



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Assistant Secretary

1200 New Jersey Avenue, SE
Washington, DC 20590

January 8, 2010

Mr. Kenneth P. Quinn
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Re: Review of Virgin America Inc.'s Proposed Change in Ownership

On August 7, 2007, the U.S. Department of Transportation (the "Department") found Virgin America Inc. ("Virgin America") to be a U.S. citizen and issued to it an effective certificate authorizing it to engage in interstate scheduled passenger air transportation. Subsequently, Virgin America notified the Department regarding the proposed transfer of certain of the shares of VAI Partners LLC ("VAI"), its 75 percent U.S. shareholder, which would constitute a substantial change in ownership of Virgin America under section 204.5 of our rules (14 CFR § 204.5). The air carrier provided information pursuant to section 204.5, describing substantial changes to its ownership.

Accordingly, the Department initiated a continuing fitness review pursuant to 49 U.S.C. § 41110(e), under which the Department assesses changes that may affect an air carrier's continuing fitness, including ownership, following its initial Department authorization. In keeping with the Department's longstanding practice, we have been working with Virgin America to address certain issues identified during this review. Based on the information provided, we conclude that Virgin America will remain a citizen of the United States under the actual control of U.S. citizens, and that the company will continue to be fit, willing, and able to conduct its operations as a U.S. certificated air carrier. It is our intention to release this letter to the public and we understand that you have no objection to this.

As you are aware, section 41102 of Title 49 (the "Statute") requires that certificates to engage in air transportation be held only by citizens of the United States. Section 40102(a)(15) of the Statute defines "citizen of the United States" as (A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; and (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.¹ In determining actual control, the Department has always reviewed the

¹ The Department has held that non-U.S. citizens may own up to 49 percent of the total equity of an air carrier so long as the home country of the non-U.S. citizen has entered into an open-skies or other aviation bilateral agreement

totality of the circumstances of the relationship between the air carrier and any foreign entity or entities. Usually, no single factor dictates a finding of domestic control or its absence; rather, in keeping with our large body of administrative precedent, we have traditionally considered all factors in combination to reach this finding.

Based on discussions with and documents provided by Virgin America, our review of the material changes the air carrier proposes to address our concerns, and the totality of all relevant circumstances, we conclude that Virgin America is in compliance with the statutory requirements.

Following consummation of the transaction, the voting stock of Virgin America will continue to be divided between VAI (75 percent) and the Virgin Group (25 percent).² Under the proposal, the new U.S. investors will acquire 100 percent of the shares in VAI for a price that was determined through a bidding process with the aid of an investment bank. We recognize that current market conditions are volatile and note that many air carriers have seen substantial declines in value in light of the current global economic environment. Further, because many of the new U.S. investors are contributing personal assets, they will have a greater incentive to actively participate in the strategic decisions of Virgin America.

The new U.S. investors and their proposed ownership percentages are as follows: Cyrus Aviation Investor, LLC (55.55 percent), VAI MBO Investors, LLC (27.77 percent), VX Employee Holdings, LLC (16.66 percent), and VAI Management, LLC (approximately 0.02 percent).

- ***Cyrus Aviation Investor, LLC (“CAI”).*** CAI is wholly owned by Cyrus Aviation Partners II, LP (“CAP II”), a Delaware limited partnership. Cyrus Capital Partners GP, LLC, a Delaware limited liability company solely owned by Mr. Stephen Freidheim, serves as the general partner of CAP II. CAP II has 8 limited partners, all of which are organized in the United States.
- ***VAI MBO Investors, LLC (“MBO”).*** MBO’s ownership is divided among Messrs. Cyrus Freidheim, Don Carty, Samuel Skinner, Robert Nickell, and David Cush.
- ***VX Employee Holdings, LLC (“Employee LLC”).*** Employee LLC’s sole members are CAI, acting as managing member, holding 67 percent of the ownership interest, and MBO, holding 33 percent of the ownership interest; and
- ***VAI Management, LLC (“Management LLC”).*** Management LLC’s ownership is divided between CAI (67 percent) and MBO (33 percent).³

with the United States. An open-skies agreement with the U.S. and the EU was signed on April 30, 2007. The U.K., a member state of the EU, is a party to that agreement.

