

**BEFORE THE  
CENTERS FOR DISEASE CONTROL AND PREVENTION  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
ATLANTA, GA**

**In the Matter of:**

**Control of Communicable Diseases;  
Foreign Quarantine**

Docket CDC-2020-0013

**JOINT COMMENTS OF  
AIRLINES FOR AMERICA,  
THE INTERNATIONAL AIR TRANSPORT ASSOCIATION,  
THE REGIONAL AIRLINE ASSOCIATION, AND  
THE NATIONAL AIR CARRIER ASSOCIATION**

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Airlines for America (“A4A”), the International Air Transport Association (“IATA”), the Regional Airline Association (“RAA”), and the National Air Carrier Association (“NACA”) submit these Comments on behalf of their members<sup>1</sup> in response to the Centers for Disease Control and Prevention’s (“CDC”) interim final rule, Control of Communicable Diseases; Foreign Quarantine (“IFR”).<sup>2</sup> Airlines annually transport over 122 million passengers from foreign destinations to the United States and over 807 million passengers within the United States. The health and safety of our passengers and crewmembers is our topmost concern. We are willing to do what it takes to meet the challenges posed by COVID-19<sup>3</sup> and partner with all governments, foreign and domestic, as well as local and federal, to facilitate a rapid global response to COVID-19. But, the solutions must be practical, implementable, and effective.

Our greatest and sincere concern is the IFR cannot get the CDC what it needs for COVID-19—*accurate* passenger contact information to perform public health follow-ups to prevent the spread of COVID-19 and get individuals the health care they need. Although the airline industry could take many months and obligate hundreds of millions of dollars to modify

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<sup>1</sup> **Appendix A** contains our members and representation, covering all major airlines operating in the United States.

<sup>2</sup> 85 Fed. Reg. 7,874 (Feb. 12, 2020) (hereinafter the “IFR”).

<sup>3</sup> References to COVID-19 include the coronavirus (SARS-CoV-2) and related disease (COVID-19).

systems to collect passenger contact information and send it to the CDC, we will still not be able to confirm that the information that we collect will be accurate. The CDC can require that passengers directly give the CDC accurate contact information.

To that end, the CDC should adopt the solution that the airlines offered, at no development cost to the CDC, and will be rapidly effective: a CDC website and mobile application for passengers to send their contact information directly to the CDC. Like the systems already developed in other countries, a passenger would simply go online or to the mobile application prior to travel and send the CDC the needed contact and travel information. For the health and safety of passengers, crewmembers, and the public, the CDC should not discard the airlines proposed solution.

The airline solution is preferable to the IFR because the CDC presumes that airlines have infrastructure, in the form of IT systems that are interconnected between industry stakeholders, that simply does not exist. Like a COVID-19 vaccine, the creation and modification of industry-wide systems to meet the IFR requirements will take substantial time to develop, must conform to international standards and coordinated across every stakeholder, and cannot be willed into existence by regulatory requirements. The airline solution, unlike a COVID-19 vaccine, is a swift solution that meets CDC's goals of the IFR.

Additionally, the CDC should withdraw the IFR because it needlessly extends far beyond COVID-19, which is a novel virus posing near-term challenges. As it has done twice before without requiring collection of additional contact information or verification for accuracy, the CDC should create broad long-term rules through a full Administrative Procedure Act ("APA")<sup>4</sup> rulemaking process. The CDC's claim that COVID-19 justifies the IFR is a pretext to avoid this process which is contrary to the public's interest. The full APA process will ensure that the CDC adopts faster, feasible, effective, and available solutions to meet CDC's long-term contact tracing goals, while reflecting the CDC's public health needs and actual capabilities of airlines.

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<sup>4</sup> 5 U.S.C. § 551 *et seq.*

## **I. INTRODUCTION**

Airlines annually transport over four billion passengers and 52 million metric tons of cargo worldwide, employ over 10 million aviation professionals, support over 65.5 million jobs worldwide, and support \$2.7 trillion (3.6%) in global economic activity. Airlines are the backbone of international transportation. To that end, the airline industry knows firsthand the gravity of the situation presented by COVID-19. Accordingly, in addition to our constant and primary responsibility to ensure the safety of our passengers and crewmembers, we recognize our unique position and responsibility to help public health officials address public health threats, including CDC's response to COVID-19.

