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Re: WestJet Response to Refund Consultation (the "Consultation")

Please find enclosed WestJet's response to the Consultation published by the Agency on December 21, 2020. These responses represent our preliminary perspectives on the specific questions raised by the Agency, along with additional issues that must be considered. We look forward to continued dialogue and an appropriate opportunity to review draft regulations and the accompanying cost-benefit analysis.

WestJet's award-winning culture of care and guest service is a source of tremendous pride. It is not just what we do – it is who we are, and it ensures that our social and economic license remains strong. Despite the significant challenges brought by the COVID-19 pandemic, WestJet has continued to receive awards distinguishing our work environment, training, human resource practices, marketing, and culture. WestJet was recently awarded a Five Star rating in the Major Airline category by the Airline Passenger Experience Association (APEX), a trade organization dedicated to elevating the airline guest experience around the world. APEX's rating program is based exclusively on third-party passenger feedback and insights collected using the TripIt app from Concur. Measured against 600 airlines around the world and using a five-star scale to rate nearly one million flights using the feedback of passengers, WestJet received the highest rating from APEX.

As the Agency is aware, WestJet has grounded 119 of 173 aircraft, reduced its active employee base from approximately 15,000, to 5,000, witnessed a reduction in year over year domestic traffic of 77%, and is currently operating an average of 93 average daily flights, down from 711 in 2019. The financial impact of the COVID-19 pandemic has been devastating on WestJet, its employees, and the Canadian communities that rely on our investments.

A lot changed overnight due to the pandemic. What did not change were our guests' tickets. Guests who had purchased refundable tickets like Business Flex or Premium Flex were immediately entitled to refunds. However, many of our guests were not eligible for refunds because of the fare class of the ticket they purchased, and some guests would have entirely forfeited their tickets because of the Econo basic fare they had purchased. WestJet made the decision to provide our domestic guests vouchers for the full price of the ticket so they could use



this voucher for future travel. We did not provide vouchers because we had to - we provided vouchers because we believed it was the right thing to do and we hope that our guests will fly with us as soon as circumstances permit.

On October 21, 2020 we went further, by unilaterally processing refunds to all guests whose flights had been cancelled no matter the fare class they had purchased, including those who had purchased our Econo Basic fare.

We raise the above to dispel any concerns the Agency may have regarding market-based solutions to problems that arise between passengers and airlines. WestJet is the most proactive and progressive airline on the issue of refunds. We are cautious that, similar to the *Air Passenger Protection Regulations*, the proposed refund regulations will seek to manage relations between passengers and airlines and impose strict requirements, rather than allowing the market to find a level. While airlines did not cause the COVID-19 pandemic, we are cautious about being turned into insurers of pandemics, rather than suppliers of air travel.

Today marks WestJet's 25th anniversary. As our founder Clive Beddoe once said: "We launched WestJet to make a difference in the lives of Canadians. We wanted to do things differently right from the beginning, lowering fares, changing rules that didn't make sense and making it possible for more people than ever before to travel by air. We've helped to connect families, fulfilled vacation dreams and made business travel more affordable so companies could grow and prosper." We take tremendous pride in our history and look forward to making a full recovery from the COVID-19 pandemic.

In light of the foregoing, we respectfully submit that now is not the time to implement new regulations; our collective focus should be on how to live safely with COVID-19, utilizing a science-based approach to improve public confidence in air travel.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert McCulloch". The signature is fluid and cursive, with a long horizontal flourish at the end.

Robert McCulloch
Director, Legal
WestJet



CONSULTATION PAPER: Development of New Airline Refund Requirements

*WestJet Submission to the Canadian Transportation Agency
March 1, 2021*

On December 21, 2020, the Canadian Transportation Agency (the “Agency”) launched a consultation (the “Consultation”) regarding the development of a new regulation requiring airlines to provide passengers with refunds when there is a flight cancellation or a lengthy delay due to situations outside of a carrier’s control, and it is not possible to complete the passengers’ itinerary within a reasonable time (the “Proposed Regulations”). The authority to draft the regulation is pursuant to a direction from the Minister of Transport, issued on January 6, 2021, and published in the Canada Gazette, Part II, Vol. 155 No. 1 (the “Ministerial Direction”).

The *Guideline for Effective Regulatory Consultations*, published by the Treasury Board of Canada Secretariat, provides that a regulatory consultation process entails a two-way exchange in which stakeholders are given an opportunity to provide input and affect the outcome of a regulatory proposal.¹ Furthermore, a good consultation process assists in developing quality regulations and mitigates implementation risks.² In order to assist the Agency with these requirements, and, most critically – to mitigate against such risks - the following is WestJet’s response to the Consultation, provided in two parts. Part 1 provides introductory comments the Agency must consider when drafting the Proposed Regulations, and Part 2 is WestJet’s response to the consultative questions.