² The Virgin Group, as used in the context of this letter, refers to one or more of five U.K. companies and/or citizens, Virgin Management Limited, Carola Holdings, Ltd., VA Holdings (Guernsey), LP, Ms. Frances Farrow, and Mr. Mark Poole.

³ Management LLC will serve as the managing member of VAI and CAI will be the managing member of Management LLC.

In addition, the new U.S. investors' interests will not be subject to any puts or guarantees as was previously allowed. Instead, each of the new investors will fund their acquisition of VAI shares from their personal assets, with the exception of Employee LLC, which will obtain a loan from Virgin America to acquire shares in VAI. The elimination of the put helps to ensure that U.S. interests will remain in actual control of the air carrier over the longer term.

Although certain investors in the ultimate ownership structure of two of the eight limited partners in VAI were unable to certify as to U.S. citizenship, Virgin America provided documents that demonstrate that these investors will be effectively prevented from investing or participating in VAI and Virgin America. To ensure that only U.S. citizens are participating in VAI's investment in Virgin America, each such limited partner has completed a certification of U.S. citizenship. In addition, the Limited Partnership agreement provides that the General Partner, in this case Cyrus Capital Advisors, LLC, a U.S. citizen, retains the right to exclude a limited partner whose participation the General Partner determines may adversely affect the funds' ability to invest in select transactions. Therefore, 75 percent of the voting stock of Virgin America will be owned by U.S. citizens, in compliance with the Statute.

Virgin America will expand the number of voting members of its Board of Directors to nine, up from the current eight, to permit the U.S. citizen Chief Executive Officer ("CEO") of the company to fully participate and to vote at all Board meetings. Mr. David Cush is the air carrier's current CEO and a new U.S. investor. With the addition of the new voting board member seat, the ratio of voting U.S. investor board members to voting non-U.S. investor board members is 7:2. The addition of the CEO as a voting Board member maintains the air carrier's continued compliance with the statutory numerical requirements and, in fact, bolsters the U.S. investors' control over the management and operations of Virgin America. The air carrier has also provided us with information confirming that over two-thirds of Virgin America's officers are U.S. citizens.

Virgin America will receive additional funding necessary to support its working capital needs. Specifically CAI affiliates and the Virgin Group will provide to Virgin America \$5 million and \$63.4 million in new debt financing, respectively. CAI affiliates will also provide an additional \$15 million in debt financing that will replace a portion of an existing debt facility provided to Virgin America by Virgin Group. These funds are firmly committed, do not restrict the incurrence or payment of junior indebtedness or otherwise confer special rights that would permit an avenue for foreign control. Further, the air carrier expects to obtain between \$250 and \$350 million in third-party aircraft financing for 2010 and additional third-party financing in 2011. These new influxes of capital not only show Virgin America's ability to obtain the capital necessary to meet the financial fitness standard, but also demonstrate that it is not dependent on Virgin Group for capital to finance its ongoing operations.

Lastly, Virgin America will issue 60 million warrants to the Virgin Group, and approximately 62 million warrants to CAI, and MBO, resulting in the U.S. investors holding a fully diluted total equity of 52 percent. The Department has not considered convertible debt or warrants in general, without special conditions, as constituting voting interests unless and until the notes are converted into equity or the warrants are exercised. The proposed issuance of warrants does not affect the ownership or control of the air carrier in this case. We do note that should the Virgin Group seek to acquire an additional equity interest in the applicant, for example through the

exercise of the warrants, Virgin America would be required to notify the Department. Moreover, the various warrant agreements preclude the exercise of any warrants if doing so would cause Virgin America to fail to satisfy the Statute's foreign ownership restrictions.

Virgin America will make several further changes to its corporate governance documents. Specifically, Virgin America will modify or remove a supermajority provision and certain consent rights previously afforded to the Virgin Group. In particular, the consent rights and supermajority provision requiring the Virgin Group's permission for any changes to the company's Bylaws and Certificate of Incorporation will be amended to only permit such consent or supermajority vote when such action would adversely or disproportionately affect, in any material respect, the interests of the Virgin Group. The Virgin Group's consent right related to mergers, consolidations, and sales involving a U.S. airline operator will also be revised so that the consent for an asset sale or similar transaction is required only if the assets comprise all or substantially all of Virgin America's assets. Also, the air carrier will remove covenants that restrict Virgin America from modifying material contracts without first obtaining permission from the Virgin Group. Further, Virgin America will include minimum dollar thresholds for the Virgin Group consent right on U.S. investor affiliate transactions. The amendment or removal of these consent rights protects against the Virgin Group's potential use of such rights to exert negative control over Virgin America and hinder the air carrier's ability to operate independently.

