

Air Canada Submission to the Canadian Transportation Agency

August 10, 2023



Air Canada welcomes the opportunity to participate in response to the Canadian Transportation Agency's (the "**Agency**") consultation process on proposed changes to the *Air Passenger Protection Regulations* (the "**APPR**") launched by the Agency on July 11, 2023, further to the amendments to the *Canada Transportation Act* (the "**Act**") introduced by the *Budget Implementation Act, 2023, No. 1* (the "**BIA**").¹

OUR COMMITMENT

Air Canada is committed to safety and customer care and service throughout our passengers' entire journey with us. We are proud to safely carry up to 150,000 passengers per day, and sometimes more, with the vast majority of them reaching their destination satisfactorily without significant disruptions. When this unfortunately is not the case, we strive to treat our customers with care and compensate them when required under the APPR or voluntarily in some cases. We are investing to improve our operational performance and customers' experience.

HOW WE APPROACH OUR REGULATORY RESPONSE

We encourage regulatory change that is evidence-based, policy driven, and fair and balanced.² We agree with the thrust of many of the proposals described in the consultation paper, and offer our perspective in that light:

- We agree with the objective of having a simplified and clear regime to ensure passengers' understanding of their rights and limit litigation and debate around the interpretation and application of the APPR. However, we are concerned that the proposed test for compensation exceptions will lead to confusion and debate.
- We agree with many circumstances included in the updated list of exceptions to compensation that the Agency proposes. We invite the Agency to consider certain changes, in particular where carriers would be penalized for events they do not control or safety decisions they take in unexpected situations.
- We agree it is fair to require carriers to explain why a disruption is not their responsibility. In most cases, this is straightforward. In more complex cases involving knock-on effects or multiple causes, gathering and organizing underlying evidence is much more involved. The delays to do so cannot be so short as to effectively deny us the opportunity to defend our position.
- We agree that the chain of knock-on or ripple effects after some disruptions could be appropriately limited. However, setting the cut-off at one upstream flight inappropriately penalises airlines, particularly for large-scale events that can take several days to recover from, notwithstanding all reasonable efforts. We suggest that a cap of two days would achieve the intended regulatory certainty and fair balance. This is not a free pass; carriers would still need to show how the original disruption caused the subsequent ones.

PRINCIPLES OF EVIDENCE-BASED RULEMAKING³

As the Agency knows, long delays and cancellations are overall infrequent, and those involving safety or mechanical issues even less so in the context of our overall operations. Safety-related cancellations and long delays due to unexpected mechanical events, represent a very low percentage of all scheduled flights. There are significantly more flights coded "controllable" for which compensation is paid to passengers.

¹ Our comments are made without prejudice or admission with respect to our position regarding the proper interpretation that should be given to the APPR as it currently stands or as it may be amended.

² See [Cabinet Directive on Regulation](#). The Agency said about the APPR when they were first adopted that they should be robust, fair and balanced: [APPR Regulatory Impact Analysis Statement](#).

³ [Cabinet Directive Regulation](#).

The proposed changes should be grounded in fact and seek to meet long-term goals based on a normalized operating environment, not the unprecedented and challenging operating circumstances faced by the airline industry as it emerged from the pandemic.⁴ Indeed, the pandemic has in our view disproportionately coloured the debate on whether to review the APPR. For example, the pre-consultation process may once again give rise to a range of comments claiming that carriers “abused” the safety category to reduce their liability. This is simply not the case. The evidence confirms that carriers applied the APPR in good faith. In fact, the Agency itself has first-hand evidence of this, having independently investigated allegations of airlines miscoding flights. In our case, the Agency conducted several investigations pertaining to the controllability assessment of over 60 Air Canada flights. The Agency agreed that Air Canada had properly coded the flights in all but five cases. As further evidence of our even-handed interpretation of the APPR, the investigation showed that a similar proportion of flights had been coded controllable, leading to passengers being compensated, when in fact the event should have been coded uncontrollable. There was no evidence of abuse of the safety provision.

Regulating based on evidence also means taking context into account. Airlines and others take their responsibilities to deliver safe and reliable air transportation to Canadians seriously and carry passengers to their destinations every day in real world conditions. Like many other critical sectors that make up Canada’s national economy, the air transportation infrastructure combines processes, systems, facilities, technologies, networks, assets, and services. Even if our air transportation system is robust and we have learned from the experience of the pandemic and from having to rebuild itself since, disruptions can occur within each of its components, heightened by complex interdependencies which can lead to cascading effects. The regulations should reflect the complexities and real-world conditions of air travel, and not hold airlines financially responsible for events they do not control.

