



## **Regulatory Modernization Initiative:**

**WestJet Submission to Canadian Transportation Agency**

**October 6, 2017**

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# RMI Summary Document

## Overview

The following is WestJet's response to a series of questions posed by the CTA with respect to the CTA's Regulatory Modernization Initiative ("RMI").

### 1. Charters and advance payment protection

- 1) To what extent does the existing regulatory regime for charters continue to serve public policy goals?

The existing regulatory framework meets the public policy goals by providing a flexible mechanism in terms of scheduled and unscheduled domestic and international charter operations.

The current requirement of pre-payment, insurance and sufficient funding obligations protects both the business and the consumer – this is a reasonable approach.

- 2) Has charter activity evolved to encompass a broader scope of activities?

There are evolving models such as 'subscription charters' where potential passengers 'sign up' for a potential flight and if there are sufficient numbers the flight will operate as proposed. These tend to be business traveler focused flights using small aircraft in local markets between major cities and to date exist predominantly in the U.S.

Nothing in the current policy would restrict the establishment of such arrangements here in Canada, provided they met all of the Canadian aviation documentation requirements (license and AOC).

If similar models were employed on a meaningful magnitude for commercial air services within Canada, we would expect there to be sufficient consumer protection requirements imposed on such entities, including, but not limited to, an obligation to maintain a tariff. This is necessary to ensure there is a level playing field where existing carriers can compete without being put at a competitive disadvantage.

- 3) How could the ATR (Air Transport Regulations), as they relate to charters and advance payment protection, be updated to reflect today's reality? What value would these changes bring?

Advance payment is essential for charter operations to ensure revenues are realized. Risk of lost revenue is significant if no prepayment received. WestJet's charters are generally funded through existing flying and not from charter sales as often flying is pulled down to accommodate charter operations. Larger charter programs tend to be less risky as sizeable credits are usually provided to draw on for the operating carrier.

Invoices are only received when flying has been completed, so if payment is not received until over 30 days the carrier could be significantly out of pocket.

### **Questions regarding domestic originating charters**

- 4) Re the question whether the existing eight categories of Canadian originating charter types be replaced by either:
- a. Option A: Three categories of charters (PRCs, PNCs and GCs); or,
  - b. Option B: Two categories of charters (PCs and GCs)

WestJet supports option B.

- 5) Should the following regulatory requirements be maintained, modified, or revised as they relate to Canadian originating charters:
- a. the prohibition against the carrier selling directly to the public,
  - b. the requirement that 100% of the aircraft capacity be chartered, and;
  - c. the requirement that the air carrier holds the appropriate non-scheduled international license that authorizes services on a charter basis between Canada and the foreign country to which the flight is destined or from which it originates.

WestJet supports modernizing and streamlining these requirements.

- 6) Should additional regulatory provisions for Canadian originating charters be retained or eliminated?

WestJet supports reducing the number of categories to help streamline the process and identify the charter flight type.

## Questions regarding foreign originating charters

- 7) Should the size of the aircraft continue to be a trigger to obtain a charter program permit?

Yes.

- 8) Should consideration be given to streamlining the processes for the acceptance of foreign originating charters?

Yes, provided the Agency continues to ensure that a program of foreign origin charters is not created to circumvent the licensing requirements for a scheduled service.

- 9) Should other regulatory requirements, such as minimum advance booking before each flight, the obligation for passengers to purchase return transportation, and a minimum period of stay in foreign country prior to return be maintained?

WestJet supports these revisions provided the Agency continues to ensure that a program of foreign origin charters is not created to circumvent the licensing requirements for a scheduled service.

## Question regarding Advanced Payment Protection

- 10) Should APP, in the current market environment, be maintained?

WestJet does not see a need to maintain APP in the current market environment.

## Questions regarding permit and notification filings

- 11) Should the permit application and issuance process be replaced with advance notification?

WestJet supports advance notification over permit application and issuance.

- 12) If so, is notification 48 hours prior to a flight a realistic timeframe?

WestJet suggests 72 hours would be preferred.

## 2. Code Share

13) Should the ATR be amended with regard to code-sharing and wet-leasing, and if so, how?

