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and Intergovernmental Relations
Committee on Government Reform and Oversight
House of Representatives

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OSHA

Potential to Reform Regulatory Enforcement Efforts

Cornelia M. Blanchette, Associate Director
Education and Employment Issues
Health, Education, and Human Services Division

GAO/T-HEHS-96-42

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to assist the Subcommittee as it looks for ways to improve operations at the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). Since its creation in 1970, OSHA has made significant progress in achieving its mission of assuring American workers safe and healthful workplaces. However, the ever-accelerating pace of technological change, increasing globalization of markets, and continually evolving employer-employee relations have created new demands and challenges for OSHA. You asked us to focus our remarks on the question: What should OSHA's role be today in ensuring American workers a safe and healthful workplace and how can that role be carried out in a cost-effective manner? More specifically, I would like to comment on how employers and employee representatives view OSHA's mission and its current strategy to protect workers and their perspectives on how OSHA can enhance its enforcement efforts. My discussion is based on work we have done over the years on OSHA's role in the regulation of occupational safety and health. (See app. I.)

In summary, our work suggests that although OSHA has accomplished more than may often be acknowledged during its fairly short history, its current approaches to regulating safety and health are in some cases dated and frustrating for both workers and employers. What is needed, according to employer and employee representatives we spoke with, is a greater service orientation. This means improved communication with business and labor, increased employer and worker accessibility to compliance information, and enhanced cooperation with both business and labor throughout the regulatory process. By developing alternative regulatory strategies that supplement and in some instances substitute for its often confrontational labor-intensive enforcement approach, OSHA may be able to carry out its statutory responsibilities in a more effective manner. To its credit, OSHA has begun to take some positive steps to change its enforcement approach, although it may be too early to assess their effect.

BACKGROUND

The Congress enacted the Occupational Safety and Health Act of 1970 with the sweeping goal of

> "assuring so far as possible every working man and woman in the Nation safe and healthful working conditions."

The act marked the first comprehensive, nationwide regulatory program to prevent workplace injuries and illnesses. It requires employers in the private sector to (1) furnish employment and a place of employment that are free from recognized hazards that cause or are likely to cause serious physical harm or death to workers and (2) comply with occupational safety and health standards.

OSHA and the approved state-operated safety and health programs[1] set mandatory safety and health standards. Through its regional, area, and district offices, OSHA inspects private sector worksites, proposes penalties and prescribes abatement deadlines for employers found violating the standards or failing to meet their general duty to provide a safe and healthful workplace. Several other agencies assist OSHA in conducting its mission. The Bureau of Labor Statistics facilitates OSHA's enforcement by providing the agency with occupational injury and illness data by specific industry for the targeting of inspections. The National Institute of Occupational Safety and Health, within the Department of Health and Human Services, is responsible for conducting research to assist OSHA's promulgation of new safety and health workplace standards. Finally, the independent Occupational Safety and Health Review Commission provides an opportunity for review for those employers who wish to appeal the penalty assessments proposed by OSHA.

In fiscal year 1995, the Congress appropriated about $313 million to OSHA, which maintained a staff of 2,323, including about 1,900 field personnel in 107 offices. In total, federal OSHA and the state-operated safety and health programs had approximately 2,000 compliance officers to enforce standards in well over 6 million workplaces, employing about 97 million workers.

EMPLOYERS AND EMPLOYEES SUPPORT OSHA'S MISSION

Last year we released a report that collected information about actual employer and employee experiences within the existing framework of federal workplace regulation, including occupational safety and health standards.[2] To obtain this information, we used a case-study approach and interviewed a range of employers and employee representatives of 36 large and small businesses and employee organizations in over 20 industries with headquarters in 16 states and the District of Columbia. Six of the employers had fewer than 75 workers, 12 had more than 500 workers. Nine of the businesses had multistate operations and 9 had some workers represented by a union.

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[1]The act permits states, with OSHA's approval, to operate their own safety and health programs. The performance of the state programs is to be "at least as effective" as OSHA, and OSHA monitors the state programs to assure that they perform at that level. OSHA provides up to 50 percent of program costs to state programs. In fiscal year 1995, there were 23 state-operated programs for private sector employers and 2 additional states had state-operated plans covering only state and local government employees.

[2]Workplace Regulation: Information on Selected Employer and Union Experiences (GAO/HEHS-94-138, June 30, 1994).

We found that both employer and employee representatives generally supported OSHA's mission as well as the general regulatory effort to implement that mission. For example, an official from a large retail company had a typical response, saying

> "[The Occupational Safety and Health Act] is a very important statute and has really contributed to the protection of employees in the workplace . . .. The [act] has really forced many corporations to change their health and safety practices in the workplace."

A representative from a large electronics manufacturer echoed this sentiment, saying he was

> ". . . absolutely convinced that OSHA's rules have reduced workplace injuries and illnesses . . .. For the company, OSHA provides a baseline standard with which the firm can judge its own program."

Union officials also supported OSHA saying that it provides a general baseline of protection for workers and supplements the protection that union members receive from collective bargaining contracts.

Although we have conducted only limited formal assessments of OSHA's effectiveness, in at least one area, employers have reported positive effects from OSHA's regulation. In our nationally representative study[3] of employer perspectives on OSHA's Hazard Communications Standard (HCS),[4] one of the most far reaching and controversial of OSHA's regulatory efforts, 29 percent of the complying employers told us that they had replaced workplace chemicals with safer, less hazardous alternatives because of information they received under the regulation and 17 percent reported fewer workplace injuries because of the standard's requirements. This suggests a real improvement in the protection afforded to American workers.

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[3]Occupational Safety and Health: OSHA Action Needed to Improve Compliance with Hazard Communication Standard (GAO/HRD-92-8, Nov. 26, 1991) and Occupational Safety and Health: Employer Experiences in Complying With the Hazard Communication Standard (GAO/HRD-92-63BR, May 8, 1992).

