Consultation on Development of new airline refund requirements

A Submission from the Public Interest Advocacy Centre

Public Interest Advocacy Centre
285 McLeod Street, Suite 200
Ottawa, Ontario K2P 1A1
CANADA

1 March 2021

Table of Contents

Introduction 3

PIAC Responses 4

Q1. 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? 4

Q2. 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"? 5

Q3. What should a refund cover? 6

Q4. How should airlines be required to refund passengers? 7

(a) Method of Refund 7

(b) Scope of Refund 10

Q5. How much time should airlines have to provide refunds to passengers under the new requirements? 11

Q6. a) Should there be greater flexibility in the requirements for certain types of airlines, or in certain situations? 13

(a) Airline size 13

(b) Airline providing essential services 13

(c) Large-scale events 14

(d) Event threatening an airline's financial viability 15

b) If so, in what areas should flexibility be given? 15

Q7. 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? 16

Q8. 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? 17

(a) European Union Regs– Overview 17

(b) European Union Regs – Aspects to Consider 19

(c) United States (U.S.) – Overview 20

(d) United States (U.S.) – Aspects to Consider 21

Introduction

The Public Interest Advocacy Centre ("PIAC") is a national not-for-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. PIAC has been active in the field of air passenger protection and policy for over 20 years.

PIAC welcomes this opportunity to comment on the Canadian Transportation Agency's (CTA) consultation on new airline refund requirements.[1] We note that even though the resulting regime is unlikely to have impact on the current issues regarding passenger refunds during this pandemic, it would be integral to fixing the gaps in the Air Passenger Protection Regulations surrounding refunds.[2]

Our response discusses the various aspects raised by this consultation paper and importantly highlights the challenges associated with the use of vouchers or any other non-monetary form of refund, which are often subject to arbitrary practices and present an inadequate and unfair alternative to passengers. We hope that our comments will assist the CTA in its development of this new regulation.

[1] Canadian Transportation Agency (CTA), Consultation paper: Development of new airline refund requirements, online: <https://otc-cta.gc.ca/eng/consultation-paper-development-new-airline-refund-requirements>. Also see: [Minister of Transport], 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] Air Passenger Protection Regulations (SOR/2019-150), online: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-150/FullText.html>.

PIAC Responses

Q1. 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?

1. A reasonable time for completing a passengers' itinerary could vary depending on the duration of the flight and the distance being covered. The other variable is the passenger's right to "care" in the European rules sense, that is, a right to reasonable accommodation, travel and sustenance during a delay that may or may not become a cancellation declared by the air carrier or a "deemed cancellation", that is, an "entitlement to a refund will apply if the airline cannot complete the passenger's itinerary within a reasonable time".

2. Section 18(1) of the APPR concerning alternate arrangements — outside carrier's control, requires in case of a large carrier, a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which it has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the pertinent destination and departs within 48 hours of the end of the event that caused the delay, cancellation or denial of boarding.[3] No specific time frame has been identified in case of small carriers.[4]

3. This suggests that a reasonable time for completing a passenger's itinerary should not be more than 48 hours for both large and small carriers and that if the airline cannot do so, the passenger should be entitled to a refund as if the flight were cancelled, after this time has elapsed (in effect, a deemed cancellation). This should provide air carriers sufficient time to make the required travel arrangements. If it would take air carriers longer than 48 hours, then they should be required to provide a refund. The new regulation should also require air carriers to provide regular and continuous updates to passengers regarding the status of their next flights and any related arrangements.

4. As noted, however, were the passenger provided a right to "care" during this entire period, it may be permissible for a time longer than 48 hours to be a reasonable time. This is effectively what the EU rules hold. The EU has applied this rule in light of COVID-19 delays and has issued guidance on such major disruptive effects that are outside of the control of the airline.[5] Crucially, in general, while a passenger is delayed under the EU rules, the passenger continues to receive the right to "care".

---

[3] Air Passenger Protection Regulations (SOR/2019-150), s.18(1).
[4] *Ibid.*
[5] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19, (Brussels, 18.3.2020, C(2020) 1830 final), online: <https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf>. For the press release, see here: <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_485>.

5. Were the CTA to consider requiring an extended right to “care” during a long delay, we could support a longer “reasonable delay” than 48 hours to complete an itinerary prior to triggering a deemed cancellation. However, since the CTA may not be considering such a requirement of “care” for long delays, PIAC believes a deemed cancellation and right to a refund should be triggered after 48 hours of delay to an itinerary if there is no “care”.

Q2. 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"?

6. Please see our answer to Question 1, above. PIAC submits that the entitlement to a refund should apply in case of a lengthy delay, not just a flight cancellation; that is, whether the airline intends to try to continue the itinerary, or simply refuses to formally cancel a long-delayed flight. In effect, this is a “deemed cancellation”. Several lengthy delays can not only subject passengers to significant financial and emotional distress but in many cases also defeat the purpose of time-sensitive trips. This will also ensure that airlines efficiently plan to minimize such delays. Thus, we strongly support including lengthy delay in this regulation.

