Consultation: Proposed Regulations Amending the Air Passenger Protection Regulations

Submission of the Public Interest Advocacy Centre

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Introduction

The Public Interest Advocacy Centre (PIAC) writes to comment on the proposed regulations amending the Air Passenger Protection Regulations (proposed regulations)[1] and welcomes this opportunity to participate in this consultation process.[2] We strongly support the efforts to introduce important changes to provide refunds to air passengers for flight cancellations and lengthy delays due to situations outside of a carrier's control.

The COVID-19 pandemic has highlighted the barriers faced by passengers in getting their money back in emergency situations. It also revealed the need for clear rules to protect passengers in similar situations as government support to provide passengers with redress is not guaranteed, timely, nor necessarily feasible.[3]

During the exceptional COVID-19 pandemic, significant public pressure, including public petitions,[4] Parliamentary hearings and numerous passenger complaints played a role in initiating the process for passenger refunds,[5] but this is not an efficient mechanism to deal with this issue nor is it a method that could be relied on every time in a similar crisis.

Many Canadian airlines eventually received bailout packages from the government, with mandated conditions to refund passengers who had purchased non-refundable tickets or who had not followed their airline's refund procedure strictly in seeking to make return flight arrangements. Many airlines' refund policies remained subject to short time frames, specific application processes and other terms and conditions, limiting their utility for passengers. The time frames within which the refunds subject to these policies, even when eventually paid, also vary by airline. For instance, Air Canada said it could take from one to three months for the refund to appear in one's account, depending on one's financial institution.[6] Likewise, Air Transat said

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[1] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), online: <https://www.gazette.gc.ca/rp-pr/p1/2021/2021-07-03/html/reg1-eng.html> (including the Regulatory Impact Analysis Statement: hereafter "RIAS"). Also see: Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control: SOR/2020-283 (Canada Gazette, Part II, Volume 155, Number 1), online: <https://canadagazette.gc.ca/rp-pr/p2/2021/2021-01-06/html/sor-dors283-eng.html>.

[2] Canadian Transportation Agency, "Proposed Regulations Amending the Air Passenger Protection Regulations," online: <https://otc-cta.gc.ca/eng/consultation/proposed-regulations-amending-air-passenger-protection-regulations>.

[3] Ashley Burke, "Canadian airlines could 'fail' if forced to refund passengers, says transport minister," *CBC News* (29 May 2020), online: <https://www.cbc.ca/news/politics/transport-minister-airlines-survival-versus-refunds-1.5590392>.

[4] Sarah Turnbull, "Thousands sign petition calling for flight refunds amid COVID-19 cancellations," *CTV News* (21 May 2020), online: <https://www.ctvnews.ca/politics/thousands-sign-petition-calling-for-flight-refunds-amid-covid-19-cancellations-1.4948495>.

[5] Lee Berthiaume- The Canadian Press, "Ottawa says federal support for airline industry contingent on refunding customers," *CBC News Business* (8 November 2020), online: <https://www.cbc.ca/news/business/airline-industry-federal-support-covid-19-pandemic-customer-refunds-1.5794630>.

[6] Air Canada, "Air Canada Refund and Cancellation Policy," online: <https://www.aircanada.com/ca/en/aco/home/fly/customer-support/cancellation-refund.html>.

that processing may take up to three months.[7] Similarly, Porter Airlines has said that it could take up to 150 days for the claims to be processed from the date of receipt but most responses will be provided much sooner,[8] and Sunwing said that it would attempt to process all refunds within 120 days of the request, while noting that there might be delays in processing if the credit card has expired or the original charge to a credit card is greater than 18 months old.[9]

Reportedly, WestJet had earlier stated that it expects to take six to nine months to process refund claims.[10] Notably, unlike other airlines, WestJet has chosen not to take a bailout package.[11] At the time of writing, WestJet's COVID-19 refunds policy states that: "For any WestJet-initiated cancelation or schedule change, where the schedule change was greater than 90 minutes or one or more stops were added, guests are eligible for a refund to original form of payment if desired."[12] This creates uncertainty as to the availability of refunds for those WestJet passengers who had non-refundable tickets and cancelled their own flights and places these customers at a disadvantage compared to customers of airlines who took a bailout with refund conditions.

It is also not clear what enforcement mechanisms, if any, are in place should these refunds not be paid and/or be subject to long delays. This *ad hoc*, bailout-driven process indicates that we cannot rely on the government or industry to come up with a concrete and coherent plan to protect air passengers during mass travel disruption incidents such as pandemics. The bailout negotiations were not open to the public to comment on[13] and no consumer representatives were invited to participate in the negotiations for the resulting COVID-19 refund policies. Considering these issues, an unequivocal and mandatory regime to provide refunds for flight cancellations and lengthy delays caused by situations outside of a carrier's control is not only a step in the right direction but a much needed initiative.

