



## United States Air Passenger Rights: Grounded or Cleared for Take-Off? [Note]

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# UNITED STATES AIR PASSENGER RIGHTS: GROUNDED OR CLEARED FOR TAKE-OFF?

M. Tanner Giar\*

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## ABSTRACT

*The golden age of flying is no longer. In the last two years, there has been an unprecedented surge in demand for air travel, and with that demand has come an equally unprecedented wave of passenger complaints relating to cancellations, delays, or other interruptions. Much of the allure that flying once possessed has been replaced with uncertainty, dissatisfaction, and frustration with what is and is not considered a passenger's right. This Note examines the current state of airline passenger rights in the United States and the European Union and how government regulation has shaped those rights.*

*This Note delves into the intricacies of the current regulatory landscape in both regions and highlights the divergent approaches to addressing passenger concerns. The United States relies on the variability of carrier-specific contracts, leaving passengers uncertain about their rights and the assistance or compensation*

they might receive. In contrast, the European Union's regulatory framework provides uniformity but poses challenges in the cumbersome process of obtaining compensation and creates an environment where airlines will not do more than what is strictly required. This Note posits that neither extreme serves passengers optimally and suggests that an effective solution lies in striking a balance that safeguards consumer interests while allowing airlines operational autonomy.

This Note contributes to the ongoing discourse on airline passenger rights by offering a comparative analysis of regulatory approaches in the United States and the European Union. By scrutinizing proposed regulations in the United States, it seeks to provide insights into potential frameworks that could better serve the interests of consumers and the aviation industry, ultimately posing the question: Can a balanced regulatory model be crafted to ensure a win-win scenario for all stakeholders in air travel?

## I. INTRODUCTION

*Will my flight be delayed?* This question goes through nearly every traveler's mind on the way to the airport.<sup>1</sup> Since the surge of airline travel began following the COVID-19 pandemic, passenger complaints have risen by 322.8%, with approximately one-third of those complaints relating to cancellations, delays, or other interruptions.<sup>2</sup> Passengers have become disenchanted with what was once considered the premier way to travel.<sup>3</sup> Is it time for something other than market pressure to force the hand of air carriers<sup>4</sup> in the United States to improve their

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<sup>1</sup> See *Air Travel Consumer Report: August Consumer Complaints Up 6 Percent from July, More Than 320 Percent Above Pre-Pandemic Levels*, U.S. DEP'T OF TRANSP. (Oct. 26, 2022) [hereinafter *Air Travel Consumer Report*], <https://www.transportation.gov/briefing-room/air-travel-consumer-report-august-consumer-complaints-6-percent-july-more-320-percent> (“Of the 7,243 complaints received, 2,321 (32.0%) concerned cancellations, delays, or other deviations from airlines’ schedules.”).

<sup>2</sup> *Id.*; see generally Jacopo Prisco, *What the 'Golden Age' of Flying Was Really Like*, CNN: TRAVEL (Aug. 5, 2022), <https://www.cnn.com/travel/article/golden-age-flying-really-like/index.html> (describing what was considered the “golden age of [air] travel,” from the 1950s to the 1970s).

<sup>3</sup> See *Air Travel Consumer Report*, *supra* note 1.

<sup>4</sup> In this note, the term “air carrier” is used when referring to specifically the companies that operate air transportation services for passengers in the United States, Europe, and the world. The term “airline” is used when referring generally to the industry. There is no significant difference between the two terms—this decision was made due to the language used in statutes, bills, and other regulatory documents.

customer service, or have the expectations of passengers in the United States become unobtainable?<sup>5</sup>

As a result of the movements to deregulate airline operations in both the United States and Europe, air carriers were each free to govern their individual relationships with their passengers, including determining what a passenger is entitled to should a flight be delayed, canceled, or otherwise interrupted.<sup>6</sup> This led to a patchwork of policies that varied from carrier to carrier and a cacophony of confusion that occupied passengers' minds.<sup>7</sup>

As the world of commercial air travel evolved, so did government regulation regarding the carrier-passenger relationship.<sup>8</sup> However, the evolution of government regulation has not been consistent throughout the world.<sup>9</sup> Two of the largest commercial airline markets in the world, the United States and the European Union,<sup>10</sup> have drastically different governmental policies regulating the carrier-passenger relationship.<sup>11</sup> Two opposing approaches leave passengers in both regions with very different questions in mind. In the United States, the question is *what* do I get; and in the European Union, *how* do I get compensated? The United States' lack of regulation leaves the passenger at the mercy of the individual air carrier's policies regarding what assistance or compensation the passenger will

<sup>5</sup> See generally *A Consumer Guide to Air Travel*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/airconsumer/fly-rights> (May 6, 2023) [hereinafter *A Consumer Guide to Air Travel*] (highlighting that each airline is responsible for what it includes in its contract of carriage, logically concluding that it is self-serving except what the market demands).

<sup>6</sup> Stephen Breyer, *Airline Deregulation, Revisited*, BLOOMBERG (Jan. 20, 2011), <https://www.bloomberg.com/news/articles/2011-01-20/airline-deregulation-revisited> *businessweek-business-news-stock-market-and-financial-advice*.

<sup>7</sup> *A Consumer Guide to Air Travel*, *supra* note 5 (“Each airline has its own policies about what it will do for delayed passengers waiting at the airport; there are no federal requirements.”).

<sup>8</sup> See, e.g., Economic Regulations, 14 C.F.R. pt. 250 (2008); Regulation 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 295/91/EEC, 2004 O.J. (L 46), 1–8 [hereinafter EU 261].

<sup>9</sup> Compare *A Consumer Guide to Air Travel*, *supra* note 5, (“Each airline has its own policies about what it will do for delayed passengers waiting at the airport; there are no federal requirements.”), with EU 261, *supra* note 8 (“This Regulation establishes, under the conditions specified herein, minimum rights for passengers when: (a) they are denied boarding against their will; (b) their flight is cancelled; (c) their flight is delayed.”).

<sup>10</sup> Erick Burgueño Salas, *Number of Passengers on Airlines Worldwide in 2021, by Registration Country*, STATISTA (Jul. 17, 2023), <https://www.statista.com/statistics/537002/airline-passengers-worldwide-by-country/> (measuring number of passengers on airlines registered in a specific region, with the United States having the most passengers, followed by China and the European area).

<sup>11</sup> Compare *A Consumer Guide to Air Travel*, *supra* note 5, with EU 261, *supra* note 8.

receive in a delay, cancellation, or other interruption, with some air carriers being more generous than others.<sup>12</sup> Under this model, passengers rely on each air carrier's contract of carriage to dictate the level, if any, of compensation and care they will receive in the event of a flight interruption.<sup>13</sup> On the other hand, the European Union regulates passenger rights and the carrier-passenger relationship strictly, clearly outlining what the passenger will receive but leaving little autonomy to the individual air carriers.<sup>14</sup> The uniformity of regulated policies across all air carriers makes it easy for the passenger to find and know their rights under this model; however, the process of obtaining due compensation is cumbersome and time-consuming.<sup>15</sup>

Which regulatory scheme ultimately serves the passenger better? Perhaps neither. The best solution may lay in the middle of the two approaches, where the customer is protected and receives what they are contracted to receive, and the air carrier maintains autonomy from overbearing government control. This Note will explore the current approaches to air carrier regulation in the United States and the European Union and examine proposed regulatory amendments in the United States, including a proposed Passenger Bill of Rights. The ultimate question becomes whether the proposed regulation in the United States fits in the middle of the two current approaches: does it balance the needs of the consumer with the needs of the industry in a way where everyone wins?

## II. HISTORY

### A. Regulatory History of Flight Delays and Cancellations in the United States

#### 1. Overview of U.S. Airline Industry Regulation

Until 1978, the airline industry in the United States was heavily regulated.<sup>16</sup> Air carriers were regulated "as if they were public utilities," with the government dictating everything from routes to fares.<sup>17</sup> This regulation was due to the apparent need to assist a relatively new industry in its growth and prevent a monopoly on travel should railroad companies begin to invest in airlines and

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<sup>12</sup> See, e.g., *Airline Customer Service Dashboard*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard> (Oct. 17, 2022).

<sup>13</sup> See *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>14</sup> See EU 261, *supra* note 8.

<sup>15</sup> See *id.*

<sup>16</sup> John Barnum, *What Prompted Airline Deregulation 20 Years Ago? What Were the Objectives of That Deregulation and How Were They Achieved?*, FINDLAW (Jan. 10, 2018), <https://corporate.findlaw.com/law-library/what-prompted-airline-deregulation-20-years-ago-what-were-the.html>.

<sup>17</sup> *Id.*

smother competition.<sup>18</sup> Various factors led to the deregulation of the airline industry in 1978, which gave air carriers the power to govern their own affairs.<sup>19</sup> Prior to deregulation, air carriers competed with a differentiation strategy, as they could not adjust ticket prices.<sup>20</sup> Post-1987, air carriers began to compete using a cost strategy that reduced the quality of service but put air travel back within the reach of middle-class America.<sup>21</sup>

## 2. An Industry Dominated by Contracts of Carriage

The contract of carriage is the primary source of the terms governing the carrier-passenger relationship.<sup>22</sup> These are contracts of adhesion: the passenger has no bargaining power; either agree and fly or disagree and stay grounded.<sup>23</sup> Each air carrier structures its contract differently; however, most address three topics: baggage regulation, denied boarding, and flight interruptions.<sup>24</sup>

While the contract of carriage existed long before deregulation of the industry, it arguably began to play a more expansive role in the passenger-carrier relationship after 1987, as the federal government took a back seat in regulation of the relationship.<sup>25</sup> With significant deregulation, and—as discussed more fully below—the near lack of regulation governing the carrier-passenger relationship, contracts of carriage vary significantly between individual air carriers.<sup>26</sup>

Air carriers do not guarantee their schedules, flight operations, or aircraft; per most contracts of carriage, they cannot be held liable should the schedule

<sup>18</sup> Barnum, *supra* note 16.

<sup>19</sup> *Id.* This authority excepted certain areas of necessary regulation, such as safety, that were left with the Department of Transportation and the Federal Aviation Administration. *Id.*

<sup>20</sup> Breyer, *supra* note 6.

<sup>21</sup> Breyer, *supra* note 6 (noting that prior to deregulation, airlines often flew half empty planes with seats open for the business traveler’s briefcase. Since deregulation, certain route prices have decreased by 81% but now “[w]e sit in crowded planes, munch potato chips, flare up when the loudspeaker announces yet another flight delay. But how many now will vote to go back to the ‘good old days’ of paying high, regulated prices for better service? Even among business travelers, who wants to pay ‘full fare for the briefcase?’”).