7. However, we believe that some travellers will wish to complete a long-delayed itinerary, despite the inconvenience, in order to avoid losing a seat and being required to rebook. In this case, were there a requirement of “care”, PIAC would support the right of some travellers to “hang in there” and wait for a long-delayed flight to fly. However, this could be abused with no “care” right. The CTA should also keep in mind that simply creating a “deemed cancellation” or “right to a refund” does not mean that all passengers, even if entitled to do so, may choose this option. We would, however, support a rule to require “care” for those passengers who choose to try to complete a delayed flight. Without such a right to “care”, the passengers who were stoicly waiting could be abused or misled while others who take their refund would also not get care but would at least get their money back.

8. The CTA may also wish to consider that the definition of a lengthy delay should also be drafted to align with the distance or expected flight time. As for a short flight from Toronto to Ottawa, a delay of 3 three hours or more (which is the period normally provided for compensation for delay for matters within a carrier’s control) could therefore be deemed excessive and therefor could trigger a “deemed cancellation” and a right to a refund. This would again be dependent on the ability to receive “care”. The shorter the flight, the lower should be the time amounting to a lengthy delay. Were “care” provided, PIAC would be willing to support a longer delay without a right to carriage and a full refund – perhaps double the normal delay to receive compensation for delay – but in no case should a passenger who is forced to depart a day following the scheduled departure day be denied a refund (that is, a deemed cancellation should apply if the passenger is told to come back the next day).

Q3. What should a refund cover? For example:

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

9. A refund should definitely cover the unused portion of the passenger's ticket. At the same time, if the passenger paid for any additional services that were not used, these must also be reimbursed in full. Passengers should not be required to pay for services that were not utilized. In some cases, airlines may not have even incurred operating costs for providing these services, such as transportation and storage costs for baggage, including extra baggage, which was not required to be stored and transported in case of flight cancellations or alternatively it had to be stored for longer in case of lengthy delays. In either case as noted earlier, passengers should not be required to bear the costs of providing these services that were not used.

10. Notably, the fees for seat selection and even checked baggage, not just extra baggage could amount to a significant cost and should be repaid in full. For instance, Air Canada charges a basic extra bag fee of $20-100 within Canada/Canada-U.S., $20-$100 CAD/USD to Caribbean and Mexico and for international flights it charges $30-$100 CAD/USD. The standard fee ranges from $10-50 within Canada/Canada-U.S. and international destinations.[6] Notably, these are prices per passenger, per one-way flight segment and inclusive of taxes.[7] This means if a family of two or four is travelling then this would cost much more, depending on the number of family members travelling.

11. For checked baggage, Air Canada charges basic and standard fees of $30 for the first bag and $50 for the second bag with some fares allowing one or two free bags for economy class travel, including travel between Canada and the U.S. and Mexico or the Caribbean.[8] For international travel, one free bag is allowed and the maximum fee for a second bag is $100, though an exception to this is charging of economy basic fare on flights between Canada and Europe that entails $70 for the first bag and $100 for a second bag.[9] There are extra charges for additional checked baggage, including overweight/oversize bag, broadly costing $100 and above depending on the flight

[6] Air Canada, "Advance Seat Selection" online: <https://www.aircanada.com/ca/en/aco/home/fly/onboard/preferred-seats/online-advance-seat-selection.html>.
[7] *Ibid.*
[8] Air Canada, "Fees Related to Baggage and Optional Services," online: <https://www.aircanada.com/ca/en/aco/home/legal/products-and-services.html>.
[9] *Ibid.*

destination.[10] Likewise, WestJet[11] and Air Transat[12] have costs associated with the provision of these services, which all could add up to a substantial cost, depending on what the passengers choose to pay for. Thus, the new regulation should definitely cover the costs of these services in the refund.

12. We also submit that the new regulation should cover any other additional fees and services besides those discussed above to ensure that all other services that were paid for but not used are reimbursed in full.

Q4. How should airlines be required to refund passengers? For example:

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

(a) Method of Refund

13. Airlines should be required to refund passengers using the same method used to buy the ticket or in monetary form. In times of emergency, it is extremely unlikely for passengers to opt for other options as demonstrated by many passenger complaints during this pandemic.[13] Undoubtedly, this pandemic has highlighted the numerous challenges faced by passengers in getting their money back and has prominently resurfaced the imbalance of bargaining power between air passengers and air carriers. Thus, we strongly support the use of monetary forms of refund (cash, cheque or bank account deposit) or the same payment method used to buy the ticket over non-monetary methods (vouchers) any other method.

14. We submit that the regulation should clearly specify the exact method of refund and also require airlines to send a written notice to all the affected passengers regarding how and when the refund will be paid. Importantly, the regulation should require the refund to apply

---

[10] *Ibid.*

[11] WestJet, Service fees: baggage, cancellation and more, online: <https://www.westjet.com/en-ca/travel-info/fares/service-fees#checked-baggage>. (The checked baggage fees range from $30-$35.40 and above for Basic, Econo or Member Exclusive fare option, and free for some other options, particularly the first bag. The fees for advance seat selection vary based on the fare option, it ranges from $5-$100 CAD at check-in, $5-$50 CAD for standard seat for basic fare, with various other options.)

[12] Air Transat, Seat selection, online: <https://www.airtransat.com/en-CA/book/book-a-flight/on-board-comfort/seat-selection>. Also see: Air Transat, [Baggage] Weight – Dimensions, online: <https://www.airtransat.com/en-CA/Travel-information/Baggage/Weight-Dimensions>.