When COVID-19 became a public health threat, the airlines were among the first to respond, and we continue to respond as the COVID-19 threat evolves. Airlines help public health officials respond to outbreaks by adjusting services, diverting passengers to designated airports for screening, screening passengers, enhancing aircraft cleaning, transporting individuals to their country of citizenship, and voluntarily waiving flight change and cancellation fees. Compliant with CDC's pre-IFR rule, 42 C.F.R. § 71.4(a) ("Section 71.4(a)"), airlines provide the CDC with available passenger contact information as quickly as possible to respond to COVID-19.

However, airlines do not have all the passenger contact information that the CDC desires, nor can we validate contact information, now or in the future. Accordingly, airlines have proposed feasible, effective, and efficient alternative solutions beyond Section 71.4(a) to meet CDC's immediate COVID-19 contact tracing needs, including paper forms and building the CDC a website and mobile application for passengers to provide contact information directly to the CDC. In sum, throughout the COVID-19 public health threat, the airline industry has been an active and willing partner in developing reasonable and effective solutions. We pledge our

continued assistance and compliance, so long as the requirements are technologically feasible, tethered to the realities of the aviation industry, and reasonably tailored to address COVID-19.

In our discussions with the CDC, we have focused primarily on the capabilities of airlines, both in the near and long-term. On a global scale with 222 airlines flying internationally to and from the United States,<sup>5</sup> travel agents worldwide, and other third parties, the entire airline industry simply cannot modify its operations, systems, and processes, in less than 12 months, to collect and provide passenger contact information through existing airline data channels to the CDC. The constellation of systems designed in accordance with international standards, processes, and operations by scheduled passenger airlines are extraordinarily complex, and charter airlines face additional challenges because we have less interaction with passengers and their systems and operations are fundamentally different from those of scheduled passenger airlines. More fundamentally, forcing airlines to collect unverifiable passenger contact information will not fulfill CDC's public health mission to identify and contact passengers who may have been exposed to COVID-19 or any future communicable disease; only the government has the sovereign authority to require and enforce that passengers provide accurate contact information that is useful for CDC's public health follow-up purposes.

For these reasons and others explained herein, the IFR fails to adopt a rational solution for COVID-19 public health follow-up; is fundamentally flawed, overly broad, and legally deficient; fails to properly consider passenger privacy laws and international agreements; imposes undue burdens on private industry in contravention of the Administration's rulemaking policies; and sets the airlines up for failure with extreme unavoidable penalties for noncompliance. We submit that the CDC should:

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<sup>5</sup> Based on U.S. Department of Transportation ("DOT"), Bureau of Transportation Statistics ("BTS") T-100 data for the period of September 2018 through August 2019, including airlines carrying to the United States daily: (i) one or more passengers; or (ii) more than 0.5 tons of cargo.

1. Withdraw the IFR and undertake a full APA rulemaking process to revise Section 71.4 in a manner that addresses the long-term needs of CDC and creates effective solutions that take into account the airline industry's technical complexities; and
2. Adopt digital portals (*i.e.*, website and mobile application) and require passengers to provide contact information directly to the CDC for COVID-19, relying on CDC's explicit authority to compel individuals to provide such information.<sup>6</sup>

Alternatively, the CDC must, at the very least, revise the text of the new rules, 14 C.F.R. §

71.4(d)-(e) ("Section 71.4(d)-(e)"), to:

1. Limit its applicability to COVID-19; and
2. Allow an airline to submit passenger contact information through each airline's selected method (*e.g.*, paper, email spreadsheet, etc.) based on their capabilities that address identified gaps in contact information.

