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**BY EMAIL**

Dear Ms. Jones,

**RE: Response to the Canadian Transportation Agency's (CTA) Air Passenger Protection Regulations - Technical Questions**

The International Air Transport Association (IATA) was created in 1945 by a special act of the Canadian Parliament. Although incorporated in Canada and headquartered in Montreal, IATA's responsibilities are global in scope and vital to the safe, efficient, seamlessly networked conduct of international commercial air transport.

IATA's mission is to represent, lead and serve the airline industry. Our members comprise some 290 airlines in over 120 countries – including Canada, carrying 82% of the world's air traffic. As such, we have a significant interest in the CTA's Air Passenger Protection Regulation consultation process and outcome.

I appreciate the opportunity to respond to the technical consultation paper and welcome an ongoing dialogue with the CTA.

IATA promotes partnerships with governments around the world that result in regulation that delivers clearly defined, measurable policy objectives in the least burdensome way. This can only be achieved via a transparent, objective, and consultative process. In support of the CTA's mandate, it is our hope that the Air Passenger Protection Regulation consultation process will point the CTA towards Smarter Regulation principles which can make a valuable contribution to this process. Essentially Smarter Regulation describes policy measures that create value by efficiently solving real problems with minimal compliance costs while enhancing competitiveness. Establishing a set of principles for the CTA could play a vital role for future developments.



## **Exclusions and Adjustments**

1 & 3. Applying the proposed legislation to flights to, from and within Canada, including connecting flights, would be extraterritorial, likely unenforceable and in breach of principles of public international law. For example, let's assume a passenger originates in Vancouver and connects in Denver to his/her final destination, Houston. If there is a delay which occurs in Denver that causes the passenger to arrive in Houston with a delay, the Canadian Government would not have the authority to enforce compensation provisions on a US domestic flight. In another example, on a Philippine Airlines flight from Manila to Vancouver, it would be unclear which rules should apply – the Philippine Passenger Bill of Rights or the Canadian regulation? The stipulation that the regime will apply to flights to, from and within Canada would mean that it will almost always interfere with other passenger rights regimes in existence therefore creating confusion and legal uncertainty for both passengers and airlines. Canadian regulations which apply to events occurring in foreign territory contravene Articles 1 and 11 of the Chicago Convention 1944, and internationally recognized principles on territorial sovereignty. Furthermore, the existence of multiple regimes will enable passengers to claim twice for the same itinerary thus increasing potential airline liabilities through over-compensation. All elements of the regulation should therefore apply to passengers departing on a flight from any airport located within the jurisdiction of Canada only.

If “minimum compensation” or a compensation ‘floor’ (i.e. specific, standardised lump sums for certain events) is established for cases of flight delay or delay and damage to baggage, this element should only apply to domestic carriage. Article 29 of the Montreal Convention bars non-compensatory damages, which include scenarios where legislation provides for lump sums that are not related to damages suffered by the passenger. The Montreal Convention applies to international carriage by air, including component domestic legs completed as part of an international itinerary. The exclusivity principle, provided in Article 29, is supported by a strong consensus of superior courts in a number of jurisdictions, including Canada, the United States, the United Kingdom, Germany, Australia, Hong Kong, New Zealand and Singapore, among others. IATA therefore urges the CTA to refrain from establishing set minimum compensation standards for international carriage that are inconsistent with the Montreal Convention; such compensation must be subject to provable individual loss.

Because compensation is payable as a result of individual damages, claims for compensation must also be filed and scrutinized on an individual basis. A collective redress mechanism, whereby the CTA would order an airline to pay all



passengers on board an aircraft as a result of a single claim, would not be consistent with the individual claim-based system put in place by the Montreal Convention. The Convention calls for non-compensatory damages based on individual loss. A collective action would be consistent with the Convention only if the loss of each person in a group of individuals is the same, and can be proven. Furthermore, it would also upset the balance of protecting passengers on one hand and maintaining industry competitiveness on the other. The financial impact on airlines of a collective redress mechanism would be significant, and would likely result in lower connectivity and higher fares, depending on the degree of success airlines have in passing the increased costs onto consumers. The effect would undermine the stated objective behind the Transportation Modernization Act of creating a more competitive market for Canadians.

Another unintended consequence of introducing minimum delay compensation is an increase on the administrative burden on the CTA itself. European National Enforcement Bodies (NEBs) report a continued workload increase as the number of claims and their complexity rises, particularly due to the ongoing lack of clarity of the use of the term “extraordinary circumstances” in the European Union that absolves carriers from the requirement to pay compensation. Passengers suffer from the same complexity; over a three-year period, half of the claims received by NEBs were dismissed because they were not applicable, invalid, or unfounded.