[13] The Canadian Press, "Thousands of flight complaints amid COVID-19 won't be processed until 2021," *CTV News* (1 December 2020), online: <https://www.ctvnews.ca/business/thousands-of-flight-complaints-amid-covid-19-won-t-be-processed-until-2021-1.5212628>.
Also see: Tomasia DaSilva, "Frustrated customers continue to demand refunds from airlines," *Global News* (5 January 2021), online: <https://globalnews.ca/news/7557039/consumer-alberta-refunds-airlines-travel/>, and Christopher Reynolds (the Canadian Press), "Airline complaints: Canadians filed more than 8,000 grievances since March," *CTV News* (1 September 2020), online: <https://www.ctvnews.ca/business/airline-complaints-canadians-filed-more-than-8-000-grievances-since-march-1.5087695>.

automatically when the air carriers cancel their flights or in case of lengthy delays. Passengers should not be required to apply for refunds, and this should also be specified in the regulation.

15. 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, resulting in several limitations and complications. These non-monetary forms of refunds often provide inadequate protections and limited options to passengers. For instance, recently, British Columbia's Supreme Court approved a class-action lawsuit against WestJet's policy of issuing travel credits with a one-year expiry date.[14] Reportedly, the plaintiff from Vancouver, Tiana Sharifi states that tens of thousands of people have had their WestJet credits expire or have had to pay fees to extend them, with the issue here being whether travel credits qualify as gift cards that are prohibited from having an expiry date.[15] The duration of credit offered or the validity period of other forms of refund is just one of the many limitations attached to these options.

16. Notably, this pandemic has resulted in a high volume of complaints, specifically in relation to refunds and vouchers. A CTV News report notes:

> "CTA chairman Scott Streiner says the agency is struggling to handle another 11,000 complaints it received between last December and March, immediately after a new passenger rights charter came into effect.
> The majority of complaints since March concern refunds, which most Canadian airlines have refused to give customers after cancelling hundreds of thousands of flights due to pandemic travel restrictions, opting instead for flight vouchers or credit."[16]

17. If other non-monetary options are offered in the new regulation, it is likely that again a high number of passenger complaints would arise. These options have an extremely limited value, especially in times of extended emergency where many passengers definitely prefer receiving their money back as clearly demonstrated by this pandemic.[17] We briefly noted in one of our blogs the challenges for passengers in using future flight vouchers with some likely to not use them at all.[18] Consider, for example, elderly Canadians caught

---

[14] Maryse Zeidler, "B.C.-based class-action lawsuit targets 1-year expiry on WestJet travel credits," *CBC News British Columbia* (20 December 2020), online: <https://www.cbc.ca/news/canada/british-columbia/b-c-based-class-action-lawsuit-targets-1-year-expiry-on-westjet-travel-credits-1.5849112>.
[15] *Ibid.*
[16] The Canadian Press, "Thousands of flight complaints amid COVID-19 won't be processed until 2021," CTV News (1 December 2020).
[17] Numerous Petitions were started and signed demanding consumer refunds for canceled flights. See: Petition to the Government of Canada in the House of Commons, initiated by Marie-Eve Dumont from Montreal, Quebec, online: <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-2604&fbclid=IwAR3d_vQLzK36qjkCawy9Uz-CR8yE4lv55eamdOld-Q8QBH3D8cZIxxYtHI0>. (This has 32,789 signatures).
[18] John Lawford, "Canadian Airlines: No Refund = No Bailout," Public Interest Advocacy Centre blog (18 April 2020), online: <https://www.piac.ca/canadian-airlines-no-refund-no-bailout/>.

visiting foreign relatives who are now (for health or financial reasons, or simply due to the uncertainty of future air travel) unlikely to use a voucher in the future.[19]

18. Nonetheless, in case passengers are to be given a choice to indicate their preferred form of payment, then vouchers might be considered but only if and when passengers specifically and explicitly indicate their preference for it. Though we reiterate our strong disapproval of the use of vouchers or any other non-monetary form of refunds at all, which are often subject to arbitrary and uncertain practices.

19. We expressed similar concerns relating to these options in our response to the CTA's consultation on APPRs in August 2018:

> PIAC believes that passengers should be offered compensation in either cash, or credit card refunds. We do not encourage the use of frequent flyer points, upgrades, and complementary tickets, which we believe to be of limited use, if any, in comparison to cash or credit refund. Importantly, we contend that travel vouchers, even those valued at more than the cash value option, remain inconvenient for those who are not frequent flyers or who do not use them before their expiry date; and could be subject to taxes and other fees. The expiry date of these vouchers is often not very clear. In a 2013 decision, the CTA held that travel vouchers if applicable, should be accompanied with conditions, such as; full disclosure of all material restrictions, and allowing them to be exchanged for cash within 1 month, at the rate of CAD$1 in cash being equivalent to CAD$3 in travel vouchers.[20]

20. Likewise, we argue that in case this new regulation provides passengers with an option to indicate their preferred form of refund than the provision of vouchers must be accompanied with a right to convert their vouchers to cash by giving a one month notice to their air carriers.[21] This should be explicitly provided for in the regulation to avoid any uncertainties.