The historic policy of granting three year approvals for code share arrangements is an unnecessary administrative burden on both the airlines and the regulator. Especially where open-skies agreements exist, approval ought to be unlimited as long as an open-skies regime remains.

Given the frequency of schedule and network changes in today's environment it seems unrealistic to be constantly updating the regulatory filing as code shared markets come and go. Except in exception cases like China where the bilateral has specific named code share markets, it would be more efficient for both the airlines and the regulator if they gave a truly blanket approval on a country basis instead of a market basis, recognizing that markets will come and go over the years based on network, connectivity, and commercial value. This seems to be an area of unnecessary administrative churn.

Ultimately, code share services should always be inherently open unless the agreement is not reciprocal. Market forces should dictate limitations and the extent to which they are pursued.

WestJet continues its support for CTA consultations on ad-hoc and extra-bilateral code share applications to allow carriers to evaluate their ability / interest to compete as well as to identify concerns.

### 3. Wet Leases

The existing Wet Lease Policy can be improved and enhanced. For example, the existing policy has no limits on bringing in foreign pilots through the Temporary Foreign Worker Program (“TFWP”) to operate dry leased aircraft to get around the wet lease limitations. There needs to be a way to monitor and enforce for non-compliance for carriers who use foreign pilots and wet leasing to seasonally increase capacity. The use of TFWP pilots violates the intent of the wet lease policy.

WestJet recommends a policy which is based on the limitation of the air carrier’s year-round fleet and permanent pilot compliment. This year-round fleet would need to be staffed by Canadian pilots given the programs by which an air carrier may employ foreign pilots, such as TFWP, are limited in duration.

It is the CTA’s responsibility to approve wet-lease arrangements for all non-scheduled (charter) and scheduled air services to, from, and within Canada for the transportation of both passengers and goods. It is WestJet’s position the current Wet Lease policy limitations are ineffective in curbing the illegitimate use of wet leased aircraft beyond the scope of what wet leased aircraft were intended for within the existing regulations. It is clear from the ATR that wet leases are permitted for short term use and not meant to provide ongoing operational requirements by the fact that explanations are required for requests outside of temporary and unforeseen circumstances. The following elements of the Wet Lease policy were clearly designed to prevent using wet leases for example to seasonally increase capacity:

- repeated wet-lease applications may be permitted as long as the 20-percent cap is not exceeded;
- The Wet-Lease Policy does not apply to wet-lease arrangements of 30 days or less. The Agency must ensure that repeated applications to renew a wet lease of 30 days or less are not being used to circumvent the requirements of the Policy.

In addition, any ‘government approved’ application that involves a wet lease program needs to be made readily available to the public and industry alike so all stakeholders can take comfort in a transparent and public process. This would include things like Labour Market Impact assessments and use of the Temporary Foreign Worker Program. Part of this process includes an ongoing declaration

from carriers who employ wet leasing for ongoing operational purposes, on a regular and frequent basis, which provides transparency on their existing fleet and permanent pilot compliment to ensure there is no abuse or use of loop holes to avoid the intent of the existing wet lease policy.

Not unlike the US DOT economic authority related application processes, all (non-confidential) materials and comments surrounding the wet lease application need to be made public and made available for comment. For wet lease applications there needs to be a reasonable comment period to allow for adequate assessment of larger economic considerations.

Furthermore the 'at time of application' limit for the 20% of aircraft on AOC is easy to get around through contracted dry leased aircraft. Recommendation is to restrict the ability of carriers to dry lease aircraft simply to circumvent the policy by increasing the number of aircraft registered to the carrier solely for the purpose of increasing the number of wet leased aircraft that would be permitted.

Our recommendation is to either link the application to the number of permanent pilots employed by the carrier, or ensure the application is approved based on the number of aircraft owned by the carrier over a 12 month period, or a combination of both.

Finally, the wet lease policy should also apply to damp leases (only front end crew is third party) as this is simply another mechanism, similar to dry leasing aircraft, to add capacity to a carrier's fleet seasonally without incurring the cost to maintain the pilot expenses for the remainder of the year which thereby creates an unlevel playing field for Canadian operators who do not use wet leased aircraft for this purpose.

