



Airlines for America®

We Connect the World

August 10, 2023

Canadian Transportation Agency
60 Laval Street
Unit 01
Gatineau, Quebec
J8X 3G9
Canada

Re: Consultation on the Proposed Changes to the Air Passenger Protection Regulations

Dear Canadian Transportation Agency APPR Team,

Airlines for America (A4A), on behalf of its passenger air carrier members that serve Canada¹, appreciates the opportunity to comment on the Canadian Transportation Agency's (CTA) consultation regarding the proposed changes to the Air Passenger Protection Regulations (APPR). We support the comments submitted by the National Airlines Council of Canada (NACC) and the International Air Transport Association (IATA) but wish to supplement them with comments of our own.

Our members annually transport over 15.4 million passengers between Canada and the United States, supporting approximately 85,000 jobs in Canada and contributing \$6-7 billion to the Canadian gross domestic product. In 2019, Canada was the largest international air travel market for the United States. Unfortunately, this is no longer the case, and while the downward trend can be linked to multiple factors, we believe continuing to introduce costs and regulations will further this decline. In any circumstance, the safety of passengers is the highest priority of all of our members, and we ask the CTA to continue working with industry to ensure that aviation safety remains the top priority.

Providing world-class customer service is second only to safety for our members. We know that passengers benefit from excellent customer service, and this service thrives in a robust marketplace which provides the opportunity for carriers to compete and innovate, increasing choice for consumers. Airlines have the greatest incentive to meet customer expectations because it results in repeat business while also keeping operating costs lower. However, the proposed APPR changes seek to replace market competition with standardized mandates, which will disincentivize competition and decrease market attractiveness to the detriment of passengers. Indeed, it will result in a race to the bottom whereby market participants only do what is mandated by the

¹ A4A's passenger members that serve Canada are Alaska Air Group, Inc.; American Airlines Group, Inc.; Delta Air Lines, Inc.; JetBlue Airways Corp.; and United Airlines Holdings, Inc. Air Canada is an associate member.

government and nothing more. An additional impact is that air carriers may make the decision to leave or decrease service to markets because of excessive regulatory regimes or unreasonable fee structures, which increase the risks of much higher costs to airlines. Passengers are then harmed due to fewer options available in air travel services. This is already noted: While capacity on transborder flights is not restricted for U.S. carriers, in the past 10 years, U.S. carriers have decreased their number of flights by 45% and their seat capacity by 29%. In 2013, U.S. carriers flew to 24 points in Canada. Today, however, they serve only 11.

Canada appears intent in molding the APPR regulations to emulate and become more onerous than the European Union's regulatory regime, specifically Regulation 261/2004 on denied boarding, cancellations and long delays (EU261). The U.S. airline industry has significant concerns with EU261, which serves as a cautionary tale for Canada. The application of EU261, including multiple legal judgments by the European Court of Justice of the European Union and its predecessor, the European Court of Justice, has highlighted numerous shortcomings with the drafting of the original regulation, especially concerning the concept of "extraordinary circumstances." Over the years, this has created a convoluted and complex interpretation, difficult for both passengers and airlines to understand. Consequently, the EU261 regime is highly litigious, which has resulted in clogging the court system and increasing costs for passengers and airlines.

Most importantly the added costs that airlines face to adhere to EU261's punitive scheme have not resulted in operational performance improvements despite airlines dedicating significant resources to address operational issues. Indeed, operational performance has declined in the EU from 2011 to 2018 despite the obligations of EU261 for the pure and simple reason that airlines do not have absolute control over every aspect of the aviation ecosystem (domestic, transborder or international). However, EU261 (and APPR) holds them accountable when any aspect of the aviation ecosystem thwarts their efforts to transport their passengers to/from their destinations. Furthermore, a Steer study, commissioned for the European Commission (EC) itself, even recognized that the high cost of EU261 may generate disincentives for airlines to operate severely delayed flights and incur operating costs in addition to disruption costs.² The end result being that flights are cancelled and passengers are being forced to seek alternative travel arrangements to reach their destination.

It is worth noting that the CTA asserts this consultation contains both proposals to comply with the Budget Implementation Act, 2023, No. 1 (Bill C-47) (BIA) and discretionary proposals not required by statute. A detailed review of what has been set out in the consultation paper, however, makes clear that the vast majority of CTA's current proposals are not required by statute but wholly discretionary by CTA. Given this fact, we urge CTA to only implement reasonable and balanced proposals.