21. In case passengers are given a choice to identify their preferred form of refund, then they should be required to reply within a time frame of 3-5 days from the time the initial notice is sent. If no reply is sent by passengers within this time then the default option should apply, which is payment using the same method used to purchase the ticket or in monetary form. We propose 3-5 days because it is important that any time given to passengers for making a choice is not too long to cause unnecessary delays and issues, and at the time it should not be so short that passengers are unable to meaningfully review their options and make a decision. Importantly, this initial notice should clearly and prominently identify the monetary forms of compensation available in clear and plain language as a default option, along with a choice to opt for another method of refund, if applicable.

---

[19] *Ibid.*
[20] Public Interest Advocacy Centre, Consultation Paper on Air Passenger Protection Regulations- A Submission from the Public Interest Advocacy Centre (August 2018), online: <https://otc-cta.gc.ca/sites/default/files/piac.pdf> at p.14. Also see, Canadian Transportation Agency, "Decision No. 342-C-A-2013," online: <https://otc-cta.gc.ca/eng/ruling/342-c-a-2013>.
[21] *Ibid.*

22. Additionally, the regulation should mandate standards on what should be disclosed in relation to these vouchers or any other non-monetary option to enable passengers to make well-informed choices and not be blindsided at the time of use. These details should be included in the initial notice, after the details of the default monetary option and should clearly include the specific terms and conditions attached to them, such as the amount or trip(s) covered, duration of validity, if any (preferably there should be no expiry date) and any other terms and conditions that could affect their use in the future. We reiterate that it is extremely important that the regulation should require all the details associated with these forms of refund to be clearly disclosed upfront and before the passengers decide which form of refund to choose. Also, such vouchers must have conditions attached to them for converting them to cash.

23. The above processes should be strictly monitored by the CTA to ensure there is no abuse of process by the airlines. This could be done by requiring air carriers to submit reports to the CTA on their compliance processes, and payment schedules. In case, any delays and compliance issues are suspected, then we would strongly encourage the CTA to require that refunds should just be paid in monetary form or the original method of payment to all passengers.

24. We also oppose the use of rebates (understood to be partial refunds) and argue that the new regime should only offer full refunds. Provision of rebates will not only create unnecessary complications as to their calculation and fair determination but also result in administrative delays and challenges. In any case provision of partial refunds instead of full refunds in times of emergency and other situations is an inequitable option.

(b) Scope of Refund

25. We also argue that the regulation should require air carriers to refund all passengers, not just those who purchased a refundable ticket. Many passengers opt for non-refundable tickets because they are more economical. Passengers should not be made to suffer because of this. Ferio Pugliese, senior vice-president of Air Canada Express and government relations, noted that those who did purchase refundable tickets have been given their money back, adding that these refunds amounted to "just over $1 billion."[22] Such a practice clearly leaves passengers with non-refundable tickets with no clear redress to their own funds. We argue that all passengers should be paid the actual value of their ticket i.e. provided a full refund. Moreover, it is extremely unfair to make passengers facing financial difficulties to help airlines, while allowing those who could

[22] Rachel Gilmore, “Airline execs double down on refund refusal amid parliamentary grilling,” *CTV News* (22 June 2020, last updated 23 June 2020), online: <https://www.ctvnews.ca/politics/airline-execs-double-down-on-refund-refusal-amid-parliamentary-grilling-1.4995175>..

afford to get refundable tickets to be reimbursed. This includes others such as business travellers who are likely reimbursed for the cost of flights.[23]

26. These refunds should also be provided in both cases, *i.e.*, when the air carriers cancelled their flights or passengers cancelled their flights in case of emergencies like this pandemic. We submit that refunds should not be limited to merely those situations where the airline cancelled the flights as many situations might limit or discourage passengers from traveling such as the pandemic, which would leave passengers who cancelled their flights in a state of emergency with no access to refunds.

Q5. How much time should airlines have to provide refunds to passengers under the new requirements?

27. We strongly support identifying a specific time for providing refunds to passengers under the new requirements. In our view, air carriers should be given a maximum of thirty (30) days to provide refunds in a monetary form or by using the same method used to buy the ticket, meanwhile they should be encouraged to pay sooner than the 30 day deadline, even as soon as within seven (7) days, as provided in the EU regulations (more on this discussed ahead). We argue that a maximum 30 day period to administer the refund payments in situations outside the air carriers' control will give air carriers more than adequate time to make the required arrangements and coordinate with passengers to ensure timely payments. At the same time, this will ensure that passengers do not have to wait for too long to get their money back as many situations covered by the new regulation could entail passengers facing financial difficulties and being in dire need of their money.

28. Notably, a 30 day duration should be the maximum time given to airlines to make the required payments, and it should include the time the passengers are given an initial notice by the airlines and if applicable, an option to choose the preferred method of payment. Though as noted earlier, we support the monetary form of refund over any other form, and it should remain the default option.

29. We submit that any duration beyond a 30 day period would be excessive and unfair. WestJet stated in October 2020 that it will begin providing refunds to eligible flyers with WestJet and Swoop on November 2 whose flights were cancelled due to the pandemic.[24] It said that it will start with those whose flights that were cancelled in March 2020 to offer refunds in the original form of payment.[25] It also said that this process is expected to take

---

[23] Rumina Dhalla, "Airlines should rethink their refusal to refund passengers during COVID-19," *The Conversation* (7 July 2020), online: <https://theconversation.com/airlines-should-rethink-their-refusal-to-refund-passengers-during-covid-19-140380>.