2. Airline interline agreements cover the liability of operating and contracting carriers in a variety of situations. As a result, the regulation should not seek to define the various scenarios in which operating or contracting carriers are liable, but should remain consistent with Articles 36, 39 and 40 of the Montreal Convention in this respect.
  
4. IATA believes that no entitlement to compensation should arise if the passenger is notified of the cancellation at least two weeks before the scheduled time of departure, or is notified of the cancellation within two weeks of the scheduled time and is offered re-routing which allows the passenger to reach their final destination within four hours of the scheduled time of arrival. In addition, successful notification to passengers of changes in travel plans depends upon the passenger having provided correct contact information to the airline at the time of booking; should this be absent, a passenger should not be entitled to compensation in these instances. We believe that a right to compensation should be based on proven individual loss, as set forth in the Montreal Convention. In those instances, the loss will be minimized by either providing the passenger sufficient time to change plans, or by transporting or arranging to transport the passenger to his/her destination close to the original scheduled arrival time.



**International Comparisons – Best Practices and Lessons Learned**

A. Unites States of America

	Flight delays and cancellations	Denied boarding	Tarmac delays	Clear communication with passengers
Effective measures	Refers to MC 99 to determine compensation amounts, keeping intact the international liability regime governing air travel.	The ability to first call for volunteers, in exchange for benefits agreed between the airline and the passenger.		Air carrier terms and conditions are required to be prominently displayed on airline websites.
Non-effective measures		High levels of compensation (up to US \$1,350) can result in greater levels of involuntary denied boarding as passengers hold out for bigger sums.	The disproportionate fines for tarmac delays (US\$32,140 per passenger) has resulted in a high number of cancellations and inconvenience to passengers by lengthening journey times. Studies have shown that passengers spend 3 extra minutes in transit for every 1 minute saved on tarmac delays <sup>1</sup> .	Provision of written notices for denied boarding; handing out written notices does not reflect how passengers communicate with the airline (e.g. other methods, such as app updates) and diverts airline resources from getting passengers where they need to be.

<sup>1</sup> <https://engineering.dartmouth.edu/news/airline-passengers-face-longer-delays-under-dot-rule-dartmouth-mit-finds>



## B. European Union

	Flight delays and cancellations	Denied boarding	Tarmac delays	Clear communication with passengers
Effective measures	Offers compensation for cancellations within the carrier's control.	The ability for airlines to first seek volunteers.	N/A	Air carrier terms and conditions are required to be prominently displayed on airline websites; providing passengers with notification of their rights during check-in.
Non-effective measures	<p>The amount of compensation offered is disproportionate and can be higher than the total ticket price. Care and assistance obligations for delays are open-ended, causing airlines to spend millions of dollars caring for passengers during the Icelandic volcanic ash incident, for example.</p> <p>Delay compensation arising after three hours, under the <i>Sturgeon</i> decision of the Court of Justice, provides for windfall payments instead of compensation in breach of the Montreal Convention. While the Court of Justice upheld</p>	Government mandated entitlements for volunteers. Such measures should be avoided; it is a contractual agreement between two parties.	N/A	Provision of written notices; handing out written notices does not reflect how passengers communicate with the airline (e.g. other methods, such as app updates) and diverts airline resources from getting passengers where they need to be.



	<p><i>Sturgeon</i> in the <i>Nelson</i> case, there is reason to doubt that the decision would be followed in other jurisdictions. The courts of the United Kingdom, Turkey and Switzerland have refused to acknowledge this type of payment in similar cases where they are not bound by the <i>Sturgeon</i> ruling.</p> <p>Finally, a major issue in the EU law today is that the definition of 'extraordinary circumstances' which exempts airlines from compensation is unclear. This has resulted in a barrage of court cases, which Canada would do well to avoid.</p>			
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C. Other jurisdictions

	Flight delays and cancellations	Denied boarding	Tarmac delays	Clear communication with passengers
Effective measures	China & Australia: No minimum set compensation – both jurisdictions refer to MC 99. In China, carriers provide care and assistance if the circumstances are within a carrier's control.	China & Australia: No government mandated compensation for involuntary denied boarding, recognizing carrier financial and reputational risk.	China & Australia: No tarmac delay regulations in effect.	Australia: Carriers required to post key elements of their conditions of carriage prominently on their website; the Civil Aviation Authority of Singapore, in cooperation with the Consumers Association of



				Singapore, undertook a public education campaign to make consumers aware of the different choices in the market. This resulted in a decrease of complaints to the CAA.
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### **Definitions of Key Terms**