Based on discussions with the Government of Canada, it is the WestJet Groups understanding that the government, through the Ministerial Direction, seeks to achieve the following:

1. Protect the integral nature of fare classes to the benefit of the travelling public;
2. Apply the Proposed Regulations to carrier cancellations only, which is consistent with all other jurisdictions; and
3. Ensure the Proposed Regulations do not impose an undue financial burden on air carriers.

EXECUTIVE SUMMARY

The following submission is based on the above understandings. Throughout this document, WestJet has raised a number of issues for the Agency to consider, and would highlight the following:

¹ Treasury Board of Canada Secretariat – Guideline for Effective Regulatory Consultations

² *ibid*

- ***The Proposed Regulations must maintain various fare classes. This model keeps prices as low as possible and provides a variety of fare choices that best meet the needs of the guest.***
- ***Regulation 261 must not be followed. Rather, portions of the USDOT are more appropriate, particularly given the volume of trans-border traffic.***
- ***Guest cancellations should NOT be captured by the Proposed Regulations – Canada cannot become a global outlier in this regard.***
- ***The timeline to provide refunds must give consideration to the scale of the uncontrollable event – we have proposed “Small” “Large” and “Catastrophic” events for the Agency to consider.***
- ***The Proposed Regulations are arguably offside the Montreal Convention for international flights, risk making air carriers insurers (which exposes them to criminal prosecution for undertaking insurance without a license), and represent an encroachment on the freedom of contract.***

PART 1 - INTRODUCTION

“We had a very strong airline industry before the pandemic and we need to continue to have a strong airline sector once this is all done”³ – Prime Minister Justin Trudeau

As previously noted by the Agency, 2020 was characterized by a “once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.”⁴ In response to this once-in a century circumstance, air carriers are now faced with Proposed Regulations regarding refund requirements, an initiative which, if not carefully considered and discussed with carriers, risks further consequential financial impairment to our industry.

For context, at the time of drafting, WestJet has grounded 119 of 173 aircraft, reduced its active employee base from approximately 15,000, to 5,000, witnessed a reduction in year over year domestic traffic of 77%, and is currently operating an average of 93 average daily flights, down from 711 in 2019. The financial impact has been devastating on WestJet, its employees, and the Canadian communities that rely on our investments. Our concern is the potential that rushed, and ill-considered regulations will further impact carriers during these unprecedented times. These concerns are certainly not without merit – consider, for example, the following government decisions that have directly led to increased cancellations:

- (i) the shifting guidance concerning flights to and from the UK following the discovery of a second COVID-19 strain;
- (ii) Transport Canada’s decision to announce a new testing regime on December 30th, 2020, without airline consultation, without adequate details, and an incomprehensible 7 days to implement;

³ See - <https://ca.travelpulse.com/news/airlines/trudeau-hints-at-coming-aid-for-canadian-airline-industry.html>

⁴ See - <https://otc-cta.gc.ca/eng/statement-vouchers>

- (iii) the Federal Governments request to cancel flying to Mexico and Caribbean destinations (of which, which we complied); and
- (iv) recent orders by the Federal government for mandatory Canadian-bound pre-departure PCR testing and mandatory post arrival testing and quarantine at a government approved hotel.

In addition to the above, we would also note guidance from Prime Minister Trudeau urging Canadians not to travel – “...we all agree that now is just not the time to be flying”,⁵ supported by an \$850,000 ad campaign relaying similar messaging.⁶ Thus, in addition to managing (with a significantly reduced workforce) the devastating economic collapse of our industry, we must also manage severe and impractical policy decisions (at times without our consultation), and statements from Government officials advising against the usage of the services we provide. The message of this approach is clear – the Federal Government’s intention is to deter and punish international travellers. While these government issues have directly led to flight cancellations, further imperiling the financial health of our industry, Canada still remains the only G7 country that has not provided sector-specific financial relief, including grants and liquidity, to its aviation sector.

In light of the foregoing, we respectfully submit that now is not the time for the Proposed Regulations; our collective focus should be on how to live safely with COVID-19, utilizing a science-based approach to improve public confidence in air travel.

The Consultation – “Fixing a Gap”

As a preliminary matter, the Consultation presents the need for refund regulations as “fixing a gap” in the *Air Passenger Protection Regulations* (“APPR”). We note, however, that this was not a “gap”, but rather an issue that was thoroughly discussed during the development of the APPR. Consider, for example, the following excerpt from the Agency’s guidance document entitled “*Flight Delays and Cancellations: A Guide*”, which states:

“Refunds

There is no refund requirement for flight delays or cancellations outside the airline’s control. If an airline’s tariff allows passengers to seek a full or partial refund, the airline must provide this refund.”⁷

The issue of refunds during uncontrollable events was discussed throughout the development of the APPR. This includes the initiating Consultation Paper, Technical Questions, Regulatory Impact Analysis Statement, Gazette 1 publication, and subsequent guidance documents issued by the Agency. Colouring this issue as “gap” is simply not accurate. Rather, the Proposed Regulations are a reactionary measure to the COVID-19 pandemic and should not undergo a rushed implementation. Rather, they must be carefully measured in light of existing legal requirements, and thoroughly reviewed with respect to a

⁵ See - <https://www.ctvnews.ca/politics/now-is-just-not-the-time-to-be-flying-pm-trudeau-announces-new-travel-restrictions-1.5287311>

⁶ See- <https://www.cbc.ca/news/business/travel-borders-federal-government-snowbirds-covid-19-1.5849599>

⁷ See - <https://otc-cta.gc.ca/eng/publication/flight-delays-and-cancellations-a-guide>

carrier's operation. The following section highlights legal and operational issues the Agency must consider in this regard.

