



NACC
National Airlines
Council of Canada

CNLA
Conseil national des lignes
aériennes du Canada

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Mr. Scott Streiner
Chair and CEO Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

By email: Consultations-aeriennes.Air-Consultations@otc-cta.gc.ca

Re: Consultation on new refund requirements

The National Airlines Council of Canada (NACC), Airlines for America (A4A) and the International Air Transport Association (IATA) (collectively "the Associations") appreciate the opportunity to provide input into the CTA's Consultation on new regulations governing refund requirements.

Several of the questions in the CTA consultation call for airline operational data to which the Associations lack access and may be confidential in nature. As such, this submission will focus on the consultation generally as well as any questions on which the CTA would benefit from a broader industry perspective.

At the start we would like to highlight some overarching principles we believe CTA should consider. Most importantly, and as we will explain further below, we believe now is not the time to enact new regulations regarding refund requirements. However, if the CTA insists on adopting regulations regarding airline refunds then:

1. Regulations should only apply to future tickets sold,
2. Regulations should only apply to airline-initiated cancellations, and the airline has not provided the customer with a reasonable opportunity to rebook on own services,
3. Vouchers or e-credits should be permitted as a first response or default response of carriers, and
4. Any refund obligation that CTA imposes on carriers should require the passenger to initiate the refund process, it should not be automatic.

Introduction

As the CTA knows, airlines globally have suffered unprecedented losses due to COVID-19 and the responses of many governments to the pandemic, which include either full border closures for various periods of time and/or limiting entry into their country to only their citizens and nationals. Mandatory quarantine requirements have resulted in an effective ban on travel wherever they exist. The impact of these measures globally, compounded by public concern, has decimated demand for air travel, which has all but evaporated. Since the beginning of March 2020, air carriers have seen their previous positions of strong financial health deteriorate at an unprecedented and unsustainable pace.

As Prime Minister Trudeau and various Cabinet Ministers have stated on numerous occasions, Canada has enacted some of the most stringent border entry, testing and quarantine provisions in



the world. In addition, the federal government requested – and Canadian carriers agreed – to completely suspend service to Mexico and the Caribbean until the end of April.

In addition to limiting entry to Canada to a finite group of people, the Government of Canada's recent orders requiring not only mandatory Canadian-bound pre-departure PCR testing but also mandatory PCR testing upon arrival, quarantine at a government-approved hotel, a third PCR test during quarantine and the fact that the full 14-day quarantine must be served whether all three molecular tests are negative, are examples of government policies that are an effective ban on travel. One stark example is the effect Canadian policies have had on the U.S.-Canada transborder market. A4A reports that in January 2020, according to data from the U.S. government, U.S. and foreign airlines carried 2,552,769 passengers between the United States and Canada. In January 2021, they carried just 163,337 passengers between those two countries, a decline of 94%. While the Government of Canada may, in effect, shut its border to international air traffic, it cannot ignore the severe impact this zero COVID-19 importation policy is having on the financial health of Canadian and foreign carriers serving this market. The fact that Canada is one of the only major countries in which the government has not provided its carriers the financial support needed to survive these government restrictions only makes this economic crisis more severe. During a February 24, 2021 media briefing, IATA predicted that globally airlines will burn through another \$75-95 billion in cash this year; travel demand will be up only marginally over 2020, and still be only 38% of what it was in 2019, before COVID-19 caused travel demand to crater.

Given the above, we believe now is not the time to enact new regulations instituting refund requirements that will further strain our members' already decimated balance sheets and imperil the jobs of not just airline workers but also the various companies that the industry supports. Our members' business success depends on meeting and exceeding our customer service standards. Our members also strictly follow and comply with all laws and regulations imposed by the governments where they provide service, including those concerning provision of refunds. When a refund is due under those regulations, carriers promptly provide them. It is also true, while policies vary from carrier to carrier based on their respective business models, many carriers are encouraging customers to accept vouchers for future travel. This practice underscores the economic reality that if air carriers refund all tickets, including those purchased under the condition of being non-refundable or those cancelled by a passenger instead of the carrier, this will result in negative cash balances that may lead to bankruptcy. Vouchers, future credit opportunities and other incentives are being offered to stem untenable cash drain and to protect our employees' livelihood.

Because of the daily uncertainty associated with this global pandemic and governments' patchwork response to the same, it is impossible for airlines to maintain a normal schedule and/or avoid last minute cancellations. Imposing regulations that do not reflect this fact is both unrealistic and counterproductive. We therefore request that this consultation be deferred until such time as airlines are able to resume normal operations that normal refund policies would support.