[24] Sarah Rieger, "WestJet to provide refunds, not just credits, for flights cancelled due to pandemic," *CBC News Calgary* (24 October 2020), online: <https://www.cbc.ca/news/canada/calgary/westjet-refunds-flights-pandemic-1.5771760>. Also see: WestJet (web page), "Refunds due to COVID-19," online: <https://www.westjet.com/en-ca/travel-info/covid-refunds> (last accessed on 24 February 2021).

[25] Sarah Rieger, "WestJet to provide refunds, not just credits, for flights cancelled due to pandemic," *CBC News Calgary* (24 October 2020).

six to nine months with customers required to wait to be contacted.[26] At the time of writing, WestJet on its webpage, "Refunds due to COVID-19," noted that it is currently processing refunds for reservations with departures up to June 7, 2020.[27] Such a prolonged timeline of six to nine months is extremely excessive and unfair for passengers, particularly in situations like this pandemic. Whereas Air Canada has posted on its website that if your refund request is being reviewed by one of our refund agents, please note that it can take between 10 and 12 weeks for your refund claim to be processed.[28] The new regulation should ensure that such delays in paying refunds are adequately addressed and these issues are not repeated in the future, by specifying a reasonable time frame of a maximum 30 days.

30. Additionally, if a passenger chooses another form of refund over monetary form such as a voucher, then the regulation should require this to be provided within fifteen (15) days of making the choice and not in 30 days. A 15 day period should be more than enough for airlines to send the required voucher that should clearly provide an option to be converted into cash refund within a 1 month period. Notably, some passengers are still waiting for their vouchers, let alone cash refunds during this pandemic. For instance, a passenger, Ashley Nunes shared his negative experience in a Globe and Mail article.[29] He stated:

> [S]ome 10 months after my original flight was cancelled, and nearly two months after I first tried redeeming the voucher, I have nothing to show for my efforts. I have tried resolving this with the airline but was met with the following response. "We understand the time frame for having the vouchers issued was supposed to be six weeks, however with the volume of requests we've received this has pushed back the issue time." For good measure, the agent noted, "I regret to say I'm unable to give you an issue date when the voucher will be emailed out to you" and that if I want to travel sooner, I should call Air Canada directly. I did and was told by a recorded message that the carrier is experiencing "high call volume."[30]

31. If the CTA were to require vouchers to be given more quickly than refunds, it would also have to mandate clear disclosure of the right to a full cash or equivalent refund, positive consent for consumers to choose vouchers over cash or equivalent such as refunding a card and penalties for attempting to coerce customers into taking vouchers because of the time differential in receiving recompense. The CTA could monitor, and if such abuse were to happen, could re-align the timing of cash and non-cash recompense again to the same delay. We would also support a rule, in line with the present APPRs, that vouchers would have to offer customers more value than a simple refund and in no cases any less.

---

[26] *Ibid.*
[27] WestJet (web page), "Refunds due to COVID-19."
[28] Air Canada, Refund Services, online: <https://www.aircanada.com/ca/en/aco/home/fly/customer-support/cancellation-refund.html>.
[29] Ashley Nunes, "Ottawa wants airlines to give us refunds. Ten months after Air Canada cancelled my flight, I can't even get my voucher," *The Globe and Mail (Opinion)* (1 February 2021), online: <https://www.theglobeandmail.com/business/commentary/article-ottawa-wants-airlines-to-give-us-refunds-ten-months-after-air-canada/>.
[30] *Ibid.*

Q6. a) Should there be greater flexibility in the requirements for certain types of airlines, or in certain situations? For example:

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

(a) Airline size

32. There should not be any greater flexibility based on airline size. Under the APPR, we note that different levels of minimum compensation have been set for small and large air carriers for flight disruptions within their control,[31] and for compensation in case of refund if the alternate travel arrangements offered do not accommodate the passenger's travel needs.[32] This could be argued by some to be justified based on small carriers' lower number of operations and/or revenue as compared to large carriers to be able to manage the costs of paying compensation. We disagree with such an approach as we argued in our response to the consultation on the APPRs that the new obligations set out in the air passenger protections regulations should apply in whole, to all sizes of licensed carriers, resulting in common industry standards for ensuring transparency and clarity in the administration and application of the new regulations.[33]

33. Similarly, we argue for maintaining the same standard of obligations on all air carriers regardless of their size. Moreover, placing separate standards for refunds based on airlines' size for situations outside the air carriers' control does not make sense as air carriers are not required to provide compensation here, rather they have to refund money for a service that was not provided and/or completed. Thus, we submit that there should not be any difference based on the size of air carriers relating to their refund obligations for situations outside their control.