LEGAL ISSUES

In accordance with the Ministerial Direction, the Proposed Regulations are to be designed in a manner that is "fair and reasonable to passengers and, to the extent possible, does not impose an undue financial burden on air carriers that could lead to their insolvency."

In the event that the Agency develops regulations that mirror the Ministerial Direction, air carriers will be legally obligated to indemnify individuals for losses caused by random and fortuitous situations outside of their control, a role normally reserved for insurance companies. For the purposes of refund legislation, the common law does not provide a basis to impose obligations on an airline to provide refunds in situations outside of the control of the carrier. Doing so essentially renders the carrier an insurer of unforeseeable events, which is contrary to the substantial amount of case law which has refused to do just that. As an alternative, due to the significant number of cancellations caused by government policies and statements (such as those outlined above), the Agency should consider an indemnity from the federal government for any such losses.

Equally concerning, the Proposed Regulations are inconsistent with the obligations imposed by the Montreal Convention, and do not respect the exclusivity of the Convention, which provides that air carriers are not liable for losses caused by delays if the carrier took all reasonable measures to avoid the delay or if it was impossible for it to take all reasonable measures.⁸ Finally, the Proposed Regulations represent a novel encroachment on a business' freedom to formulate, in consideration of operational limitations, the terms of the contract with its customers.

The relatively sudden arrival and rapid spread of COVID-19 caused many travelers to cancel or interrupt their plans, often having to forfeit flights or vacations. Where airlines, hotels or tour operators are not contractually required to provide refunds, trip cancellation or interruption insurance is the appropriate way for passengers to mitigate their risk. In addition, WestJet, along with the majority of other Canadian air carriers, offer different fare classes, some of which entitle passengers to refunds after a delay or cancellation has occurred. Under the current regulatory scheme, air carriers are required to set and publish their own policies related to refunds for situations outside of the control of the carrier. This regulatory scheme has proven adequate to protect the interests of passengers and air carriers up until the COVID-19 pandemic. The Proposed Regulations practically render fare classes and force majeure clauses unenforceable and would have detrimental effects on the business efficacy of air carriers moving forward.

1. Air Carriers as Insurers

Insurance is a mechanism for spreading the risk of loss. In exchange for contribution in the form of premiums, insurers will indemnify insureds for losses caused by random, fortuitous events. The contributions of the many pay for the losses of the few. The success of insurance for both insureds and

⁸ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) at Article 19.

insurers is rooted in the fact that among a relatively large number of people facing similar risks, only a relative few (whose identity is unknown at the outset) will actually suffer loss.⁹

The Proposed Regulations seek to impose the obligations of an insurer on air carriers, without allowing passengers to choose whether to reduce their exposure to the risk of loss by paying insurance premiums. This arrangement is fundamentally inconsistent with the principles of insurance, and will necessitate air carriers to build a “premium” into ticket prices (thus increasing fares) to ensure financial viability. Insurers calculate and define their exposure to risk carefully and price their products accordingly. When this calculation is undermined and an insurer is made liable for claims that have not been contemplated, the business model is seriously undermined. The jurisprudence is clear that a carrier of passengers is not an insurer, and it should not be held liable when the carrier has used all due, proper and reasonable care and skill to avoid or prevent the loss.¹⁰

Further, the Proposed Regulations will have the unintended consequence of forcing air carriers to comply with insurance legislation. The legislation commonly defines insurance as:

... the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance. ¹¹

A key distinguishing feature of activities caught by the definition is that they involve the right of the "insured" to demand payment or the provision of a service on the happening of some uncertain misfortune. If the "premium" is merely an advance payment for services that may be accessed at any time, it is not insurance.¹² The thrust of the legislation is to protect consumers of insurance in two basic ways: by ensuring the solvency of insurers through complex licensing, auditing, deposit and accounting requirements, and by regulating the terms of the contracts which insurers enter into. Further, whether incorporated under federal or provincial legislation, an insurance company must conform to certain requirements pertaining to capital structure and governance.

Statutorily requiring air carriers to insure passengers from the consequences of uncontrollable events will not only severely impact the economic viability of air carriers, but also exposes air carriers to criminal prosecution for undertaking insurance without a license.

⁹ Brown, C., *Insurance Law in Canada* (2021), Thomson Reuters at section 1.1.

¹⁰ *Day v Toronto Transportation Commission*, [1940] SCR 433 at para 19.

