textsuperscript{103} The Agency has every right to enact such mandatory inspections twice per year.\textsuperscript{104} The Director, Daniel Calleja, also requested the financial and human resources information necessary to impose such requirements.\textsuperscript{105}

In a response to Calleja's letter, the Executive Director of the EASA agreed with him that the EU would react in a "reciprocal manner."\textsuperscript{106} The procedure to determine an efficient changeover from U.S. to EU inspectors would include identifying the locations of EASA-approved stations, the number of staff required for the inspections, the number of local offices needed in the U.S., the cost for each,
and the determination of a possible change in regulatory fees for each EASA certified station.\textsuperscript{107} In an August 19, 2009, letter to all EASA-certified repair stations in the U.S., the EASA outlined the new procedures and requested information from each station.\textsuperscript{108} The EASA informed the organizations that new regulations would be put in place if the U.S. enacted additional inspections requirements that were not originally part of the Bilateral Aviation Safety Agreements ("BASA").\textsuperscript{109} The domestic repair stations would be required to reapply for EASA certification and higher certification fees would be put in place based upon the number of employees at the station.\textsuperscript{110}

There is a concern that requirements such as these impose a burden upon the EU due to a lack of personnel available to keep in stride with such standards if the EU were to require reciprocal inspections.\textsuperscript{111} Compared to the 1,237 repair stations located in the U.S.,\textsuperscript{112} the requirement to inspect 325 repair stations in the EU is burdensome.\textsuperscript{113} The burden is highly disproportionate for the EU, because three times the number of repair stations exist in the U.S. as compared to the EU. The U.S. inspection requirements create a high degree of unfairness, essentially prohibiting the EU from enacting similarly stringent requirements if the U.S. ever decided to do so.

C. Americans Face Potential Job Loss, and Requirements Harm Small U.S. Businesses

If the EU implements the reciprocal policy of engaging in biannual inspections of repair stations, many Americans may face potential job loss\textsuperscript{114} in addition to the effects businesses\textsuperscript{115} would face when dealing directly with the repair stations. Americans would face potential job loss in two manners: 1) EASA not granting certification for traditionally certificated repair stations;\textsuperscript{116} and 2) EU personnel conducting inspections instead of U.S. personnel.\textsuperscript{117}

\textsuperscript{107} Id.
\textsuperscript{108} Letter from Wilfried Schulze, EASA Head of Organisations Dept., to U.S. EASA Certified Repair Stations (August 19, 2009) (on file with author).
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Goudou letter, supra note 106.
\textsuperscript{114} Id.
\textsuperscript{115} 155 CONG. REC. H5913-04, H5919 (daily ed. May 11, 2009).
\textsuperscript{116} Id.
\textsuperscript{117} Schulze letter, supra note 108.
If a U.S. repair station does not receive its recertification from the EASA, the station would not have further need for individuals to conduct inspections. The EASA would not certify stations for American inspectors; only for EU inspectors. The U.S. cannot bear any more job losses given the state of the economy. If the U.S. were to enact more costly requirements on foreign service stations, with repair, inspection, and part services, the U.S. would reduce workforce to adjust the loss of business lines. Furthermore, a business would reevaluate its business model to recoup lost revenue. If a repair station does receive certification, EU officials would replace U.S. officials and acquire their responsibility. This is one way the EU would phase out the U.S. workforce in retaliation for policies set forth by the U.S. Whether or not a domestic repair station is granted recertification, Americans would lose their jobs in either event.

Small aviation supply businesses in the U.S. could also be harmed by the new requirements. Similar to service station employees, the need for these businesses would no longer exist, and it would make it difficult for the business to survive. Also, legislation “would prevent a manufacturer from either rebuilding a part under its current authority or repairing a part it manufactured as a subcontractor to a repair station or air carrier.” These small companies are losing business as a result of repair stations becoming essentially unnecessary. In essence, the effect of these inspections create a giant ripple effect for employees and businesses, as it seems everyone and everything will be losing something, whether it is a job, profits, or customers.

D. Requirements Are Extremely Burdensome on and Inefficient for the FAA and EU

Much of the FAA Reauthorization Act is complex. However, provisions involving such items as the foreign repair station inspections fail to make the cut. The requirement that all 325 foreign repair stations be inspected twice per year by FAA personnel is overly burdensome, extremely costly, and inefficient. The reality of these two annual inspections is unlikely and financially detrimental.

Representative Oberstar, in a speech to the International Aviation Club, stated that “[s]urely they can find enough bodies in this 215,000-person Department to do this job.” This implies that the DOT would have to engage in some type of labor shift by reviewing its em-

119. Id.
120. Oberstar speech, supra note 3, at 8.
ployee breakdown in order to determine who in its entire agency would be responsible for making these two inspections per year. From a labor standpoint, it is inefficient for the Department to reallocate its employees to determine the individuals responsible for these inspections.

Thomas Zoeller, President and CEO of the National Air Carrier Association, stated his many concerns with the language for legislation of this type. He notes that certification of each foreign repair station is not indefinite.\textsuperscript{121} Since the certification process would expire every two years, the stations would have to reapply for certification every two years, and each station is responsible for its own costs in the application process.\textsuperscript{122} The U.S. should not be instituting requirements on the EU member states that pertain to efficiency and financials. Procedures enacted that require the twice per year inspection of foreign repair stations are redundant. Furthermore, similar to the ATI re-application process, the repair stations would never have a guarantee of certification in the inspections.

