

II. Background

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.¹ Section 204.5(c) specifies that, if such information is being filed in support of an application for new or amended certificate authority, it shall be filed in the docket seeking such authority as part of a public proceeding. For example, a certificated or commuter air carrier must apply for new or amended authority if its existing authority is not adequate for the performance of its planned service (e.g., if a carrier wishes to serve a new city pair route in foreign air transportation, if a carrier holding all-cargo authority wishes to conduct passenger service, or if a carrier currently operating only small aircraft wishes to operate large aircraft). If the substantial change being proposed does not affect the carrier's authority to perform its service under its existing authority, then the information is reported directly to the Department's staff and is reviewed as part of an informal continuing fitness investigation, without a public proceeding. Examples of substantial changes that may not require a carrier to apply for new or amended authority include changes in the carrier's stockholders or management. The purpose of these informal reviews is to decide whether a more formal, public proceeding is warranted, and, thus, whether the carrier's authority should be modified, suspended, or revoked or the carrier should be subject to enforcement action.

During a continuing fitness review, Department staff may examine the carrier's ownership structure and whether the air carrier continues to satisfy all statutory citizenship tests and continues to be under the actual control of U.S. citizens. Under the control standard, we examine all of the facts to

determine whether a foreign interest will have a substantial ability to influence the carrier's activities. See Acquisition of Northwest Airlines by Wings Holdings, Inc., Order 89-9-51, issued September 29, 1989, at 5; Application of Discovery Airways, Inc., Order 89-12-41, issued December 22, 1989, at 10; In the matter of USAir and British Airways, Order 93-3-17, issued March 15, 1993, at 19; and Application of North American Airlines, Inc., Order 89-11-8, issued November 6, 1989, at 6.

On March 4, 2003, the Inspector General of the U.S. Department of Transportation issued a letter to the Chairman of the House Transportation and Infrastructure Committee on the subject of the Department's procedures for making air carrier citizenship determinations in continuing fitness reviews, as well as a docketed proceeding before the Department (In the matter of the citizenship of DHL Airways, Inc., Docket OST-2002-13089). By this notice, we seek comments only on the procedural issues raised in the letter, not on the matter of DHL Airways.² The letter, which contains all of the Inspector General's recommendations on such procedural matters, is available in this docket at <http://dms.dot.gov>.

In the letter, the Inspector General recommended, first, that the Department should publicly address the factors used to determine whether an air carrier is under the "actual control" of U.S. citizens and, second, that the Department should consider whether to modify its procedures for reviewing an air carrier's citizenship status during a continuing fitness review.

With respect to the first recommendation, the Inspector General states, "There are seven factors that frequently recur in past orders of the Department addressing the issue of actual control. These factors, while known to Department and aviation attorneys, have not been delineated in any one public document. Good public policy would suggest that the Department address these and other factors in a document that is widely available." The seven factors cited are: (1) Control via supermajority or disproportionate voting rights; (2) negative control/power to veto; (3) buy-out clauses; (4) equity ownership; (5) significant contracts; (6) credit agreements/debt; and (7) family relationships/business relationships.

² On March 5, 2003, in Docket OST-2002-13089, the Department issued a notice requesting comments on the Inspector General's report as it related to the matter of the citizenship of DHL Airways, Inc.

We seek comments on whether there are other factors or criteria that the Department routinely considers in addition to those listed above. However, it is important to note that, in its decisions, the Department has repeatedly stated that citizenship determinations are necessarily made on a case-by-case basis due to the fact that every case has its own unique set of circumstances. Accordingly, the Department believes that its administrative precedent, published in Civil Aeronautics Board and Department of Transportation Orders, as noted above, shows that no single list of factors and criteria will be inclusive, due to the changing legal and market circumstances faced by carriers when organizing their corporate and financial structures.

With respect to the second recommendation, the Inspector General states that "[t]he informal process used for citizenship reviews can be beneficial when the issues are not complex or contentious by providing for open dialogue between the Department and carriers to resolve matters expeditiously." However, the recommendation we seek comments on is as follows: "For the future, we believe the Department should give consideration to a more transparent and formal process in complex and contentious cases. To that end, the Department's procedures would have to be modified to provide public notice of the initiation and completion of citizenship reviews; create dockets for third-party comments; provide third-party access to confidential documents, similar to those used in the Alliance Carrier review;³ and obtain sworn or certified statements."

III. Comments

In response to the Inspector General's letter, the Department seeks comments on the list of factors frequently used to evaluate whether an air carrier is actually controlled by U.S. citizens and the need for a regulatory change to its procedures for determining the citizenship of U.S. air carriers after a substantial change in operations, ownership, or management. Accordingly, this ANPRM requests comments on the Inspector General's proposals and on alternatives to such proposals.

Specifically, we invite commenters to submit data and information on the recommendations of the Inspector General and on the following issues as

³ The "Alliance Carrier review" refers to the Delta/Northwest/Continental code-share and frequent-flyer program reciprocity proceeding.

¹ Section 204.2(l) defines substantial change in operations, ownership, or management as including but not limited to the following events: "(1) changes in operations from charter to scheduled service, cargo to passenger service, short-haul to long-haul service, or (for a certificated air carrier) small-aircraft to large-aircraft operations; (2) the filing of a petition for reorganization or a plan of reorganization under Chapter 11 of the federal bankruptcy laws; (3) the acquisition by a new shareholder or the accumulation by an existing shareholder of beneficial control of 10 percent or more of the outstanding voting stock in the corporation; and (4) a change in the president, chief executive officer or chief operating officer, and/or a change in at least half of the other key personnel within any 12-month period or since its latest fitness review, whichever is the more recent period."