[4]HCS, issued by OSHA in 1983 to cover only manufacturing firms and extended in 1987 to all industries, requires the identification of workplace hazardous chemicals and the communication of information--typically through labels or material safety data sheets (MSDSs)--on these hazards to employees. It requires, among other things, that employers maintain a file of MSDSs on the hazardous chemicals they use in their business and to train their employees in the safe handling and use of hazardous chemicals.

EMPLOYERS AND UNIONS DISSATISFIED WITH OSHA'S CURRENT STRATEGY FOR ENSURING WORKERS' PROTECTION

Despite support for OSHA's mission and recognition of its contributions in protecting workers, the agency's enforcement strategies do not always appear well-suited to the demands and challenges of today's work world. In our study of workplace regulation,[5] we found that although firms of all sizes supported the need for the regulation of occupational safety and health, employers and workers were more concerned with how that regulation was carried out than with the goals of the regulations themselves. For example, employers we interviewed generally believed that

-- communication between OSHA and firms and unions is poor and OSHA does not facilitate appropriate access to compliance information;

-- OSHA relies on an adversarial approach rather than a more collaborative strategy to enforce safety and health regulations; and

-- standards enforcement is unfair and inconsistent, in part due to staffs' lack of knowledge of regulations and how those regulations apply to specific business or industry operations.

Some employer and union representatives whom we interviewed reported difficulty getting information from federal OSHA or the state-operated OSHA programs and believed that they sometimes received inaccurate or incomplete information. For example, an official from a large oil refining company had a problem getting information from OSHA and said

> "maintaining the injury and illness records required by OSHA is largely not a problem. The difficult problem is determining which illnesses are OSHA-recordable illnesses . . . . We feel that we cannot get a correct answer from OSHA on this: we can call three levels there and get three different interpretations."[6]

Another company, a medium-sized fruit packing firm, reported that it made a number of informational inquiries to OSHA without ever receiving a response. Unions also described difficulties obtaining information. Officials from a local union representing

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[5]Workplace Regulation (GAO/HEHS-94-138, June 30, 1994).

[6]OSHA does make information available to the public, and several years ago the Department of Labor began publishing a handbook on employer compliance requirements for OSHA and other statutes it enforces.

hotel and restaurant workers claimed that they had difficulty obtaining information from the state OSHA regarding the inspection records of particular employers, even though they are public records.

Our past work on HCS[7] also provides evidence concerning how the lack of information available to employers affects compliance efforts with OSHA requirements. We found that almost 52 percent of employers of all sizes in the construction, manufacturing, and selected service industries reported that they were out of compliance with at least one HCS requirement. However, about 26 percent of all employers had little or no awareness of the regulation and, further, over one-half of those employers who said that they were aware of HCS were not knowledgeable about key requirements of the regulation.

Many employers whom we recently interviewed also believe that OSHA's attitude concerning its enforcement efforts contributes to an adversarial environment and discourages more constructive responses to safety and health issues. For example, an official of a large hospital said,

> "OSHA has conducted several inspections at our facility, which we believe were done on a 'gotcha' approach . . .. The hospital is not allowed to interpret regulations and standards for the situations at hand. The standards are enforced too rigidly."

Employers also believe that OSHA's enforcement is inconsistent across regions and that inspectors often appear to have inadequate training or insufficient knowledge of the work processes of a particular firm or industry. This was illustrated by the comments from an official from a large multistate manufacturer

> "The interpretation of standards by inspectors will vary from region to region; some are stricter than others. Because there is no single strict OSHA interpretation, inspectors can interpret the standards differently from state to state. We have been cited for a violation in one state that was acceptable in another state."[8]

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[7]Occupational Safety and Health (GAO/HRD-92-8, Nov. 26, 1991) and Occupational Safety and Health (GAO/HRD-92-63BR, May 8, 1992).

[8]Some of this inconsistency may be due to variations in practices across the state-operated programs as well as across different federal OSHA offices.

OPPORTUNITIES TO INCREASE OSHA'S SERVICE ORIENTATION MAY EXIST

Despite past successes, there is a growing concern that OSHA must take a critical look at the way it conducts its business to find more effective means of assuring workers a safe and healthful workplace. Consistent with this perspective, many employer and union representatives we interviewed expressed a belief in the need for OSHA to adopt a greater service orientation. For example, they suggested that OSHA make a greater effort to improve communication and provide more and better compliance information to both employers and to workers. Similar conclusions were reached in a recent study looking at ways to improve workplace practices and views of workers on workplace issues.[9]

Many employer and union representatives that we interviewed suggested that OSHA could foster greater compliance by increasing the amount of technical assistance it provides and better educating workers and employers about their rights and responsibilities. Some of the suggestions they made include (1) setting up toll-free hot-lines and computer bulletin boards to help employers and workers get information, (2) establishing information offices with staff who would answer questions, (3) providing more education and outreach services, and (4) publishing newsletters on regulatory developments.

Some employers also suggested expanding OSHA's consultation assistance and expanding outside attendance at OSHA's training institute.[10] An official from an employee leasing company raved

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[9]In March 1993, the President asked the Secretaries of Labor and Commerce to form a Commission on the Future of Worker-Management Relations to explore, for example, the extent to which the present legal framework and practices of collective bargaining could be enhanced to improve productivity and reduce conflict in the workplace. The Commission issued its final report in December 1994: Report and Recommendations: Commission on the Future of Worker-Management Relations, U.S. Departments of Labor and Commerce.

[10]OSHA's consultation assistance is a free service available to employers who need help in establishing and maintaining a safe and healthful workplace. Assistance includes identifying and correcting hazards; appraising work practices; and developing and implementing workplace safety and health programs, training, and education. No penalties or citations are issued when consultants identify hazards and the employer's identity is not reported to OSHA's inspection staff. OSHA also operates a training institute where it provides training, primarily to agency staff, on various regulatory and inspection issues.