Other changes to the air carrier's corporate governance documents relate to the composition of Virgin America's Board of Directors. Virgin America will amend its Bylaws and Stockholders' Agreement to explicitly state that U.S. Investors appoint six designees and the Virgin Group appoints two designees; no investor shall have the right to determine or vote on any Board designees of the other party. The language that allows vacancies on the Board to be filled by the vote of the remaining directors or by a majority vote of all stockholders will also be deleted. Additionally, the Board quorum requirements will be revised to provide that no action at a meeting will be effective unless two-thirds of the Board members in attendance and permitted to vote and actually voting on any matter at such a meeting are U.S. citizens and designees of Virgin America's U.S. investors. These changes to Virgin America's Board of Directors strengthen the actual control of U.S. citizens.

Virgin America will also amend several of its debt agreements and other transaction documents to clearly reflect its ability to obtain stable, unrestricted sources of capital. For instance, the air carrier will revise certain debt provisions to ensure that Virgin America is able to incur indebtedness (other than certain senior indebtedness) without having to apply the proceeds of such indebtedness toward repayment of Virgin Group debt. Also, such agreements will now enable the air carrier to repay subordinated debt without first having to repay the Virgin Group. Further, Virgin America will ensure that the Virgin Group is unable to block payment of dividends based on a failure to pay interest on subordinated notes, which will also make Virgin America's stock more marketable to potential investors.

Various restrictions that bind Virgin America to the Virgin Group will also be amended or removed. Specifically, transfer restrictions on Virgin Group and VAI related to rights of first refusal, rights of first offer, and drag along requirements will be removed, while the remaining transfer restrictions will be amended, among other things, to prevent the transfer of Virgin

America shares to a third-party for a period of three years. Virgin America will remove the restriction that requires the U.S. investors to join in a company sale initiated by the Virgin Group. The removal of these provisions further enforces the position that Virgin America is under the actual control of U.S. citizens.

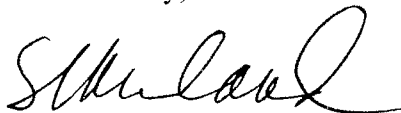
In light of the information provided, the proposed changes Virgin America has agreed to implement no later than 30 days from the date of this letter, and in the totality of the circumstances, we conclude that Virgin America will remain a citizen of the United States under the actual control of U.S. citizens as required by the Statute, and that the air carrier continues to be fit to conduct its operations as a U.S. certificated air carrier. This conclusion is consistent with established Department policy and precedent.

As always in such cases, our determination reflects, and is predicated on the accuracy of, the information that you have provided to the Department. However, this determination is contingent on our satisfactory review of the amended documents, including governance documents for all involved parties, which you must submit to us upon signature. To ensure continued compliance with the Statute, we will also require the air carrier to notify the Department in the event of a default under, or receipt of a notice of default or potential default under, any governance-related document or any material debt or other agreement by the company or any of its subsidiaries, along with an explanation detailing how the company intends to address the situation.

We also remind the air carrier that it continues to remain subject to the provisions of section 204.5 of the Department's rules, which requires the company to advise us of any substantial changes in operations, ownership, or management. These changes would include, but are not limited to, any alteration to the ownership structure discussed above, any change in key management and technical personnel, or any other circumstances affecting foreign involvement in the structure or capitalization of the air carrier, including new governance provisions (such as supermajority voting rights). In addition, the air carrier must notify the Department of any exercise of warrants that would constitute a change in ownership. Lastly, we remind Virgin America of the requirement that the voting trust established during its initial proceeding must remain in place and can only be dissolved upon the Department's written consent. Such changes may affect the Department's fitness determination with respect to the air carrier's citizenship.

We appreciate your cooperation in this matter, and wish you well in your future operations. If you have any questions concerning this matter, please contact Lauralyn J. Remo of my staff at (202) 366-9721.

Sincerely,



Susan L. Kurland
Assistant Secretary

for Aviation and International Affairs