<sup>22</sup> *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>23</sup> Ty McDuffey & Ken LaMance, *Contract of Carriage*, LEGALMATCH (Oct. 12, 2022), <https://www.legalmatch.com/law-library/article/contract-of-carriage.html>.

<sup>24</sup> *Id.* Baggage regulation and denied boarding will not be discussed in detail in this note; however, they are major portions of the contract of carriage.

<sup>25</sup> *See generally History and Development of the Contract of Carriage*, LAWTEACHER (Nov. 3, 2020), <https://www.lawteacher.net/free-law-essays/contract-law/history-and-development-of-the-contract-of-carriage-5605.php>; *see also* Bill McGee, *Contracts of Carriage: Deciphering Murky Airline Rules*, USA TODAY (July 12, 2017, 5:00 AM), <https://www.usatoday.com/story/travel/columnist/mcgee/2017/07/12/airline-contract-carriage/469916001/>.

<sup>26</sup> McGee, *supra* note 25.

change.<sup>27</sup> In case of a flight interruption such as delay, cancellation, or diversion, most contracts of carriage state that the air carrier *may* (beyond the situationally-mandated refund of the ticket price) provide further compensation, hotel arrangements, or alternative transportation.<sup>28</sup> While there are instances where air carriers will provide compensation beyond the ticket price, those instances are heavily restricted in the contract of carriage and rely on the air carrier's designation of the flight interruption as one that is within their control.<sup>29</sup> When a force majeure

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<sup>27</sup> *Contract of Carriage: U.S.*, DELTA at Rule 2 (Apr. 13, 2021) [hereinafter *Contract of Carriage*, DELTA], <https://www.delta.com/us/en/legal/contract-of-carriage-dgr> (Rule 2 states that “published schedules, flight times, aircraft types, seat assignments, and similar details reflected in the ticket or Delta’s published schedules are not guaranteed and form no part of this contract.”); *Contract of Carriage Document*, UNITED at Rule 24(A)(3) (Feb. 17, 2023) [hereinafter *Contract of Carriage*, UNITED], <https://www.united.com/en/us/fly/contract-of-carriage.html> (“Times shown on tickets, timetables, published schedules or elsewhere, and aircraft type and similar details reflected on tickets or UA’s schedule are not guaranteed and form no part of this contract.”).

<sup>28</sup> See, e.g., *Contract of Carriage*, DELTA, *supra* note 27, at Rule 19(B)(a) (“If overnight accommodations are available at Delta contracted facilities, Delta will provide the passenger with a voucher for one night’s lodging when the delay is during the period of 10:00 pm to 6:00 am.”); *Contract of Carriage*, UNITED, *supra* note 27, at Rule 24(F) (“UA will provide at its option either one night’s lodging, or, if no lodging is provided and upon the passenger’s request only, reimbursement for one night’s lodging in the form of an electronic travel certificate.”); *Conditions of Carriage*, AM. AIRLINES (Nov. 21, 2022) <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp> (“If the delay is beyond our control, or you book your own arrangements without written authorization from American Airlines, you’re responsible to pay for your hotel, meals and other expenses. An American Airlines agent may be able to help you find a hotel.”).

<sup>29</sup> See, e.g., *Contract of Carriage – Passenger*, SOUTHWEST, § 1(b) (Dec. 14, 2023) <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>. Southwest is not liable for schedule changes due to Force Majeure Events, which include:

[A]ny event outside of Carrier’s control, including, without limitation, acts of God, and meteorological events, such as storms, polar vortex, rain, wind, fire, fog, flooding, earthquakes, haze, or volcanic eruption. It also includes, without limitation, a pandemic, public health emergency, catastrophe, government action, disturbance, or potentially volatile international condition, armed conflict, civil unrest or commotion, riot, embargo, war, or hostility, whether actual, threatened, or reported, strike, work stoppage, slowdown, lockout, or any other labor-related dispute involving or affecting Carrier’s service, mechanical difficulties by entities other than Carrier, Air Traffic Control, or the inability to obtain fuel, supplies, components, parts, fluids, airport gates, labor, landing facilities, or other items which Carrier, in its unilateral discretion, decides is reasonably necessary for the flight in question, or any fact or situation that was not foreseen, anticipated, or predicted by Carrier.



event causes an interruption, the air carrier is released from nearly all liability through their contract; such events ever-expanding beyond the traditionally thought of acts of God.<sup>30</sup>

Specifically, regarding flight delays (rather than cancellations), “[t]here are no federal laws requiring airlines to provide passengers with money or other compensation when their flights are delayed. Each airline has its own policies about what the carrier will do for delayed passengers.”<sup>31</sup> The Department of Transportation does not shy away from noting the lack of federal laws or regulations; however, there are specific, limited areas that federal law does govern.<sup>32</sup>

### 3. Existing Regulations in Existence Today

Though this Note focuses on the future of passenger rights in the United States, to know where to go, we must understand where we have been. Thus, it is worth taking a brief detour to discuss current regulations in the United States regarding an air carrier’s duty to passengers for delays, cancellations, and other interruptions.<sup>33</sup>

#### a. Enhanced Protections for Airline Passengers Act: Tarmac Delay Regulation

Different from a schedule delay or change, “[a] tarmac delay occurs when an airplane on the ground is either awaiting takeoff or has just landed, and passengers do not have the opportunity to get off the plane.”<sup>34</sup> A tarmac delay can occur for different reasons, including air carrier operations; however, more often,

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*Id.*

<sup>30</sup> *Contract of Carriage – Passenger*, SOUTHWEST, *supra* note 29.

<sup>31</sup> *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>32</sup> *Id.*

<sup>33</sup> It is worth noting that the specifics surrounding these existing regulations are much more involved than what is outlined below. The purpose of this section is only to highlight areas of regulation related to interruptions in flights, and an airline’s duty to its passengers; it is not an exhaustive analysis of the regulation or its implementation. In a later section, this note will take a closer look at proposed U.S. regulations surrounding delays.

<sup>34</sup> *Tarmac Delays*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/tarmac-delays> (Oct. 6, 2021) (indicating that a tarmac delay takes place either (1) after the boarding process is complete and the boarding door is closed but prior to take off or (2) after the plane has landed but the boarding door has not been opened for deplaning; whereas, a delay or schedule change occurs prior to boarding).

tarmac delays are caused by factors outside the air carrier's control.<sup>35</sup> These factors include weather, air traffic congestion, security threats, and airport operation restrictions.<sup>36</sup> Tarmac delay regulation applies to airplanes on U.S. soil; in other words, it applies to both foreign and domestic air carriers so long as the tarmac delay occurs at an airport in the United States.<sup>37</sup>

The Enhanced Protections for Airline Passengers Act, establishing rules surrounding tarmac delays, was enacted in April 2010 with the goal of “mitigat[ing] hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers' accountability to consumers.”<sup>38</sup> The Enhanced Protections for Airline Passengers Act lays the ground rules for the minimum an air carrier must do during a tarmac delay lasting 30 minutes or longer.<sup>39</sup>

Table 1: Tarmac Delay Action Items in the United States<sup>40</sup>

Length of Tarmac Delay	Actions Air Carrier Must Take
30 minutes	Notify passengers of the delay. <sup>41</sup>
30 minutes and longer	Provide working toilets, a comfortable cabin temperature, and adequate medical attention. <sup>42</sup>
2 hours and longer	Provide every passenger with water and a snack, such as a granola bar. <sup>43</sup>
3 hours and longer (4 hours for international)	Allow passengers to deplane, provided it is safe to do so. <sup>44</sup>

In addition, the Enhanced Protections for Airline Passengers Act requires air carriers to notify passengers within 30 minutes of the air carrier becoming aware of a significant delay, cancellation, or diversion.<sup>45</sup> For tarmac delays longer than

<sup>35</sup> P. Paul Fitzgerald, *A Re-Examination of Tarmac Delays Causes and Solutions*, 84 J. AIR L. & COM. 53, 53 (2019).

<sup>36</sup> *See id.*

<sup>37</sup> *See* 14 C.F.R. § 259.4 (2021).

<sup>38</sup> 14 C.F.R. § 259.1.

<sup>39</sup> *Tarmac Delays*, *supra* note 34.

<sup>40</sup> *Tarmac Delays*, *supra* note 34.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; 14 C.F.R. § 259.4 (2021) (stating that if the pilot determines that deplaning would “jeopardize passenger safety or security, or there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac” or “[a]ir traffic control advises the pilot-in-command that returning to a suitable disembarkation point to deplane passengers would significantly disrupt airport operations” then airlines do not have to allow passengers to deplane).

<sup>45</sup> 14 C.F.R. § 259.8.

three hours (or four hours for an international flight), air carriers must file a report with the Department of Transportation and could face a fine if the air carrier does not adhere to the abovementioned actions.<sup>46</sup> The Enhanced Protections for Airline Passengers Act provides a floor for air carrier policy surrounding tarmac delays; however, it does not regulate any other delays or cancellations.<sup>47</sup>

b. Denied Boarding Compensation Regulation.

In 2008, Part 250 of the Code of Regulations governing the oversale of flights went into effect.<sup>48</sup> Accordingly, air carriers may *bump* or deny boarding to any passenger; however, in certain circumstances, that passenger is entitled to either a refund or additional compensation.<sup>49</sup> Bumping is a result of the entirely legal practice of overselling flights to compensate for no-shows.<sup>50</sup> Before involuntarily bumping a passenger, air carriers may offer incentives for passengers to voluntarily give up their seat; the following does not apply, however, when a passenger voluntarily gives up their seat.<sup>51</sup>

Generally, passengers are entitled to compensation when they are involuntarily denied boarding due to an oversold flight.<sup>52</sup> To be entitled to compensation, a passenger must have a confirmed reservation, be checked in on time, and arrive at the departure gate on time; in addition, the air carrier must not be able to get the passenger to their destination within one hour of the original

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<sup>46</sup> 14 C.F.R. § 259.4; see, e.g., *DOT Fines United Airlines for Violating Tarmac Delay Rule*, U.S. DEP'T OF TRANSP. (Sept. 24, 2021), <https://www.transportation.gov/briefing-room/dot-fines-united-airlines-violating-tarmac-delay-rule>.

<sup>47</sup> 14 C.F.R. § 259.5.

<sup>48</sup> See generally 14 C.F.R. pt. 250 (2008).