". . . The best thing about OSHA is its consultative service; it's one of the last of the good deals. The consultants are former OSHA compliance officers, so they are very knowledgeable about OSHA regulations."

An official from a large oil refinery said

"OSHA has allowed our staff to attend its training institute. This has been a very positive experience . . .. The price is reasonable, and the courses are excellent . . .. This is a good opportunity for industry representatives to discuss issues with OSHA's compliance officers in a non-adversarial way."

While some of these suggestions may be limited by existing budgetary constraints, they merit review and consideration.

Another existing OSHA activity that appears to have enjoyed employers' support is the Voluntary Protection Program (VPP). Employers we interviewed supported an expansion of this program, which is designed to recognize the success of employers who have integrated safety and health programs into their workplaces; who motivate other employers to do the same; and who promote cooperation among employers, employees, and OSHA. Under VPP, in return for management developing a comprehensive safety and health program and demonstrating a serious commitment to safety and health, participants are not subject to programmed--targeted--OSHA inspections.

The participation of employers in VPP is completely voluntary. At this time, the program remains comparatively small. As of October 6, 1995, about 200 worksites, including both union and unorganized facilities, employing about 142,000 employees in about 30 states were enrolled in VPP. Most of these participating worksites are in manufacturing industries, especially chemicals, petroleum, and high-hazard industries like paper manufacturing. OSHA has stated that in cooperation with the employers participating in the program, it is currently exploring ways to improve VPP's effectiveness.

Some employers and union officials we talked to also identified additional staffing resources--more and better trained staff--as a means to assure the adequacy and timeliness of OSHA's enforcement efforts. However, given current budgetary realities and its relatively large number of employers--currently OSHA has one compliance officer for about every 3,000 employers--there are limitations to this approach. In the future, faced with a decreasing workforce, OSHA may want to better focus its enforcement efforts to worksites that are more hazardous in nature. In

addition, based on our past work,[11] we believe that other regulatory approaches that involve placing greater responsibility on workers and individual employers to maintain a safe and healthful workplace show great promise in enabling OSHA to fulfill its statutory mission more effectively. For example, in our review of employer worksite safety and health programs,[12] we determined that the potential reduction in injuries and illness could likely justify the additional burden associated with their implementation, at least for high-risk employers. Although we did not review their effectiveness, we note that four states require or encourage the formation of joint labor-management health and safety committees and several Canadian provinces rely on such committees as a critical component in protecting workplace safety and health.[13] OSHA has issued voluntary guidelines on the formation of worksite programs and one of the components includes structuring employee participation such as labor management committees. As for expanding the role of employees, we identified increasing worker participation in OSHA's inspection process as one option to strengthen the role of workers in the regulatory process.[14]

OSHA, in some recent actions, has begun addressing the service-orientation and cooperative issues we have raised. For example, in 1993, OSHA initiated a pilot program in Maine where OSHA invited the state's 200 companies with the highest number of injuries to conduct self-inspections to identify workplace hazards and to develop worksite safety and health action plans. In return for such participation, OSHA would remove them from its primary targeted inspection list. About 90 percent of these firms agreed

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[11]For other options to improve OSHA's enforcement, standard setting, and education and outreach efforts see Occupational Safety and Health: Options for Improving Safety and Health in the Workplace (GAO/HRD-90-66BR, Aug. 24, 1990).

[12]Worksite safety and health programs are essentially management systems for overseeing and controlling safety and health in the workplace. Components of such programs can include development of a written plan addressing workplace hazards and the means to control these hazards, worker training and education on health and safety, and employee involvement in the development and implementation of the program. OSHA issued voluntary guidelines for such programs in 1989 but has no regulation requiring the formation of such programs. See Occupational Safety and Health: Worksite Safety and Health Programs Show Promise (GAO/HRD-92-68, May 19, 1992).

[13]Occupational Safety and Health: Differences Between Programs in the United States and Canada (GAO/HRD-94-15FS, Dec. 6, 1993).

[14]See Occupational Safety and Health (GAO/HRD-90-66BR, Aug. 24, 1990).

to participate in the program, and over the 18-month pilot period they detected over 95,000 hazards--three times the number detected during the previous 8 years of inspections. OSHA has also conducted a pilot project aimed at the expeditious abatement of workplace hazards--abatement before an inspection's closing conference--in return for a reduction in penalties.[16] We have not assessed either of these initiatives but they appear consistent with the goal of improving the agency's service orientation and fostering a more collaborative inspection process.

OSHA has also taken steps to change its focus on penalties mind-set. For example, the agency will now waive penalties for any employer with up to 250 employees who is found to have no significant (willful, repeated, or serious) violations of health and safety regulations. In addition, employers who already have implemented a worksite safety and health program will qualify for another program that would allow a reduction in penalties for significant violations.

CONCLUSION

Based on our past work, there is a general consensus among both the employer and union representatives that we spoke to that OSHA continues to play an important role in providing for the safety and health of American workers. Although OSHA appears to be taking some steps in the right direction, it is too early to fully assess the impact of the agency's actions. In the interim, OSHA should be encouraged to continue its experimentation with new regulatory strategies that improve its service orientation and foster a less combative regulatory climate, while not jeopardizing the safety and health of America's workers.

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Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions you or other Members of the Subcommittee may have.

For more information on this testimony, please call Charlie Jeszeck at (202) 512-7036 or Linda Stokes at 512-7040.

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[16]On the issue of hazard abatement, we have urged OSHA to revise its procedures to verify the abatement of workplace hazards by requiring better evidence from employers that they have taken action. OSHA has taken some action in this area, issuing a proposed regulation in April 1994, and expects to issue a final regulation in December 1995. See Occupational Safety and Health (GAO/HRD-91-35, May 8, 1991), and Occupational Safety and Health (GAO/HRD-90-66BR, Aug. 24, 1990).