² <https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1#>

We highlight specific concerns with the proposed APPR changes below:

Exceptional Circumstances List

The CTA is proposing the removal of the existing flight disruption categories of controllability and instead is defining exceptional circumstances that would not require passenger compensation. The CTA proposal introduces a two-pronged definition of exceptional circumstances: The event causing a disruption must be outside the airline's control and the event could not be avoided even if the airline took all reasonable measures to do so.

The application of these limits unnecessarily and severely restricts the number of exceptions for compensating passengers for flight disruptions. Additionally, the limits discount the controllability of flight disruptions by airlines. Most importantly, the CTA strikes all exceptions for carrier actions related to safety, including any kind of unexpected mechanical malfunctions, decisions based on a Safety Management System, safety-related decisions by pilots, and even delays due to an aviation accident. Safety is the top priority for the aviation industry and critical safety decisions should never be undermined in any way by economic regulations.

It is for these reasons that A4A strongly endorses the suggested exceptional circumstances list provided by NACC in their submission (Annex 1). If included in the regulation, the NACC list would provide a list of circumstances exempting airlines from the obligation to pay compensation which includes a clear, logical, and comprehensive list of safety related exemptions for unexpected situations.

Finally, even applying the two overreaching new limits described above, carriers constantly strive to improve safety by addressing safety concerns within the airline's control, so exceptions for safety would presumably meet the test outlined. Adding the safety exception into the regulations will apply the precision needed to avoid situations such as those that have been litigated under EU261 due to lack of clarity.

Departure Delays

The CTA proposes to require compensation when there is an arrival or departure delay of at least 3 hours. We urge the CTA to remove the departure delay compensation requirements as it is not required by statute and a delayed departure does not mean a 3-hour delay as passengers benefit from carriers' ability to reroute and potentially get the passenger to their intended destination more efficiently. Industry and governments generally focus on arrival delays to address passenger expectations of arrival and so should the CTA.

Chain Reactions (Knock-On Effects)

CTA seeks to limit the number of flights that can benefit from an "exceptional circumstance" defense to two, i.e., the affected flight and the following flight. This

limitation appears to be based on the flawed assumption that all flights with an operational disruption are at the airline's hub where substitute crew, aircraft and/or other resources are readily available. This is simply not the case, especially given the expansive scope CTA purposefully created for APPR: all flights to, from and within Canada, including connecting flights³. U.S. airlines do not have any hubs in Canada, much less in every possible city worldwide that any Canadian may be traveling to/from. In addition, the black and white rule proposed fails to take account of exceptional circumstances that can cause widespread disruption. For example, a hidden manufacturing defect or an air traffic control (ATC) outage, both exceptional circumstances, may cause the disruption of more than two flights. In addition, it is not unusual to find that multiple exceptional circumstances can impact a flight: an ATC outage in the New York City area delays flights to Toronto, where there is a significant weather event that restricts flights to/from the city. Consequently, actual operation of any New York City area-Toronto-New York City area flight is impacted by events at both locations such that relief from one exceptional circumstance does not necessarily result in an airline actually operating its planned flights. Specifically, once weather issues in Toronto cease and flights resume, a U.S. airline would not necessarily have aircraft and crew in Toronto to operate their planned schedule.

Given the severity of this issue, A4A is prepared to engage the U.S. government that such a rule is a violation of the U.S. – Canada Air Transport Agreement (ATA) because CTA's currently proposed two flight limit clearly favors Canadian airlines which have hubs in Canada with aircraft, crew, and other infrastructure to help limit flight impacts to two flights. U.S. airlines and likely all other airlines by virtue of being based outside the U.S. have no such infrastructure and thus are unfairly more impacted by this rule than Canadian airlines. Consequently, A4A agrees with IATA and NACC that CTA should instead adopt a 48-hour rule to more closely align with the operational reality of international airlines. If, however, CTA remains adamant that a specific number limit must be placed on knock on effects, A4A recommends a minimum of three flights as a more reasonable and balanced alternative.