¹¹ See - Alberta Insurance Act, R.S.A. 2000, c. I-3, s. 1(aa); B.C. Insurance Act, R.S.B.C. 2012, c. 1, s. 1; Manitoba Insurance Act, C.C..S.M. 1987, c. I40, s. 1; New Brunswick Insurance Act, R.S.N.B. 1973, c. I-12, s. 1; Newfoundland Insurance Companies Act, R.S.N.L. 1990, c. I-10, s. 2(x); Nova Scotia Insurance Act, R.S.N.S. 1989, c. 231, s. 3(k); Ontario Insurance Act, R.S.O. 1990, c. I.8, s. 1; P.E.I. Insurance Act, R.S.P.E.I. 1988, c. I-4, s. 1(j); Saskatchewan Insurance Act, S.S. 2015, c. I-9.11, s. 1-2; Quebec Civil Code, S.Q. 1991, c. 64, s. 2389; Northwest Territories Insurance Act, R.S.N.W.T. 1988, c. I-4, s. 1; Yukon Insurance Act, R.S.Y. 2002, c. 119, s. 1. The Northwest Territories Insurance Act was duplicated for Nunavut on April 1, 1999, according to s. 29 of the Nunavut Act, S.C. 1993, c.28.

¹² *Insurance Law in Canada*, supra at section 2.2

2. Inconsistent with the Montreal Convention

The Montreal Convention is the exclusive recourse against airlines for damages.¹³ Article 29 of the Montreal Convention states that:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 17 of the Montreal Convention applies to delays, and states that:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20 of the Montreal Convention deals with exoneration, and states that:

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 37 of the Montreal Convention deals with the right of recourse against third parties, and states that:

Nothing in this Convention shall prejudice the question of whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

When the delay is caused by an event of force majeure, the avoidance of the occurrence and the associated loss is objectively impossible. Further, an air carrier can exculpate itself, when the loss was caused by a third party, and that loss was not possible to prevent.¹⁴

¹³ *Thibodeau v Air Canada*, 2014 SCC 67 at para 37.

The Proposed Regulations are to apply to “lengthy delays” and cancellations caused by situations outside of the control of the carrier. Neither the Ministerial Direction nor the associated Consultation paper give any indication that reasonable measures or the culpability of a third party will be considered in the Proposed Regulations. As such, the Proposed Regulation is neither conducive nor consistent with the provisions of the Montreal Convention, and further offends the exclusivity of the Convention.

Further, under the APPR, when disruptions happen for reasons outside an air carrier’s control (such as government advisories against travel or border closures due a pandemic), the air carrier must ensure the completion of the passenger's itinerary as soon as feasible. Extending this requirement to also require refunds is inconsistent with the Montreal Convention and the APPR.

3. Encroachment on Freedom of Contract

Traditionally, companies and organizations have been free to set their own refund policies. Canada does not have any federal or provincial legislation that grants consumers a right to a refund. Despite this, many businesses establish return and refund policies in order to remain competitive and gain consumer loyalty. Businesses that choose to establish such a policy can set their own terms and conditions of sale. In the airline industry, an air carrier’s terms and conditions are statutorily required to be in the form of a tariff, and must contain certain types of provisions, including an air carrier’s refund policy. If an air carrier fails to apply a provision of the tariff, it may be found liable of breach of contract, or be subject to a variety of remedies or penalties imposed by the Agency.

The APPR has imposed additional requirements on air carriers, with mixed reception and questions with regards to legality.¹⁵

In other circumstances, such as advanced ticket sales for events, there is similarly no right to a refund. In Canada, there is no express legal requirement for primary ticket sellers to refund for cancellation or postponement of an event. Typically, the ticket seller is able to set the terms of sale. Some regulations in the United States, such as NY Arts & Cult Aff L § 23.08 (2018), provide that ticket purchasers are entitled to a refund if the event is canceled or rescheduled. However, no refund is required if the event is rescheduled due to an act of God or catastrophe and the ticket purchaser is given the right to use the ticket for the rescheduled event or to exchange the ticket for a comparable ticket to a similar event. A refund is also not required if the back of the ticket conspicuously states that if the performance is canceled or rescheduled, the ticket purchaser will have the right, within 12 months of the originally scheduled event, to attend the rescheduled event or to exchange the ticket for a comparable ticket to a similar event.

The Proposed Regulations seek to remove an air carrier’s right to set its own terms and conditions of sale, and instead impose a requirement for the air carrier to provide a refund to passengers where there is no fault on the air carrier whatsoever.

¹⁴ Guemulla & Schmid, Montreal Convention (2018). Wolters Kluwer at Article 19-15 paras 41-42.