<sup>49</sup> *Bumping & Oversales*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/bumping-oversales> (Apr. 15, 2021) (defining bumping or denied boarding as “when there are more passengers scheduled to fly on an airplane than available seats.” Bumping can also be when a passenger is downgraded from one class to another).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 14 C.F.R. § 250.5(a) (2021); *Bumping & Oversales*, *supra* note 49 (On planes with more than 60 seats, air carriers are not required to compensate passengers when 1) the carrier offers alternate transport that is planned to arrive at the airport of the passengers first stopover within one hour of the original arrival, 2) a smaller aircraft is used for the flight due to operational or safety reasons, or 3) the passenger is downgraded to a lower class on the same flight (though air carriers are required to refund the difference in fare prices)).

arrival time.<sup>53</sup> Compensation is calculated based on the original price of the fare and the length of delay the passenger will experience, as shown in Table 2 below.<sup>54</sup>

Table 2: Involuntary Bumping Compensation Model in the United States<sup>55</sup>

Length of Delay	Compensation
0 to 1 hour	No compensation.
1 to 2 hours (1 to 4 hours for international)	200% of one-way fare, with an air carrier-optional limit of \$775.
Over 2 hours (over 4 hours for international)	400% of one-way fare, with an air carrier-optional limit of \$1,550.

Air carriers are required to compensate passengers at the airport on the day of their denied boarding.<sup>56</sup> If this is not possible due to the passenger departing on carrier-arranged transportation before compensation can be issued, the air carrier has 24 hours to compensate the passenger.<sup>57</sup> Again, this regulation provides some protections for passengers in only the narrowest circumstances.<sup>58</sup>

### c. Significant Delay Demi-Regulation

Generally, there is little regulation in the United States that touches aircraft delays.<sup>59</sup> However, in April 2020, the Department of Transportation issued an Enforcement Notice clarifying what was expected of air carriers during the COVID-19 pandemic.<sup>60</sup> The Enforcement Notice stated that the Aviation Enforcement Office would “refrain from pursuing an enforcement action against [an airline]” provided that the airline issued travel vouchers for canceled flights and “update[d] its refund policies and contract of carriage provisions to make clear that it provides

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<sup>53</sup> *Bumping & Oversales*, *supra* note 49 (the passenger must also be in full compliance with the air carrier’s contract of carriage. Air carriers can involuntarily deny boarding and not compensate passengers if, for example, the passenger is intoxicated, interferes with flight crew members or operations, or has “an offensive odor that is not caused by disability or illness.”).

<sup>54</sup> *Id.*

<sup>55</sup> *See Bumping & Oversales*, *supra* note 49.

<sup>56</sup> 14 C.F.R. § 250.8(a).

<sup>57</sup> 14 C.F.R. § 250.8(b).

<sup>58</sup> *See generally Fly Rights, A Consumer Guide to Air Travel*, *supra* note 31.

<sup>59</sup> *Id.*

<sup>60</sup> *See* Blane A. Workie, *Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of The Covid-19 Public Health Emergency on Air Travel*, U.S. DEP’T OF TRANSP. (Apr. 3, 2020). [https://www.transportation.gov/sites/dot.gov/files/2021-09/Enforcement%20Notice%20Final%20April%203%202020\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/2021-09/Enforcement%20Notice%20Final%20April%203%202020_0.pdf).

refunds to passengers if the carrier cancels a flight or makes a significant schedule change.”<sup>61</sup>

On its face, the Enforcement Notice appears to be a step towards a unified approach to delay refunds and compensation; however, the Department of Transportation did not define “significant delay” or “cancellation.”<sup>62</sup> Instead, it allows for “airlines [to] develop reasonable interpretations of those terms.”<sup>63</sup> This dilutes the Enforcement Notice down to a toothless demi-regulation that does nothing for the consumer other than put the fate of their refund back in the hands of the airlines. Aside from the Enforcement Notice, which was only issued in response to the staggering number of consumer complaints during the COVID-19 pandemic,<sup>64</sup> “[t]here are no federal laws requiring airlines to provide passengers with money or other compensation when their flights are delayed.”<sup>65</sup>

#### d. A Note on the Montreal Convention

The Montreal Convention is a treaty that establishes accountability for air carriers that transport passengers internationally between any of the over 135 member countries or territories.<sup>66</sup> Under the treaty, an air carrier is “liable for damage occasioned by delay in the carriage by air of passengers.”<sup>67</sup> However, the Montreal Convention takes a case-by-case approach in determining both whether an air carrier is liable, and if so, how much compensation a passenger should

<sup>61</sup> Workie, *Enforcement Notice*, *supra* note 60, at 2.

<sup>62</sup> *See id.*

<sup>63</sup> Blane A. Workie, U.S. Dep’t of Transp., *Frequently Asked Questions. Regarding Airline Ticket Refunds Given The Unprecedented Impact Of The Covid-19 Public Health Emergency On Air Travel*, U.S. DEP’T OF TRANSP., (Apr. 3, 2020), <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds%20-%20Second%20Enforcement%20Notice%20%28May%2012%202020%29.pdf>.

<sup>64</sup> *Id.* A point of clarification: I am not suggesting that an enforcement notice is a federal law or regulation—only that this enforcement notice is the only semi-regulatory statement issued by the DOT in response to whether airlines have to provide a refund for a delay.

<sup>65</sup> *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>66</sup> Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 350 art. 1 §§ 1–4 [hereinafter Montreal Convention]. Since the Montreal Convention is common between both the European Union and the United States, it is not a major focus in this note. A brief mention of it is worthy here because the lack of regulation in the United States leaves the Montreal Convention as the only way for passengers to seek recourse, at least for international flights originating from the United States. *See also Montreal Convention — Your Passenger Rights on International Flights*, AIRHELP [hereinafter *Montreal Convention*, AIRHELP], <https://www.airhelp.com/en/montreal-convention/> (last accessed on Oct. 20, 2022).

<sup>67</sup> *Montreal Convention*, AIRHELP, *supra* note 66, art. 19 (excepting circumstances where the airline “and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.”).

receive.<sup>68</sup> When a passenger is affected by a delay on a flight governed by the Montreal Convention (in other words, most international flights), the affected passenger can submit a claim with the air carrier stating the problem and including an itemized list of damages.<sup>69</sup> If the air carrier does not comply with the treaty, the passenger can file a complaint with the U.S. Department of Transportation, which air carriers must acknowledge within 30 days and respond to within 60.<sup>70</sup> While most international itineraries are covered by the Montreal Convention, it is superseded by more generous and specific regulations in jurisdictions such as the European Union.<sup>71</sup> Consequently, while the Montreal Convention provides some protection for passengers, it only applies in the narrowest of circumstances and still leaves recourse up to chance.<sup>72</sup>

#### 4. Evidence of Lack of Substantial Regulation in the United States: The Department of Transportation's Airline Customer Service Dashboard.

It may seem as though there are a plethora of laws governing passenger rights and compensation in the United States; however, this could not be further from the truth.<sup>73</sup> To emphasize the lack of regulation and uniformity among air carriers, the Department of Transportation created an Airline Customer Service Dashboard to show which air carriers, by their own choice, offer refunds, compensation, or accommodations in the case of a delay or cancellation.<sup>74</sup> The dashboard makes clear that air carriers offering accommodations do so only because their contract of carriage states they will (or at least *may*) offer them.<sup>75</sup> Under general contract law and Department of Transportation regulations, air carriers must adhere to their contract of carriage.<sup>76</sup> However, no real protection is provided to passengers other than knowledge of what their rights are on individual air carriers.<sup>77</sup> Tables 3.1 and 3.2 below detail what the ten major U.S. air carriers provide in cases of cancellation or delay according to their individual contracts of carriage.<sup>78</sup>

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<sup>68</sup> *Montreal Convention*, AIRHELP, *supra* note 66, art. 19.

<sup>69</sup> Avery Campbell, *Montreal Convention: International Travel and Trip Delays*, FORBES (March 20, 2023), <https://www.forbes.com/advisor/travel-rewards/montreal-convention-international-travel-and-trip-delays/>.

<sup>70</sup> *Id.*

<sup>71</sup> *Montreal Convention*, AIRHELP, *supra* note 66.

<sup>72</sup> *Id.*

<sup>73</sup> *See generally*, *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>74</sup> *Airline Customer Service Dashboard*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard> (May 6, 2023).

<sup>75</sup> *See supra* Part II.A.2. In other words, it is up to the individual air carrier as to whether they offer accommodations. This is not mandated by the DOT, FAA, or any regulatory body. The dashboard shows the variability in what each air carrier offers.

<sup>76</sup> *See generally* *Airline Customer Service Dashboard*, *supra* note 74.

<sup>77</sup> *Airline Customer Service Dashboard*, *supra* note 74.

<sup>78</sup> *Id.*

Table 3.1: U.S. Air Carrier Commitments for Controllable Delays<sup>79</sup>

	Air Carrier									
	Alaska	Allegiant	American	Delta	Frontier	Hawaiian	JetBlue	Southwest	Spirit	United
Rebook passenger on same air carrier at no additional cost for significant delays	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rebook on partner air carrier at no additional cost for significant delays	✓	x	✓	✓	x	✓	✓	x	x	✓
Meal or meal voucher when flight delay results in passenger waiting 3 hours or more	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Complimentary hotel accommodations for any passenger affected by an overnight delay	✓	✓	✓	✓	x	✓	✓	✓	✓	✓
Ground transportation to and from hotel for any passenger affected by an overnight delay	✓	✓	✓	✓	x	✓	✓	✓	✓	✓

In all, the United States relies heavily on individual air carriers to establish acceptable policies regarding passenger rights during delays, cancellations, or other interruptions through the contract of carriage.<sup>80</sup> Ultimately, this system has worked for the better part of 40 years.<sup>81</sup> The question thus becomes whether this method of patchwork self-governance is the best approach to establish passenger rights, or if there is a better avenue—such as the more uniform regulatory approach of the European Union?

**B. Regulatory History of Flight Delays and Cancellations in the European Union**

1. Overview of EU Airline Industry Regulation

The European airline industry (focusing primarily on what is now the European Union) was established, governed, and controlled by individual nation-

<sup>79</sup> *Airline Customer Service Dashboard*, *supra* note 74.