POLICY-BASED RULEMAKING

Regulations must be justified by a clear rationale. Yet, there is no articulated remedial policy reason to make carriers responsible for situations they do not control or that they cannot reasonably avoid, or for safety reasons in situations that are unexpected. In fact, because these are cases where nothing further can be expected of them, making carriers responsible does not lead to a better transportation system or, more importantly, to a better passenger experience. Suggesting otherwise arguably lacks transparency and would likely lead to frustration about our industry, the Agency and government.

SUMMARY

Our comments can be summarized as follows:

- The BIA does not require exceptions to compensation to be only in “exceptional circumstances”. The Agency should not fetter its discretion by reading it that way. It should explore all alternatives in proposing regulatory changes, in line with a proper reading of the BIA.
- Carriers should not be held accountable for events over which they have no control or despite having taken all reasonable measures.
- Decisions taken for safety reasons caused by unexpected situations should always be recognized as an exception to compensation, when carriers have abided by their safety and maintenance program approved by Transport Canada.

⁴ The enduring effects of the pandemic continue to be felt to some degree as our global economy restores its full capacity. This has an impact on the global supply chain and in turn on the airline industry throughout the world.

- There are a wide range of events and complex reasons that can lead to a disruption. Carriers should not be held to a 30-day timeline to provide documentary evidence in support of their position.
- Passengers should maintain flexibility to choose options that best suit their needs in the event of rebooking.
- Because third parties are often involved in ticket bookings by passengers, carriers should not be required to provide a refund within unrealistic timeframes.
- Providing hotels for all passengers during large-scale events, such as major storms, can be impossible due to limited hotel availability and should be subject to a maximum amount.
- Mandating the issuance of specific standards of treatment before passengers are expected to be at the airport is inappropriate and unnecessary.
- Carriers cannot provide specific compensation information prior to the passenger's arrival time at final destination being known.
- Limiting knock-ons to one post-disruption flight is inappropriate and will unfairly prejudice short-haul and regional services. Knock-ons should instead be allowed up to 48 hours following initial time of departure, with an exception in situations of widespread disruptions affecting large regions or entire fleets, for which recovery within 48 hours cannot be reasonably expected.
- The current requirement to confirm in writing denied boarding entitlement prior to departure offers no benefit to passengers, jeopardizes on time departure processes, and has an overall negative impact on operations.

1. IDENTIFYING EXCEPTIONS TO COMPENSATION

We note that contrary to what is implied in the consultation paper and related materials neither the Act nor the BIA use the expression "exceptional circumstances", nor do they state that the exceptions to APPR compensation must constitute "exceptional circumstances". The Act only provides that exceptions must be specified in the regulations. If Parliament had wished to use the expression "exceptional circumstances" in the BIA, it could have done so just as it has in other Canadian federal statutes.

In interpreting the amendments introduced by the BIA, the Agency must also take note that other new sections thereof refer to situations "outside carrier's control" and "within carrier's control but required for safety."⁵ These sections are necessarily relevant to the meaning of the term "exceptions", as the BIA provisions need to be read in harmony.⁶

Proposed requirement:

The Agency proposes to eliminate flight disruption categories for compensation that currently exist under the APPR. Going forward, passengers would receive compensation for all flight disruptions, unless there are exceptional circumstances. The Agency is contemplating that, to be exceptional, an event that caused a disruption:

- (1) must have been outside the airline's control;

⁵ Sections 85.07 and 85.08 BIA

⁶ Indeed, the framework for the development of the APPR rules as explained by the Agency itself in 2018 when they were first adopted remains that they be robust, fair and balanced. <https://otc-cta.gc.ca/eng/air-passenger-protection-regulations-regulatory-impact-analysis-statement>

- (2) must not have been inherent to the normal exercise of the activities of the airline;⁷ and
- (3) could not be avoided even if the airline took all reasonable measures to do so
- (together referred to as the “**Potential Test**”).

Comment:

As indicated above, the underlying policy or purpose of any change should always be clearly articulated. It is unclear what exceptions the Potential Test is intended provide for given the combination of its three cumulative conditions for outcomes that would not be compensated by airlines. For example, one must infer from the Potential Test that airlines could be held liable in respect of events (No. 1) they do not control, even if (No. 3) they took reasonable measures to avoid them. Moreover, there is no explanation offered for the second leg of the Potential Test.