Shifting the Burden of Proof

The CTA proposes to shift the burden of proof to require an airline denying a compensation claim to provide the passenger with a detailed explanation, including documentary evidence that the circumstances were exceptional and a reference to the applicable terms and conditions of the passenger's ticket, including fare rules. The CTA should reinforce that a passenger must first provide sufficient information for a carrier to process a claim for compensation. CTA should also clarify that if an exceptional circumstance applies to a particular delay or cancellation, the carrier can use the same

³ Given APPR's overly generous scope, a Canadian traveling from Toronto, connecting to Chicago and then traveling to Guatemala is afforded all the protections and benefits of APPR throughout the entirety of their journey. This exceeds even EU261's scope which rightly is limited to flights within the EU and departing the EU. The EU made conscious efforts to avoid overlapping and duplicative regimes; however, the CTA attempted no such regulatory subtlety. See IATA/A4A et. al appeal of IATA/A4A et. al. v. CTA et. al. [2022] F.C.A. 211, to the Canada Supreme Court challenging the extraterritorial application of the APPR.

data as a basis to decline compensation requests for all passengers on that particular flight. Equally, CTA must also make clear that the compensation regime is claim based. There is no automatic right to compensation and a passenger must make a claim with the airline to be eligible.

Assistance

A4A notes, with concern, that CTA proposes to require airlines to give passengers assistance for all flight disruptions after a defined delay at departure, including in an exceptional circumstance for a certain (currently undefined) period of time. As a background matter, an airline's actual ability to provide assistance to passengers during a flight disruption can be hampered (if not prohibited) by the size and services available at certain airports and surrounding areas: Smaller airports may not have restaurants open past certain hours to provide meals and airports in more remote areas may have a very limited supply of hotels. In addition, the open-ended nature of CTA's proposal makes airlines vulnerable to cases where passengers can require reimbursement of luxury hotel stays (during a travel disruption) where a more reasonable hotel near the airport was available. Of greatest concern to A4A is that CTA would require assistance be given even in exceptional circumstances such as firm border closures such as those during the COVID pandemic. An airline should not be the insurer of last resort and it should be up to everyone involved (authorities, airports, airlines, hotels, and passengers) to accept a shared responsibility to resolve the situation. As discussed below, travel insurance is available for passenger purchase that would address CTA's concerns. If, however, CTA requires assistance to be provided by airlines during exceptional circumstances, a balanced approach requires CTA to allow carriers to place limits both on cost and type of assistance, as well as duration (i.e., does not exceed three-night accommodations).

Communications

The CTA proposal dictates specific means of airline communication with passengers during a "flight disruption" and the content of those messages. Our members are already doing much of what CTA has proposed and continue to invest significant resources to provide passengers with updates and information throughout their journey. Leaving this aside, there are clear issues with some of CTA's proposals. First, CTA suggests that carriers will be required to send passengers messages through a preferred communication method and include what entitlements are due *at the moment*. The concern here is that a carrier may not fully understand the root cause(s) of a disruption during the actual operation and therefore is simply not in a position to provide the information that CTA proposes. Many delays have multiple causes and cascading effects, such as weather that causes a delay that ultimately results in a crew to time out. Determining what entitlements are due to a plane load of passengers (or several plane loads) *at the moment* a disruption is occurring is simply not possible given the complexity of CTA rules and the variety of factors that cause any operational disruption. CTA must reconsider this proposal as it will cause more passenger confusion and less certainty as to when compensation is due. Also, requiring carriers to provide information

about the disruption “in the moment” is more likely to result in *misinformation* to customers.

Second, CTA proposes for airlines to provide disruption information in a “proactive and timely manner” on airline websites and digital platforms. Given APPR’s expansive scope, this proposal is highly questionable in both feasibility of execution and effectiveness. As written, CTA suggests that information about any and all flights throughout an airline’s network that may be experiencing any disruption must be posted on the airline’s website and digital platform. This could cause confusion among passengers checking on the website for future travel as well as those checking on disruptions. Moreover, airlines already send flight status updates to passengers who provide their contact details and also allow passengers to share their itinerary with any interested party who may need information on their flight’s status. In addition, airline websites and their mobile apps have a “Flight Status” section/function where a precise, targeted search for information on a specific flight (or route) can be obtained.

Government of Canada Issued Travel Advisories

CTA proposes to change refund rules to allow passengers to cancel travel and receive a refund even if they purchased a nonrefundable ticket where (1) the government of Canada issues a travel advisory for the passenger's destination country or a connecting country; (2) the advisory risk level has risen since the passenger bought their ticket; and (3) the new recommendation is either to "avoid non-essential travel" or "avoid all travel."