<sup>80</sup> *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>81</sup> Barnum, *supra* note 16.

state authorities.<sup>82</sup> Individual control led to a monopolistic market dominated by individual national carriers and airports.<sup>83</sup> This structure presented ever-limiting options for passengers with the “growing demand for air [travel].”<sup>84</sup> In the 1970s, the airline industry worldwide evolved from “an administered economy to a market economy.”<sup>85</sup> In the United States, this led to the 1978 Airline Deregulation Act.<sup>86</sup> Likewise, Europe gradually introduced regulation to “turn[] protected national aviation markets into a competitive single market for air transport” over the decade following deregulation in the United States.<sup>87</sup> The final regulatory acts removing all commercial restrictions for European Union air carriers went into effect in 1992.<sup>88</sup> Following the decades-long deregulation, air carriers were able to set fares and establish intra-European Union routes on the individual airline’s accord.<sup>89</sup>

## 2. An Industry Dominated by Government Regulation

Despite the long-haul journey to deregulation, the European Parliament still has a hand in governing the airline industry.<sup>90</sup> Parliament recognized the importance of a liberalized European airline market, but it also felt the need to support such a market through repeated regulation in a supposedly deregulated market.<sup>91</sup> In contrast to the initial approach taken by the United States, Europe was hesitant to completely liberalize the market, stressing the importance of balancing the needs of the industry and the consumer.<sup>92</sup> Instead of relying on individual air carriers to govern their relationships with passengers through lengthy contracts of carriage, the European Parliament has historically stepped in to provide regulatory minimums that air carriers must adhere to.<sup>93</sup>

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<sup>82</sup> Ariane Debyser & David Pernice, *Air Transport: Market Rules*, EUR. PARLIAMENT: FACT SHEETS ON THE EUR. UNION (Oct. 2022), <https://www.europarl.europa.eu/factsheets/en/sheet/131/air-transport-market-rules>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Debyser & Pernice, *supra* note 82.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Debyser & Pernice, *supra* note 82.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



### 3. Past and Present EU Regulations

The history of EU airline regulation follows a more evolutionary path than that of the United States, which has stayed relatively stagnant since 2008.<sup>94</sup> What follows is a brief review of the regulatory frameworks that took shape in the European Union during the short time between total deregulation in 1992 and the enactment of the current passenger rights regulation in 2004, as well as a brief analysis of the role the contract of carriage plays in the European Union.

#### a. Denied Boarding Compensation

One of the first major regulatory actions taken by the European Parliament to establish favorable passenger rights, with regard to denied boarding compensation, was in 1991.<sup>95</sup> The purpose of regulating denied boarding compensation was to ensure a balanced development of the airline industry, standardize the practice across all air carriers, ensure a certain level of quality of service is maintained among intense competition, and hold air carriers accountable.<sup>96</sup>

While it was in effect, the 1991 regulation provided passengers with assurance that they would not be denied boarding—or if they were, that they would be compensated a minimum amount depending on the length of their flight and provided meals and accommodations reasonable for the situation.<sup>97</sup> Though first enacted over 30 years ago, the EU's regulation on denied boarding provided greater rights to passengers than the current U.S. regulation does.<sup>98</sup> It remained in effect through 2004, when a new, more expansive regulation replaced it.<sup>99</sup>

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<sup>94</sup> See generally Debyser & Pernice, *supra* note 82; see also *A Consumer Guide to Air Travel*, *supra* note 5.

<sup>95</sup> Council Regulation 295/91, 1991 O.J. (L 36) 5–7. Despite lagging behind the United States in deregulation, Europe was drastically ahead of the United States when it came to establishing fundamental passenger rights in the event of denied boarding. This remains true, as discussed later, with regard to additional passenger rights during delays or cancellations.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (covering passengers that held a valid ticket, had a confirmed reservation, and were present for boarding).

<sup>98</sup> Compare Council Regulation 295/91, 1991 O.J. (L 36) 5–7 (providing accommodations and meals in addition to minimum compensation), with 14 C.F.R. § 250 (providing only a minimum compensation amount, leaving additional terms to the individual airline's contract of carriage).

<sup>99</sup> Council Regulation 295/91, *supra* note 95; EU 261, *supra* note 8.

b. (EC) no 261/2004<sup>100</sup>

In contrast to Europe's slow evolution toward airline deregulation over the decades following 1978, the European Union moved swiftly to implement further-reaching passenger rights regulation due to the continued high numbers of passengers denied boarding and affected by sudden cancellations and lengthy delays.<sup>101</sup> EC 261/2004, colloquially known as EU 261, establishes basic passenger rights for all passengers on flights originating in a European Union Member State.<sup>102</sup> The ultimate goal of EU 261 is to further "strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market."<sup>103</sup> EU 261 is regarded, by some, as the pinnacle of automatic passenger rights.<sup>104</sup>

EU 261 is still in effect today and has remained unchanged.<sup>105</sup> A number of amendments to reduce ambiguity were proposed in 2013 but have not been adopted as of 2022.<sup>106</sup> However, official Council interpretive guidelines,<sup>107</sup> in addition to a plethora of judicial opinions, have been issued regarding interpretation of certain phrases in EU 261.<sup>108</sup>

Between the relatively thorough text of EU 261 and the expansive judicial interpretation thereof, it is easy to see how—especially when compared to current U.S. regulation—the European Union is considered a leading body with regard to passenger rights.<sup>109</sup> Due to the expansive nature of EU 261, the contracts of carriage for European Union air carriers do not have to do as much heavy lifting in spelling

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<sup>100</sup> This section presents only a brief overview of the history and goals of EC 261/2004. Since the purpose of this note is to compare the current European Union regulation, EC 261/2004, with proposed amendments to the United States regulation, a more in depth look at EC 261/2004 is reserved and presented in Section 3(A) of this note.

<sup>101</sup> EU 261, *supra* note 8, § 3.

<sup>102</sup> EU 261, *supra* note 8 (This regulation also extends to protect passengers leaving from a third country if the flight is operated by a community carrier, or rather, is operated by an airline from within the EU.).

<sup>103</sup> *Id.* § 4.

<sup>104</sup> See, e.g., Dylan Pearl & Jeffery Brownson, *What Is EU 261 and How Does It Work?* FORBES (Jun. 7, 2022), <https://www.forbes.com/advisor/travel-rewards/eu-261/>.

<sup>105</sup> EU 261, *supra* note 8.

<sup>106</sup> Davide Pernice, *Passenger Rights*, EUR. PARLIAMENT: FACT SHEETS ON THE EUR. UNION (last visited Feb. 10, 2024), <https://www.europarl.europa.eu/factsheets/en/sheet/48/passenger-rights>.

<sup>107</sup> EU 261, *supra* note 8.

<sup>108</sup> See, e.g., Kathryn Ward et al., *Regulation 261/2004 Timeline of Key Case Law to Date*, DLA PIPER (Oct. 2020), <https://docplayer.net/205419848-Regulation-261-2004-timeline-of-key-case-law-to-date-october-2020-ukm.html>.

<sup>109</sup> See, e.g., Pearl & Brownson, *supra* note 104.

out every aspect of the passenger-carrier relationship, especially in comparison to their U.S. counterparts.<sup>110</sup>

### c. The Role of the Contract of Carriage<sup>111</sup>

Because EU 261 explicitly states what rights a passenger has during a delay, cancellation, or other interruption, contracts of carriage for European Union air carriers do not need to outline those rights.<sup>112</sup> Instead, the contracts of carriage for many European Union air carriers incorporate EU 261 by reference.<sup>113</sup> This is not necessary, however, as EU 261 is written to apply to passengers rather than to air carriers, and therefore does not need to be incorporated into a carrier's contract of carriage to be binding.<sup>114</sup> The result is that contracts of carriage in the European Union are generally shorter and easier to read compared to their equivalents in the United States.<sup>115</sup> Thanks to the floor put in place by EU 261, passengers to which EU 261 applies have common rights across all carriers and do not need to rely on the contract of carriage of the individual air carrier to spell out those rights.<sup>116</sup>

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<sup>110</sup> Compare *Contract of Carriage*, DELTA, *supra* note 27, with *General Conditions of Carriage*, AIR FRANCE [hereinafter *Conditions of Carriage*, AIR FRANCE], <https://wwws.airfrance.fr/en/information/legal/edito-cg-airfrance> (last updated Mar. 2022).

<sup>111</sup> While the contract of carriage still plays an important role in defining the passenger-carrier relationship and includes many provisions beyond the scope of EU 261, because the focus of this note is compensation for delays and cancellations, this section is a brief look at how the contract of carriage fits into that narrative instead of its overall impact. EU 261 governs the passenger-carrier relationship without the need for a provision in a carrier's contract of carriage; thus, the contract of carriage as it relates to compensation for delays and cancellations does not play a major role.

<sup>112</sup> See, e.g., *Conditions of Carriage*, AIR FRANCE, *supra* note 110.

<sup>113</sup> *Conditions of Carriage*, AIR FRANCE, *supra* note 110. In addition to incorporating EU 261, airlines also incorporate the Montreal Convention: "In the event of a flight cancellation or delay, and if the Passenger has a single Contract of Carriage (as defined by the Convention), the Carrier will implement all the provisions of the relevant applicable regulations." *Id.*

<sup>114</sup> EU 261, *supra* note 8, § (1)(a)–(b) ("This Regulation shall apply. . . to passengers."); see, e.g., *General Terms and Conditions – Conditions of Carriage for Passengers and Baggage*, LUFTHANSA, <https://www.lufthansa.com/xx/en/business-terms-and-conditions-1> (last visited Feb. 22, 2024) (does not incorporate EU 261). *But cf.* Richard Ritoro & Stephan A. Fisher, *Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261)— A Bumpy But Navigable Ride*, 82 J. AIR L. & COM. 561, 577–78 (2017) (noting the exception that because EU 261 is not enforceable in the United States, for an EU 261 cause of action to even be considered in U.S. courts, EU 261 must be incorporated into the contract of carriage. By incorporating EU 261, a U.S. court can adjudicate the matter based on breach of contract instead of a private right of action under EU 261).

<sup>115</sup> Compare *Contract of Carriage*, DELTA, *supra* note 27, with *Conditions of Carriage*, AIR FRANCE, *supra* note 110.

<sup>116</sup> EU 261, *supra* note 8.

### III. COMPARING PROPOSED REGULATORY SCHEMES IN THE UNITED STATES TO THE CURRENT REGULATORY SCHEME IN THE EUROPEAN UNION

#### A. Current European Union Regulation (EC) No. 261/2004

The current EU regulation aims to “strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.”<sup>117</sup> EU 261 establishes minimum rights for passengers who are (1) departing from an airport located in an EU Member State on any air carrier, and (2) traveling from a non-Member State airport to a Member State airport when the flight is operated by a Community Carrier.<sup>118</sup>

EU 261 guarantees affected passengers: (1) the right to compensation, (2) the right to reimbursement or re-routing, (3) the right to care, and (4) the right to be informed.<sup>119</sup> These rights apply to instances of denied boarding, flight cancellation, and flight delay.<sup>120</sup> In addition, these rights apply in a limited fashion when a passenger’s class of service is either upgraded or downgraded.<sup>121</sup>

#### 1. Article 4: Denied Boarding

Under EU 261, *denied boarding* means “a refusal to carry passengers on a flight, although they have presented themselves for boarding [with a confirmed reservation having checked in at the time published by the carrier], except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.”<sup>122</sup> Air carriers operating under the regulatory control of EU 261 must, when there is a need to deny boarding, call for volunteers to relinquish their seats in exchange for benefits or compensation agreed upon between the passenger and the air carrier.<sup>123</sup> If an air carrier needs to deny boarding against a passenger’s wishes (when the requisite number of volunteers was not met), the air carrier must compensate that passenger in accordance with the specified compensation amounts outlined in Article 7.<sup>124</sup> In addition to providing compensation, the air carrier must comply with Articles 8 and 9.<sup>125</sup>

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<sup>117</sup> EU 261, *supra* note 8.