The only motivation for the *inherency condition* (No. 2) appears to be its use in a European ruling⁸ involving EC Regulation No 261/2004 that has been widely commented upon⁹ and has led to interpretative debates¹⁰. Challenges in interpreting this concept of “extraordinary circumstances” following a number of decisions in Europe have resulted in a lack of judicial certainty and a desire to review the regulation.¹¹ Thus, rather than clarifying APPR as intended, this amendment will lead to confusion and disagreement as carriers and passengers seek to determine what is and what is not inherent to airline activities and most importantly how this affects APPR compensation. If the Agency seeks to learn from the EU experience, it should be to avoid introducing a test that has led to endless confusion, debate and litigation in that jurisdiction.

Finally, we submit that the burden of proving or disproving the elements of any chosen test must be applied reasonably and in accordance with general principles. For example, if having taken reasonable measures were to become a condition, proving this on a balance of probabilities should not require proving that there was no way in which, with the benefit of hindsight, a disruption could have been prevented. This would represent an unachievable burden of proof and effectively negate the possibility of defending against any claim.

Recommendation:

We recommend basing the exceptions to compensation on the notions of control and reasonable measures, and not introducing a reference to what is inherent to airline activities.

The Agency states that a list of exceptional circumstances, as well as a list of those circumstances that would not be considered exceptional, would be added in the regulations. We comment below on the list provided by the Agency, which has been reordered for convenience.

7 The wording refers to the airline rather than airlines generally. It is unclear which is intended, compounding further the potential for differing interpretations. What might be considered inherent to normal airline operations generally may differ airline-by-airline based on factors such as geographical location, airline size, and industry standards.

8 *Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA*, 2008 European Court of Justice (ECJ) Case C-549/07.

9 Court rulings in Europe have expanded the list of activities that are considered inherent to the activities of airlines, leading to surprising positions. For example, the following have been found to be inherent in the normal exercise of the activity of an airline and not beyond its control: cracked engine fan blade that a few weeks earlier had been inspected at a regular maintenance check; unexpected technical error with an aircraft engine despite following an approved maintenance schedule (*Corina van der Lans v Koninklijke Luchtvaart Maatschappij NV*, 2015 Court of Justice of the European Union (CJEU) Case C-257/14. ECLI:EU:C:2015:618); aircraft wing damaged by a set of mobile boarding stairs (*Sandy Siewert and Others v Condor Flugdienst GmbH*, 2014 CJEU Case C-394/14. ECLI:EU:C:2014:2377); burst tire that failed because of a hard landing in a windstorm (see G. Petsikas above); death of a pilot assigned to operate a flight shortly before departure (*TAP Portugal v flightright GmbH and Myflyright GmbH*, 2023 ECJ Joined Cases C-156/22 to C-158/22. ECLI:EU:C:2023:393).

10 See Jochem Croon & Jim Callaghan, “Punctuality or a Safe Flight: Which Should Have Priority?” (2018) 53:60 *Air and Space Law*; and Petsikas, above.

11 Vincent Correira, “La proposition de révision du règlement n° 261/2004 : entre clarifications textuelles et perfectionnement des droits des passagers aériens”, *European Journal of Consumer Law* 2014/1 at page 8, 11, 12, 15, 16, 17, and 19.

Exceptions at circumstances could include:

- Security threat or risks incompatible with the safe operation of the flight such as war, political instability, illegal acts, sabotage, and terrorism
 - Hidden Manufacturing defects that come to light and affect flight safety that are safety related and identified by the aircraft manufacturer or by a competent authority
 - Air traffic management restrictions, instructions from air traffic control, airspace closures, and airport closures
 - An official NOTAM
 - Orders or instructions from a manufacturer of an aircraft, engine or part, or from a state, law enforcement agency, or airport security officials
 - System outage or infrastructure breakdown by governmental or essential service providers, essential to the operation of a flight
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- Health risks or medical emergencies on route that require a flight diversion or discovered shortly before flight departure that necessitate the interruption of the flight make it impossible to safely operate the flight
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- Weather, meteorological conditions, or other atmospheric conditions, or natural disasters, that make it impossible to safely operate the flight
 - Collision with wildlife
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- Airport operational issues for which the airline is not responsible
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- Labour disruptions at the airline or by essential air service providers like airports managers, air navigation personnel, or ground handlers
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- Technical defect(s) or problems, provided that all of the following criteria are fulfilled:
 - the maintenance has been executed in accordance with the approved maintenance programme, including/taking into account Minimum Equipment List (MEL) and Configuration Deviation List (CDL); and
 - the defect is related to the airworthiness of the aircraft, is not listed in the Minimum Equipment List (MEL) and results in the defect having to be fixed before the flight can operate or several defects occur which are listed in the MEL and/or CDL and in accordance with the Canadian Aviation Regulations the pilot decides that it is not safe to operate the aircraft with the combination of these defects.
 - A defect or concern discovered through the carrier's, a supplier's, or a relevant third party's safety management system or quality assurance program that requires immediate action to ensure the safety of further flight(s).
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- A delay, cancellation or denial of boarding that is directly attributable to earlier delay(s) or cancellation(s) which has occurred within the last 48 hours and that was due to exceptional circumstances, is considered to also be due to situations of exceptional circumstances if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation;