¹⁵ *International Air Transport Association v. Canada* (Transportation Agency), 2020 FCA 172 (CanLII)

OPERATIONAL ISSUES

1. Importance of Fare Classes – Not all Tickets are Equal

Like most airlines, WestJet sells different kinds of fares for the same flight including Econo, Premium and Business, each of which offers unique features and benefits to our guests. To keep prices as low as possible, WestJet provides a variety of fare choices that best meet the needs of the guest, some of whom value things such as extra flexibility, a business pod or priority boarding and some of whom value the lowest price possible. When a ticket is booked with WestJet either through our website or a travel agent, guests are given the option to buy a refundable ticket which is available with our Flex Premium and Flex Business fares. These fares provide nearly complete flexibility to change or cancel travel and still receive a refund to the original form of payment. In fact, the only unique attribute to these fares (WestJet's 'J' and 'W' classes) is that they are refundable. To force refundability on any other lower fares would mean guests purchasing J & W tickets are getting nothing in return for higher costs. The ability to provide different fare classes ensures that prices remain low for our guests. Without this, if all fares were made the same, prices would increase since each fare would have all the attributes offered (as opposed to paying for what one actually wants).

WestJet's fare classes have different levels of refundability; these are attributes that guests choose to pay for (if they value it) or not (to enable them to save money). The Proposed Regulations should not force all guests to pay more to receive the same level of refundability. For reference, the refundability of WestJet's fare classes are broken down as follows:

- **Business and BusinessFlex** - available on flights operated on our Boeing 787 aircraft, fully refundable to original form of payment for guest cancellations.
- **Premium and PremiumFlex** - fully refundable to original form of payment for guest cancellations.
- **Econo and EconoFlex** - discounted fares refundable to future travel credit when guest cancels. In some cases, a cancellation fee may apply. Flex fares within the above categories offer the ability for guests to change or cancel itineraries for no additional fee.
- **Basic** - deeply discounted fares that are non-refundable for guest cancellations.

When WestJet's guests are reasonably confident they won't need to change travel plans and are looking for a lower fare, they can choose a more affordable option such as Basic, Econo, Premium or Business without the "flex". Per the above, WestJet's basic fare is the best possible price offered to guests. As basic fares are not for everyone due to their lack of flexibility, guests are advised of the fare restrictions along with alternative fare options through multiple prompts at the time of booking. In normal circumstances, this means a guest may forfeit their ticket on a basic fare or receive a voucher on other non-refundable fares if they decide to cancel their trip. They might make that choice because price is more important than flexibility and they are confident they can use the voucher for a flight in the future. This affordable fare option, in combination with Swoop, leverages WestJet's growing network to stimulate new air travel demand with attractive prices and to compete in the price-sensitive segment of the market. This market stimulation is often referred to as the "WestJet Effect", which entices more people to travel with lower fares and a better experience. WestJet's history is to enter new markets, lower fares, and dramatically stimulate air travel demand.

Helping to maximize connectivity and feed guests through our network is WestJet's regional airline, WestJet Encore. Since its launch in 2013, WestJet Encore has lowered airfares by as much as 50 per cent while stimulating travel by as much as 90 per cent in small and medium-sized communities where populations are not large enough to sustain larger jet aircraft. WestJet's regional presence is further enhanced with WestJet Link, a third-party capacity purchase agreement with Pacific Coastal Airlines on their fleet of 34-seat Saab 340B aircraft. In addition to WestJet Encore and WestJet Link, Swoop was launched in June 2018 and continues to bring another segment of traveller into the WestJet group while leveraging the lowest costs in the Canadian aviation industry. Consider, that inflation adjusted prices have dropped by 50% and twice as many Canadians are flying compared to 20 years ago – this would not have been possible without our various fare classes, and relentless pursuit of guest satisfaction.

WestJet's approach to refundable/non-refundable fare classes is common in the industry and is recognized by the US Department of Transportation ("USDOT"). As explained in recent USDOT FAQs¹⁶, passengers who purchase a non-refundable ticket on a flight to, from, or within the U.S. that is still being operated without a significant change, but would like to change or cancel their reservation, are generally not entitled to a refund or a travel voucher for future use on the airline. However, since the airline-passenger relationship is governed by the contract of carriage, Tariff or other agreement between the passenger and airline, if that agreement provides for some form of refund – whether cash, credit card, voucher, travel credit, etc. – in such situations (e.g., passenger cancels a non-refundable ticket before departure), then the airline must comply with the agreement and provide the agreed refund.

As the intent of the Proposed Regulations is to capture carrier cancellations due to situations outside its control, guest-initiated cancellations (travelling on non-refundable tickets) must be exempt from its application. This approach is in line with other jurisdictions, reflects the intention of the Ministerial Direction, and maintains the integrity of a carriers' fare classes. We note that despite its significant short-comings and punitive nature, even Regulation 261 excludes refunds for guest cancellations. Canada must not become a global outlier in this regard.