To be clear, airlines are not opposed to assisting CDC in collecting passenger contact information to combat the spread of COVID-19. We respectfully disagree, however, with the way that CDC imposed requirements to obtain passenger contact information in the IFR without considering what passenger contact information other federal agencies possess and without conducting due diligence with respect to feasible and more effective methods that address CDC's immediate COVID-19 needs.

In fact, the only solution for the CDC to meet its COVID-19 contact tracing needs is our suggested solution: an airline-designed but CDC-controlled website and mobile application services, through which passengers can directly send the CDC the passenger's contact and travel information. This solution has already been implemented in Korea and other countries.<sup>7</sup> With this solution, the CDC can, among other benefits:

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<sup>6</sup> See 42 C.F.R. § 71.20 (giving the CDC Director authority to require individuals to provide contact information, as well as other pertinent information to assist CDC's response to communicable diseases).

<sup>7</sup> See *e.g.*, <http://ncov.mohw.go.kr/selfcheck/> (providing access to download the Korean Self Diagnosis Mobile App which requires information regarding recent travel and at least one phone number: a phone number in Korea, an emergency contact phone number in Korea, or a roaming phone number), **Attachment 1**; BBC News, China Launches Coronavirus 'Close Contact Detector' App (Feb. 11, 2020), *available at* <https://www.bbc.com/news/technology-51439401> (explaining that Chinese mobile app), **Attachment 2**.



- Collect passenger contact information in as little as two weeks via the mobile application and up to four weeks via the website, making it a viable solution for COVID-19;
- Collect *accurate* contact information directly from passengers under the penalty of law;
- Without a rulemaking or lengthy industry implementation, quickly modify the passenger information requirements beyond that which is required from the airlines in the IFR, such as recent travel to specific countries, as well as contact and travel information from passengers on other modes of transportation (*i.e.*, rail, bus, and maritime, including cruise lines);
- Avoid the unnecessary complexities, substantial technical risks, costs, and long implementation times of creating and/or modifying integrated airline, online travel agent (“OTA”), global distribution systems (“GDS”), and U.S. Customs and Border Protection (“CBP”) systems, processes, and operations to get unvalidated contact information from the passengers, through the airlines (and OTAs and GDSs) and CBP, which is clearly unattainable to serve CDC’s immediate COVID-19 contact tracing needs;
- Avoid major CDC costs: A4A has offered to develop the website and mobile application at no cost to the U.S. government; and
- Avoid privacy issues related to airlines collecting and transferring passenger contact information to the U.S. government.

For these reasons alone, the CDC should withdraw the IFR and implement this solution urgently.

## **II. COVID-19**

Since the beginning of the COVID-19 threat, airlines have been actively involved in the response. In fact, the airline industry was communicating and coordinating with the CDC before the President’s Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus on January 31, 2020 (“January 31 Proclamation”) and the funneling of persons who were at risk of exposure in China to designated airports for screening by the CDC. During this early engagement, the CDC informed the airlines that the active entry screening protocol was in place, involving the U.S. government’s identification of passengers from Wuhan, China, medical screening of passengers at select airports, and the requirement of the completion of traveler health forms. Concurrently,

the CDC and CBP informed the airlines that they were collaborating to identify at-risk passengers from the Wuhan, China region on direct and indirect flights to the United States.

After the January 31 Proclamation, but before the IFR, airlines implemented the U.S. government's directives to stop carrying foreign nationals from China to the United States and funneled all other passengers that had been in China within 14 days to designated airports. We continued to engage with the CDC, CBP, and other agencies on possible next steps to help the response to COVID-19, including responding to any CDC requests for passenger contact information under Section 71.4(a) in a timely and comprehensive manner to the best of their ability. During this time, the CDC informed the airlines of its intent to mandate airlines' collection of passenger contact information in the very near term, based on the immediate threat presented by COVID-19 and its belief that existing passenger contact information coming from the airlines was not only incomplete, but "inaccurate," and the CDC had an immediate need for "quality" information. The CDC suggested that, since the last CDC rulemaking in 2016, airlines should have known that we would eventually have to develop a process to collect passenger contact information to help with communicable disease tracing, despite the final 2016 rule's preamble stating, in no uncertain terms, that airlines would not be required to collect additional passenger information beyond what airlines already collected and maintained. It also acknowledged that it would take the airlines many months to operationalize CDC's passenger contact information requirements.