RELATED GAO PRODUCTS

Department of Labor: Rethinking the Federal Role in Worker Protection and Workforce Development (GAO/T-HEHS-95-125, Apr. 4, 1995).

Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops (GAO/HEHS-95-20, Nov. 2, 1994).

Workplace Regulation: Information on Selected Employer and Union Experiences (GAO/HEHS-94-138, June 30, 1994).

Occupational Safety and Health: Changes Needed in the Combined Federal-State Approach (GAO/HEHS-94-10, Feb. 28, 1994).

Health and Safety: DOE's Implementation of a Comprehensive Health Surveillance Program Is Slow (GAO/RCED-94-47, Dec. 16, 1993).

Occupational Safety and Health: Differences Between Programs in the United States and Canada (GAO/HRD-94-15FS, Dec. 6, 1993).

U.S.-Mexico Trade: The Work Environment at Eight U.S.-Owned Maquiladora Auto Parts Plants (GAO/GGD-94-22, Nov. 1, 1993).

Mine Safety and Health: Tampering Scandal Led to Improved Sampling Devices (GAO/HRD-93-63, Feb. 25, 1993).

Risk-Risk Analysis: OMB's Review of a Proposed OSHA Rule (GAO/PEMD-92-33, July 2, 1992).

Hazardous Waste: A North Carolina Incinerator's Noncompliance With EPA and OSHA Requirements (GAO/RCED-92-78, June 30, 1992).

Occupational Safety and Health: Worksite Safety and Health Programs Show Promise (GAO/HRD-92-68, May 19, 1992).

Occupational Safety and Health: Options to Improve Hazard-Abatement Procedures in the Workplace (GAO/HRD-92-105, May 12, 1992).

Occupational Safety and Health: Employers' Experiences in Complying With the Hazard Communication Standard (GAO/HRD-92-63BR, May 8, 1992).

Occupational Safety and Health: Penalties for Violations Are Well Below Maximum Allowable Penalties (GAO/HRD-92-48, Apr. 6, 1992).

Occupational Safety and Health: OSHA Action Needed to Improve Compliance With Hazard Communication Standard (GAO/HRD-92-8, Nov. 26, 1991).

Occupational Safety and Health: Inspectors' Opinions on Improving OSHA Effectiveness (GAO/HRD-91-9FS, Nov. 14, 1990).

Occupational Safety and Health: Options for Improving Safety and Health in the Workplace (GAO/HRD-90-66BR, Aug. 24, 1990).

Occupational Safety and Health: California's Resumption of Enforcement Responsibility in the Private Sector (GAO/HRD-89-82, Apr. 17, 1989).

Occupational Safety and Health: Assuring Accuracy in Employer Injury and Illness Records (GAO/HRD-89-23, Dec. 30, 1988).

Whistleblowers: Management of the Program to Protect Trucking Company Employees Against Reprisal (GAO/GGD-88-123, Sept. 22, 1988).

OSHA's Resumption of Private Sector Enforcement Activities in California (GAO/T-HRD-88-19, June 20, 1988).

OSHA's Monitoring and Evaluation of State Programs (GAO/T-HRD-88-13, Apr. 20, 1988).

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Testimony

Before the Subcommittee on Aviation,
Committee on Commerce, Science, and Transportation
U.S. Senate

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INTERNATIONAL AVIATION

DOT's Efforts to Increase U.S. Airlines' Access to International Markets

Statement of John H. Anderson, Jr., Director,
Transportation and Telecommunications Issues,
Resources, Community, and Economic
Development Division

G A O
75 years
1921 - 1996

GAO/T-RCED-96-32

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to testify on the Department of Transportation's (DOT) efforts to increase U.S. airlines' access to the United Kingdom. Of the approximately 95 million passengers that flew on scheduled service between the United States and the rest of the world in 1995, nearly 11.5 million flew to or from the United Kingdom, making it the largest U.S. aviation trading partner overseas. Because of the size of this market and the fact that the United Kingdom's location makes it a key gateway to the European continent, Africa, and the Middle East, U.S. airlines strongly desire increased access to London's Heathrow Airport. In recent years, however, DOT has had only limited success in negotiating increased opportunities for U.S. airlines to this airport.

Over the past few years, we have issued several reports that examined international aviation issues and have testified before this and other Committees on our findings.[1] Drawing from this body of work, our testimony discusses (1) how limited U.S. leverage affects current negotiations with the United Kingdom and (2) the importance of data and economic analysis in strengthening DOT's negotiating position and potential options that may improve the negotiating process. In summary,

- While DOT has been successful in negotiating more liberal aviation agreements with a number of other countries, it has achieved only limited success in securing increased access for U.S. airlines to the most desirable airport overseas, London's Heathrow Airport. This is largely because the United Kingdom's major airline—British Airways—has already obtained in previous negotiations extensive access to the U.S. market. The additional rights that British Airways does seek, such as the right to carry U.S. government traffic, are controversial.[2] DOT must assess the tradeoffs of increased opportunities for U.S. airlines—whose share of the U.S.-U.K. market has declined from 50 percent in 1992 to under 42 percent in 1995 (see appendix I)—and the potential negative effects on other airlines and their employees from offering British carriers more opportunities in the U.S. market. These tradeoffs and the competing interests of U.S.

[1]International Aviation: Airline Alliances Produce Benefits, But Effect on Competition Is Uncertain (GAO/RCED-95-99, Apr. 6, 1995), International Aviation: DOT Needs More Information to Address U.S. Airlines' Problems in Doing-Business Abroad (GAO/RCED-95-24, Nov. 29, 1994), International Aviation: Measures by European Community Could Limit U.S. Airlines' Ability to Compete Abroad (GAO/RCED-93-64, Apr. 26, 1993), and Airline Competition: Impact of Changing Foreign Investment and Control Limits on U.S. Airlines (GAO/RCED-93-7, Dec. 9, 1992).