1. The best approach to defining events outside of an airline's control is to create a clear, detailed but non-exhaustive set of categories, as we cannot foresee every situation that may arise. IATA's Industry Affairs and Legal Committees put together such a list, below:

<b>Item</b>	<b>Event or circumstance</b>
(1)	Immediate political instability, riots or acts of military intervention.
(2)	Terrorist activity.
(3)	Removal of baggage or passengers for security reasons.
(4)	Aircraft search by governmental authority.
(5)	Bomb discovery or scare either on board or at airport.
(6)	Passenger or crew member becomes ill, suffers from a special or unforeseen condition (including disability requiring special handling) or dies on-board at short notice before or during the flight.
(7)	Crew becomes out-of-hours as a result of a delay incurred following a circumstance beyond the airline's control, or crew is unable to perform their duties on-time due to circumstances outside their control.



(8)	Delay or cancellation of flight due to a circumstance outside the carrier's control affecting the aircraft (including gauge change) on previous flights, until such time as the aircraft is out of operation for more than 4 hours, but not if the original delay occurred more than 48 hours prior.
(9)	Strikes or other industrial action by employees of the Airline or any other third party upon which the Airline is dependent for the provision of air transport services.
(10)	Meteorological conditions incompatible with the safe operation of a flight.
(11)	Airport or airspace closures.
(12)	Congestion or failure of airport or air traffic navigation infrastructure.
(13)	Any decision of an air traffic management body or other regulatory authority.
(14)	Damage to the aircraft structure.
(15)	A bird strike sustained during a flight or the flight immediately preceding the flight.
(16)	In-flight damage to an aircraft sustained during the flight immediately preceding the subject flight that has given rise to a claim under this regulation.
(17)	Any technical defect or difficulty causing the aircraft to make an unscheduled diversion or return to the original airport of departure.
(18)	A technical defect which becomes apparent –  (a) immediately prior to the departure of a flight; or  (b) in-flight





	provided always that the defective component in question has been properly maintained in accordance with the manufacturer's guidance.
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This list is inspired by the April 2013 non-exhaustive list produced by National Enforcement Bodies, which was the product of safety experts from all the member states.

As per point 8, the knock-on effects of delays must be taken into account in determining whether or not a circumstance is beyond a carrier's control. A delay or cancellation because of a circumstance beyond a carrier's control that occurred earlier in the aircraft's flight program should also be considered to be beyond the carrier's control, provided that the carrier can demonstrate a direct causal link between the circumstance and the delay in question. Once an aircraft is out of position, it can take several hours, or even days, to recover the scheduled flight program, depending on the length of the flight and the severity of the circumstance.

The challenge in using the term "extraordinary circumstances" is how the Court of Justice of the European Union ("CJEU") has defined it: the circumstance needs to flow from causes that are not inherent to the operation of an airline. The CJEU interprets inherency by reference to the frequency of the occurrence in the airline industry. This has given rise to illogical rulings from the European Court of Justice on what is and what is not considered extraordinary circumstances. For example, lightning strikes are not considered an extraordinary circumstance because lightning has always bedeviled the industry. The collision of aircraft stairs with an aircraft is not considered an extraordinary circumstance because ground handling is an activity inherent in airline operations. We therefore do not support the CJEU's interpretation of the term because it penalizes airlines for events over which they have no control.

IATA believes the UK list falls short because it fails to include as extraordinary circumstances the failure of airport or air navigation infrastructure, damage to the aircraft structure, and technical defects. It also should be remembered that the European Commission never intended the "extraordinary circumstances" defense to be applicable to claims for delay compensation. The Commission deliberately excluded delay compensation from the suite of passenger rights included in regulation 261 but the CJEU subsequently decided to read the right into the regulation.



3. Safety is the number 1 priority and the CTA should be careful not to jeopardize a safety culture which is the envy of other modes of transport. Point 17 in the above non-exhaustive list of circumstances outside a carrier's control includes technical malfunctions. This is a critical area as requiring compensation for safety-related delays and cancellations can risk undermining the carefully nurtured safety culture of aviation.
4. IATA proposes the following definition of denied boarding:

A refusal or inability on the part of the airline, other than due to cancellation or delay, to carry the passenger on a flight, despite that passenger having presented himself/herself for check-in or boarding in conformity with the airline's contract of carriage, except where:

- (a) There are reasonable grounds to deny boarding, including but not limited to reasons of health, safety, security, unruly behaviour or inadequate travel documentation; or
- (b) The flight for which the passenger holds a reservation is unable to accommodate that passenger because of substitution of equipment of lesser capacity when required by operational or safety reasons; or
- (c) The passenger voluntarily gives up his/her seat by agreement with the airline.