Our comments below generally follow the order of commentary and details provided in the Canada Gazette, Part 1 publication.[14]

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[7] Air Transat, "Refunds of travel credits issued as a result of COVID-19," online: <https://www.airtransat.com/en-CA/refunds>.
[8] Porter Airlines, "Claim Your COVID-19 Credit Bonus, or Refund," online: <https://www.flyporter.com/en-ca/customer-service/help-contact/covid-19-refunds>.
[9] Sunwing, "Refunds for Vacations Cancelled due to COVID-19," online: <https://www.sunwing.ca/en/request-a-refund>.
[10] Sarah Rieger, "WestJet to provide refunds, not just credits, for flights cancelled due to pandemic," *CBC News* (24 October 2020), online: <https://www.cbc.ca/news/canada/calgary/westjet-refunds-flights-pandemic-1.5771760>.
[11] Ashley Burke, "WestJet drops out of talks with government on pandemic aid," *CBC News* (20 July 2021), online: <https://www.cbc.ca/news/politics/westjet-ends-negotiations-federal-goverment-pandemic-support-1.6110250>.
[12] WestJet, "Refunds due to COVID-19," online: <https://www.westjet.com/en-ca/prepare/covid/refunds>.
[13] Ashley Burke, "Ottawa, airlines close to bailout package that could soar past $7 billion, says labour leader," *CBC News* (4 March 2021), online: <https://www.cbc.ca/news/politics/airlines-air-canada-westjet-pandemic-covid-unifor-1.5936739>.
[14] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021).

Refund Obligation and Timing

We strongly support the proposed changes that impose an obligation on the carriers for providing refunds when there is a flight cancellation or lengthy delay caused by situations outside the carriers' control that prevents them from ensuring completion of passengers' itinerary within a reasonable time.

Under the new requirements, if there is a flight cancellation or delay of 3 hours or more, air carriers would have to rebook passengers on the next available flight.[15] A reasonable time for ensuring completion of a passengers' itinerary under the proposed changes is noted to be within 48 hours of the departure time on the passenger's original ticket. The proposed regulations require carriers to provide, free of charge, a confirmed reservation on a flight leaving within 48 hours of the departure time on the passenger's original ticket, and if they cannot provide such a reservation, then they would have to provide passengers with a choice of a refund for any unused portion of the ticket or rebook them on the next available flight, free of charge if the passenger does not wish to get the refund.[16] We support this provision, which generally provides passengers with clarity on what to expect and the time within which they should receive a confirmed reservation before they could opt for a refund or wait for the next available flight.

Notably, the inclusion of a provision allowing eligible passengers to opt for a refund at any time prior to being provided a confirmed reservation for the next available flight[17] would provide flexibility and relief to many passengers who may choose to take the refund and make other travel arrangements as necessary. In some situations, this could mean driving and/or travelling on a train, depending on the destination and the time and distance involved. Thus, we definitely support this provision and suggest the CTA be cautious of any attempts to dilute and/or limit the protections offered by this provision. Additionally, we would suggest adding a condition with this provision, requiring the air carriers to inform passengers in clear and plain language about their option for a refund up to the point of rebooking so that passengers can make well-informed decisions based on their individual circumstances. This will be particularly helpful in time-sensitive situations where passengers need to reach their destinations on an urgent basis and would prefer taking a refund and making alternate arrangements, rather than wait for a confirmed reservation for the next available flight.

We also support the provision of refunding and returning passengers to their pertinent point of origin as mentioned on their original ticket if the travel no longer serves a purpose due to the delay

[15] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021).
[16] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), see Regulations Amending the Air Passenger Protection Regulations, s.18(1) and (1.1).
[17] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), see Regulations Amending the Air Passenger Protection Regulations, s.18(1) (1.3)- Refund.

or cancellation,[18] which will ensure that passengers are not left stranded and are able to return to the initial point of their journey.

The proposed regulation does not address right to care that is passengers' access to meals, means of communication and/or accommodation, in the waiting period. This is when passengers opt to wait for the next available flight, rather than take their refund. We believe passengers would have a need for the right to care in these situations, same as other situations when the delay or cancellation is within the carriers' control. This right will be particularly helpful in case of international travel, where it could be more challenging for passengers to make arrangements. After all, a consumer waiting for a next available flight may have to wait quite some time and in this period, needs to eat or sleep, and is in this situation through no fault of his or her own.[19]

We encourage the CTA to look at the EC rules and guidelines in this regard and to consider doing a separate consultation on this issue going forward. Articles 5 and 6 of the Regulation (EC) No 261/2004 ("Reg 261/2004") regarding cancellation and delay respectively,[20] require different parts of Article 9 (right to care) to apply.[21] The Guidelines released by the EC Commission in relation to the application of passenger rights in the context of COVID-19 clarify the application of a right to care, which is available in case passengers wait for rerouting at the earliest convenience.[22] This is not available when the passenger opts for reimbursement of the full cost of ticket, or when the passenger opts for re-routing at a later date at the passenger's convenience.[23] The extent of care is to be assessed on a case-by-case basis, and notably, the price paid for the ticket or the length of the inconvenience suffered should not interfere with this right.[24] Importantly, the Guidelines note that according to the regulation, the air carrier is to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances, which could not be avoided even after taking all reasonable measures.[25]

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[18] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), see Regulations Amending the Air Passenger Protection Regulations, s. 18(1)(1.2).