CTA Jurisdiction

As this letter will demonstrate, the Government's response to COVID-19 and its impact on traffic levels etc. is outside the control of our member airlines. As a threshold issue, while the CTA has not explicitly stated its intent on applying refund regulations retroactively, (i.e., to tickets purchased prior



to the date in which the regulations are adopted) we caution the CTA against such an approach. This would be an illegal application of regulations.

Equally unclear and problematic is whether CTA has the authority to mandate a regulatory refund obligation for situations outside of a carrier's control. Indeed, while the Minister of Transport does have broad powers to issue directives to the CTA under s. 86.11(2) of the Canada Transportation Act (the "Act"), these powers apply to a carrier's "other" obligations,¹ that is, other than those already stated in s. 86.11(1) of the Act. Section 86.11 of the Act does not provide powers to the CTA to make regulations in respect of refunds for situations outside carriers' control. On the contrary, the powers to make regulations in respect of refund are clearly and explicitly limited to situations within carriers' control. As such, we believe that the regulatory changes being considered are likely illegal and *ultra vires*.

General Feedback to the Consultation Questions

Please find below our general comments to the questions raised under the "Issues for Consultation":

- 1. The entitlement to a refund will apply if the airline cannot complete the passenger's itinerary within a reasonable time. In the context of an event outside of an airline's control - such as a border closure, security incident, or volcanic eruption - what should be considered a "reasonable time" for completing a passenger's itinerary?**

As mentioned at the outset, any new regulation in this area should only apply to future carrier-issued tickets and for carrier-initiated cancellations, it should not apply to passenger-initiated cancellations. The comments submitted herein are based on that assumption.²

Any regulation should also provide an adequate time for the airlines to recover before the obligation to rebook is initiated.

We believe that a reasonable time for completing a passenger's itinerary should be no less than 72 hours starting after the end of an event that is outside of an airline's control and that the airlines are able to safely operate without any impediments. This recommendation is based on typical recovery times for events occurring outside a carrier's home country. We acknowledge that section 18(1)(a) of the APPR provides for 48 hours after an event for issues outside of a carrier's control. However, we believe that 72 hours is more appropriate in situations outside carrier's control, as some destinations are located far outside a carrier's home country where new crew may need to be sent for recovery and it may also entail additional crew rest. In the context of this global pandemic, this timeline should begin after the removal of all government travel restrictions having any significant impact on a carrier's network and should not be analysed on a route basis exclusively, given the interconnected nature of airline's networks.

¹ S. 86.11(1)(g) of the Act

² The Associations would like to underscore that airlines are responsible for handling refunds only for tickets which they issue. Refund requests for tickets purchased through a travel agency -- whether online or a traditional agency -- are processed/handled by the issuing agency.



As per the IATA [Core Principles on Consumer Protection](#):

- Passenger entitlements enshrined in regulations should reflect the principle of proportionality and the impact of extraordinary circumstances;
 - The industry recognizes the right to re-routing, refunds or compensation in cases of denied boarding and cancellations, where circumstances are within the carrier's control;
- The industry recognizes the right to re-routing, refunds or care and assistance to passengers affected by delays where circumstances are within the carrier's control;
- In cases where delays or disruptions are outside an airline's control, governments should allow market forces to determine the care and assistance available to passengers;
- The responsibilities imposed by the regulator, related to both care and assistance as well as compensation, must be fairly and clearly allocated between the different service providers involved and should not impact on the contractual freedom of all service providers.

It is vital that regulations on refunds act as a simple baseline upon which airlines can build enhanced consumer offerings, and that they allow flexibility to develop competitive customer service policies.

2. The entitlement to a refund could potentially apply not just in the context of a flight cancellation, but also a "lengthy delay." What should be considered a "lengthy delay"?

A "lengthy delay" should be at least 25 hours starting from the scheduled departure time. The availability of new departure times can be very restricted on some routes crossing many time zones, accounting for night-time flight restrictions at both departure and arrival airports, the need to provide customers with hotels for overnight delays, and airport slot congestion. On such routes, even relatively short operational delays may require a rescheduled of the flight departure for a full day.

3. What should a refund cover? For example:

- **The unused portion of the passenger's ticket;**
- **Any additional services the passenger purchased, but did not use (for example, seat selection or extra baggage);**
- **The full cost of the passenger's ticket, if their trip no longer serves a purpose because of the flight disruption.**

As noted above, airlines should only be required to provide a refund of airline-issued tickets for cases that are within their control and initiated by them. Any refund in those limited circumstances should be for the unused portion/s of the passenger's ticket including ancillaries.