Several reasons counsel against requiring airlines to provide a refund to passengers with non-refundable tickets in these circumstances. First, travel advisories are now commonplace. A look at the U.S. State Department website currently shows over 212 active alerts (with over 42 at a level 3 or 4) and even with these in place, people are continuing to travel widely. Second, such a requirement would drive up fares because airlines will be forced to forfeit revenue when passengers decide they do not want to travel and claim a pre-existing government travel advisory for basis of refund. Third, the requirement is a clear violation of the freedom of pricing guarantee that airlines enjoy under the U.S. – Canada ATA because CTA will force airlines to change their pricing practices to mitigate the resulting damage when the U.S. – Canada ATA provides freedom for airlines to price according to market dynamics. The optimal approach is to encourage passengers to purchase travel insurance to cover their losses in case they are forced to change their plans for the reasons the government enumerates.

We support two proposals to reinforce the rights of passengers in this area. First, airlines should inform passengers that their right to reimbursement is governed by the airline’s conditions of carriage if the passenger cancels a non-refundable booking. Second, airlines should provide passengers with information about travel insurance that will entitle them to a refund in the event of a major crisis occurring at their destination, place of departure or immediate vicinity, which significantly affects their travel plans. Airlines should provide the above information in the manner they consider to be most

effective. The Canadian government in turn should encourage insurance companies to offer such insurance through, e.g., financial incentives and tax credits.

If CTA adopts this proposal despite these principled objections, we recommend several changes to mitigate the impact of fraud that will result from this rule:

- First, the travel advisory must have been issued after the itinerary is purchased and ticketed.
- The travel advisory must be in effect at the time of travel.
- The passenger should present the travel advisory to the carrier and explain why it applies.
- The travel advisory permitting a full refund, even for nonrefundable itineraries, should only apply when there is an “avoid all travel” for the entire traveling public, for the region in which origin, destination or connecting airport is located.
- Carriers should also be able to offer and agree with customers on other forms of compensation instead of a cash refund such as travel credit, miles or discounts equivalent to the value of the flight original flight.

Thank you for the opportunity to express our concerns. We stand ready to discuss these issues further at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Glatz". The signature is fluid and cursive, with the first name "Keith" written in a smaller, more compact script and "Glatz" written in a larger, more prominent cursive style.

Keith Glatz
Senior Vice President
International Affairs

Annex 1
Exceptional Circumstances List – NACC Proposal

- (a)** war or political instability;
- (b)** illegal acts or sabotage;
- (c)** Weather or other atmospheric conditions, or natural disasters, that make it impossible to safely operate the flight, including items such as: actual or forecasted blizzards, heavy winds, lightning, hurricanes, etc
- (d)** instructions from air traffic control;
- (e)** a NOTAM, as defined in subsection 101.01(1) of the Canadian Aviation Regulations;
- (f)** a security threat or risk, incompatible with the safe operation of the flight, including unruly passengers;
- (g)** airport operation issues;
- (h)** a medical emergency;
- (i)** a collision with wildlife, drones, or any other unforeseeable accident
- (j)** a labour disruption within the carrier or within an essential service provider, or labour shortages within an essential service provider such as an airport or an air navigation service provider;
- (k)** a manufacturing defect in an aircraft that reduces the safety of passengers and that was identified by the manufacturer of the aircraft concerned, or by a competent authority;
- (l)** Technical defect(s) and/or problems, provided that all of the following criteria is fulfilled:
 - o the maintenance has been executed in accordance with the approved maintenance program, including taking into account Minimum Equipment List (MEL) and Configuration Deviation List (CDL)
 - o 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.
- (m)** . A defect or concern discovered via the carrier's, a supplier's, or a relevant 3rd party's safety management system or quality assurance program that requires immediate action to ensure the safety of further flight(s).
- (n)** an order or instruction from a manufacturer of an aircraft, engine or part, or from an official of a state or a law enforcement agency or from a person responsible for airport security;
- (o)** system outage or infrastructure breakdown by governmental or essential service providers, essential to the operation of a flight;
- (p)** 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;

(q) any other situation that cannot be reasonably foreseen if the carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid the delay or cancellations or that it was impossible for it or them to take such measures.