<sup>118</sup> *Id.* (“[c]ommunity carrier” means an air carrier with a valid operating license granted by a Member State).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> EU 261, *supra* note 8, art. 2.

<sup>123</sup> *Id.* art. 4.

<sup>124</sup> *Id.* art. 7.

<sup>125</sup> *Id.* art. 4.

2. Article 5: Cancellation

Under EU 261, *cancellation* means “the non-operation of a flight which was previously planned and on which at least one place was reserved.”<sup>126</sup> In all instances of a canceled flight, the air carrier must offer either reimbursement or re-routing as prescribed in Article 8.<sup>127</sup> Additionally, an air carrier must inform the passenger about possible alternative transport.<sup>128</sup> If an air carrier does not notify a passenger of a cancellation within the appropriate timeframe, it must additionally issue compensation to the affected passenger in accordance with Article 7.<sup>129</sup>

Table 4: Exceptions to the Right to Compensation After a Cancellation<sup>130</sup>

<b>Time Frame of Notice of Cancellation</b>	<b>Action Carrier Must Take for Compensation Exception to Apply</b>
Two weeks or more prior to scheduled departure.	No further action.
Between two weeks and seven days prior to scheduled departure.	Offer re-routing with the new departure “no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival.”
Less than seven days prior to scheduled departure.	Offer re-routing with the new departure “no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.”

Air carriers are exempt from the compensation requirement if the cancellation “is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”<sup>131</sup>

3. Article 6: Delay

According to EU 261, a *delay* (as it relates to passenger rights) occurs when a flight is “delayed beyond its scheduled time of departure” by at least two

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<sup>126</sup> EU 261, *supra* note 8, art. 1.

<sup>127</sup> *Id.* art. 5.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (including weather-caused cancellations).

hours.<sup>132</sup> The Interpretive Guidelines add that a *long delay at arrival* occurs when a flight lands three hours or more beyond its scheduled time of arrival.<sup>133</sup> EU 261 passenger rights are only triggered in the event of a delay when both the distance of the flight and the length of the delay meet certain thresholds, shown below in Table 5.<sup>134</sup>

Table 5: Delays that Trigger EU 261 Passenger Rights<sup>135</sup>

Distance of Flight	Length of Delay (from scheduled time of departure)
1,500 km or less.	Two hours or more.
More than 1,500 km (flights within the EU) Between 1,500 and 3,500 km (all other flights).	Three hours or more.
More than 3,500 km.	Four hours or more.

When a delayed flight falls within any of the above categories, the air carrier is not required to provide additional compensation to the affected passenger.<sup>136</sup> In these instances, the air carrier is bound by the passenger's right to care in Article 9.<sup>137</sup> If the departure delay is longer than five hours, the air carrier must reimburse the passenger as specified in Article 8(1)(a).<sup>138</sup>

The Interpretive Guidelines point to case law that adds another layer to a passenger's rights when the *arrival* of a flight is delayed by three hours or more.<sup>139</sup> When the arrival of a flight is delayed three hours or more from the scheduled arrival time, the delay is treated as a cancellation for the purpose of calculating and

<sup>132</sup> EU 261, *supra* note 8, art. 6.

<sup>133</sup> Commission Notice 2016 O.J. (C 214) 10 (the time of arrival is based on when the cabin door opens for passengers to deplane).

<sup>134</sup> EU 261, *supra* note 8, art. 6.

<sup>135</sup> EU 261, *supra* note 8, art. 7.

<sup>136</sup> *Id.* art. 6.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* art. 8 (“reimbursement within seven days . . . 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.”).

<sup>139</sup> Commission Notice 2016, *supra* note 133, at 5; Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA*, 2009 E.C.R. I-10923, ¶ 73(2).

issuing compensation.<sup>140</sup> The notable exception to this is when the *long delay on arrival* is caused by extraordinary circumstances, thus absolving the air carrier of its obligation to issue compensation.<sup>141</sup>

#### 4. Article 7: Right to Compensation

When a passenger is eligible for additional compensation, the air carrier must provide such compensation in accordance with the specific amounts outlined in Article 7.<sup>142</sup> In addition to the amount specified, the compensation must be “paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.”<sup>143</sup> Table 6.1 outlines the general minimum compensation model an air carrier must adhere to.<sup>144</sup>

Table 6.1: General Passenger Minimum Compensation Model<sup>145</sup>

<b>Amount</b>	<b>Distance of Flight</b>
€ 250	1,500 km or less.
€ 400	More than 1,500 km (flights within the EU) Between 1,500 and 3,500 km (all other flights).
€ 600	More than 3,500 km.

When an air carrier can offer an affected passenger the option to re-route to their final destination, the air carrier may use the modified minimum compensation model outlined in Table 6.2.<sup>146</sup>

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<sup>140</sup> Commission Notice 2016, *supra* note 133, at 5; Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA*, 2009 E.C.R. I-10923, ¶ 73(2).

<sup>141</sup> Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA*, 2009 E.C.R. I-10923, ¶ 73(2).

<sup>142</sup> EU 261, *supra* note 8, art. 7.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Table 6.2: Modified Passenger Minimum Compensation Model  
(When Re-Routing is Offered)

Amount	Distance of Flight	Re-Routing Arrival Time
€ 125	1,500 km or less.	Within two hours of original scheduled arrival time.
€ 200	More than 1,500 km (flights within the EU) Between 1,500 and 3,500 km (all other flights).	Within three hours of original scheduled arrival time.
€ 300	More than 3,500 km.	Within four hours of original scheduled arrival time.

The distance of the flight is measured using the great circle route method.<sup>147</sup>

#### a. The Extraordinary Circumstance Exception

When a cancellation or delay is caused by extraordinary circumstances, the air carrier is exempt from issuing compensation.<sup>148</sup> This is the only right that is affected by extraordinary circumstances; the right to care and the right to reimbursement or rerouting are triggered no matter the cause of the delay or cancellation.<sup>149</sup> Further, the existence of an apparent extraordinary circumstance is not immediate grounds for exemption; rather, exemption from EU 261 is determined on a case-by-case basis.<sup>150</sup> A carrier seeking exemption must prove (1) “the existence and the link between the extraordinary circumstances and the delay or the cancellation, and [(2)] the fact that this delay or cancellation could not have been avoided although it took all reasonable measures.”<sup>151</sup> Further, EU 261 does not define what an extraordinary circumstance encompasses, leading to a seemingly

<sup>147</sup> EU 261, *supra* note 8; *see, e.g., Straight Talk on Great Circles*, AEROSAVVY (Apr. 29, 2014), <https://aerosavvy.com/great-circle-routes> (discussing the great circle route method measures the shortest distance between two points on a globe.).

<sup>148</sup> EU 261, *supra* note 8, art. 5; Commission Notice 2016, *supra* note 133, at 15 (while EU 261 does not mention extraordinary events as being an exception to delays, the Interpretative Guidelines on EU 261 clarifies that the extraordinary circumstance exception applies to delays.).

<sup>149</sup> EU 261, *supra* note 8; Commission Notice 2016, *supra* note 133, at 13.

<sup>150</sup> Commission Notice 2016, *supra* note 133, at 9.

<sup>151</sup> *Id.* at 16.



ambiguous mandate for air carriers to compensate passengers.<sup>152</sup> The interpretation of *extraordinary circumstances* is one of the more litigious issues surrounding EU 261.<sup>153</sup> While this debate has not been settled entirely, judicial opinions have shed some light on what is and is not an extraordinary circumstance.<sup>154</sup> European courts have determined that, for example, a delay due to the need to remove an unruly passenger is an extraordinary circumstance generally insulating the carrier from liability.<sup>155</sup> Conversely, technical issues generally do not qualify as an extraordinary circumstance.<sup>156</sup> Indeed, for technical issues to fall under the extraordinary circumstance exception, the carrier must prove that the issue was not “inherent in the normal exercise of the activity of the air carrier” and is “beyond the actual control of that carrier on account of its nature or origin.”<sup>157</sup> Weather that is “incompatible with the operation of the flight”<sup>158</sup> or that causes airport congestion and capacity issues are both generally considered extraordinary circumstances.<sup>159</sup> If an air carrier is responsible for the delay, even indirectly, it is still liable for passenger compensation.<sup>160</sup>

Tangential to the importance of the interpretation of an extraordinary circumstance, in any event covered by EU 261, air carriers are required to “deploy[]

<sup>152</sup> Commission Notice 2016, *supra* note 133, at 16; *see, e.g.*, Case C-549/07, Wallentin Hermann v. Alitalia, 2008 E.C.R. I-11061, ¶ 16; Case C-581/10, Nelson v. Lufthansa, ECLI:EU:C:2012:657 (2012); Case C-394/14, Siewert and Other v. Condor Fulgienst, ECLI:EU:C:2014:2377 (2014); Case C-74/19, LE v. Transport Aéreos Portugueses SA, ECLI:EU:C:2020:460 (2020).

<sup>153</sup> EU 261, *supra* note 8, (“[O]bligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”); *See Ward et al.*, *supra* note 108.

<sup>154</sup> *See Ward et al.*, *supra* note 108.

<sup>155</sup> Case C-74/19, LE v. Transport Aéreos Portugueses SA, ECLI:EU:C:2020:460, ¶ 4 (2020) (noting that an airline may still be required to compensate passengers for the delay due to the removal of an unruly passenger if (1) the unruly behavior began prior to boarding, or (2) there were warning signs to suggest the traveler would become unruly).

<sup>156</sup> Case C-549/07, Wallentin Hermann v. Alitalia, 2008 E.C.R. I-11061, ¶ 34 (2008) (excepting technical issues where the “problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its control.”); Case C-257/14, Van der Lans v. Koniinklijke Luchvaart Maatschappij N.V., ECLI:EU:C:2015:618, ¶¶ 37–38 (2015) (unforeseen technical issues causing a delay do not insulate a carrier from liability, only if those technical issues result from manufacture defects, sabotage, or terrorism).

<sup>157</sup> Commission Notice 2016, *supra* note 133, at 16.

<sup>158</sup> EU 261, *supra* note 8.

<sup>159</sup> Commission Notice 2016, *supra* note 133, at 16.