4. How should airlines be required to refund passengers? For example:

- **Using the same method used to buy the ticket;**



- **In monetary form (for example cash, cheque, or a bank account deposit);**
- **Passenger's choice of money or other forms offered by the airline (such as vouchers or rebates).**

Refunds to passengers are normally processed using the same method used to buy the ticket. This helps prevent fraud, as airlines have no other ability to vet who purchased the tickets. Identification cards can be and often are altered, as are email addresses.

However, during major world crises such as a global pandemic or other events that effectively halt international travel, airlines should have the flexibility to make temporary changes to this rule. For example, airlines should have the flexibility to refund customers directly when travel agencies hold the original form of payment if we are faced with travel agency bankruptcies and failures.

In all cases, airlines should have the flexibility to offer vouchers or e-credits for future travel *in lieu* of a cash refund, if this form of payment is acceptable to the customer. Finally, CTA should allow airlines to make sure that refunds are made to passengers (as opposed to third party claimant companies, as in EU 261) and that passengers do not receive double compensation (such as a refund from the carrier and a penalty under EU 261).

5. How much time should airlines have to provide refunds to passengers under the new requirements?

Assuming that refunds rather than vouchers will be mandated, we believe a distinction has to be made between cancellations that directly result from government policies that impact all carriers and those where carriers faced unique challenges that required a cancellation/delay. For those impacting the industry generally (e.g., government entry restrictions), we recommend that airlines be given 12 months from the date of travel to refund the passenger. Alternatively, airlines should be allowed to provide a voucher or e-credit that is exchangeable for a cash refund if not used within the 12-month period. For events or circumstances unique to the airline (e.g., a wildlife strike) we believe that carriers should be given 30 days to refund the passenger. However, we think that CTA should provide some latitude on either scenario since a crisis may severely limit an airline's processing times making it impossible to comply with normal refund deadlines. This latitude can be general or tied specifically to industry metrics (such as decreases in system wide capacity or traffic levels) that would justify a delay in these refunds.

6. a) Should there be greater flexibility in the requirements for certain types of airlines, or in certain situations? For example:

- **Based on airline size (smaller airlines may be, for example, less able to recover quickly after an event outside their control);**
- **If an airline provides essential services (for example, to remote, regional or northern communities);**



- **If the event is large-scale (as opposed to an isolated event like a collision with wildlife);**
- **If the event could threaten an airline's financial viability (for example, one that results in operations being shut down for months).**

b) If so, in what areas should flexibility be given? For example, should there be a different:

- **definition of "lengthy delay";**
- **deadline to provide a refund to passengers.**

The Associations believe that the CTA should provide greater flexibility depending not on the airline size or service but on the circumstance and duration of the travel disruption. For example, a bird strike that renders an aircraft inoperable would result in a flight delay but an airline may be able to reaccommodate passengers on an alternate flight (either that it or another airline operates) or launch a replacement flight within 24-48 hours of the event, depending on the location of the event and its proximity to the airline's hub. In contrast, a larger scale crisis (such as a global pandemic or natural disaster) will severely impact all airlines equally.

- 7. Events since March have shown that some situations caused by a pandemic are outside of airlines' control, while others may be within airlines' control. An airline's business decision to consolidate flights during a pandemic could sometimes be considered within its control, while government travel restrictions, employee quarantine or self-isolation, and additional hygiene procedures are examples of pandemic-related situations the CTA considers outside airlines' control. Are there other, specific pandemic-related situations that you think should be considered either within or outside airlines' control.**

We appreciate the CTA's recognition that government policies are outside of an airlines' control and that airlines should therefore be given more flexibility in terms of passenger refund deadlines. At the same time, while an airline's business decision to consolidate flights is technically within their control (since they are making the decision), the decision in the current context is the direct result of government decisions across the globe concerning who can enter and/or what kind of flights can operate into its territory, affecting an airline's entire network. As illustrated during the COVID-19 pandemic, governments swiftly enacted border closures or flight suspensions with immediate effect and of uncertain duration, all in an effort to contain COVID-19 infections. These actions severely impacted not just who can actually travel in the near term but future demand. It also is important to note that these government policies have a bilateral and even multilateral impact, i.e., government restrictions on one route may result in cancellations on another route. Government policies have also driven passengers to book later and cancel later than ever before, which results in airline decisions that would never be made in a non-pandemic environment. As such, any new regulation should reflect the fact that very few scheduling decisions these days, if any, can be considered within an airline's control as this term would be understood in normal times.



8. The CTA will consider the legal frameworks in the European Union (EU) and the United States (US) in developing the new regulation on refunds. What particular aspects of these frameworks should the CTA consider?