Circumstances that would not be ~~considered~~ exceptional:

- Flight crew or cabin crew unavailability, except if outside the control of the airline
- Staff shortages at the airline
- ~~Technical problems that are an inherent part of normal airline operations~~
- ~~Any situation the airline knew about, or should have known about, when it sold the ticket to the passenger~~
- Any action, or failure to act, by the airline or others with which the airline has a contractual relationship except if outside the control of the airline

The most troubling aspect of the proposed list is related to safety. Safety is a fundamental tenet of the air transport industry, making it the safest form of transportation.¹² The existing delineation of “safety” within the categories of controllability found in the current APPR, and the distinct obligations on carriers that arise within them, reflect this commitment to safety. Any actual or perceived deviation from that priority runs counter to the highest priority of the air travel system.

In addition, the deliberate exclusion of mechanical or technical malfunctions (or concerns regarding the same) from the list of proposed exceptions departs from the original fair and balanced intention of the APPR. Limiting exceptions to exclusively mechanical issues that arise because of manufacturing defects, as suggested in the English version of the consultation document, presupposes that airlines have control of the timing of unexpected mechanical issues or concerns that arise despite adherence to an approved maintenance programme. The vast majority of mechanical issues or concerns are not controllable and are unforeseeable circumstances. When a concern arises, it must be dealt with in accordance with the framework set through the *Canadian Aviation Regulations*. As such, carriers should not be penalized for following the mandatory safety regulations.¹³

Air Canada recognizes that public perception in 2022 was that the safety provision may have been overused. Air Canada chose to code many disruptions in 2022 that it felt were uncontrollable to “within carrier’s control for safety” in order to trigger the issuance of standards of treatments to its customers (i.e. hotels and meals). We did this on a goodwill basis in order to alleviate the widespread impact disruptions were having on our customers, many of whom were left stranded at airports for lengthy periods of time, often overnight. These goodwill gestures were unfortunately misconstrued as an attempt to avoid compensation payments. Outside of the pandemic and other uncontrollable events, Air Canada codes crew unavailability as a controllable event and fully compensates its customers when disruptions ensue.

There is no evidence that the safety provision is overused or that carriers are circumventing their obligations under APPR. The Agency’s enforcement branch has thoroughly investigated this question on multiple occasions and found no such evidence. A regulatory change that would hold carriers accountable to pay compensation as a result of unforeseen mechanicals for years to come on the basis of the exceptional events of 2022 would not be evidence or policy based.

¹² See IATA report: [Flying is the safest form of transport](#).

¹³ *Canadian Aviation Regulations*, Standard 625, Appendix G

We urge the Agency to provide expressly that compensation is not payable for a disruption resulting from unexpected safety-related decisions pertaining to mechanical issues. The overriding focus on safety must be reinforced in all rulemaking in our industry.¹⁴

2. AIRLINES' RESPONSIBILITIES REGARDING CLAIMS FOR COMPENSATION

Proposed requirement:

The APPR would specify that if an airline refuses a compensation claim, it must give the passenger a detailed explanation, including documentary evidence that the circumstances were exceptional, and reference the applicable terms and conditions of the passenger's ticket, including fare rules.

Comment:

We agree that passengers should have an explanation of our determinations. We make every effort to ensure this even though as the Agency knows these determinations made in real time often need to be amended or supplemented as events unfold. This has been particularly apparent in those cases where there are multiple delays or cancellations stemming from common causes.

Requiring airlines to provide detailed information, including documentary evidence, within 30 days, disregards the complexity of some disruptions. This requirement will be overly burdensome on carriers while offering no proportionally equivalent benefit to passengers. Air Canada makes a determination based on the best information it has at the time and reviews this decision in good faith when a complaint is made. As reported by the Agency, the 97% of complaints are resolved before the adjudication process. Even when we the Agency reviews our determinations through the adjudication process, our original determination is deemed accurate in about 80% of cases.

The 30-day timeline that is currently imposed to review and to respond to complaints is generally manageable but has proven difficult to meet in circumstances when carriers are faced with major events leading to spikes in complaints. This difficulty has been reiterated on several occasions to the Agency through requests for exemptions, responses to enforcement actions, and previous consultation documents. An additional, unrealistic requirement which also calls for definitive documentary evidence within 30 days will effectively preclude carriers from providing timely responses to claims in complex cases.