<sup>160</sup> *See, e.g.*, Case C-159/18, André Moens v. Ryanair Ltd., ECLI:EU:C:2019:535, ¶ 30 (2019) (“[P]etrol on a runway of an airport which led to . . . the long delay of a flight . . . falls within the concept of ‘extraordinary circumstances’ . . . when the petrol in question does not originate from an aircraft of the carrier that operated that flight.”) (emphasis added).

all [the airline's] resources in terms of staff or equipment and the financial means at its disposal in order to avoid" a delay or cancellation.<sup>161</sup>

### 5. Article 8: Right to Reimbursement or Re-routing

When a passenger is eligible for reimbursement or re-routing, the air carrier must offer the passenger a choice between three primary options.<sup>162</sup> These choices may be instead of, or in addition to compensation, depending on what the regulation calls for.<sup>163</sup>

Table 7: Reimbursement and Re-Routing Model<sup>164</sup>

Type	Time Frame	Specifics
Reimbursement	Within seven days	Reimbursement includes: <ul style="list-style-type: none"> <li>- The full cost of the ticket;</li> <li>- The part or parts of the journey not made;</li> <li>- The parts of the journey already made, if the flight is no longer serving any purpose in relation to the passenger's original travel plan; and</li> <li>- When relevant, a return flight to the first point of departure.</li> </ul>
Earliest Re-Routing	The earliest opportunity to re-route passenger to final destination	Earliest re-routing can be to an alternate airport in the same town, city, or region, provided the passenger and air carrier agree on any additional transportation necessary.
Later Re-Routing	A later date at the passenger's convenience	Later re-routing is subject to seat availability and can be to an alternate airport in the same town, city, or region, provided the passenger and air carrier agree on any additional transportation necessary.

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<sup>161</sup> Germanwings GmbH v. Wolfgang Pauels, Case C-501/17, ECLI:EU:C:2019:288, ¶ 19 (2019) (when an aircraft tire is damaged due to foreign debris on the runway, that is considered an extraordinary circumstance, yet the airline is only exempt from liability if it can prove it took all reasonable measures to mitigate any delay due to the damaged tire).

<sup>162</sup> EU 261, *supra* note 8, art. 8.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

## 6. Article 9: Right to Care

When a passenger's right to care is triggered, the air carrier is obligated to offer the passenger certain amenities and accommodations free of charge.<sup>165</sup> The right to care only extends so long as the passenger must "wait for re-routing [or for the delayed flight to depart] to their final destination at the earliest opportunity . . . or a return flight."<sup>166</sup> In general, the extent of the amenities and accommodations provided will depend on the circumstances and the "principle of proportionality."<sup>167</sup> The right to care covers four primary categories, listed in Table 8 below.

Table 8: Right to Care Categories<sup>168</sup>

<b>Category</b>	<b>When Carrier is Required to Offer</b>
Meals and Refreshments	Whenever the Right to Care is triggered.
Hotel	"[W]here a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary."
Transportation	When transportation to the place of accommodation is required.
Communication (phone or email)	Whenever the Right to Care is triggered.

Air carriers must offer care in an accessible, active way and should not leave it up to affected passenger to make arrangements for meals, accommodations, or transportation.<sup>169</sup> If an air carrier fails to provide care when required, passengers may make their own arrangements and receive reimbursement "provided [the meals, accommodations, and other care were] necessary, reasonable and appropriate."<sup>170</sup>

An air carrier is not released from its obligation to provide care in cases of extraordinary circumstances.<sup>171</sup> This is a notable difference from the other passenger rights in EU 261. "[EU 261] contains nothing that would allow the conclusion to be drawn that it recognises a separate category of 'particularly

<sup>165</sup> EU 261, *supra* note 8, art. 9.

<sup>166</sup> Commission Notice 2016, *supra* note 133, at 12.

<sup>167</sup> *Id.* (noting that "the principle of proportionality" means the time a passenger must wait and that "[t]he price paid for the ticket or temporality of the inconvenience suffered should not interfere with the right of care.")

<sup>168</sup> EU 261, *supra* note 8, art. 9.

<sup>169</sup> Commission Notice 2016, *supra* note 133, at 13 (care, when available, should be made accessible for people with disabilities.).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

extraordinary' events, beyond 'extraordinary circumstances' . . . which would lead to the air carrier being exempted from all its obligations."<sup>172</sup> The reasoning behind this is that passengers are often most vulnerable and in need when these extraordinary events occur.<sup>173</sup>

### 7. Article 14: Obligation to Inform

Air carriers are responsible for informing passengers of their rights both at check-in and when there is an instance of denied boarding, flight cancellation, or flight delay.<sup>174</sup> At check-in, air carriers must have clearly visible text stating: "If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance."<sup>175</sup> When a passenger is denied boarding or experiences a flight cancellation or delay, the air carrier shall provide the passenger with "written notice setting out the rules for compensation and assistance in line with [EU 261]."<sup>176</sup>

### 8. Article 10: Upgrading and Downgrading

Where a passenger is upgraded or downgraded from their purchased class of service on a particular flight, EU 261 takes a slightly different approach than in the other instances of a flight interruption.<sup>177</sup> When a passenger is upgraded to a higher class of service, the air carrier cannot request additional payment from that passenger.<sup>178</sup> Conversely, when a passenger is downgraded to a lower class of service, the air carrier must provide reimbursement<sup>179</sup> according to the model in Table 9.

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<sup>172</sup> Commission Notice 2016, *supra* note 133, at 13 (summary from Denise McDonagh v. Ryanair Ltd., Case C-12/11, ECLI:EU:C:2013:43, ¶ 30 (Jan. 31, 2013)).

<sup>173</sup> Commission Notice 2016, *supra* note 133, at 13.

<sup>174</sup> EU 261, *supra* note 8, art. 14 (Delay as defined under EU 261).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* art. 10.

<sup>178</sup> *Id.* (noting that upgrading occurs when a passenger, for instance, is moved from an economy seat to a first-class seat).

<sup>179</sup> EU 261, *supra* note 8, art. 10; Commission Notice 2016, *supra* note 133, at 15 ("[R]eimbursement is payable only for the flight on which the passenger has been downgraded and not for the whole journey included in a single ticket, which may include two or more connecting flights.").

Table 9: Downgraded Class of Service Reimbursement Model<sup>180</sup>

Amount	Distance of Flight
30% of Ticket Price	Less than 1,500 km
50% of Ticket Price	Between 1,500 and 3,500 km (all other flights) More than 1,500 km (flights within the EU, except as included below)
75% of Ticket Price	More than 3,500 km (and flights to or from the French overseas departments, irrespective of distance)

### **B. Proposed United States Regulation 14 C.F.R. Parts 259, 260, 399**

Following years of regulatory interpretation, the U.S. Department of Transportation released a Notice of Proposed Rulemaking (NPRM), which in part stated its intent to codify a longstanding interpretation:

[I]t is an unfair business practice . . . to refuse to provide requested refunds to consumers when a carrier has cancelled or made a significant change to a scheduled flight to, from, or within the United States, and consumers found the alternative transportation offered by the carrier or the ticket agent to be unacceptable.<sup>181</sup>

Perhaps in following the example of the European Union, the goal of the proposed amendments (NPRM Regulation) is to protect passengers, limit financial loss due to air travel interruptions, and provide a consistent policy across all carriers operating in the United States.<sup>182</sup>

The NPRM Regulation makes changes, additions, and clarifications to existing regulations regarding (1) refunding airline tickets, (2) the definition of cancelled flights, (3) the definition of significant change of flight itinerary, (4) the notification of right to refund, (5) non-expiring travel vouchers, (6) refunds when government financial assistance is involved, (7) documentation requirements, and (8) service and processing fees.

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<sup>180</sup> EU 261, *supra* note 8, art. 10 (compensation must be paid within seven days and according to the other compensation requirements in Article 7(3)).

<sup>181</sup> U.S. DEPT. OF TRANS., AIRLINE TICKET REFUNDS AND CONSUMER PROTECTIONS NOTICE OF PROPOSED RULE MAKING 1 [hereinafter NPRM] (to be codified as 14 C.F.R. pts. 259, 260, 399) <https://www.transportation.gov/sites/dot.gov/files/2022-08/Airline%20Ticket%20Refund%20NPRM%20-%202022-08-03.pdf>.

<sup>182</sup> *Id.* at 4, 30.

### 1. Refunding Airline Tickets

The NPRM Regulation would require air carriers to provide refunds for canceled flights or significant changes of flight itinerary with clear and specific language.<sup>183</sup> In contrast, current regulations require refunds under such circumstances only to avoid the appearance of unfair business practices—though that specific definition and requirement is not codified.<sup>184</sup>

### 2. Definition of Cancelled Flight

Under the NPRM Regulation, a *cancelled flight* is defined as one that existed in the “carrier’s Computer Reservation System (CRS) at the time of the ticket sale but was not operated by the carrier.”<sup>185</sup>

### 3. Definition of Significant Change of Flight Itinerary

Under the NPRM Regulation, *significant change of flight itinerary* would encompass both a delay and an earlier departure time.<sup>186</sup> The NPRM Regulation defines a significant change of flight itinerary as a change in which: (1) the departure time is changed three hours or more (six hours or more for international flights) earlier than the scheduled departure time; (2) the arrival time is changed three hours or more (six hours or more for international flights) later than the scheduled arrival time; (3) the departure or arrival airport changes; (4) the number of scheduled connections changes; (5) the class of ticket is downgraded; or (6) the aircraft changes, resulting in “a significant downgrade of the available amenities and travel experiences.”<sup>187</sup>

The Department of Transportation notes that two alternative frameworks for defining a significant change are under consideration.<sup>188</sup> The first of these alternatives continues the current method of not defining timeframes for departures or arrivals that would qualify as a significant change.<sup>189</sup> The second alternative uses a tiered approach to determine when a refund is required.<sup>190</sup> The tiered approach compares the length of total travel time to the length of delay experienced.<sup>191</sup> For

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<sup>183</sup> NPRM, *supra* note 181, at 13.

<sup>184</sup> *Id.* at 1.

<sup>185</sup> *Id.* at 13.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 13–14.

<sup>188</sup> NPRM, *supra* note 181, at 36–37.

<sup>189</sup> *Id.* at 36.

<sup>190</sup> *Id.* at 37.