It is particularly important to distinguish between volunteers who give up their seats in exchange for benefits, which is a mutually acceptable agreement between two parties, and a passenger being involuntarily denied boarding, where certain entitlements should apply, including the right to compensation, re-routing or refunds.

### **Passenger Recourse**

1. A major challenge that passengers face in seeking information on their rights or enforcing them are the number of overlapping regimes in existence today. For example, as many as three different regimes can apply to a passenger travelling from Toronto to Tel Aviv via London – the Canadian regime, the EU regime if the carrier is an EU carrier, and the Israeli regime, which applies on all itineraries involving Israel. The complexity could be addressed by following already established international instruments on consumer protection – namely the Montreal Convention 1999, and ensuring that the scope of the regulation does not create extraterritorial and overlapping provisions.



2. It is important to emphasize the importance of a claim-based process. Passengers may file a claim for compensation, and the airline should be provided sufficient time to examine that claim in order to determine its validity. Payment within 30 days after an airline determines the claim is valid is standard international practice, and one that IATA supports.

### **Operational Challenges and Considerations**

1. The regulations should be clear and unambiguous, so that everyone knows the rules of the game. The numerous court cases in the European Union illustrate the challenge of vague regulations. Disagreement over what is meant by “extraordinary circumstances” in Europe has led to numerous court judgments that have essentially re-written the regulation, imposing more obligations than the Commission originally intended. While we support plain, clear language, we do not favor prescriptive requirements. Instead, we support government policies that emphasize existing legal instruments, such as the Montreal Convention 1999, as well as consumer education efforts to ensure that the Canadian public can make their own price-service trade-offs. Prescriptive requirements run the risk of creating unintended consequences for the very consumers the government seeks to protect. For example, requiring care and assistance early into the delay can lengthen the delay travelers experience by diverting airline resources. Any care and assistance requirements should therefore be considered after a delay of three hours or longer. In addition, if the delay is due to a massive disruption (e.g. snowstorm), it is unclear what level of care and assistance would be available for passengers. In such circumstances beyond their control, carriers should not be held liable for a shortage of food or accommodation.. Equally, requiring compensation or fines for delays can incentivize airlines to cancel flights instead – as we’ve seen with tarmac delays in the United States.
- 2a. As far as re-booking is concerned, we do not believe that passengers should enjoy a right to rerouting in the event of a delay. Forcing airlines to re-book passengers reduces the pressure to operate the delayed flight as quickly as possible and may even result in the cancellation of the flight. For example, if passengers on a delayed flight would have a rerouting right, and start claiming it after a specified threshold, the concerned airline would be left with a half empty aircraft and may be tempted to cancel the flight which is clearly not in the benefit of the remaining passengers.



A rerouting right for delayed passengers may also result in a misuse of the situation by competitors, who will see a golden on-the-spot opportunity to “take over” the passengers from the original carrier at a hefty transfer price, creating significant rerouting bills for carriers, on top of the costs arising from the delays itself (costs for crew, repairs, care to passengers, etc), and from flying a half-empty aircraft (with those passengers who preferred to wait).

The current CTA ruling which forces carriers to provide re-routing to passengers who provide “credible verbal assurance” should not be taken forward in the new regulation in light of the financial impact it would have on carriers serving Canada. Indeed, for the reasons cited above, there is currently no jurisdiction in the world which requires airlines to re-route on other carriers in case of delays. Such a requirement would add significant costs to airlines, again raising fares for passengers or causing international carriers to re-evaluate the profitability of service to Canada.

IATA therefore does not support re-booking requirements for delays. We support a refund requirement after a delay of 5 hours or more as it may no longer make sense for the passenger to travel, having regard to their original purpose of travel. Such a requirement currently exists in the European Union.

- 2b. Disembarking passengers after a three hour tarmac delay can be operationally challenging for carriers if the airport is unable to accommodate the aircraft safely. In addition, a requirement to disembark can force carriers to cancel flights rather than run the risk of incurring fines or compensation, as they may not be able to predict when they can turn back and head towards the gate.
- 2c. Compensation for delays and cancellations should be claim-based and provide the carrier with sufficient time to verify the claim’s validity and process payment.
- 2d-f. The airline should have the flexibility to use the most expedient means available to make such notifications. These may include email, text message, telephone, messages or notices communicated via the Airline’s website or app, and announcements or notifications at the airport.
3. None that have not been mentioned already.
4. The new obligations should take effect 12 months after are they are enacted, in order to provide airlines with sufficient time to comply.



Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink that reads "Douglas Lavin".

**Douglas Lavin**

Vice President, Member & Government Relations, North America  
International Air Transport Association