While the Government of Canada has not provided the financial support to the industry that other leading governments have, the CTA has been a leader in providing some flexibility to airlines on the issue of vouchers and refunds. This has been critical to the continued financial survivability of Canadian airlines in this crisis.

We recommend that the CTA maintain the existing refund flexibility that allows airlines to issue vouchers given the continued perilous state of the industry. Such flexibility would not only address concerns over airline liquidity but also would align Canada with many other aviation regimes that allow for vouchers to be issued in lieu of providing a refund if the passenger were entitled to one.

For example, the United States, which does not have a clear refund requirement in its legislation, allows airlines to offer vouchers to passengers entitled to a refund with their consent and it gives airlines discretion not to provide even vouchers for passenger-initiated cancellations for a flight that is still operated. The legal frameworks of Mexico, Brazil and Colombia permit airlines to issue vouchers in lieu of cash refunds even without the passengers' consent because they each recognize the precarious state of airlines.³ The Latin American Civil Aviation Authorities Commission (LACAC) issued a resolution recommending that Latin American countries allow airlines to issue vouchers for up to 12 months. In the case of Colombia and Brazil, the vouchers are valid for a period of 12 months. In enacting their regulation, Colombia noted the following:

In the Colombian Regulation Refunds of payments made for air services must be paid by the air operators within 30 days of their request from the user, but currently, air transport services are mostly suspended, and restricted, for which operators must cancel routes and frequencies with significant percentages of tickets already sold, which could be subject to reimbursement. Therefore, it is intended to guarantee the protection of users' rights and to consider the situation faced by airlines.

In order to guarantee the rights of the users it is necessary to adjust the current rules in such a way that it is not only allowed to reduce the pressure of these companies, but also allow the effective reactivation of air transport in the future.(emphasis added)

The Latin American Civil Aviation Authorities Commission (LACAC) issued a resolution recommending that Latin American countries allow airlines to issue vouchers for up to 12 months. Its preamble for that resolution notes the following:

CONSIDERING the importance of air transport for the economic and social development of the region, in order to provide the flow of business and tourism passengers, as well as integration between nations;

³ COVID-19-related airline bankruptcies are not limited to regional airlines but also includes larger airlines such as Avianca; Aeromexico, LATAM and LATAM Brazil.



CONSIDERING the fact that passengers can benefit from a competitive air transport sector, which encourages and offers more possibilities of services to passengers;
CONSIDERING that the closure of borders adopted by governments to control the COVID-19 pandemic in the region has harmed the operation of airlines and passengers who suffered flight cancellations;
CONSIDERING that LACAC should promote the viability and sustainability of air transport in the region, as well as its development for the benefit of both the countries, the airlines and especially the users;
CONSIDERING the need to support the airline industry at a regulatory level at this difficult time, generating tools that allow to help in the sustainability of the industry, which in the long term will be reflected in a wide range of services for the passenger, which translates into better rates, greater variety and quality of service;
CONSIDERING the need to strike a balance between passenger protection and the promotion of competition in the airline industry;
CONSIDERING the ICAO Council Declaration on COVID-19, adopted on March 9, 2020, by which States and financial institutions, in accordance with their mandates, should consider the need to provide direct and / or indirect support, in various ways, proportionate and transparent. In doing so, they must safeguard fair competition and not distort markets or undermine diversity or access; and
CONSIDERING the Council Declaration on COVID-19, adopted on March 9, 2020, whereby aviation is the business of connections and an engine of economic and social recovery and that States and industry must strive to ensure economic sustainability and environment of the aviation sector.

In addition, governments in many other parts of the world (for example Malaysia, Morocco, Russia, Turkey, and the United Arab Emirates) have taken legislative or regulatory action to defer refund obligations or expressly recognise the use of vouchers in lieu of a cash refund. Others have relaxed their enforcement approach to allow flexibility in light of the COVID-19 crisis and its impact upon the travel sector.

These governments have recognized that the use of vouchers strikes a reasonable balance between the interests of passengers and the public interest in ensuring that commercial aviation survives the pandemic. The CTA acknowledged this when it issued its voucher guidance in March 2020. If anything, the logic that led to a decision to allow for the temporary use of vouchers in lieu of refunds holds as true today as it did in 2020.

Conclusion

We thank you for the opportunity to contribute to this exercise and reiterate our request for the deferment of this consultation until such time as the government is prepared to lift the travel restrictions that are preventing airlines from maintaining their normal schedules.



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aériennes du Canada

Yours truly,

Mike McNaney
President and CEO
National Airlines Council of Canada

Douglas Lavin
Vice President, Member & External Relations, North America
International Air Transport Association

Keith Glatz
Vice President, International Affairs
Airlines for America