[2]Federal law requires that U.S. government personnel travel on U.S. airlines when on official business, when reasonably available.

airlines—each of which strongly desires access to London's Heathrow Airport—made it very difficult for DOT to achieve progress with the British in liberalizing the current accord during recent talks. As a result, those talks concluded in mid-October of last year without an agreement.

- A consistent theme of our work over the past several years has been that DOT has not had sufficient data or done sufficient economic analysis to value the rights that are on the negotiating table and to evaluate the tradeoffs, such as granting airline alliances immunity from U.S. antitrust laws in exchange for increased opportunities overseas for U.S. carriers. We have emphasized the need for DOT to improve its economic analysis and have made recommendations aimed at addressing shortcomings in the agency's traffic data. DOT has agreed with our recommendations and is in the process of implementing them. The failure of the recent round of negotiations with the United Kingdom and the corresponding lack of consensus among U.S. airlines as to what constitutes an acceptable agreement indicate that improved economic analysis and better data, while positive steps, by themselves may not be enough. Additional actions, such as having the U.S. Trade Representative assist DOT, as some have suggested, may be needed to improve the negotiating process and better position DOT to secure deals that benefit consumers and increase the overseas opportunities for all U.S. airlines.

Background

In the international sector, the routes that airlines can fly, the frequency of their flights, and the fares they can charge are governed by the 72 bilateral agreements between the United States and other countries. As we have highlighted in previous testimonies, many of these agreements, including the accord with the United Kingdom, are very restrictive—creating a competitive environment very unlike that which exists in the deregulated U.S. domestic market.[3] Moreover, the importance of DOT's efforts to reduce or eliminate these restrictions has increased because the importance of international service to U.S. airlines has increased. Overall, international operations by U.S. airlines have grown steadily and in 1995 constituted 27 percent of U.S. airlines' traffic—compared to 21 percent in 1980—and are expected to increase to 30 percent by 2007.

DOT's Office of the Assistant Secretary for Aviation and International Affairs, with assistance from the State Department, is responsible for negotiating bilateral agreements and awarding U.S. airlines the right to offer services provided for in those agreements. Overall, DOT has achieved

[3]International Aviation: Better Data on Code-Sharing Needed by DOT for Monitoring and Decisionmaking (GAO/T-RCED-95-170, May 24, 1995) and International Aviation: New Competitive Conditions Require Changes in DOT Strategy (GAO/T-RCED-94-194, May 4, 1994).

mixed results in its negotiating efforts with other countries. It has recently reached agreements that substantially reduce or eliminate bilateral restrictions with more than 20 nations, including many of the smaller European countries in the European Union. In addition, in February 1996, it reached an agreement with Germany that, if fully implemented, would lead to the elimination of all restrictions in the U.S.-Germany market. However, several major aviation trading partners, including the United Kingdom and Japan, have maintained—and in some cases added—extensive restrictions on U.S. airlines' access to and beyond their markets. In addition, France renounced its bilateral agreement with the United States more than 3 years ago and talks to reestablish the relationship have not yet been scheduled.

The current U.S.-U.K. accord was signed in 1977 after the British renounced the prior agreement. Since that time, DOT has expressed increasing dissatisfaction with the accord and attempted to negotiate increased access for U.S. airlines to and beyond Heathrow—the world's largest airport in terms of international traffic. Only two U.S. airlines—currently American and United—are allowed to serve Heathrow and that service is restricted to certain designated U.S. cities (see appendix II). In part, this has led to a substantial market share advantage at Heathrow for British Airways and the United Kingdom's other major airline, Virgin Atlantic (see appendix III).

In part because only American and United can serve Heathrow and can do so only from a limited number of U.S. cities, Heathrow accounted for only 2.6 million of the 4.8 million passengers travelling on scheduled service on U.S. airlines between the United States and the United Kingdom in 1995. Continental, Delta, Northwest, and TWA are forced to use London's Gatwick Airport, which is less desirable because it is farther from downtown London and offers fewer connection possibilities to the European continent, Africa, and the Middle East than Heathrow (appendix IV lists the current scheduled service provided by U.S. and British airlines to Heathrow and Gatwick). Finally, the rights of U.S. cargo carriers to fly between the United Kingdom and the fast-growing Asia-Pacific region are severely restricted under the agreement.

Little Leverage and a Variety of Controversial Issues Complicate Negotiations With the United Kingdom

DOT's success in liberalizing the current accord with the United Kingdom has been very limited, largely because it has little leverage. The United Kingdom's major airline—British Airways—has already obtained extensive access to the U.S. market through its code-sharing alliance with USAir and thus already has, according to British Airways representatives, most of what it wants.[4] Moreover, additional rights that the British do seek, such as the eventual relaxing of the statutory limit on foreign ownership and control of U.S. airlines[5] and the right to bid on U.S. government travel contracts, generally involve departures from traditional U.S. policy and the costs of granting such rights must be balanced against any benefits that might accrue from increased access to Heathrow.[6]

U.S. Leverage Limited

As a result of DOT's desire to bolster cash-strapped TWA and Pan Am, it negotiated the 1991 "Heathrow Succession" agreement which allowed those airlines to sell their Heathrow routes to American and United. In exchange, the United Kingdom obtained broad access to the domestic U.S. market by getting the right to code-share with a U.S. airline. As we reported last year, British Airways' exercising of those rights through its alliance with USAir has resulted in substantial traffic gains for British Airways, largely at the expense of U.S. airlines. In part because of the success of that alliance, the British share of the overall U.S.-U.K. market has increased from 50 percent in 1992 to more than 58 percent in 1995. Not only does British Airways have a greater share of the market than every U.S. airline combined, but Virgin Atlantic has a larger share than any of the 6 U.S. airlines in the market except American. In light of this success and the extensive access the British have already secured, DOT has little leverage with which to secure additional Heathrow opportunities for U.S. carriers. Finally, DOT must negotiate with the British knowing that any action it considers taking, such as renouncing the current accord, will set a precedent and could be used by the Japanese in their efforts to improve their carriers' 36 percent share of the U.S.-Japanese market.