### **Questions regarding wet lease and code share**

14) Are the definitions for code-share and wet-lease arrangements currently used in the guides consistent with practices in the industry and the legislative purposes underpinning the ATR?

Yes.

15) Is there any reason why these definitions should not be included in the ATR?

No.



16) Are there any specific benefits that will come from including these definitions in the ATR?

Providing clear definitions allows for greater certainty for the users through uniformity, transparency and facilitates greater compliance with the intent of the policy. Having clear definitions allows for stronger application of the policy and mitigates the risk of abuse through technicalities.

17) Should other types of arrangements also be defined?

WestJet would recommend including terms that cover different versions of the same activities, namely damp and dry leases as well as interlining.

18) Should a move be made to a notification instead of an approval process for code-sharing arrangements made pursuant to bilateral agreements?

Yes. The notification period should be significant enough (for example at least 30 days) to allow industry time to reflect on the potential commercial impact and reasonableness of the application and provide comments if concerns are raised.

19) Should the minimum notice period for code-sharing arrangements be changed to 5 business days before the first flight?

No as this would effectively remove the opportunity for other carriers to assess the commercial impact. Furthermore these types of arrangements are typically done further out to enable selling, so it is unclear that a change to 5 business days would be beneficial.

20) Should the minimum filing time to seek Agency approval for wet-leasing arrangements be changed to 15 business days?

No as this would limit the opportunity for other carriers to assess the commercial impact.

21) Are there any other changes that could be made to the approval and notification requirements for code-sharing and/or wet-leasing arrangements?

WestJet recommends the Wet Lease policy limit the number of pilots who are not permanent employees of an airline used to operate aircraft that are permanently registered to a Canadian carrier (e.g. foreign pilots to operate domestic airline aircraft.)

WestJet recommends that wet lease applications should not form the basis of an airlines business model and that the 20% limitation should apply to aircraft registered on the carrier's AOC on a 12 month rolling window basis.

### **Question regarding Canada and US carrier services**

22) Should the ATR be amended to remove the requirement for Agency approval of services between Canada and the US, when such service is operated by licensed air carriers that are either or both Canadian or US carriers?

Yes. WestJet recommends a notification system only so that all carriers are aware that another Canadian carrier has entered into an agreement with a US carrier but no government approval would be required in the process.

## 4. Insurance

23) What changes to the ATR might be considered to improve the air insurance regime and ensure that air insurance requirements continue to be appropriate over time?

WestJet currently carries insurance in excess of the \$300,000.00 per passenger minimum. The appropriateness and adequacy of air insurance is dependent on the potential loss compared to the ability of an air carrier to cover losses both on its own as well as after drawing on its insurance policies. The availability of air insurance in the market has been reasonably stable over the past 10+ years however we note that aviation insurance is a dynamic industry with limited capacity and therefore sudden changes to requirements that could cause many corporations to suddenly increase demand for aviation insurance could potentially create a scarcity of supply which could take some time to equalize. We would recommend that changes be implemented slowly and cautiously. With respect to potential loss, we believe that it is reasonable that passenger minimums be adjusted for inflation periodically.

24) What would constitute an adequate amount of passenger liability and public liability coverage and why?

Considering the required coverage amounts in the U.S. and EU, which average between US \$250K - \$350K, while also accounting for differences between the US, EU and Canada, we would consider the appropriate amount to be in the range of CAD \$300k to CAD \$400k.

25) What amendments, if any, could be made to: the allowed standard exclusion clauses; the certificate of insurance form, the certificate of endorsement, and the annual filing requirement?

WestJet does not have any comment on this at this stage.

### Questions regarding minimum passenger liability coverage

26) Should the minimum level of liability insurance be raised? If so, would an amount that reflects the change in the level of inflation (i.e. \$680,000 CAD per passenger seat) be appropriate?

While WestJet would support increasing the minimum levels periodically to account for inflation, a movement from \$300k to \$680k appears sudden and excessive; it represents an over 100% increase. While this change would not materially impact WestJet immediately since WestJet currently carries more than the \$680k of passenger liability coverage per passenger, this change has the potential to cause a supply/demand imbalance in the aviation insurance market if many carriers (e.g. smaller carriers or general aviation entities) are currently carrying the minimum requirement and suddenly need to more than double their coverage. Further, accounting for inflation does not necessarily ensure appropriateness and adequacy of coverage amount. We would recommend that regulators review actual claims data every 5 years to establish best estimates for coverage requirements and assess the need for adjustments. Should adjustments to the minimums be required, we recommend that it is carried out in a measured and methodical way over a reasonable timeframe with consideration given to the impacts on the aviation insurance market and existing and forecasted capacity in this market.