<sup>191</sup> NPRM, *supra* note 181, at 37.

instance, for travel time between three to six hours, a refund would be due if the delay was more than three hours.<sup>192</sup>

#### 4. Notification of Right to Refund

Under the NPRM Regulation, before offering any credits or vouchers air carriers would be required to provide the passenger with notice that, when circumstances dictate that a passenger is eligible for a refund, the passenger is entitled to a refund.<sup>193</sup>

#### 5. Providing Non-Expiring Travel Voucher

The NPRM Regulation would require air carriers to provide non-expiring travel vouchers to passengers who are (1) “restricted or prohibited from traveling [by government order] in relation to a serious communicable disease;” (2) advised not to travel during a public health emergency by a medical professional or determine not to travel in light of guidance from the CDC, WHO, or similar entity; or (3) advised not to travel by a medical professional or determine not to travel in light of guidance from the CDC, WHO, or similar entity, irrespective of a public health emergency.<sup>194</sup>

#### 6. Providing Refunds if Receiving Significant Governmental Financial Assistance

In addition to providing non-expiring travel vouchers in the above scenarios, under the NPRM Regulation air carriers would be required to issue refunds instead of travel vouchers if they receive government financial assistance.<sup>195</sup>

#### 7. Documentation

The NPRM Regulation would require passengers to provide documentation when requesting a refund or non-expiring travel voucher for a flight that is still scheduled to be operated.<sup>196</sup> Such documentation would include the applicable government order demonstrating the passenger's inability or restriction

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<sup>192</sup> NPRM, *supra* note 181 at 38.

<sup>193</sup> *Id.* at 14.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 15.

<sup>196</sup> NPRM, *supra* note 181, at 15.

to travel and/or a written statement from a licensed medical professional stating the passenger cannot travel due to the health risk posed to the passenger or other passengers.<sup>197</sup>

## 8. Service and Processing Fees

Finally, the NPRM Regulation would allow air carriers to retain a service fee when issuing a refund or non-expiring travel voucher, so long as the service fee is on a per-passenger basis and is “clearly and prominently disclosed” when a passenger purchases a ticket.<sup>198</sup>

## **C. Proposed Passengers’ Bill of Rights in the United States**

While the Department of Transportation’s proposed rules and amendments have yet to be adopted, an alternative means for implementing further protections for passenger rights in the United States is taking shape.<sup>199</sup> Following the devastating impacts of delays and cancellations during the 2022 holiday travel season,<sup>200</sup> a group of U.S. senators has proposed new legislation dubbed the “Airline Passengers’ Bill of Rights” (Passengers’ Bill of Rights).<sup>201</sup>

The Passengers’ Bill of Rights covers a variety of topics ranging from water and food safety on aircraft to frequent flyer programs, to fees and pricing.<sup>202</sup> It encompasses a much wider range of rights than EU 261.<sup>203</sup> The relevant portions of the Passengers’ Bill of Rights (those rights directly associated with delays, cancellations, and denied boarding) are discussed below.

### 1. Proposed Rights Associated with Delays and Cancellations

The proposed rights associated with delays and cancellations are structured in a similar way to those in EU 261.<sup>204</sup> However, the Passengers’ Bill of Rights does

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<sup>197</sup> NPRM, *supra* note 181, at 16.

<sup>198</sup> *Id.*

<sup>199</sup> Kris Van Cleave & Analisa Novak, *Senators Push for “Passenger Bill of Rights” That Would Give Travelers at Least \$1,350 if Bumped Due to Oversold Flight*, CBS NEWS (Feb. 6, 2023), <https://www.cbsnews.com/news/passenger-bill-of-rights-airline-delays-cancellations-baggage-seating-fees/>.

<sup>200</sup> *Id.*

<sup>201</sup> Airline Passengers’ Bill of Rights, S. 178, 118th Cong. (2023) (noting that a previous bill was introduced in 2021 during the 117<sup>th</sup> Congress; a discussion of this previous bill has been omitted due to the introduction of the 2022 bill).

<sup>202</sup> *Id.* § 1.

<sup>203</sup> *See generally* S. 178, *supra* note 201.

<sup>204</sup> *See id.* § 103.



not differentiate between a delay and cancellation—treating both in the same way for purposes of passengers’ rights.<sup>205</sup> These rights would only be triggered in the event of a delay or cancellation that occurs “within the control of the air carrier.”<sup>206</sup> Delays and cancellations that fall into this category are defined as “including crew scheduling, routine maintenance, functioning of information technology systems, passenger service issues, issues related to baggage services, issues related to ground handling of aircraft, or other reasons as specified by the Secretary.”<sup>207</sup> Table 10 outlines what air carriers would be required to provide to passengers under the Passengers’ Bill of Rights.

Table 10: Proposed Passenger Rights Associated with Delays and Cancellations<sup>208</sup>

<b>Length of Delay Resulting from a Delay or Cancellation (based on scheduled arrival time)</b>	<b>Actions Air Carrier Must Take</b>
Between one and four hours	(1) Automatically refund the amount paid for the ticket; and (2) Find a seat for the passenger on any air carrier or other means of transportation that would result in arrival no later than four hours after scheduled arrival time.
More than four hours	(1) Automatically refund the amount paid for the ticket; (2) Find a seat for the passenger on any air carrier or other means of transportation at the earliest available opportunity, if passenger so chooses; (3) Compensate the passenger \$1,350 in cash; and (4) Provide the passenger with an amount equal to the cost of a meal.
To the next day	In addition to the requirements for flights delayed more than four hours, provide the passenger with an amount equal to the cost of a hotel.

The stand-out requirement proposed by the Passengers’ Bill of Rights is the amount of compensation—\$1,350—that a passenger would be entitled to should

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<sup>205</sup> S. 178, *supra* note 201, § 103(a).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

their flight be delayed more than four hours or canceled, resulting in an arrival delay of greater than four hours.<sup>209</sup>

The Passengers' Bill of Rights would further limit what delays and cancellations air carriers could attribute to force majeure events.<sup>210</sup> Specifically, air carriers could only attribute delays or cancellations to a force majeure event if the delay or cancellation occurred because of events "such as weather, an act of God, or a war or other hostilities."<sup>211</sup>

### 3. Proposed Rights Associated with Denied Boarding

When a passenger is denied boarding, in addition to the rights that currently exist under 14 C.F.R. 250, the Passengers' Bill of Rights would require air carriers to provide compensation to the passenger at a minimum amount of \$1,350.<sup>212</sup>

### 4. Proposed Transparency Requirements for Passenger Rights

The Passengers' Bill of Rights would require air carriers to notify passengers of their rights and eligibility for a refund or compensation.<sup>213</sup> The bill lays out specific requirements for how passengers are to be notified.<sup>214</sup> Within 30 minutes of an air carrier becoming aware of an event that would make a passenger eligible for compensation, refunds, or other protections, the air carrier would be required to "promptly and expressly notify" the affected passengers of their rights.<sup>215</sup>

Air carriers would also be required to display information relating to eligibility for compensation and refunds.<sup>216</sup> In addition, on all boarding passes, trip itineraries, and at ticket and gate counters, air carriers would be required to display passengers' rights and contact information for the Department of Transportation's consumer complaint system.<sup>217</sup>

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<sup>209</sup> S. 178, *supra* note 201, § 103(a)(2)(C).

<sup>210</sup> *Id.* §104.

<sup>211</sup> *Id.* §104.

<sup>212</sup> *Id.* § 102.

<sup>213</sup> *Id.* § 207 (including any further rights or compensation that come from the Air Carrier's contract of carriage, in addition to rights prescribed by law).

<sup>214</sup> S. 178, *supra* note 201, § 207.

<sup>215</sup> *Id.* § 207(b)(1).

<sup>216</sup> *Id.* § 207(b)(3).

<sup>217</sup> *Id.* § 207(b)(4).

## **D. A Brief Synopsis of Comparison Between EU 261 and the Proposed U.S. Regulations**

### 1. EU 261 and the NPRM Regulation

The approach taken by EU 261 and the NPRM Regulation is entirely different. While EU 261 dictates specific rights and remedies, the NPRM Regulation simply seeks to codify the Department of Transportation's interpretation of the concept of unfair business practice to include definitions of canceled and delayed or significantly changed flights.<sup>218</sup> The NPRM Regulation only dictates that an air carrier must refund the passenger's ticket in the case of a cancellation or significant change in flight itinerary, while EU 261 requires additional compensation in certain circumstances.<sup>219</sup> In contrast to EU 261, the NPRM Regulation also neglects to address any requirements for air carriers to provide hotels, meals, or other accommodations during lengthy delays.<sup>220</sup>

Overall, the NPRM Regulation does not make any dramatic changes to the landscape of passenger rights in the United States. It keeps the status quo. What it does do is keep the power with air carriers to dictate what is provided to passengers (beyond a refund) should their travel be interrupted. While the NPRM Regulation may be beneficial to the overall air travel economy, it lacks any new protections for passengers' rights.<sup>221</sup>

### 2. EU 261 and the Passengers' Bill of Rights

The proposed Passengers' Bill of Rights is more closely aligned with EU 261 regarding the specificity with which it dictates passengers' rights and air carriers' obligations.<sup>222</sup> Both of these regulatory schemes put a price on the inconvenience of a cancellation or significant delay: \$1,350 in the Passengers' Bill of Rights, and between €125 and €600 in EU 261.<sup>223</sup> However, the two differ regarding how compensation is distributed. Under EU 261, it is the passenger's responsibility to file a claim to receive this compensation, while under the Passengers' Bill of Rights the air carrier is required to provide compensation automatically.<sup>224</sup>

Both schemes provide for notice requirements that generally mirror each other, with the exception that the Passengers' Bill of Rights requires air carriers to

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<sup>218</sup> Compare EU 261, *supra* note 8, with NPRM, *supra* note 181.

<sup>219</sup> Compare EU 261, *supra* note 8, art. 7, 8, with NPRM, *supra* note 181, at 31.

<sup>220</sup> Compare EU 261, *supra* note 8, art. 9, with NPRM, *supra* note 181.

<sup>221</sup> See discussion *infra* Section IV.

<sup>222</sup> Compare EU 261, *supra* note 8, with S. 178, *supra* note 201.

<sup>223</sup> Compare EU 261, *supra* note 8, art. 7, with S. 178, *supra* note 201, § 103(a)(1).

<sup>224</sup> Compare EU 261, *supra* note 8, art. 16, with S. 178, *supra* note 201, § 103(a)(1).

proactively notify affected passengers rather than only posting signs and placards.<sup>225</sup>

Unlike the NPRM Regulation, both the Passengers' Bill of Rights and EU 261 require air carriers to provide hotels, meals, and other accommodations to passengers during lengthy or overnight delays.<sup>226</sup> Both the Passengers' Bill of Rights and EU 261 have nearly identical requirements for when such accommodations are required.<sup>227</sup>

Overall, the Passengers' Bill of Rights takes a similar but more sweeping approach to passenger rights than EU 261.<sup>228</sup> While EU 261 utilizes a multi-tiered approach to most rights and obligations, the Passengers' Bill of Rights generally draws a hard line regarding when rights and obligations are triggered. For instance, under the Passengers' Bill of Rights, if a flight is delayed four hours or more, the passenger is entitled to receive the full \$1,350 in additional compensation, while EU 261 considers the length of the delay, the distance of the flight, and whether re-rerouting was available when determining how much additional compensation a passenger is entitled to.<sup>229</sup>

The most notable difference between the Passengers' Bill of Rights and EU 261 is the sweeping nature of the Passengers' Bill of Rights.<sup>230</sup> The Passengers' Bill of Rights encompasses far more than the rights associated with delays and cancellations.<sup>231</sup> It touches on nearly every aspect of the air travel experience, from booking to aircraft seat design to luggage.<sup>232</sup> It is truly a passenger's bill of rights, rather than a mere regulation on delays and cancellations.