2. International Context

The Agency has requested comments on the EU/UK, and U.S. approach to refund requirements. This request is in accordance with the Government of Canada's *Cabinet Directive on Regulation* (the "Directive"), which states at section 4.2:

Departments and agencies are to assess opportunities for cooperation with other jurisdictions, domestically and internationally, on regulations and associated regulatory activities. ***This includes examining alignment of regulatory approaches and outcomes with key trading partners, in order to reduce the regulatory burden on Canadian business,*** while maintaining or

¹⁶ See Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel ("May 2020 COVID-19 Refund FAQs"), dated May 12, 2020, available at https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020

improving the health, safety, security, social and economic well-being of Canadians, and protecting the environment. [emphasis added]¹⁷

While this will be further explained below, Regulation (EC) No 261/2004¹⁸ (“**Regulation 261**”) is not an appropriate regulatory framework to follow. This regulation has been entirely redrafted by the Courts, imposes a significant financial burden on carriers, and is punitive in nature. We find very few effective points with this regime, and would caution that following this model will seriously undermine Canadian carriers’ ability to recover from the COVID-19 pandemic. Regulation 261 has repeatedly had a crippling effect on airline finances – a report published by the European Regions Airline Association (“**ERA**”) indicated that some airlines spend on passenger claims increased by 326 per cent since 2016, with compensation entitlements averaging more than 296 per cent of the amount paid for the ticket.¹⁹ It is clear the regulation is unsustainable and inequitable, and is suggested to have caused a number of airline bankruptcies in Europe.²⁰ Furthermore, the specific refund requirements under Regulation 261 (which are triggered upon a delay of 5 hours) were never contemplated in the context of a global pandemic and imposed significant cash-flow problems when air carriers were attempting to discharge basic business functions.

Rather, in line with the Directive, reference should be made to the USDOT, with consideration given to challenges experienced during the COVID-19 pandemic. That is, carrier-initiated cancellations during uncontrollable events may give rise to refunds, with flexible time allocations based on the causal event (per question 5, below). Alignment with the U.S. would seem obvious given the significant volume of trans-border air traffic between our jurisdictions.

¹⁷ See - <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html>

¹⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91

¹⁹ See - https://www.eraa.org/sites/default/files/era_eu261_study_brochure_final_version_26sep.pdf

²⁰ See - <https://simpleflying.com/eu261-airline-bankruptcies/>

PART 2 – 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 previously indicated, the Proposed Regulations must only apply to carrier-initiated cancellations, not passenger cancellations – we note the clear global distinction in this regard, of which, Canada should not become a global outlier. All submissions herein are based on this assumption.

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 a carriers' control and that carriers are able to operate without any impediments. While section 18(1)(a) of the APPR provides for 48 hours after an event for issues outside of a carrier's control, 72 hours is more appropriate given the scope of the pandemic and (government imposed) COVID-19 restrictions that continue to negatively impact airline operations.

- 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"?**

As noted by professors Paul Dempsey and Svante Johansson, the concept of delay in air transport can be difficult to grasp. Differences in judicial viewpoints colour the interpretation of what constitutes 'delay', and courts have struggled with the effort to regulate delay exhaustively by international conventions.²¹

This difficulty in establishing a definition of the concept of 'delay' has been re-iterated by the USDOT. The terms "significant change" and "cancellation" are not defined in USDOT regulations or statute. In the April 2011 Final Rule on Enhancing Airline Passenger Protections, the USDOT decided not to define "significant change" for purposes of refunds. It explained:

"However, we have been persuaded by industry commenters that the Department should not adopt a strict standard of what constitutes a significant delay as such a delay is difficult to define. We agree with the contention of carriers and carrier associations that the definition of a significant delay depends on a wide variety of factors such as the length of the delay, length of the flight and the passenger's circumstances. The Department's Aviation Enforcement Office will continue to monitor how carriers apply their non-refundability provision in the event of a significant change in scheduled departure or arrival time, and will determine on a case by case basis based on the facts and circumstances of the delay whether a failure to provide a refund in response to such a delay is an unfair and deceptive practice."²² [emphasis added]

In its May 2020 COVID-19 Refund FAQs, the USDOT stated that because "cancellation" and "significant change" are not defined in the context of ticket refunds, airlines may develop "reasonable

²¹ Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage. Air and Space Law

²² 76 Fed. Reg. at 23110, 23129 (April 25, 2011).

interpretations of those terms” for purposes of their refund policies.²³ Given the above analysis, we submit this is a reasonable approach for the Agency to follow.

3. What should a refund cover? For example:

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

While the unused portion of a passenger’s ticket and optional services purchased may be refundable, certain incidental fees are not. Incidentals include (but are not limited to) items such as contact centre fees, cancellation fees, hotels, etc.

We note that in the Preamble to the Final Rule on Enhancing Airline Passenger Protections (April 2011), the USDOT concluded that the obligation to provide refunds applies not only to refunding the basic price of a ticket but also to refunding optional fees charged to a passenger for services that the passenger is unable to use due to a flight cancellation.²⁴ We submit that this is a reasonable approach.