Recommendation:

This proposed change should be amended. Carriers should continue to be required to review their original determination, but only be required to provide additional evidence if they can reasonably do so and without prejudice to their ability to add additional evidence in future.

3. REBOOKING AND REFUNDS

Proposed requirement:

- (a) Promptly rebook passengers on the first available flight of any airline if a carrier fails to rebook on itself or a partner airline within 9 hours.
- (b) The time frame to provide a refund will also be reduced from the 30-day timeline that currently applies.

¹⁴ The Agency should be mindful that the pendulum may shift back towards safety in Europe. The Croatian president proposed in 2020 to amend EC261 to explicitly exclude compensation where the cancellation or delay is caused by an unexpected flight safety shortcoming and could not have been avoided even if all reasonable measures had been taken ([clyde-co-aviation-newsletter-autumn-2021.pdf](#), at 41).

Comment:

(a) Rebooking

This requirement would inevitably disservice passengers. In proposing prompt rebooking, the Agency assumes that all passengers prefer arriving at destination as soon as possible, rather than waiting for a direct flight, or flying at the same time the next day. In our experience, this assumption is ill-founded and travel options should not be imposed on the passenger by default. A passenger's original carrier may be the only carrier with direct service or may operate on a schedule more adapted to their needs.¹⁵

Air Canada's experience with the current APPR requirement of booking on any other carrier has not been positive from a customer service standpoint. In several cases, this process has caused the original carrier and travel agent to lose oversight and control over the itinerary, and to therefore lose the ability to assist the passenger in the event of a disruption on the new carrier's services. This situation is suboptimal for passengers, who may wish to rely on their original carrier (with whom they may have loyalty status) or travel agent for travel arrangements, which may need to be adjusted as a result of the disruption.

The Agency's new proposal would worsen the situation for passengers, as they would lose the ability to make their own decisions. It also does not account for situations where a new itinerary, while departing earlier than an alternative proposed by the original carrier, arrives later at destination. This would arise with lengthy connections. In such a case, the new carrier would not be offering standards of treatment at the point of connection, whereas standards of treatment would be provided by the original carrier at the original point of departure, until the new departure time is set. Passengers would be disadvantaged by such a situation as well.

Air Canada has systems in place to offer the best possible alternative options when rebooking passengers during unfavorable situations. However, the Agency's proposal would preclude offering the best possible alternative to passengers.

Air Canada is not aware of any evidence supporting the proposed change. While the Agency may have complaints regarding limited rebooking options, these would be due to alternate flights being full at time of rebooking, particularly during peak periods. The Agency's proposal is not going to add seats on flights. It will only serve to remove consumer choice.

Recommendation:

Carriers' obligation should be to offer rebooking options to passengers, so that they may choose the carrier and schedule that best suit their needs.

¹⁵ Disrupted passengers may prefer to go back home or to their hotel and return at a similar time the next day, rather than stay at the airport for a flight hours later, which may be late into the night, or arrive at destination late into the night. This is particularly true for long haul flights, flights departing and landing in widely different time zones. Many passengers may well prefer having flexibility to choose their flight schedule, such as those requiring assistance from service providers on their journey, those traveling with young children or with preferred sleep schedules, unaccompanied minors, etc. Similarly, arranging transportation on other carriers through different connection points may cause visa issues and complexities for transit at new connection points. When rebooking passengers with other carriers with which Air Canada does not have an agreement, certain crucial elements, such as certain Special Service Request (SSR) codes, are not used in the same way. Some passengers may have special needs that cannot be accommodated or must be accommodated differently on another carrier, and these may drive a consumer's choice of carrier. Moreover, checked baggage cannot be transferred between carriers who do not have a transfer agreement in place, and check-in processes cannot be streamlined either. Connecting between carriers who have no agreement to work together will add burden and time to a passengers' itinerary. Baggage fees need to be paid again with a new carrier with which the previous carrier does not have an agreement. For international connections, this may also mean exiting the transit zone, which is contingent upon the passenger having required entry documentation. Accordingly, rebooking practices must be contingent upon each passenger providing consent and satisfaction with the proposed alternative carrier and itinerary. Baggage and other policies cannot be streamlined between carriers generally. There are competition law safeguards preventing the alignment of customer service policies. Further, not all carriers have similarly high safety ratings or service standards, and a number of public lists exist to provide consumers with pertinent safety information so that they may make informed decisions about their chosen carrier. [IATA Operational Safety Audit \(IOSA\)](#), rates safety levels by carriers, through an internationally recognized and standardized assessment program. Similarly, the [EU Air Safety List](#) offers a list of banned carriers and some operating under certain conditions. The [ICAO Universal Safety Oversight Audit Program \(USOAP\)](#), assesses and monitors the safety oversight capabilities of member states.