### **Questions re alignment with the Montreal Convention**

27) Should the ATR be amended to clearly state that the operation of an air service include embarkation and disembarkation within the meaning of the Montreal Convention?

Yes. While we believe that this is generally understood to be the case, the ATR should be amended to clarify this.

### **Questions regarding per seat vs. per passenger basis for insurance coverage**

28) What would be the impact of amending the calculation of minimum insurance for passenger liability on a per passenger basis instead of per passenger seat?

It would be highly impractical for airlines to obtain insurance on a per passenger basis versus per passenger seat basis because passenger counts fluctuate significantly and are highly volatile dependent on many factors. As a result it would be very difficult for corporations and insurance underwriters alike to estimate what their exposures are and what premiums should be. We strongly recommend that the basis for insurance premiums in our sector remain on a number of passenger seats basis. Total passenger seats are much more stable measure since aircraft seat configurations are not volatile and do not change often. Further, the number of passenger seats would ensure that if an aircraft was completely full that there would be adequate insurance to cover for the potential loss of each passenger.

## Questions regarding minimum public liability coverage

29) Should the minimum level of liability insurance be raised? If so, would an amount that reflects the change in the level of inflation from 1983 be appropriate?

WestJet believes that applying inflation since 1983 would not be appropriate. We recommend analysis be completed to understand what current average losses are and use that as a basis to establish the updated threshold. Thereafter, periodic reviews (e.g. every 5 years) be performed to determine whether inflation should be applied to update the thresholds.

30) Should the minimum level of liability insurance be updated regularly to keep pace with inflation? If so, would updates every five years (rounding to the nearest \$5,000), represent an appropriate approach?

Yes, subject to our response above we agree that a regular review / update is a reasonable approach.

31) Will any such changes have a material impact on insurance premiums and the financial viability of licensed air carriers?

As with many changes, markets learn to adjust however the pace of the change must be managed to ensure that it does not represent a sudden and unexpected event for the aviation insurance market. As mentioned before, this is a highly specialized market with limited capacity and any sudden significant increases in demand will most definitely impact premiums. We would recommend any changes proposed be adopted over time with adequate time to communicate these changes to the market.

## Questions regarding persons not on board

32) Should the ATR be amended to require that the minimum public liability insurance coverage include the same per person coverage for persons not on board the aircraft as the minimum passenger liability coverage per passenger?

We strongly disagree with this concept because it would be impossible for an underwriter or the corporation to quantify and assess the potential exposure as the number of persons that may be affected and requiring coverage by public liability

is unknown. Without an understanding of potential exposure, insurance underwriters cannot offer insurance as premiums are priced based on exposure.

33) Will any such changes have a material impact on insurance premiums and the financial viability of licensed air carriers?

Yes – if coverage is required for an unknown quantum of risk related to public liability - there likely would be very limited capacity if any, and if offered, this capacity would likely be unaffordable. Air carriers would need to price these costs into the price of air travel which could have an impact on the affordability of air travel for Canadians.

\*see answer above\*

### **Questions regarding exclusions**

34) Should employees not on board the aircraft who are not acting in the course of their employment be included in, or remain excluded from, an air carrier's public liability insurance requirements?

Employees NOT acting in the course of their employment ARE (currently) covered. Employees acting in the course of their employment are covered through WCB.

### **Questions regarding Public Liability vs Third Party Liability**

35) Should the term "public liability" be replaced with "third party liability" throughout the ATR to increase clarity and to better align with other international regimes?

Yes.

### **Questions regarding insurance provisions related to aircraft with flight crew arrangements**

36) Should the indemnity provision be removed from the ATR?

While this is a separate agreement between the operators and it is a business decision which does not relate to the insurance, WestJet feels this is a helpful inclusion in the ATR.