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

- a. Using the same method used to buy the ticket;**
- b. In monetary form (for example cash, cheque, or a bank account deposit);**
- c. Passenger's choice of money or other forms offered by the airline (such as vouchers or rebates).**

While the above sub-items are acceptable, there are several issues the Agency must consider, including:

- Tax issues – tax accounts for approximately 30% of the amount paid by a guest. Some taxes are non-refundable, and some taxes are refundable regardless of fare class purchased, however, most are silent or vague on refundability rules. This should be clarified with the Canadian Revenue Agency and the Minister of National Revenue to avoid implementation issues.
- Cash (or cash equivalents) cannot be provided to guests who paid with alternate methods. Consider tickets purchased with WestJet Dollars, Air Miles, credit card or travel agency loyalty program points, or other redemption means – the Proposed Regulations cannot convert such methods to cash equivalents.
- Carriers should be entitled to innovate. The Proposed Regulations should not limit a carriers’ ability to provide innovative payment options that may be deemed valuable by consumers. We note that this approach is reflected in section 21 of the APPR.

²³ Retrieved online at: https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020

²⁴ 76 Fed. Reg. at 23129

- Currency of payment – specifically, Canadian carriers should only be required to utilize Canadian dollars in providing refunds. This is a common issue with Regulation 261, where guests may elect a currency of their choosing, along with a method of payment, often to the detriment of carriers. The Proposed Regulations must be clear and unambiguous in this regard.
- Matters that a carrier cannot control – such as expired credit cards (thus limiting the ability to provide original form of payment to a guest). Carriers must be provided reasonable alternatives in these instances.
- The payment should be provided to the guest, and not third-party claims companies. As the Agency is aware, the proliferation of such companies is often viewed as a direct result of Regulation 261 – an issue which may require their own regulation (the topic of a UK Treasury consultation process).
- Double compensation for tickets booked through travel agents – a problem often cited in Europe. Airlines may not necessarily have passenger bank details and may face double claims, one from the agent and one from the passenger (who, under Regulation 261, has a primary claim against the airline regardless of how the ticket was booked and whether or not the airline has in fact received funds). In addition to this, the Agency should also consider issues related to the refunding of travel agent commissions.
- Payment Card Industry Data Security Standard (PCI Compliance) – for credit card refunds, carriers will need a guest’s credit card number to process the refund and can’t ask for this through an online form. Delays may be experienced with guests calling with their original credit card for a carrier to process the actual refund.
- Privacy Laws – specifically the requisite consent requirements. In these instances, if consent has not been provided, guests must contact the carrier for refunds.

For international context, we note that there is no USDOT regulation specifying the form in which refunds must be provided to customers who experience a carrier-induced cancellation or schedule irregularity. In the May 2020 COVID-19 Refund FAQs, the USDOT explained in response to the question “May airlines or ticket agents offer credits or vouchers to consumers in lieu of refunds?”:

“Airlines and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed if the passenger is entitled to a refund.”

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

The allocation of time to provide refunds must be capable of winding up or down based on the circumstances. WestJet submits this flexibility must reflect the scope of the uncontrollable event giving rise to the refund, be it small, large, or catastrophic. We have provided the following examples for the Agency’s consideration:

Small Events – are isolated to a single location or aircraft. Examples may include weather specific to an airport or isolated aircraft incidents (i.e. impact with wildlife). In these circumstances, carriers must be provided a minimum of 30 days to provide a refund following a request from a guest. We note this is in line with subsection 19(4) of the APPR.

Large Events – impact multiple locations or multiple air carriers. Examples may include volcanic eruptions, nuclear disasters, civil war/disobedience, government (or competent authority) instructions, the closing of airspace, or extreme weather (i.e. consider airport devastation caused by Hurricane Dorian in the Bahamas). In these instances, carriers should be provided a minimum of 90 days to provide a refund following the end of the event. These events should also provide an opportunity for carriers to request an additional period of time if necessary.

Catastrophic Events – are those that impact the industry generally. Examples may include fleet groundings, or pandemics causing an industry slowdown. The timeframe to provide refunds cannot be fixed and must be made flexible in these instances.

While the above are provided for illustrative purposes, the Agency must also consider the location of the impacted flight and subsequent availability. For example, remote regions will face significant recoverability challenges, as will trans-Atlantic flights (i.e. consider the North Atlantic Tracks). Furthermore, the Agency must consider that an incident may start at one location, then expand to others. For example, weather-related cancellations may be initially classified as a “Small Event”, but quickly spread to other locations across the country, thus becoming a “Large Event” (i.e. “snowmageddon”). Given Canada’s challenging operating environment, the Proposed Regulations must be flexible in their application. Finally, in line with the Consultation, refunds stemming from a Catastrophic Event should not “impose an undue financial burden on air carriers that could lead to their insolvency.” Again, the Proposed Regulations must remain flexible in these instances.