(b) Refunds

The Agency's proposal to further reduce the timeframe to respond and issue refunds to passengers is highly problematic given the realities of airline ticket sales, which are processed through various distribution channels (e.g., direct sales, travel agencies, other airlines).

As a matter of industry practice, passengers are typically directed back to their original booking source as the originating seller holds all pertinent information to efficiently process the refund, which includes the storage of original payment details. While the refund of tickets sold through a carrier's direct distribution channels can generally be processed quickly, the 30-day timeline can be difficult to meet where an airline is not the original seller of the ticket. Some of the practical issues that arise include, but are not limited to the following:

- Carriers are not necessarily paid by travel agencies or third-party booking sources prior to the time of departure. Many bookings are processed through the IATA clearing house and are reconciled on a monthly basis. Airlines cannot refund sums that are not currently being held by them.
- Under the current version of the APPR, the airline has to refund within 30 days after the day on which it becomes obligated. In certain cases, the airline may not have any contact with the passenger directly and the 30-day timeline may lapse if the travel agency fails to promptly process the refund or contact the airline to advise of the refund request.
- In many cases, a passenger who originally booked through a travel agency must contact the travel agency to process the refund, as the carrier cannot refund directly and inadvertently the 30-day timeline may expire as a result of this exchange. This same scenario also applies to ticketing that is purchased through interline or code share agreements, where the operating carrier does not possess the ability to process the refund directly and the passenger must then be referred back to the ticketing carrier.

Thirty days is already a short timeline for the many exchanges that are often necessary. Any further reduction in this timeline will exacerbate the issues expressed above and make the refund timeline unachievable, creating unfair expectations for consumers.

Recommendation:

The timeline to process refunds should not be further reduced in light of the practical issues and complexity of airline ticket sales. Conversely, the timeline could be shortened for refunds of tickets booked directly through a carrier's direct distribution channels.

4. ASSISTANCE

Proposed requirement:

The proposed APPR mandates airlines to provide assistance to passengers for all flight disruptions following a departure delay over 2 hours, in all circumstances, unless passengers are notified of the delay at least 12 hours in advance.

Comment:

The APPR overlooks the challenges posed by large-scale disruptions and is designed primarily for isolated events. During extensive disruptions like severe weather affecting the entire network of multiple airlines, providing hotels to every affected passenger can be unrealistic and unachievable due to limited availability.¹⁶ The difficulty to provide assistance to

¹⁶ A study on the current level of protection of air passenger rights in the EU highlighted a concern regarding the provision of care and assistance during the peak holiday season. Specifically, the challenges faced by airlines in finding available hotel accommodations in popular tourist destinations. Source: *Study on the current level of protection of air passenger rights in the EU*, Final report no. MOVE/B5/2018-541, Steer, January 2020.

passengers may also be exacerbated by the size and locations of certain airports, and the services available at them (e.g., smaller airports may not have open restaurants past certain hours to provide meals, airports in more remote areas may have a limited supply of hotels and other accommodation). Experience has also been that hotel costs significantly increase during such events. In order to balance the policy objective of providing care to travelers with the disproportionate impact of such a requirement on carriers during events over which they have no control, hotel costs during such events should be capped to average prices. Moreover, choices of accommodations are often driven by personal preferences and requirements. Some passengers may require specific accessibility services. Some accommodations require credit cards as a condition for checking in, which not all passengers have. Some passengers may consider staying at accommodations that a carrier may not agree to offer in light of its own service standards (e.g., certain offers on Airbnb or bookings.com).

Finally, this requirement essentially makes the carrier assume the role of a travel insurer as it bears unlimited responsibilities toward passengers, with no temporal or monetary constraints on its liability.¹⁷ According to ICAO, the most financially burdensome requirement in EC261 is the duty to provide care, particularly the cost of hotel accommodations, as stipulated in Article 9.¹⁸

Recommendation:

The regulations should accept that a carrier may comply with the obligation to provide hotels by reimbursing reasonable accommodation costs as an alternative to providing specific accommodations in the event that it made reasonable efforts to secure suitable accommodations through its hotel providers and was not able to do so. Additionally, it is imperative to recognize that hotel costs should be limited to what is reasonable in the circumstances unless they are capped to average hotel rates when used for passenger care, and to establish a maximum accommodation period of three nights for passengers irrespective of the nature of the disruption.

5. COMMUNICATIONS

Proposed requirement:

The proposed changes require airlines to enhance communication with passengers during flight disruptions by collecting passengers' preferred communication methods at check-in, providing proactive and timely disruption information on carriers' websites and digital platforms, and by informing passengers of specific entitlements.