[4]Code-sharing is the practice whereby one airline lists another airline's flights as its own in computer reservation systems, which are used by travel agents to book flights.

[5]Federal law limits foreign investment in U.S. airlines to less than 25 percent of the voting interest in the company and requires that the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens.

[6]Each fiscal year, the General Services Administration awards airlines, on a city-pair basis, the right to carry U.S. government workers. For each city-pair, U.S. airlines can submit an offer for the right to be the contract carrier. Under certain circumstances, foreign airlines may also carry U.S. government workers.

In attempts to gain increased access for U.S. airlines to the United Kingdom, and Heathrow in particular, DOT has adopted an incremental approach. In June 1995, DOT gave British Airways (1) additional flights to and from Philadelphia, (2) approval to code-share to 72 U.S. cities in addition to the 68 cities for which it already had approval, and (3) the right to make an offer through USAir to carry U.S. government personnel between the United Kingdom and Philadelphia, San Francisco, Tampa, and Washington/Baltimore.[7] In exchange, the United States received (1) access to Heathrow from Chicago O'Hare for United and (2) expanded rights to code-share on other airlines' flights between Heathrow and Europe, the Middle East, and Africa. DOT and the United Kingdom also agreed to follow these so-called "phase one" talks with a second round of talks, which DOT hoped would lead to additional Heathrow access for U.S. carriers. In mid-October, however, the "phase two" talks ended with DOT—citing the numerous conditions and restrictions involved—rejecting a British offer that would have permitted, among other things, access to Heathrow (1) immediately for one additional U.S. airline and (2) in 1997 for another U.S. airline.

Our discussions with DOT, State Department, and British government officials as well as representatives from each of the U.S. airlines involved and British Airways indicate that the reasons for the failure of the phase two talks are rooted in the lack of U.S. leverage and the deeply divided and competing interests of U.S. airlines. Outside of additional rights to bid for U.S. government travel, there is relatively little that British Airways desires in the short-term. Originally, British Airways wanted to increase its investment in USAir and eventually control that airline.[8] Because of the recent financial problems of USAir, however, British Airways has placed its plans on hold. In addition, the announcement by USAir in early October that it was discussing a possible buyout with American and United injected considerable uncertainty about the future of British Airways' investment in USAir.

The competing interests of U.S. airlines exacerbate this lack of leverage. Because international traffic is relatively profitable, the competition among the carriers can grow fierce. Continental, Delta, Northwest, and TWA seek access to Heathrow, while American and United seek to increase the number of cities from which they can serve that airport. During the phase two talks, TWA and Delta adamantly opposed the British

[7]Technically, USAir must submit the bid on behalf of its code-sharing partner, British Airways.

[8]Currently, British Airways holds a 24.6 percent stake in USAir and has three members on the 16-person board of directors at USAir.

proposal, while American, Continental, Northwest, and United supported it. Airline representatives we interviewed stated that they believe that DOT rejected the British proposal mainly because of this split.

Foreign Ownership and Control of U.S. Airlines

In December 1992, we reported that relaxing the statutory limits on foreign investment and control could give U.S. airlines, particularly those in financial difficulty, greater access to needed capital, thereby enhancing their domestic competitive position. We also noted that there may be opportunities, particularly with regard to the United Kingdom, for eliminating bilateral restrictions in exchange for relaxing restrictions on foreign investment in U.S. airlines. Such an exchange, however, could involve national security and employment concerns. For example, U.S. airlines, through their voluntary participation in the Civil Reserve Air Fleet (CRAF) program, provide the Department of Defense with supplemental airlift capacity in emergencies. The Defense Department is concerned that foreign investors might discourage continued participation in CRAF. In addition, we reported that increased foreign investment could put some U.S. jobs—particularly those of pilots and crew on international routes—at risk.

These issues, and the fact that changes to the current restrictions require congressional action, complicate DOT's ability to use relaxation of foreign investment restrictions as a bargaining chip in bilateral talks. Furthermore, British Airways' desire to seek such changes hinges on USAir's uncertain long-term competitive position. As a result, British Airways is not pressing its government for a deal at this time, and thus the amount of Heathrow access U.S. negotiators might achieve is likely to be limited for the time being.

Fly America Act

Federal law, commonly referred to as the "Fly America Act," requires that U.S. government agencies use air transportation provided by U.S. airlines when their service is available.[9] However, foreign airlines can carry government traffic in a limited number of circumstances. Among other things, the foreign carrier's U.S. code-sharing partner must submit a bid to carry the traffic, and both carriers must have authority to serve that city-pair route. The Secretary of Transportation can also negotiate rights for foreign airlines to carry this traffic. The British have pursued increased access to U.S. government traffic. During the phase two talks, for example, securing the right to bid through USAir for such traffic from additional

[9] 49 U.S.C. section 40118.

U.S. cities, or if possible bid directly, was the quid pro quo, according to British Civil Aviation Authority officials, for DOT's attempts to obtain access to (1) Heathrow for Continental from Newark, (2) Heathrow or Gatwick for TWA from New York, and (3) Heathrow for American from Dallas.

In 1991, we issued a legal decision which held that, under certain conditions, service provided by a U.S. airline using designated space (i.e., a block of seats) on aircraft owned and operated by a foreign airline under a code-share agreement complies with the Fly America Act requirements.[10] Under such an agreement, both the U.S. and foreign carrier must have the authority to serve the route, and the agreement must be approved by DOT as a method by which the U.S. carrier may provide its service over the route in its own name. U.S. airlines offering their services under such code-sharing arrangements have been permitted to bid on city-pair contracts for government travel. Because the particular code-share arrangement that we considered in the 1991 decision may no longer be representative of the various kinds of code-share arrangements that exist today, we are currently reassessing our decision.