(b) Airline providing essential services

34. There could be some flexibility in the requirements for certain types of airlines such as those providing essential services to remote, regional or northern communities. However, any provision of flexibility should be limited. Broadly, it could entail extending the time frame for paying the refunds, however, it should not be to deny passengers of these

[31] Air Passenger Protection Regulations (SOR/2019-150), s.19 (1), online: <https://laws.justice.gc.ca/eng/regulations/SOR-2019-150/FullText.html>.
[32] Air Passenger Protection Regulations (SOR/2019-150), s.17(2) and s.19(2).
[33] Public Interest Advocacy Centre, Consultation Paper on Air Passenger Protection Regulations- A Submission from the Public Interest Advocacy Centre (August 2018), online: <https://otc-cta.gc.ca/sites/default/files/piac.pdf> at p.37.

communities a right to refund and nor should it be to reduce the amount of refund available to passengers residing in these communities. In times of emergency and other situations outside the air carriers' control, passengers of all communities are more or less affected and to limit the rights available to them in such times would be unfair and could drastically limit their redress options.

(c) Large-scale events

35. There should not be any greater flexibility in case of a large-scale event versus an isolated event (like a collision with wildlife or any other one-off event). The Minister's Direction to the CTA 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.[34] Limiting the application of these refund obligations to just one-off events or reducing the obligations in case of large-scale events would defeat the purpose of the new regulation.

36. The objective of this ministerial regulation is to fill a gap in the APPR to establish a consistent and fair policy with respect to refunds in situations outside of an air carrier's control, as contemplated in the illustrative list found in subsection 10(1) of the APPR and which result in flight cancellations.[35] Thus, restricting the protections offered under the new regulation to just certain situations would not meet the objective identified in the Direction from the Minister. The COVID-19 pandemic is one large scale event, which has revealed the clear need to do more to protect air passengers in these situations. If the new requirements are limited to isolated events than any future pandemic and other national emergencies would be excluded or subject to a lower threshold, which would more or less maintain status quo or result in a weak and ineffective protection regime for passengers.

37. Notably, subsection 10(1) of the APPR includes many situations that can be viewed as large-scale events as well as isolated events.[36] For example, war or political instability; meteorological conditions or natural disasters; a security threat; a medical emergency; amidst others reflect some large-scale events whereas illegal acts or sabotage; instructions from air traffic control; a collision with wildlife; a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider; a manufacturing defect in an aircraft that reduces the safety of passengers and that was identified by the manufacturer or a competent authority; or an order or instruction from an official of a state or a law enforcement agency or from a person responsible for airport security reflect more or less one-off events.[37] We submit that the new regulation must ensure that the same level of refund obligations apply to both large scale and isolated events. The air carriers should prepare for both contingencies and make arrangements to adequately comply with their obligations.

---

[34] Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control: SOR/2020-283, Canada Gazette, Part II, Volume 155, Number 1.
[35] *Ibid.*
[36] Air Passenger Protection Regulations (SOR/2019-150), s.10(1).
[37] *Ibid.*

(d) Event threatening an airline's financial viability

38. There should be no greater flexibility in relation to events threatening an airlines' financial viability. Air passengers should not be expected to bear the burden of maintaining the sustainability of air carriers in these situations. If the airlines' financial viability is being affected by some situation then it is highly likely that passengers are also facing a similar economic downturn and financial crunch, as clearly demonstrated by this pandemic. In times like these, it is outright unfair to require passengers to provide financial support to airlines where they themselves are out of pocket and that also for a service that was not provided to them. Air carriers should prepare better for such situations in the future and look for other means of financial support, rather than rely on passengers' money.

39. One such support mechanism is the ongoing bailout negotiations.[38] A similar practice has been followed in other countries where air carriers have received a bailout and importantly been required to provide refunds to passengers rather than burden passengers to provide fiscal support to the airlines.[39]

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

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

40. If any flexibility is given, there should just be a different deadline to provide a refund to passengers. So instead of a 30-day period of providing a refund, a 45 day period could be stipulated for providing the refund. As noted earlier, such a duration should be explicitly specified in the regulation to avoid any discretionary practices and ensure clarity and certainty of obligations.

[38] 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>.

[39] See: Glen McGregor, "Air Canada faces potential class-action lawsuits in U.S. over ticket refunds," CTV News (30 October 2020), online: <https://www.ctvnews.ca/canada/air-canada-faces-potential-class-action-lawsuits-in-u-s-over-ticket-refunds-1.5169158>.

Q7. 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?

41. Considering the drastic impact of this pandemic on passengers, we submit that there is a need to clearly evaluate the criteria used to determine what is within an airline's control and what is not. Evidently, the dichotomy between situations considered within and outside an air carrier's control in the current regulation has resulted in many air passengers being denied adequate protection and redress options. Several passengers are still waiting to get refunds, even after more than 10 months since the emergency measures were first put in place.[40] We suggest that the CTA should broadly interpret what falls within an airlines' control to strike a reasonable balance and ensure passengers are better protected during such times who have been evidently left vulnerable to abuse of power by the dominant carriers.

42. Some specific pandemic-related situations that we think should be considered within airlines' control is coordination with other carriers in arranging flights with whom they have a commercial agreement or not. This should also be viewed as business decisions to consolidate flights, which should be planned in advance. Such coordination requirements do not have a shock value now, they are something that the aviation industry should be more or less prepared to handle now. Going forward, air carriers should make contingency plans that prepare them to manage such events.

43. Moreover, the hygiene provisions and protocols relating to this pandemic- additional measures or otherwise should also be considered within the airlines' control. We argue that this is an additional cost of doing business and for maintaining the required safety protocols, we do not think it is appropriate to categorize this as something outside the air carriers' control. There are numerous guides and resources provided by the government[41] and even by foreign organizations[42] to guide and assist the airlines.