Comment:

We agree that improving communications with our customers is a priority and are investing to that end.

(a) Collecting information at check-in

A carrier can only gather passenger data when it handles the check-in process. There is no existing mechanism to collect passenger information when check-in is conducted by other carriers on a previous connecting flight, unless they collect the information themselves. This obligation should only be imposed upon carriers involved in check-in.

(b) Notification of SOT 12h in advance is unadvisable

¹⁷ An illustrative instance of this is the case of *McDonagh v Ryanair*, where the plaintiff sought compensation amounting to EUR 1129.41 to recover the expenses incurred due to the cancellation of their flight.

¹⁸ ICAO Secretariat, Effectiveness of Consumer Protection Regulations, Worldwide Air Transport Conference (ATCONF), Sixth Meeting, Agenda Item 2.3, Information Paper No 1, Doc ATConf/6-IP/1 (27 February 2013), <https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6.IP.001.en.pdf>

Standards of treatment (“**SOT**”) are designed to help passengers be comfortable while they wait. There is in most cases no better place for them to do so than at their homes. There is accordingly no policy reason to offer what is proposed. Having passengers travel to the airport to seek SOT would not be aligned with the regulatory objective, would unduly increase costs for carriers, and would create resource constraints by straining airport infrastructure through increased passenger volumes.

While notifications of new departure times and reasons for disruptions should be provided as the information becomes available, entitlement to SOT should only be notified no earlier than the time at which carriers expect passengers to be at the airport, that is, generally, two to three hours prior to revised scheduled departure for passengers originating from that location, and only for customers who have checked in. However, connecting passengers delayed on the connecting flight should be entitled to SOT during their connection if it has been lengthened by a disruption.

Experience with the European regulation has shown that advance notifications have led to a gamification of passenger protection requirements, with passengers booking disrupted flights in real time in order to receive benefits, and then canceling their travel. Regulations must strike a balance between passenger protection objectives but should not become an instrument for fraudulent claims.

In addition, Air Canada is changing its policy to provide for the automated issuance of meal and hotel vouchers to avoid forcing its customers to wait in line at airports to receive their standard of treatment. However, automated issuance is only appropriate if a customer has checked-in, particularly given that the average rate of passengers not arriving for their flight in time or misconnecting can be as high at 15%. Accordingly, Air Canada recommends that notifications of SOT be provided to checked-in passengers only.

(c) Notifications of specific compensation entitlement prior to arrival is unachievable

Providing specific compensation in advance or at the time of departure presupposes that the determined root cause of a delay at arrival at final destination is known. As the Agency itself has recognized, “[a] flight disruption can be complex and evolve over time”.¹⁹ Announcing compensation without knowing the exact reason for the delay could lead to inaccurate information being conveyed to passengers. This could prove to be a disservice to the travelers, as they may receive incorrect or misleading details.

Recommendation:

While it is appropriate to provide notifications of reasons for disruptions at time of departure, specific entitlement to compensation cannot be clarified at that time, beyond general APPR requirements.

Moreover, notifications of standards of treatment should be made no more than three hours prior to departure for non-connecting, checked-in passengers.

In addition, requirements should clearly indicate that carriers are responsible for collecting information only during a process that they control (e.g., purchase, check-in, etc.).

6. CHAIN REACTIONS (KNOCK-ON EFFECTS)

Proposed requirement:

The proposed changes to the APPR would interrupt the chain of causation and impose compensation obligations upon carriers even for an event normally exempted from

¹⁹ Inquiry decision, Decision No. 122-C-A-2021

compensation, if it is a disruption beyond the next flight operated with the same aircraft or crew.

Comment:

Air Canada recognizes the benefit of introducing guidance about cut-offs for the knock-on effects of uncontrollable events.

However, limiting knock-ons to one flight only disregards the consequences of disruptive events and would unfairly hold carriers responsible for situations they do not control.

Regardless of resiliency built into an airline schedule, due to the interconnectedness of the system, major disruptive events such as thunderstorms will always have knock-on impacts that will exceed the proposed rule of one subsequent flight. It is simply unrealistic for airlines to build a level of resiliency to be in position to recover by the next flight when an unexpected and uncontrollable event impacts many flights at the same time, or an entire hub airport operation.

Specific examples of the impact of weather and its knock-on effects can be illustrated by carriers' experience during the weekend of June 24–27, 2023, during which severe thunderstorms throughout the US East coast resulted in a number of operational challenges for air carriers.

Specifically, as a result of weather, over these four days alone:

- Over 300 Air Canada flights and 25,000 passengers were impacted;
- Nearly 2,600 flight attendants and 1,750 pilots were displaced or on cancelled legs;
- Over 1,900 hotel vouchers were provided to passengers, among other impacts.