During their limited interactions with the CDC, and more frequent interactions with representatives from the HHS, airlines raised many, if not all of the infeasibilities of the IFR discussed herein, including that airlines have no ability to validate the contact information that a passenger or travel agent provides; the need to consider alternative, faster, and more effective

solutions; that modifying the airline industry's systems would take at least 6-12 months, and likely longer;<sup>8</sup> that the CDC needs to identify and focus on addressing the U.S. government agency gaps in contact information; issues with the OTAs and GDSs; and domestic and international privacy issues. In response, the CDC has conveyed that it believed that the best way to ensure that passenger contact information is accurate is to verify the information with the passenger at the closest time of CDC's need for the information (*i.e.*, close to the time that the CDC conducts contact tracing). The CDC, to the extent it participated in these contacts, and representatives of HHS dismissed the airlines' proposed alternatives. Also, HHS representatives admitted that, if the COVID-19 threat ends before the airline industry can modify their systems to get the CDC the required information for COVID-19, the CDC would still want this information.

After the issuance of the IFR on February 7, 2020, which was posted online without warning to airline representatives, and prior to CDC's issuance of the related order, a HHS representative explained on a call with airlines on February 10, 2020 that the purpose of CDC's effort to obtain the passenger contact information was to facilitate "case management" for patients when they deplane in the United States and a "soft-handoff" of those patients from the CDC to state and local public health departments so that the patients get the follow-up care that they need. In the same discussion, the HHS official also explained that the IFR covers contact tracing. The CDC has also acknowledged that the scope of the IFR is vast and extends far beyond COVID-19, including all passengers arriving in the United States and any communicable disease, as the plain terms of the IFR make clear.

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<sup>8</sup> The airlines conducted further technical analysis and based on that analysis estimate that the modifications will take at least 12 months.

Because airlines cannot implement the IFR in any material way or with any degree of speed in the face of CDC's immediate COVID-19 needs, the airlines offered to implement a short-term solution, whereby airlines would manually collect passenger contact information for those passengers that were in China 14 days prior to attempted travel to the United States and manually input that information into the PNR. The airlines explained that this solution would not be scalable beyond 100-200 passengers per day, per airline, entering the United States with a China travel history, as a result of airlines operational and resource constraints. In other discussions about possible implementation options and the channels through which airlines could potentially send passenger contact information, CBP acknowledged that APIS cannot be modified in the short term. CBP also acknowledged that PNR does not exist for crewmembers.

On February 18, 2020, the CDC issued its first order to implement the IFR ("February 18 Order"),<sup>9</sup> for which airlines implemented the manual data collection and entry of passenger contact information into PNR for passengers from (or who traveled through) China. The airlines continued to engage the CDC on potential solutions that would help yield more effective collection of accurate passenger information to facilitate contact tracing. Specifically, the airlines have repeatedly offered to develop and pay for a website and mobile application to be used by CDC whereby passengers could enter the CDC's desired contact information, which could be transmitted immediately and directly to the CDC. According to the airlines' contractor, the mobile application could be functional in two weeks and the website could be functional in four weeks.

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<sup>9</sup> See CDC, Collection of Certain Data Regarding Passengers and Crew Arriving From Foreign Countries by Airlines, 85 Fed. Reg. 10,439 (Feb. 24, 2020) (Agency order, issued on February 18) (hereinafter "February 18 Order").

On February 19, 2020, the airlines submitted questions to the CDC requesting necessary guidance to facilitate compliance with the February 18 Order. While the CDC did eventually post answers to some of those questions on February 28, 2020, the airlines continue to have outstanding questions that are critical to facilitating their compliance.