---

[40] Tomasia DaSilva, "Frustrated customers continue to demand refunds from airlines," *Global News* (5 January 2021).

[41] Transport Canada, "Canada's Flight Plan for Navigating COVID-19," online: <https://tc.canada.ca/en/initiatives/covid-19-measures-updates-guidance-issued-transport-canada/canada-s-flight-plan-navigating-covid-19>. Also see: Transport Canada, "Aviation measures in response to COVID-19," online: <https://tc.canada.ca/en/initiatives/covid-19-measures-updates-guidance-issued-transport-canada/aviation-measures-response-covid-19>.

[42] International Air Transport Association (IATA), "Guidance for Cabin Operations During and Post Pandemic," Edition 4 – 08 Sep 2020, online: <https://www.iata.org/contentassets/df216feeb8bb4d52a3e16befe9671033/iata-guidance-cabin-operations-during-post-pandemic.pdf>. Also see: International Civil Aviation Organization,

Q8. 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?

(a) European Union Regs– Overview

44. Article 5 of the Regulation (EC) No 261/2004 ("Reg 261/2004") provides that in case of cancellation of a flight, the passengers shall be offered assistance by the operating air carrier in accordance with Article 8, among other rights.[43] Article 8 of the Reg 261/2004 provides passengers with a right to reimbursement or re-routing, which states:[44]

> Article 8
> Right to reimbursement or re-routing
>
> 1. Where reference is made to this Article, passengers shall be offered the choice between:
> (a) - reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
> - a return flight to the first point of departure, at the earliest opportunity;
> (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
> (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.
>
> 2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.
>
> 3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.[45]

45. The European Commission (EC) issued a Notice, "Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19." These guidelines sought to clarify how certain provisions of the EU passenger rights legislation apply in the context of the COVID-19 pandemic, notably with respect to cancellations and delays.[46]

(The CART Take-off guidance), "Guidance for Air Travel through the COVID-19 Public Health Crisis," Aircraft Module, online: <https://www.icao.int/covid/cart/Pages/Aircraft-Module.aspx>.

[43] 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.

[44] Reg 261/2004, Article 8.

[45] *Ibid.*

[46] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19, (Brussels, 18.3.2020, C(2020) 1830

46. Regarding reimbursement, the guidelines note that in cases where the passenger books the outbound flight and the return flight separately and the outbound flight is cancelled, the passenger is only entitled to reimbursement of the cancelled flight, i.e. here the outbound flight.[47] However, if the outbound flight and the return flight are part of the same booking, even if operated by different air carriers, passengers should be offered two options if the outbound flight is cancelled: to be reimbursed for the whole ticket (i.e. both flights) or to be re-routed on another flight for the outbound flight (Interpretative Guidelines, Point 4.2).[48]

47. With respect to re-routing, the guidelines note that "the earliest opportunity" for the purposes of rerouting may under the circumstances of the COVID-19 outbreak imply considerable delay, and also notes the challenges in as to the availability of concrete information on such "opportunity" given the high level of uncertainty affecting air traffic.[49] It notes some important requirements that should be complied with; first, passengers should be informed about delays and/or uncertainties linked to them choosing re-routing instead of reimbursement; and second should a passenger choose nonetheless re-routing at the earliest opportunity, the carrier should be considered to have fulfilled its information obligation towards the passenger if it communicated on its own initiative, as soon as possible, the flight available for rerouting.[50]

48. The guidelines summarize the right to care provisions, which are covered in Article 9 of Reg 261/2004.[51] These broadly provide affected passengers with meals and refreshments in a reasonable relation to the waiting time, hotel accommodation if applicable and transport services.[52] No right of care is available if the passenger opts for reimbursement,[53] or when the passenger opts for re-routing at a later date.[54] It only applies in case passengers have to wait for a rerouting at the earliest convenience to ensure that passengers' needs who are waiting for their return flight or re-routing are adequately addressed.[55] The guidelines note that the extent of this care is to be assessed on a case-by-case basis by taking into account the needs of passengers and the waiting time with the price paid for the ticket or the length of inconvenience suffered not to interfere with this right to care (Interpretative Guidelines Point 4.3.2).[56] This right to care is noted to apply even if the flight cancellation is caused by extraordinary circumstances.[57]

---

final), online: <https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf>. For the press release, see here: <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_485>.

[47] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights, at p.3.

[48] *Ibid.*

[49] *Ibid.*

[50] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights, at p.3-4.

[51] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights, at p.4. Also see: Reg 261/2004, Articles 5(1)(b), Article 8(1)(b) and 8(1)(c).

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

49. The right to compensation does not arise in case flight cancellations due to extraordinary circumstances that could not be avoided even if all reasonable measures had been taken as per Article 5(3) of Reg 261/2004 and the guidelines note it to be the same in relation to this pandemic as well.[58]

(b) <u>European Union Regs – Aspects to Consider</u>

50. Provisions within Article 5 and 8 of Reg 261/2004 that provide reimbursement and rerouting rights to passengers should be considered by the CTA. We note that particularly the provision of an option to receive full reimbursement when an outbound flight is cancelled should be considered. This applies when the outbound flight and the return flight are part of the same booking as noted by the guideline, even if operated by different air carriers and the outbound flight is cancelled, then passengers should be offered to be reimbursed for the whole ticket (i.e. both flights) or to be re-routed on another flight for the outbound flight.