Using access to Fly America traffic as a bargaining chip, as DOT has done in its recent negotiations, involves important tradeoffs. On the one hand, allowing more airlines to bid for this traffic injects additional competition for that service, leads to lower government contract fares, and saves taxpayer dollars. For example, as a result of the code-sharing alliance between United and Lufthansa, the government contract price for travel between Atlanta and Frankfurt has been reduced substantially. For fiscal year 1994, Delta was the only bidder for nonstop service and won the contract at a one-way fare of $492. For fiscal year 1995, United won the contract with a one-way fare of $420. The traffic was carried via nonstop service by United's partner Lufthansa. For fiscal year 1996, Delta reclaimed that service by underbidding United with a fare of $405. As a result, the government fare decreased in that market by 18 percent, while overall international government contract fares went up by 4 percent between fiscal years 1994 and 1996. Based on government traffic figures provided by the General Services Administration, we estimate that the additional competition in this one city pair will have saved taxpayers about $440,000 by the end of fiscal year 1996.

Moreover, as a result of the mini-deal last June with the British, government contract fares have fallen sharply in the city pair markets that

[10]Fly America Act - Code Sharing, 70 Comp. Gen. 713 (1991).

British Airways was given the right to bid on through USAir (see appendix V). Anticipating competition from the USAir/British Airways alliance, United significantly lowered its bid in each city pair and thereby won the right to be the contract carrier for each in fiscal year 1996. In contrast to the sharp fare declines in these city pairs, government contract fares overall between fiscal years 1995 and 1996 fell 0.5 percent.

Despite these benefits, several U.S. airlines have objected strongly to DOT's use of Fly America in bilateral negotiations. These airlines hold that U.S. tax dollars should not be spent on transporting travellers on official government business on foreign carriers when a U.S. airline serves the route. To do so, they believe, would adversely affect employment as well as U.S. airlines' financial bottom-lines. Concerns have also been raised as to the fairness of allowing foreign airlines access to Fly America traffic given that U.S. airlines are required to participate in the CRAF program in order to qualify as a bidder for Fly America traffic.

Antitrust Immunity for Other Airline Alliances

Although not a component of the recent negotiations with the British, the issue of antitrust immunity has a direct bearing on the U.S.-U.K. relationship. In 1992, DOT granted the alliance between Northwest and KLM limited immunity from U.S. antitrust laws in connection with the accord with the Netherlands that eliminated bilateral restrictions between the two countries. In doing so, DOT hoped that others would seek a similar arrangement and that the presence of several "open skies" countries and powerful airline alliances would put pressure on major aviation trading partners such as the United Kingdom, France, and Germany to open their markets.

In April 1995, we reported that antitrust immunity was a key ingredient in the success of the Northwest/KLM alliance.[11] We noted that such a grant of immunity can greatly enhance the amount of integration that can be achieved by alliance partners. Moreover, because they can make joint presentations to corporations on fare discounts, immunity can be very beneficial in attracting lucrative corporate accounts. DOT officials told us that immunity had been granted by a previous administration and that the agency had not determined, in light of the Northwest/KLM experience, whether antitrust immunity should be available for other alliances in markets that allow for significantly increased access for U.S. airlines. We concluded that antitrust immunity could be a powerful tool in DOT's efforts to obtain "open skies" agreements and the cumulative success of several

[11]GAO/RCED-95-99.

alliances with immunity could place significant pressure on the British as traffic that once travelled to Europe via London would shift to other gateways that are served by the immunized alliances. Citing the recent open skies agreements with Austria, Belgium, and Switzerland, Delta, in September 1995, requested antitrust immunity for its alliances with Austrian Airlines, Sabena, and Swissair. In addition, citing the recent U.S.-Germany open skies agreement, United and Lufthansa have applied for antitrust immunity for their alliance. If these requests are approved by DOT, in consultation with the Department of Justice, nearly half of all traffic travelling between the United States and Europe will be flown by airlines whose alliances have antitrust immunity.

As our report also indicated, however, granting immunity involves costs as well as potential benefits. U.S. antitrust laws protect consumers by prohibiting contracts and agreements that restrain trade, which include agreements between competitors to set prices. As a result, granting airline alliances antitrust immunity could lead to reduced competition and higher fares. This potential impact would have to be weighed against whether increased competition would result from the elimination of bilateral restrictions. Given these potential downsides, we recommended that DOT more fully examine these issues, analyze the value of antitrust immunity, and determine if the United States should use immunity as a tool in its efforts to deregulate the transatlantic market.

While Economic Analysis Will Strengthen DOT's Negotiating Position, Other Options May Also Improve the Process

A consistent theme of our work over the past several years has been that DOT has not had sufficient data or done sufficient economic analysis to value the rights that are on the negotiating table and to evaluate the tradeoffs. In this regard, we have emphasized the need for DOT to heighten the emphasis the agency gives to economic analysis and to improve the quality of data that it collects. Our code-sharing report, for example, outlined how DOT did little analysis of the value of code-sharing before granting British carriers extensive access to the U.S. market via code-sharing in 1991.[12] As we have detailed in prior testimonies, we have made numerous recommendations to DOT aimed at addressing its data shortcomings and better positioning it to analyze tradeoffs.

DOT over the last year has heightened the emphasis that it places on economic analysis and has responded positively to our recommendations. In November 1994, for example, DOT created the Office of Aviation and International Economics, whose sole mission is to conduct such analyses.

[12]GAO/RCED-95-99.