#### IV. THE FUTURE

One of the most prominent arguments for implementing a compensatory framework for delayed and canceled flights is to incentivize air carriers to operate a more reliable and timely flight schedule—promoting fewer delays, cancellations, and interruptions.<sup>233</sup> While at first glance this sounds straightforward, in practice it may not be as clear-cut. In order to parse this dilemma out, we must look at and let data, not emotions, drive decisions. If the ultimate goal of a compensatory model is to reduce delays, then regions such as the European Union, should average fewer

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<sup>225</sup> Compare EU 261, *supra* note 8, art. 14, with S. 178, *supra* note 201, § 213(b).

<sup>226</sup> Compare EU 261, *supra* note 8, art. 9, with S. 178, *supra* note 201, § 103(a)(2).

<sup>227</sup> Compare EU 261, *supra* note 8, art. 9, with S. 178, *supra* note 201, § 103(a)(2).

<sup>228</sup> Compare EU 261, *supra* note 8, with S. 178, *supra* note 201.

<sup>229</sup> Compare EU 261, *supra* note 8, art. 7, with S. 178, *supra* note 201, § 103(a)(1).

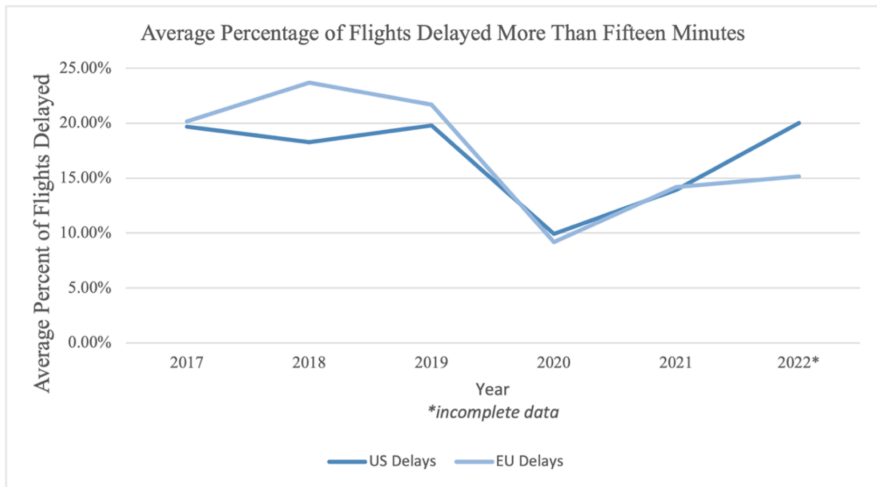
<sup>230</sup> Compare EU 261, *supra* note 8, with S. 178, *supra* note 201.

<sup>231</sup> See generally S. 178, *supra* note 201.

<sup>232</sup> See generally *id.*

<sup>233</sup> See, e.g., Van Cleave & Novak, *supra* note 199 (statement of Senator Richard Blumenthal) (“If passengers could receive 1,350 bucks whenever their flight is delayed by four hours, I am guaranteeing you there'd be a lot fewer delays.”).

delays than the United States—yet the data below suggests that this is not necessarily the case.



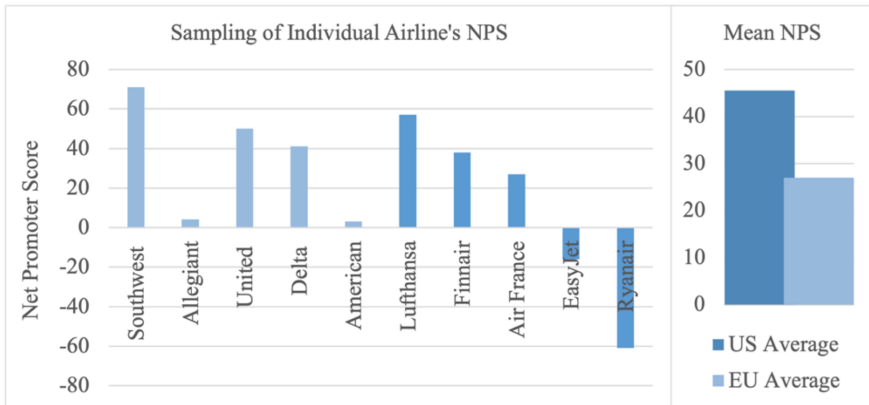
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While the difference in the percentage of delayed flights is not statistically significant, it suggests that the stricter policies of EU 261 do not do an effective job of achieving the overall goal of such regulation.

In theory, with greater rights afforded to passengers, satisfaction with the airline industry should increase. The industry-leading metric for measuring customer satisfaction is the Net Promoter Score (“NPS”).<sup>235</sup> A sampling of NPS data, below, from mainline and budget air carriers from both the United States and the European Union gives insight into how customers perceive different air carriers.

<sup>234</sup> Graph created by author using data from *All-Causes Delay and Cancellations to Air Transport in Europe for 2021*, EUROCONTROL (Apr. 7, 2022), <https://www.eurocontrol.int/publication/all-causes-delay-and-cancellations-air-transport-europe-2021> (EU delay data through 2021, monthly data has been compiled and averaged); *All-Causes Delays to Air Transport in Europe - Quarter 3 2022*, EUROCONTROL (Dec. 8, 2022), <https://www.eurocontrol.int/publication/all-causes-delays-air-transport-europe-quarter-3-2022> (EU delay data January 2022 through September 2022, monthly data has been compiled and averaged); *On-Time Performance - Reporting Operating Carrier Flight Delays at a Glance*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/homedrillchart.asp> (last visited Feb 22, 2024) (US delay data).

<sup>235</sup> Aaron Carpenter, *What Is NPS? Your Ultimate Guide to Net Promoter Score*, QUALTRICS, <https://www.qualtrics.com/experience-management/customer/net-promoter-score/> (last visited Feb. 10, 2024) (measuring customer perception of a company based on the question: How likely is it that you would recommend [company] to a friend or colleague? The response is given on a scale from 0 to 10).



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Again, there is a discrepancy between expectations and reality. On average, customers are more dissatisfied with EU air carriers than U.S. air carriers.<sup>237</sup> It is worth noting that an untold number of factors go into how satisfied a passenger is with an air carrier—certainly, it goes beyond just flight delays and cancellations.<sup>238</sup> However, a major factor in a customer's opinion of an air carrier is their trust in the air carrier, which may in part stem from the reliability of the air carrier in delivering an on-time performance.<sup>239</sup>

What does this mean for the future of air passenger rights in the United States? It means that data must drive decisions. There is likely no perfect solution; however, the data shows that implementing a strict regulatory framework does not necessarily improve reliability or customer satisfaction. If the proposed regulations, specifically the Passengers' Bill of Rights, were to become law, airfare prices would likely increase dramatically.<sup>240</sup> The air travel economy in the United States is largely based on competition to offer a positive travel experience; regulation designed to limit the options for air carriers to differentiate themselves and prescribe

<sup>236</sup> Graph created by author using data from Ian Luck, *26 Airline NPS Score Benchmarks & Airline Customer Experience Tips*, CUSTOMERGAUGE (Nov. 10, 2022) <https://customer-gauge.com/blog/airline-customer-experience-net-promoter-score> (All data except Allegiant); *Allegiant Travel Company*, COMPARABLY, <https://www.comparably.com/brands/allegiant-travel-company> (Allegiant Data).

<sup>237</sup> See Luck, *supra* note 236 (All data except Allegiant); *Allegiant*, *supra* note 236 (Allegiant Data).

<sup>238</sup> See generally Luck, *supra* note 236.

<sup>239</sup> *Economics of NPS in the Airline Industry*, QUALTRICS (2021) [https://www.qualtrics.com/m/www.xminstitute.com/wp-content/uploads/2021/03/XMInstitute\\_DataSnapshot\\_EconomicsOfNPS2020\\_Airlines-1.pdf?ty=mktocd-thank-you](https://www.qualtrics.com/m/www.xminstitute.com/wp-content/uploads/2021/03/XMInstitute_DataSnapshot_EconomicsOfNPS2020_Airlines-1.pdf?ty=mktocd-thank-you).

<sup>240</sup> Van Cleve & Novak, *supra* note 199.

dramatic compensation rights for passengers may decrease that competition, resulting in a price increase for passengers.<sup>241</sup>

Perhaps what passengers need in the United States is more transparency. Instead of dictating what air carriers must do for passengers, require air carriers to be explicit and clear regarding what they do and do not offer. Let the passengers and the economy dictate what is required when schedules go awry. If one air carrier is seen as not offering enough, then that should be reflected in a decrease in demand for that air carrier; or, in the alternative, that air carrier will offer significantly cheaper prices—making the risk taken on by the passenger worth the cost.

## V. CONCLUSION

Whether in Europe, the United States, or anywhere else in the world, the question in every traveler's mind remains the same: *will my flight be delayed?* No regulatory act can eliminate that question and no compensation, mandated or not, can make up for the inconvenience caused by a delay, cancellation, or other flight interruption. While there are valid arguments for and against stricter air carrier regulation, one aspect that can and should be agreed upon is enabling passengers to be informed. Whether the United States moves towards a more EU-like approach or maintains its current approach, air carriers should inform passengers clearly, explicitly, and unambiguously of their rights with that specific air carrier, allowing the individual passenger to choose what is important to them: higher fares with more protections, or lower fares with more risk.<sup>242</sup> Regardless of what the regulatory future holds, it is clear that transparent air passenger rights, in one form or another, are on the verge of being cleared for takeoff in the United States.

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<sup>241</sup> Van Cleave & Novak, *supra* note 199.

<sup>242</sup> The term "risk" as used in this sentence refers only to the risk associated with the inconvenience of delays, cancellations, or other flight interruptions. No passenger should ever be put at risk of safety for a lower fare—passenger safety must always come first in both air carriers' operations and the drafting and implementation of regulation. Rather, low-cost tickets may carry with them greater risk as to how the air carrier will take care of the passenger—such as the lack of hotel or meal vouchers or other accommodations—should the flight be delayed, canceled, or interrupted.