51. Importantly, the CTA should ensure that the option of full reimbursement is given upfront and in clear and plain language followed by an option to be rerouted. At the same time, the CTA should consider the challenges and realities of air carriers being able to reroute passengers in uncertain times and consider mandating similar disclosure standards as the EU that require air carriers to disclose these uncertainties and provide details regarding long waiting times with choosing the rerouting option over reimbursement. These details should be disclosed at the time the two options are given to enable passengers to make a well-informed decision.

52. Notably, Article 8 provides a short time frame of reimbursement within seven days. The CTA could consider this in its evaluation of the time within which a refund should be paid. That said, as noted earlier the stipulated time frame should not exceed 30 days, which in our view provides more than enough time to air carriers to make the requirement payments.

53. The right to care under Article 9 of Reg 261/2004 should be considered for application to situations outside the air carrier's control, and in cases where passengers have to wait for a rerouting at the earliest convenience. It would be fair to not apply this provision in case passengers opt for refunds and when the passengers opt to fly at a later date as provided in the EU Regs. Notably, the extent of care is to be determined on a case-by-case basis under the EU Regs. We would encourage the CTA to be cautious of using such an approach that could lead to uncertainty and result in inconsistent levels of care being offered to passengers in similar circumstances and waiting periods.

[58] European Commission, Commission Notice, Interpretative Guidelines on EU passenger rights, at p.4-5.

(c) United States (U.S.) – Overview

54. The U.S. Department of Transportation's (DOT) rule, 14 CFR 259 - Enhanced Protections for Airline Passengers, § 259.5 - Customer Service Plan, requires prompt provision of refunds for credit card purchases and within 20 days after receiving a complete refund request.[59] It states:

> (a) *Adoption of Plan*. Each covered carrier shall adopt a Customer Service Plan applicable to its scheduled flights and shall adhere to the plan's terms.
> (b) *Contents of Plan*. Each Customer Service Plan shall address the following subjects and comply with the minimum standards set forth:
> […] (5) Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and 12 CFR part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation…[60]

55. The U.S. Department of Transportation's (DOT) Aviation Enforcement Office issued an Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (dated April 3, 2020).[61] The notice was issued to remind the traveling public and U.S. and foreign carriers that passengers should be refunded promptly when their scheduled flights are cancelled or significantly delayed.[62] It notes that although the COVID-19 public health emergency has had an unprecedented impact, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.[63] Importantly, it states that the focus 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.[64]

56. Moreover, it notes that the Department continues to view any contract of carriage provision or airline policy that purports to deny refunds to passengers when the carrier cancels a flight, makes a significant schedule change, or significantly delays a flight to be a violation of the carriers' obligation that could subject the carrier to an enforcement action.[65] Broadly, it seems that the carriers can provide vouchers in lieu of refunds, as long as passengers are given an option for refunds.[66]

---

[59] 14 CFR 259 - Enhanced Protections for Airline Passengers, § 259.5 - Customer Service Plan, online: <https://www.govinfo.gov/content/pkg/FR-2011-04-25/pdf/2011-9736.pdf>.
[60] *Ibid.*
[61] DOT (Aviation Enforcement Office), Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel (April 3, 2020), online: <https://bit.ly/39JaIGP>. [Short URL provided]
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*

57. Notably, the refund obligations in the U.S. generally do not apply in case passengers get non-refundable tickets and choose to cancel their trips. The frequently asked questions page on the DOT's website notes:

> Passengers who purchase a non-refundable ticket on a flight to, within, or from the United States 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. This is true even if the passenger wishes to change or cancel due to concerns related to the COVID-19 public health emergency. Although not required, many airlines are providing travel credits or vouchers that can be used for future travel for those passengers electing to cancel their travel due to health or safety concerns related to COVID-19. In reviewing refund complaints against airlines, the Department will closely examine any allegation that an airline misled a passenger about the status of a flight to avoid having to offer a refund.[67]

(d) United States (U.S.) – Aspects to Consider

58. The CTA could consider the DOT's provision relating to the prompt payment of a refund for credit card purchases and within 20 days in other cases. As noted earlier, we submit that any stipulated period should not exceed a 30 day period, which is more than enough time for airlines to provide refunds. That said, unlike the DOT's provision which requires passengers to make a complete request for a refund, we suggest refunds should apply automatically in situations when the air carriers cancel their flights.

59. Moreover, we do not support the DOT's approach regarding no refunds to be given in case of non-refundable tickets and when the passengers cancel their own tickets. We view this approach as unfair and a significant impediment for many passengers who would be unable to access their own funds.

60. As for the DOT's provision of providing vouchers in lieu of refunds as long as passengers are given an option for refunds; we reiterate our earlier concerns regarding the provision of an option with vouchers and strongly support paying refunds in monetary form or by using the same method used to purchase the ticket over any other form.

*** End of Document ***

[67] DOT (Aviation Enforcement Office), Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel (May 12, 2020), online: <https://bit.ly/3oooOkJ>. [Short URL provided]