37) Should the ATR be amended to require that the additional insurance afforded to the contracting air carrier be primary and without right of contribution from any other insurance policy held by the contracting air carrier?

Yes, this is a standard contract requirement.

38) Should changes be made to those Agency forms and to the annual filing requirement process?

- a. Yes – we would suggest combining the documents.
- b. In doing so, this must retain the simplicity of confirming that limits meet or exceed the minimum required limit(s). It is not practical to show specific limits for each aircraft.
- c. We would also inquire as to whether an online version a possibility?
- d. Alternatively, is a simplified renewal version a possibility?

## **General questions**

39) Do the regulations need to be amended to proactively keep pace with changing air service business models? If so, How?

Technology and evolving business models have blurred the lines between the sellers and providers of air transportation – as shown in the NewLeaf / Flair Air example. Passengers should be directly informed about who is responsible for handling service complaints (above and beyond being informed who is operating their flights).

Consideration should be made to remove the requirement to add various aircraft sizes (small, medium and large) when the commercial agreement between operators involves only licensed Canadian operators in good standing. This relieves the administrative burden for applications such a Capacity Purchase Agreements or where a third party Canadian carrier is selected to operate on behalf of, or do business as, another Canadian operator. This allows for greater flexibility for all operators and provides more access for the Canadian traveling public to enjoy enriched and expanded networks where practical or lucrative to do so by industry.

40) Are there changes required to the current list of excluded air services? What is the rationale for any additions or deletions from the list?

WestJet has no suggestions at this time.

41) Do the cited categories with the ATR (Air Transport Regulations) remain relevant?

WestJet has no suggestions at this time.

42) What changes should the agency make to the current approach outlined in the interpretation notes?

Subject to the considerations outlined in response to question 43 below, WestJet is satisfied with the current approach provided for in the interpretation notes.

## 5. Ownership

43) What approaches are used by other jurisdictions to determine control in fact that the Agency could consider adopting? Why are these approaches suitable and appropriate reforms to the Agency's existing approach and what, if any, unintended consequences could they present?

While ownership of a company is relatively straightforward to establish, effective control is more blurred and requires effective regulations. The Agency has made it clear that even in circumstances where non-Canadians hold 25% or less of the voting interests, that fact is far from conclusive that the Canadians who hold 75% or more of the voting interests actually control the air carrier.

In response to the above question(s), WestJet has outlined a number of considerations for the Agency to review based on our analysis of other jurisdictions. The ancillary questions posed by the Agency relate to the suitability and appropriateness of the submissions, as well as the unintended consequences they may raise. As the Guidelines simply list non-exhaustive factors to be considered, the suggestions WestJet has outlined are all suitable and appropriate considerations for the Agency, particularly since no one factor is viewed as determinative in the Agency's analysis.

To quote the Guidelines: "...the facts of each case will dictate which factors are relevant in assessing control in fact." To that end, the unintended consequences of each suggestion are mitigated, since the Agency takes a holistic approach in its review of each case.

Though not exhaustive, WestJet hopes this will assist the Agency in determining whether or not an airline is effectively controlled by non-Canadian interests.



### Control through personal relationships

The Guidelines do not fully contemplate control of directors and officers through personal relationships, which may provide a more subtle method of influence. Rather, the Guidelines only address this issue with respect to the officers of a company. Specifically, it may be appropriate to have more examination into potential relationships of directors and officers with foreign air carriers, and whether these relationships would allow the foreign carrier to exercise – directly or indirectly – a degree of control that would outweigh the otherwise controlling Canadian interest.

### Control through voting alliances

While the Guidelines address “Concentration of Voting Interests”, the proposed increase to 49% makes this factor more significant. We suggest that the Agency should examine whether there are any provisions in the articles of incorporation or alliances between shareholders that prevent Canadian shareholders from independently controlling the company, such as voting alliances, supermajority voting, or the right of a minority shareholder to block majority decisions. We would note that UK structures often involve shareholders' agreements which reallocate or limit the ordinary rights of shareholding – even those conferred under the company's constituting documents. The UK Civil Aviation Authority (“CAA”) can be satisfied with, for instance, provisions that oblige blocks of shareholders to vote together or to limit the ability to appoint board members who do not meet a nationality test. In those cases the CAA expects to examine the details quite closely. The CAA guidance refers specifically to “stapling” provisions in shareholders' agreements.