In early 1995, DOT began periodically collecting and analyzing information on U.S. airlines' doing-business problems overseas. Finally, according to the Director of the agency's new economic unit, DOT will soon initiate a rulemaking proceeding aimed at addressing the shortcomings in DOT's traffic data that we identified.

While improved economic analysis and better data are positive steps, our discussions with DOT and State Department officials and U.S. airline representatives indicate that such steps by themselves may not be enough to allow the United States to develop and execute a consistent and effective negotiating strategy. Several airline representatives noted that DOT's rejection of the British proposal of incremental access to Heathrow for U.S. airlines contradicted the agency's prior position during phase one talks that an incremental approach was needed.

Because of the pressures that are brought to bear on DOT during negotiations by airlines that are competing with each other, several U.S. government officials and airline representatives have suggested that DOT, in conjunction with improving its analytical abilities, explore additional actions to improve its ability to negotiate. Representatives from one airline, for example, suggested that the U.S. Trade Representative assist DOT at the negotiating table. According to these representatives, the negotiating experience of the U.S. Trade Representative would help DOT develop a more consistent approach that can be "above the fray" caused by competing airlines. Others have suggested that a formal panel comprised of airlines, airports, and consumer groups be established to formally advise DOT, to the extent possible, with "one voice" about the advantages, disadvantages, and potential impacts of proposed deals. Such a panel, according to its advocates, could make the process less contentious in that DOT could weigh the panel's advice in conjunction with the agency's own economic analysis of proposed deals.

Mr. Chairman, this concludes our prepared statement. We would be glad to respond to any questions that you or any member of the Subcommittee may have.

The U.S.-United Kingdom Scheduled Passenger Market by Airline, Calendar Year 1995 Versus Calendar Year 1994

Airline	Market Share, 1995	Market Share, 1994	Percent Change
U.K. Airlines	58.1	53.9	+ 7.8
British Airways	43.9	40.0	+ 9.8
Virgin Atlantic	14.3	14.0	+ 2.1
U.S. Airlines	41.9	46.1	- 9.1
American	17.9	17.2	+ 4.1
United	11.0	12.5	- 12.0
Delta	4.8	6.0	- 20.0
Northwest	3.8	4.5	- 15.6
Continental	3.1	4.3	- 27.9
TWA	1.3	1.3	0.0
USAir	0.0	0.1	- 100.0
American Trans	0.0	0.1	- 100.0

Note: Numbers may not add due to rounding.

Source: DOT's international traffic data (T-100).

U.S. Cities With Existing Heathrow Rights

U.S. Gateway	U.S. Carrier Status
Anchorage	Dormant
Boston	American
Chicago	American and United
Detroit	Dormant
Los Angeles	American and United
Miami	American
Minneapolis/St. Paul	Dormant
New York	American and United
Philadelphia	Dormant
San Francisco	United
Seattle	Dormant
Washington/Baltimore	United

Note: "Dormant" denotes that neither American nor United are exercising the available right because of current market conditions.

Source: U.S. State Department.

Total Passengers Carried on Scheduled Service Between the United States and London's Heathrow Airport, Calendar Year 1995

Category	Passengers	Market share (percent)
U.K. Airlines (British Airways and Virgin Atlantic)	4,495,539	60.8
U.S. Airlines (American and United)	2,614,860	35.3
Other Nations' Airlines	289,636	3.9
Total	7,400,035	100.0

Source: GAO's analysis of DOT's international traffic data (T-100).

U.S. and U.K. Carrier Service Between the United States and London's Heathrow or Gatwick Airports

U.S. Gateway	Carrier	London Airport(s)
Atlanta	Delta	Gatwick
	British Airways	Gatwick
Baltimore	British Airways	Gatwick
Boston	American	Heathrow
	Northwest	Gatwick
	Virgin	Gatwick
	British Airways	Heathrow
Charlotte	British Airways	Gatwick
Chicago	American	Heathrow
	United	Heathrow
	British Airways	Heathrow
Cincinnati	Delta	Gatwick
Dallas/Ft. Worth	American	Gatwick
	British Airways	Gatwick
Detroit	Northwest	Gatwick
	British Airways	Heathrow
Houston	Continental	Gatwick
	British Airways	Gatwick
Los Angeles	American	Heathrow
	United	Heathrow
	Virgin	Heathrow
	British Airways	Heathrow
Miami	American	Heathrow
	British Airways	Heathrow/Gatwick
	Virgin	Gatwick
Minneapolis/St. Paul	Northwest	Gatwick
Newark	United	Heathrow
	Continental	Gatwick
	British Airways	Heathrow
	Virgin	Heathrow
New York JFK	American	Heathrow
	United	Heathrow
	British Airways	Heathrow/Gatwick
	Virgin	Heathrow
Orlando	British Airways	Gatwick
	Virgin	Gatwick
Philadelphia	British Airways	Heathrow
Pittsburgh	British Airways	Gatwick
Raleigh-Durham	American	Gatwick
San Francisco	United	Heathrow
	British Airways	Heathrow
	Virgin	Heathrow
Seattle	British Airways	Heathrow

(continued)

U.S. Gateway	Carrier	London Airport(s)
St. Louis	TWA	Gatwick
Tampa	British Airways	Gatwick
Washington Dulles	United British Airways	Heathrow Heathrow

Source: GAO's review of Official Airline Guide data, October 1995.

U.S. Government Contract Fares (One-Way) to London From Cities Involved in the Mini-Deal, Fiscal Years 1995 and 1996

City Pair	Contract Carrier, FY1995	Fare ($), FY1995	Contract Carrier, FY1996	Fare ($), FY1996	Percent Change in Fares
Washington-London	United	468	United	295	- 37.0
San Francisco-London	United	533	United	395	- 25.9
Tampa-London	United	420	United	350	- 16.7
Philadelphia-London	American	380	United	350	- 7.9

Source: General Services Administration.

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