6. a) **Should there be greater flexibility in the requirements for certain types of airlines, or in certain situations? For example:**
- a. **Based on airline size (smaller airlines may be, for example, less able to recover quickly after an event outside their control);**
 - b. **If an airline provides essential services (for example, to remote, regional or northern communities);**
 - c. **If the event is large-scale (as opposed to an isolated event like a collision with wildlife);**
 - d. **If the event could threaten an airline's financial viability (for example, one that results in operations being shut down for months).**

No - greater flexibility should not be provided for certain airlines. Consumers should be provided clear regulations that apply to all itineraries. A guest should not be any more or less entitled to a refund based on the carrier they elected to travel with. We also note that basing refunds on carrier size risks further distorting competition in Canada vis-a-vie foreign carriers

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

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

N/A – all carriers should be treated equally, per our above response.

- 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?**

As this question indicates, government policies are outside of airlines' control and should therefore be given more flexibility in terms of passenger refund deadlines. Similarly, although not stated in the drafting of this question, a decision to consolidate flights during a pandemic is almost always driven by the impact government decisions have on demand. Accordingly, the Proposed Regulations should reflect the fact that very few scheduling decisions during a pandemic can be considered within an airline's control.

Given the continuous rapid changes we have seen in every air carrier's operating environment since the onset of the pandemic, the generation of a list of specific pandemic-related situations is only bounded by one's imagination. Rather than providing "specific pandemic-related situations", we suggest the Proposed Regulations simply remain flexible to capture items we cannot foresee. We note this was provided in the drafting of the APPR, in particular for uncontrollable events, which states: "...including, but not limited to, the following". Similar drafting should be used in the Proposed Regulations.

- 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 there exist carrier refund regulations in the EU/UK, the various guidance documents on this subject issued by the USDOT do not have the force and effect of law. Thus, for the U.S., we understand this question to be in reference to these various USDOT guidance documents, and not "legal frameworks" per se.

EU/UK – Regulation 261

As the Agency is aware, the regulatory regime in the EU started as a deterrent to stop airlines from overbooking or cancelling flights for commercial reasons. From this, the regime has expanded through numerous court decisions into the financial and administrative burden that it is today. We find very few effective points with this regime, and would caution that following this model risks imposing significant costs against carriers, and would further alter the competitive landscape against us. As noted by the ERA, Regulation 261 threatens to decimate the regional airline industry; it is anticompetitive, unfair to

regional carriers, and is not fit for the purpose for which it was intended.²⁵ This regime should not be replicated in Canada.

In this context, the Agency must also consider the impact of certain differences in the operational environment and market in the UK/EU from that in Canada. This includes: (i) generally, longer distances in Canada, and a smaller market overall, which will impact the ability to re-route passengers, (ii) more extreme weather in Canada, thus more weather-related disruptions, and (iii) fewer airport hubs, meaning a disruption at one major hub can lead to delays across a carrier's entire network.

Furthermore, and with regard to the EU/UK, it was universally recognized (except perhaps within the EU Commission) that the refund obligation and timing was designed without consideration of its application in the event of a global pandemic. This not only brought the travel sector to a standstill and threatened the survival of many participants within it, but created an enormous administrative and cash flow burden at a time when airlines were struggling to discharge basic business functions. Many enforcement agencies did, in fact, recognize this and, to date, we are unaware of any actual enforcement action that has actually resulted in penalties on any airlines.

We strongly advise the Agency to not consider Regulation 261 as the guide to implementing refund requirements. Specifically, reference to 5-hour delays is not an appropriate threshold, and was not drafted with a consideration to large-scale cancellations (such as those caused by pandemics).

USDOT

The USDOT Guidance issued last April, which significantly does not have the force and effect of law, stated that carriers have an obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier.²⁶ According to USDOT,

- the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged even though the COVID-19 public health emergency has had an unprecedented impact on air travel; and
- the focus of the refund obligation is not on whether the flight disruptions are within or outside the carrier's control, but rather on the fact that the cancellation is through no fault of the passenger.

Similarly, the USDOT's website states:

- "Cancelled Flight – A passenger is entitled to a refund if the airline cancelled a flight, regardless of the reason, and the passenger chooses not to travel.

²⁵ Supra note 18 at page 5

²⁶ See - Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel ("April 2020 Notice"), dated April 3, 2020, available at https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020

- Schedule Change/Significant Delay - A passenger is entitled to a refund if the airline made a significant schedule change and/or significantly delays a flight and the passenger chooses not to travel.”²⁷

The terms “significant change” and “cancellation” are not defined in USDOT regulations or statute, therefore airlines are able to develop reasonable interpretations of those terms for applying their refund policies.

With the exception of prompt payment requirements (i.e. 7 days for credit card purchases – please see our analysis in question 5, above), we respectfully submit that this model represents an acceptable balance of being “fair and reasonable to passengers and, to the extent possible, does not impose an undue financial burden on air carriers that could lead to their insolvency.” Finally, given the significant number of trans-border flights, alignment with the U.S. would ensure a greater proportion of guests understand the new regulations. A common approach will be much simpler to communicate, and guests will appreciate the consistency of treatment.

²⁷ See - <https://www.transportation.gov/individuals/aviation-consumer-protection/refunds>