Reciprocity creates increased costs for the EU on top of the recertification process every two years. If the EU were granted its reciprocity wish in return for the FAA inspection requirement, the costs for each U.S.-based repair station would increase from $960 to $32,100 per station per year\textsuperscript{123} for each of the 1,237 certified domestic repair stations.\textsuperscript{124} Zoeller fears that this would mean U.S.-based stations would lose their EU certification due to the lack of EU personnel available to make the inspections, and Americans would be sidelined.\textsuperscript{125} Furthermore, since the EU would have insufficient personnel to conduct the biannual inspections, some stations would no longer be able to inspect EU aircraft, which would result in monetary damage to the station itself with regard to customer airlines that require both U.S. and EU certification.\textsuperscript{126} An increase in costs for the EU and the U.S. would be a step in the wrong direction. An additional reallocation of approximately $31,000 per U.S. station for EU members would be required. Proposed requirements that change the current structure of the certification of both foreign and domestic repair stations are irresponsible, especially when one considers the success of the current system.

\textsuperscript{121} Zoeller statement, supra note 116.
\textsuperscript{122} Id.
\textsuperscript{123} Zoeller statement, supra note 116; see also 155 CONG. REC. H5913-04, H5919 (daily ed. May 11, 2009).
\textsuperscript{124} 155 CONG. REC. H5913-04, H5919 (daily ed. May 11, 2009).
\textsuperscript{125} Zoeller statement, supra note 116.
\textsuperscript{126} 155 CONG. REC. H5913-04, H5919 (daily ed. May 11, 2009).
Proponents of this provision argue that it is a matter of public safety. "Opponents of Section 303 also claim that requiring two FAA inspections per year will cause the EU to retaliate by conducting reciprocal twice-a-year inspections of EASA-certified U.S. stations. But this is a matter of public safety." Further, the obligation for ensuring public safety far outweighs foreign countries' attempts to protect their own economic interests. While no American would contest the priority of maintained and improved safety on airlines in a post-9/11 society, arguing that inspections are at risk is uncalled for considering the safety record. The argument seeks to scare opponents by mixing in an implied threat without any actual public danger.

E. Solutions

The current structure of foreign repair station inspections is sound. An overzealous approach of incorporating more stringent U.S. procedures and involvement is unrealistic and extremely costly. As an alternative, the DOT could audit the safety measures taken by the current inspectors to determine if these foreign inspectors are meeting U.S. safety standards. If the DOT does not conduct an audit, then the DOT can step in and impose a more specific and thorough standard with U.S. officials and inspectors.

Current policy changes have been proposed with respect to the Transportation Security Administration ("TSA") that promote "the security of both domestic and foreign aircraft stations as required by the Vision 100-Century of Aviation Reauthorization Act, P.L. 108-176." The proposed regulations aim to preclude any unauthorized access to repair stations in order to prevent sabotage, destruction, or theft of aircraft or its components. In creating these policy changes, the TSA developed relationships with its foreign counterparts to develop international safety requirements. The FAA should repeat the steps taken by the TSA to create an international relationship and dialogue.

While this relationship may in fact exist, the FAA needs to reevaluate its relationships with the EU and its foreign repair stations. Rather than overhaul foreign repair stations purely with U.S. personnel, the U.S. should implement or continue policy that requires foreign repair stations to correct issues when they are non-compliant.

127. Id.
128. Id.
129. Farkus speech, supra note 93.
130. Id.
131. Id. at 2.
For instance, the TSA would notify the FAA if a foreign repair station failed to correct its deficiencies in order for the FAA to suspend the station's certification.\textsuperscript{132} The same actions should follow for stations that fail to comply with regulations or correct deficiencies that pertain to aircraft maintenance. Disciplinary action should be uniform across all foreign repair stations, whether a security issue, procedural or actual substandard maintenance of aircraft. If a breach in compliance were found, the FAA could suspend a station's certification until open issues are resolved.

VI. WHAT THE FUTURE HOLDS FOR AERO-POLICY

The futures of all proposed Reauthorization Acts are uncertain. It is unlikely the Senate will pass H.R. 915 without changes. President Obama presented his budget for the 2011 fiscal year that omitted some of the current legislation in H.R. 915 that falls outside the scope of these three pervasive issues—sunsetting ATI, foreign ownership of U.S. airlines, and inspecting foreign repair stations.\textsuperscript{133} Both arms of Congress must meet in order to reach a compromise.\textsuperscript{134}

The outcome of these three issues is uncertain. The airline industry, like any other industry, continues to evolve with its counterparts as technology, business practices, and consumer initiatives become more innovative. The key behind successful U.S. regulation is to enact policies that provide an opportunity to innovate. Nationalistic approaches will either lead to a failure in U.S. policies or result in sub-optimal situations for U.S. officials, businesses, consumers, and colleagues abroad. Hopefully at some point in the future these three issues will become moot—essentially terminating the need for debate while providing the airline industry with the most favorable situation possible. An optimal solution to these issues should translate to lower costs, increased features, and benefits for the consumer.

CONCLUSION

The three issues discussed either need not be altered; or if one or more are, policy should allow the airlines to flourish and operate as successful corporations. Although there is always need for focus on improvement and advancement, these three issues should not be al-

\textsuperscript{132} Id.
\textsuperscript{133} For a more exhaustive review of the Obama 2011 fiscal year budget, please visit http://www.whitehouse.gov/omb/budget/Overview/.
tered. As times progress, so will the airline industry and U.S. policy. U.S. policy must evolve with the challenges and be consistent with the best solutions in order for the airline industry to thrive domestically and globally. While no situation will ever leave all parties satisfied, these solutions and the supporting reasoning and explanations are the most beneficial at the present time.