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National Airlines Council of Canada

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Conseil national des lignes aériennes du Canada

February 20, 2019

Mr. Scott Streiner
Chair and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street
Ottawa, Ontario K1A 0N9
Via Email: Scott.Streiner@otc-cta.gc.ca

Dear Mr. Streiner:

RE: COMMENTS ON PROPOSED AIR PASSENGER PROTECTION REGULATIONS

I am writing with our comments on the proposed Air Passenger Protection Regulations (APPR), published in Part I of the Canada Gazette on December 22, 2018. These comments expand on our oral presentation of January 25, 2019 as well as to the letter to Transport Minister Garneau of February 4, 2019 (appended) wherein we request an extension to the consultation and publication period.

Introduction: A flawed process

As we said from the beginning, the proposed regulation's enabling legislation, Bill C-49, is fundamentally flawed. Rather than consider the complexity of air travel and the multiple interactions among people, policies and organizations that contribute to every flight, to incentivize system-wide capacity and service improvements, the Bill placed responsibility for the passenger experience solely on the air carrier. Given the legislative straightjacket in which they were conceived, and the compressed timelines allowed to their development, it is not surprising that the proposed regulations are also deeply flawed. But as the chief regulatory architect the CTA also shares in the responsibility of having produced a regulatory instrument that, charitably, can best be defined as not ready for prime time.

Moreover, Bill C-49 and the CTA's interpretation of its legislative mandate disregard the constructive role played by market competition. Framing the second of three objectives of the proposed regulations as being to "Reflect operational realities of carriers and allow for carrier innovation, where appropriate", (emphasis ours) begs the question: when would innovation to improve the air passenger experience not be appropriate, and who decides?

The experience of other jurisdictions shows that framing passenger rights legislation as "defending" passengers from airlines, in addition to being misguided, often produces rules that reduce consumer protection and convenience through higher fares, reduced service, and market confusion. We had hoped that Canada would avoid this course of action, but the government has chosen to imitate defective international models to craft its "world-leading" bill of rights.

The policy objective as set out is to create new air passenger protection regulations that:

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1. Are world-leading and feature robust, simple, clear, and consistent passenger rights;
2. Reflect operational realities of carriers and allow for carrier innovation, where appropriate; and
3. Align with international agreements and apply best practices from lessons learned from other jurisdictions, where appropriate.

The draft regulations fall well short of meeting this objective. They are neither robust nor clear; they fail to capture the full range of operational realities that govern every flight; they stifle innovation and competition by being overly prescriptive; they conflict with international agreements; and they generally fail to apply lessons learned. Importantly, the fail to achieve another goal, namely that of improving the traveller experience set by Transport Minister Garneau in his Vision 2030 strategic plan.

In making the observation above, we know that we are echoing many of the detailed concerns expressed by our carrier members and by our sister organization, IATA, in their representations, notably with respect to operational realities and lack of clarity. Accordingly, this representation focuses on a deeply flawed Regulatory Impact Analysis Statement (RIAS) that raises questions about the administrative and political validation and decision-making process that produced this regulatory instrument.

We do not view this as a detail or process question. On the contrary, serious and transparent consideration of this matter by CTA, Transport Canada and the Treasury Board Secretariat, is necessary to safeguard the confidence with which Canadians can view, not only these proposed rules, but all current and future government rulemaking.

Supporting Analysis and Opinion

To support our position and request for an extension, we are appending a report prepared for our organization by InterVISTAS Consulting Group, which focuses on the RIAS' cost-benefit analysis (CBA). We also cite relevant comments submitted to CTA by the International Air Transport Association (IATA) on this same matter.

Flawed Regulatory Impact Assessment Statement

In their report prepared for our organization, InterVISTAS Consulting Group finds the Regulatory Impact Analysis Statement's cost-benefit analysis "seriously, even fatally, flawed." Their principal concerns are grouped into six elements, summarized here in brief:

1. **The evidence does not support a positive conclusion in favour of the APPR**.

"The conclusion reached is not supported by good cost-benefit analysis practice, which requires a sufficiently large net benefit to justify the costs, and that scenario analysis does not reveal meaningful probabilities of negative outcomes."

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2. **The CTA has not met the requirement of consideration of alternative regulations, nor of non-regulatory alternatives.**

"The CBA considers one alternative, and it is not really an alternative. It merely considers the possibility of applying a lower payment to small carriers, leaving the payment that will be paid in the bulk of instances unchanged. This does not meet the standard of a regulatory alternative. Specifically, the CBA does not consider an alternative where the fees are set at a lower level. Further, not a single non-regulatory alternative was considered, as is required by Treasury Board CBA Guidelines."

3. **CBA is the wrong methodology for this type of regulation.**

"CBA is never to be used to evaluate the merits of redistribution of wealth or income, but that is exactly the case with APPR. One party pays another party—the airlines will pay compensation to certain passengers. The primary costs in CBA are the payments by the airlines, while the primary benefits are the payments received by passengers. This is a tautology. Absent any secondary costs or benefits, the costs will always equal the benefits. By design, the methodology cannot and should never be used to evaluate redistribution policies or regulations."