### Intermediate Shareholders

The Guidelines are unclear as to whether it matters if intermediate shareholders fail a nationality test if the ultimate owners comply. All the guidance tends to identify the need to focus on the top of the chain. The Guidelines provide the definition should be applied at each step but it is unclear if it has to be satisfied at every level within the corporate structure. More specifically, we are unsure if this is trying to deal with dilution of shareholding (i.e. topco is 100% Canadian but that shareholding is diluted through levels of subsidiaries). From our review, the CAA guidance poses the question about two layers of shareholding which each amount to a controlling interest but between them amount to a minority interest in the airline: “If, for example, EU nationals own 60% of a company which in turn

owns 70% of an airline, it may be concluded, subject to all other factors which may influence control, that the EU nationals are in a position to control the airline, However, in examining ownership the CAA will look at the diluted shareholding of the EU investor through the intermediate company having a controlling shareholding in the airline".

### Equity Interest

The equity interest test set out in the Guidelines covers the same ground as the EU/UK guidelines, but without so much consideration of the detail. The European Commission guidelines clearly focus on the need for one of (i) power over decision making and (ii) ability to share in the residual profit/value of the undertaking, but also address sharing in the risk of the venture. What is important to note is that the more complex the structure, the more scrutiny it will receive. For example, the CAA guidance states: "the CAA will look with particular care at complex structures which appear to have been devised for no purpose other than compliance". Similar points are also relevant for section IV paras g), h) and potentially i) of the Guidelines.

### Alternative Corporate Vehicles

Ownership through listed companies, trusts, institutions or investment funds can often cause difficulty in interpretation. This is particularly so where ultimate beneficial ownership can change rapidly, but those ultimate beneficial owners are purely passive investors and have no real influence over management etc. of the undertaking. The CTA should provide greater clarity on this issue.

### Board Meetings

There seems more detail, and greater prescription on nationality of, board members of Canadian airlines and who must be present at particular meetings. The UK CAA acknowledges that, in the short term, strategic decisions are likely to be made at the Board level. Therefore, when assessing control under Regulation 1008/2008, the CAA "normally requires there to be a majority of EU citizens on the Board, and will take into account both the nationality of the individuals and the nationality of the investors they represent" [emphasis added]. The CAA will also consider any requirements on quorum which could restrict the ability of the Board to make decisions in the absence of an EU majority. The CAA's starting point is that control lies with ownership rather than management (because management can be controlled by the Board, which can in turn be replaced by the shareholders).

44) Under what circumstances should the Agency make public its determination on control in fact? What would be the benefits of adopting such an approach: for the industry, for license applicants and for license holders, and for Canadians more broadly? What would be the risks and how might they be mitigated?

WestJet supports enhanced transparency in the Agency's decisions on control in fact. Safeguards could be employed concerning commercial information.

## **6. Monitoring, Compliance and Enforcement**

45) How should the Agency's monitoring, compliance, and enforcement regime be updated? Are there improvements that could be considered to further support effective Agency action?

WestJet would suggest enhancing procedures for filing insurance documents and providing updates through automation. The current paperwork process is antiquated, time and resource consuming and unnecessary. Using a link to upload updated documents would be much more effective and efficient.

Insurance brokers are currently required to issue certificates which continue to generate paperwork on behalf of carriers but there could be a repository / database where both the carrier and the CTA access the most current paperwork as needed.

This same secure repository could also be used for code share application insurance requirements. The current process is equally burdensome and inefficient. We suggest there should be limitations on unlicensed insurance.

46) Do the Agency's communications and guidance materials and tools support the achievement of ongoing compliance with Agency decisions, determinations and regulatory requirements?

WestJet would suggest developing a more effective search engine, regular enforcement action notifications, as well as the provision of links to upload updated documents.

## **Additional Perspectives- Agency Guides and Tools**

47) Are there any current guides and tools that require updating to more effectively achieve public policy goals, or better align with best practices in the regulatory field? If so, what changes could be considered?

WestJet has no suggestions at this time.

48) Are there other guides and tools that would be useful?

WestJet has no suggestions at this time.