In addition, this proposal would penalize short-haul operations, where the number of flights operated with the same aircraft is higher than for long-haul operations. This would lead to increased costs of travel for regional markets, that are mostly served with short-haul flights.

Recommendation:

Air Canada recommends it would be fair for knock-ons causing delays of either aircraft or crew be generally limited to 48 hours following initial time of departure. However, this provision should clearly allow for exceptions in situations of widespread disruptions affecting large regions or entire fleets, for which recovery within 48 hours cannot be reasonably expected. This is not a free pass, carriers would still need to show how the original disruption caused the subsequent ones.

7. IMPLEMENTATION TIMELINE

Certain proposals made by the Agency require IT development and significant time to implement, including for example communicating specific standards of treatment entitlement, which is contingent upon real time coding; communicating standards of treatment when passengers are not at the airport; collecting contact information at check-in; providing documentary evidence when responding to claims, etc. The Agency should consider an appropriate implementation timeline for such types of requirements, which should be no less than two years.

8. DENIED BOARDING

Currently, APPR requires that carriers confirm in writing the compensation a volunteer will receive for giving up their seat, prior to departure. This requirement has proven to be impractical. Airport agents are required to prioritize the on-time departure of the flight, and handling a denied boarding situation is already an exceptional situation that adds to the time needed to ensure a timely departure.

As there is no indication that verbal confirmation of benefits are not being followed through, there is no need for such a requirement. Since it yields results contrary to the overall APPR objective, we recommend adding the following words after “before the flight departs” below:

S. 15(3): If a carrier offers a benefit in exchange for a passenger willingly giving up their seat in accordance with subsection (1) and a passenger accepts the offer, it must provide the passenger with a written confirmation of that benefit before the flight departs or as soon as practicable thereafter.

Such a requirement is not standard in the industry and does not have its equivalent in any other country’s denied boarding regulation. For example, section 15 of the APPR can be contrasted with the regulations in the United States with respect to voluntary and involuntary denied boarding, reproduced below for ease of reference. As can be seen, there is no corresponding obligation to confirm the “benefit” prior to the flight departing.²⁰

9. SHARED ACCOUNTABILITY

A fair and balanced approach to APPR would reflect properly that many disruptions result from the actions or inactions of more than one stakeholder in the ecosystem. A passenger rights regime presents an opportunity to stimulate efficiencies and performance standards for all stakeholders. Accordingly, passengers are not “protected” appropriately through “Air Passenger Protection Regulations” that fail to account for the industry’s ecosystem.

Air Canada refers to the report issued by the National Airlines Council of Canada (NACC), in collaboration with the law firm YYZ Law, and recommends that government give serious thought to establishing a passenger rights regime that recognizes the role of all stakeholders in the ecosystem.²¹

20 § 250.2b Carriers to request volunteers for denied boarding [emphasis added]

- (a) In the event of an oversold flight, **every carrier shall request volunteers for denied boarding** before using any other boarding priority. A “volunteer” is a person who responds to the carrier’s request for volunteers and who willingly accepts the carriers’ offer of compensation, in any amount, in exchange for relinquishing the confirmed reserved space. Any other passenger denied boarding is considered for purposes of this part to have been denied boarding involuntarily, even if that passenger accepts the denied boarding compensation.
- (b) **Every carrier shall advise each passenger solicited to volunteer** for denied boarding, no later than the time the carrier solicits that passenger to volunteer, whether he or she is in danger of being involuntarily denied boarding and, if so, **the compensation the carrier is obligated to pay if the passenger is involuntarily denied boarding**. If an insufficient number of volunteers come forward, the carrier may deny boarding to other passengers in accordance with its boarding priority rules.
- (c) If a carrier offers free or reduced rate air transportation as compensation to volunteers, the carrier must disclose all material restrictions, including but not limited to administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer before the passenger decides whether to give up his or her confirmed reserved space on the flight in exchange for the free or reduced rate transportation. **If the free or reduced rate air transportation is offered orally to potential volunteers, the carrier shall also orally provide a brief description of the material restrictions on that transportation at the same time that the offer is made.**
- (d) Carriers must proactively offer to pay compensation to a passenger who is voluntarily or involuntarily denied boarding on an oversold flight, rather than waiting until the passenger requests the compensation.

²¹ “Enhanced Accountability, Shared Responsibility and Services Standards in Canada’s Air Travel Ecosystem”, https://airlinecouncil.ca/wp-content/uploads/2023/05/Shared-Accountability-Report_May-2023_Amended.pdf