4. **The CBA has to seek out secondary and tertiary benefits in order to make any finding in favour of the APPR.**

"Given that the payment costs are exactly equal to the payment benefits, the CTA had to find some other benefits to include in order to obtain a positive net benefit. Thus, they conceptualized things such as increased comfort, for which there is no meaningful measure in aviation. To obtain an estimate it was necessary to resort to obscure findings in urban transit, findings not applicable at all to aviation."

5. **The scope of the CBA is too narrow – only a subset of those affected are considered**.

"As an example, international passengers are counted both arriving and departing, while domestic passengers are counted only for departures. As well, foreign carriers will be obligated to make payments but their costs are not included (nor are the reciprocal benefits to their passengers)."

6. **There are analyses and computational errors, including some violation of Treasury Board guidelines**.

"As an example, the CTA used a 7% social discount rate to compute net present values, while the Treasury Board Guidelines require use of 8%. (Transport Canada's now dated guidelines require 10%)."

IATA also cites "numerous concerns" with the APPR, including with the RIAS and its cost-benefit analysis. It cites five areas in which the RIAS falls short of Treasury Board guidelines.

1. **Lack of clear description of public policy issues and lack of a quantified baseline scenario**

"The RIA does not clearly articulate the nature of the problem that the regulations are intended to address. In particular, it does not measure the extent of delays and cancellations or assess the extent of consumer harm in the baseline scenario. Given the burdensome regulatory proposals, this failure to properly articulate a base case regarding delays, cancellations and denied boarding is unacceptable. The

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justification that this data is not routinely collected is an inadequate basis for relying on that assertion. Reliance on US data as a proxy is insufficient as the markets are very different."

2. **Lack of clear policy objectives**

In addition, there is no clear statement of policy objectives. In the context of consumer policy, one could imagine that an effective set of policy instruments would be intended to incentivize enhanced consumer outcomes (reduced delays and cancellations) without inhibiting consumer choice and value (through unintended consequences). As it is, there is nothing in the CBA that suggests that the APPR will result in any improvement in actual outcomes. As far as we can ascertain, the APPR is not expected to lead to any behavioral change such as reduced delays or cancellations. As such the sole effect of the regulations is expected to be a financial transfer between airlines and consumers, with no consideration of the unintended consequences that may result in terms of increased consumer fares or reduced connectivity."

3. **Lack of consideration of alternatives, including non-regulatory options**

"The Treasury Board of Canada guidelines state that RIAs should identify and quantify a range of options. We see no evidence of this in the APPR. The CTA defense for not considering alternative instruments is that it is required to produce regulations in accordance with C-49. This misunderstands the purpose of an effective RIA. Moreover, primary legislation is not an adequate justification for ill-designed secondary legislation, particularly where the primary legislation was not subject to a cost-benefit analysis. Finally, the legislation itself does not mandate several of the measures included in the APPR that will have a significant impact on carrier costs."

4. **Partial consideration of impacts**

"A common principle governing most regulatory regimes around the world is that the government is required to demonstrate that the benefits to consumers must exceed the cost the regulated industry will bear in complying with those rules. To put it differently, regulations should only be imposed when necessity is demonstrated and should be proportional to the problems identified. In the case of the APPR, the CBA significantly underestimates the costs that would be imposed on carriers by the APPR."

5**. Marginal benefits case**

"Given that the proposal largely results in a transfer from one stakeholder to another, the net benefit is small – if calculated as a benefit/cost ratio it is just CAD 1.05. Given all the uncertainties involved in calculating the CBA, particularly the partial assessment of costs as well as the lack of robust input data, costs would only have to be 5-6% higher than estimated for the NPV to be negative."

IATA concludes that the APPR go far beyond the terms of C-49 to impose "minimum compensation" requirements that have little to no relation to the inconvenience suffered by passengers during delays or cancellations. These requirements are also unlawful and place Canada at odds with a strong international consensus under the Montreal Convention.

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Conclusion

The Treasury Board of Canada policy is clear regarding Regulatory Impact Analysis Statements in its Guide to the Federal Regulatory Development Process.

"The RIAS provides a cogent, non-technical synthesis of information that allows the various RIAS audiences to understand the issue that is being regulated, the reason the issue is being regulated, the government's objectives, and the costs and benefits of the regulation and who will be affected, who was consulted in developing the regulation, and how the government will evaluate and measure the performance of the regulation against its stated objectives."

The APPR Regulatory Impact Analysis Statement fails to meet these requirements. Instead, it reflects what has been an unjustified, hurried process driven by short-term political imperatives. The many problems with the RIAS, which was to inform Treasury Board decision-making, suggest that the formal decision-making process that preceded the publication of the regulations, may have relied on guidance containing factual errors and flawed impact analysis that overstated benefits while understating costs. This is why extending the comment period to allow for a new and thorough evaluation is so urgently required.

Sincerely,

THE NATIONAL AIRLINES COUNCIL OF CANADA

Massimo Bergamini
President and CEO

Enclosure

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