Airlines are complying with the February 18 Order to the best of their capabilities. We are also working with a contractor to develop a website and mobile application for use by the CDC so that passengers may submit contact information directly to the CDC. On March 11, 2020, the President issued a third proclamation to restrict passengers traveling from the European Schengen Zone to the United States.<sup>10</sup> Today, according to the Department of Homeland Security's ("DHS") process for Americans returning from certain European countries, China, and Iran, **Attachment 3**, upon arrival, passengers will proceed to customs processing and undergo enhanced entry screening, which the U.S. government performs, including being "asked for contact information for local health authorities."<sup>11</sup> We understand that airlines will not be required to collect passenger contact information from such passengers and send it to CDC.

### **III. BACKGROUND**

To assess the sufficiency, adequacy, and legality of the IFR, it is imperative that the CDC first understand and consider the complexity of the circumstances, including the history, facts, and complexity of airline passenger data systems; the interoperability of airline passenger data systems with third-party systems; the information that the U.S. government received from airlines and passengers before the IFR; and the pre-IFR regulatory framework for the CDC to

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<sup>10</sup> See Proclamation – Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus (Mar. 11, 2020).

<sup>11</sup> See DHS, Department of Homeland Security Outlines New Process for Americans Returning from Certain European Countries, China, and Iran (March 13, 2020).

obtain passenger contact information from the airlines, including the regulatory history and airlines' compliance. As explained in Section V below, the CDC's failure to consider the following critical facts, renders the IFR fatally flawed.

A. Passenger and Crewmember Information

Airlines and passengers already provide substantial contact information to the U.S. government. *See Appendix B, Summary of Contact Information Available to the U.S. Government Before the IFR.* According to CDC's report following the 2017 final rule that implemented Section 71.4, discussed in Section III.D.3 below, the CDC appears to successfully leverage this existing information, as well as the supplemental information that airlines provide pursuant to Section 71.4(a), for public health follow-up and other purposes. It is important for the CDC to recognize that no major change to the airline industry's systems, processes, or operations that capture, transmit, and/or use passenger contact information, like the IFR will require, has been accomplished in less than 12 months from inception to full implementation.

1. *Passenger Name Record ("PNR")*

PNR is a commercial passenger information data set that scheduled passenger airlines have long used for reservation and ticketing business purposes. Charter airlines<sup>12</sup> typically do not have PNR because we do not normally sell individual seats to the public. The International Civil Aviation Organization ("ICAO") aptly describes PNR as "the generic name given to records created by aircraft operators or their authorized agents for each journey booked by or on behalf of any passenger."<sup>13</sup> Airlines and their agents have used PNR for their commercial and operational purposes long before airlines began transmitting PNR to the U.S. government for

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<sup>12</sup> Charter airlines do not operate on a schedule, but generally operate on customer demand and by contract, such as sports teams chartering an aircraft to travel to a competition.

<sup>13</sup> *See* ICAO, Guidelines on Passenger Name Record (PNR) Data, Doc. 9944 ¶ 2.1.2 (1st ed. 2010) (hereinafter "ICAO Doc. 9944"), **Attachment 4**.

security reasons. Because PNR is proprietary to each airline, the scope and collection of PNR data varies widely across airlines. A full description of PNR is provided in **Appendix C**.

Key facts about PNR include:

- Beyond a passenger's name, which all airlines collect and include in a PNR, no law, international standard, or other arrangement requires an airline's PNR to contain passenger contact information (*e.g.*, address, phone, or email); accordingly, some airlines' PNRs may not contain any contact information beyond an individual's name.
- The data that airlines capture for PNR depends on the existing systems and the systems of third parties (*e.g.*, GDS and OTAs), which may not be designed to capture, include in a PNR, or transmit passenger contact information.<sup>14</sup>
- PNR data only contains information that is provided by or on behalf of the passengers (*e.g.*, parent or OTAs), which may be provided up to a year in advance and cannot be verified by the airlines for accuracy or completeness.<sup>15</sup>
- It is internationally recognized that “[s]tates should *not* require or hold an airline responsible for submission of PNR data that are not already collected or held in the operator's reservation or [departure control system (“DCS”)]. An operator should be held responsible *only* for data that are available in its reservation system or DCS.”<sup>16</sup>
- After the CDC issues specifications for airlines to meet the IFR requirements, which has yet to occur, airlines estimate that it will take at least 12 months to modify existing systems to ensure that the CDC-specified passenger contact information is collected and included in a PNR, and, for airlines that do not have existing PNR-related systems (*e.g.*, charter airlines), it may take even longer depending upon the situation.