[19] The RIAS notes that Canadian travel realities, especially for flights to some northern parts of Canada, can be delayed for long periods: "However, the Canadian rebooking window needs to take into account the realities and concerns of carriers in Canada, including small carriers serving northern and remote communities, where flights are often infrequent, and weather-related disruptions that can be lengthy. There are limited flights to northern and remote areas, and in some cases there is only one carrier per route with a limited fleet. Therefore, northern and remote carriers may require more time to rebook their passengers."

[20] 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, Article 5. Regulation (EC) No 261/2004, Articles 5 and 6.

[21] See Regulation (EC) No 261/2004, Articles 5,6 and 9.

[22] Official Journal of the European Union, Commission Notice, Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 (2020/C 89 I/01), online: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020XC0318(04)>.

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*

Scope of Changes

We understand that the proposed regulations would cover all situations outside the carriers' control, including all those listed under s.10(1) of the APPR.[26] We strongly support this provision of refunds in all situations deemed to be outside the carriers' control. We understand that this would be a major change for the industry, but this pandemic has showed us how distressing it can be for passengers to be out-of-pocket in difficult circumstances. Even though not all such situations would be as unexpected or severe as this pandemic, providing passengers their money back for a service not received within a reasonable time, is not only fair and equitable but also good policy. Passengers with 'non-refundable' tickets in effect are provided new rights to: 1. a refund in these circumstances, but must allow the airline time (48 hours) to attempt to complete their itinerary; and 2. free return to point of departure after 48 hours and a refund as well. These regulations should help to rebuild passenger confidence in air travel.

This scope is also in line with the Minister's Direction to the CTA, which requires that the new regulation must provide for refunds to passengers for flight cancellations due to situations outside of a carrier's control, including the situations listed in subsection 10(1) of the APPR, that prevent it from ensuring that passengers complete their itinerary within a reasonable time.[27] Lastly, we hope that this broad scope would also incentivize the airlines to better manage their schedules and travelling arrangements in these situations, as far as feasible.

Refund Coverage

We support the proposed changes regarding refund coverage and certainly recommend the reimbursement of any unused portion of the ticket when a passenger chooses a refund.[28] The fees for ancillary services such as seat selection, and checked baggage can result in significant costs for passengers and these should be returned to passengers in the original form of payment. The timescales applicable for refunding cancelled flights or those subject to lengthy delay should apply for refunding the costs of these services as well.

Refund Method

As evident from this pandemic, the method of refund and the application of any non-monetary forms of refund is an extremely critical issue for passengers. We support the proposed provision of giving refunds to the person who purchased the ticket or additional service, in the method used for the original form of payment.[29]

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[26] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021).
[27] Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control: SOR/2020-283, online: <https://canadagazette.gc.ca/rp-pr/p2/2021/2021-01-06/html/sor-dors283-eng.html>.
[28] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), see Regulations Amending the Air Passenger Protection Regulations, s. 18.1 (1) and (2).
[29] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), Regulations Amending the Air Passenger Protection Regulations, s. 18.2 (1).

As noted earlier, we do not support the provision of providing passengers choice of money or other forms of refund (such as vouchers or rebates), which could be easily exploited by airlines to their advantage by promoting these options over cash refunds, while consumers are under stress, resulting in several limitations and complications.[30] Though the requirement of informing passengers in writing about the option for a refund in the method used for original payment, and receiving passenger's confirmation in writing that they have chosen to receive a refund in another form would likely protect passengers from being exploited.

Along with these requirements, importantly, the regulations should provide that the default option of refunds is in the original form of payment and that this default option would apply if passengers do not confirm in writing about their preferred form of refund within a stipulated time frame, which should not be more than 7 calendar days. This is to ensure that those passengers who do not receive the notice or miss the notice from the airline regarding their different options for refund are not left out of pocket for long and/or left to coordinate with the airline to find out about their refund.

Refund Deadline

We note that the proposed regulations require all refunds under the Air Passenger Protection Regulations (APPR) to be paid within 7 days for tickets purchased by credit card and within 20 days for tickets purchased by other forms, such as cash, cheque, and travel points.[31] We support the proposed deadlines for paying of refunds, which align with the practices followed in the European Union and the United States[32] and is reasonable.

Concluding Remarks

We conclude by indicating our support for the proposed regulations and would like to see them in force soon. We would also urge the Canadian Transportation Agency (CTA) to ensure that these proposed regulations, similar to other provisions of the APPR are supplemented with implementation guides and other consumer facing materials that provide consumers with a clear understanding of their rights in such situations.

End of Document

[30] Public Interest Advocacy Centre, Consultation on Development of new airline refund requirements- A Submission from the Public Interest Advocacy Centre, (1 March 2021) at page 8.
[31] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021), see Regulations Amending the Air Passenger Protection Regulations, s.18.2(2)- Refund deadline.
[32] Canada Gazette, Part I, Volume 155, Number 27: Regulations Amending the Air Passenger Protection Regulations (July 3, 2021).