In 2001, Congress passed the Aviation and Transportation Security Act (“ATSA”), which responded to aviation security issues identified after the September 11, 2001 terrorist attacks and

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<sup>14</sup> Cf. IATA, Air Transport & Travel Industry: Principles, Functional and Business Requirements, PNRGOV 7 (Version 13.1, Aug. 2013) (“The specific data elements that might be available from an aircraft operator's system will also depend upon the type of air transport services provided by the operator . . . and by how and by whom the passengers' reservations were finalized.”) (hereinafter “IATA Principles”), **Attachment 5**.

<sup>15</sup> See *supra* note 13, ICAO Doc. 9944 at ¶¶ 2.1.2, 2.1.11, and 2.16.1 (“States should acknowledge that PNR data collected by aircraft operators cannot be verified for accuracy or completeness.”).

<sup>16</sup> *Id.* at ¶ 2.5.2 (emphasis added). It is also recommended that states should not take action against an operator nor should an operator be held legally, financially, or otherwise responsible for transferring PNR data that have been collected in good faith, but which are later found to be false, misleading, or otherwise incorrect. *Id.* at ¶ 2.16.1.

required airlines to provide to the U.S. government information or access to information regarding passengers and crewmembers.<sup>17</sup> Specifically, Congress required that airlines make PNR data available to the Customs Service (“Customs”) upon request.<sup>18</sup> Notably, even before this mandate, airlines voluntarily provided the U.S. Immigration and Naturalization Service (“INS”) and Customs access to reservations systems for the purpose of sharing PNR data. Accordingly, the U.S. government, through CBP, which replaced INS and Customs, has long had access to PNR, including for passengers at risk of COVID-19 exposure.

When implementing ATSA, Customs emphasized that airlines were required to make “any and all” PNR data elements relating to identity and travel plans available to Customs, but explicitly limited the scope “to the extent that the carrier in fact possesses the requested data elements in its reservation system and/or departure control system.”<sup>19</sup> It included that “there is no requirement that an air carrier collect any other Passenger Name Record information than the particular PNR data that the carrier already collects on its own and maintains in its electronic reservation/departure control systems.”<sup>20</sup> Under these PNR access requirements, an airline must also provide access to the airline’s flight schedule and the airline’s passenger flight lists,<sup>21</sup> which may help the CDC find additional passenger contact information. The CBP has not substantively changed these rules.<sup>22</sup>

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<sup>17</sup> Pub. L. No. 107-71 § 115 (2001) (codified at 49 U.S.C. § 44909) (hereinafter “ATSA”).

<sup>18</sup> *Id.*

<sup>19</sup> See Customs Service, Passenger Name Record Information Required for Passengers on Flights in Foreign Air Transportation to or From the United States, 67 Fed. Reg. 42,710 (June 25, 2002) (Interim rule) (hereinafter “PNR IFR”); 19 C.F.R. § 122.49d(b)(2). Airlines are required to ensure that their systems interfaced with Customs Service within 30 days of Customs contacting the airline to request an interface. *Id.* § 122.49d(c)(2).

<sup>20</sup> 19 C.F.R. § 122.49(b)(2).

<sup>21</sup> See 19 C.F.R. § 122.49d(c)(1).

<sup>22</sup> The regulation was recodified from 19 C.F.R. § 122.49b to 19 C.F.R. § 122.49d. See Bureau of Customs and Border Protection, Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft, 70 Fed. Reg. 17,820 (Apr. 7, 2005) (Final rule).



Notably, during the rulemaking, Customs acknowledged that “[g]enerally speaking, the PNR information contained in an air carrier’s automated PNR database may consist of as few as 5 data elements or in excess of 50 data elements, depending upon the particular record and carrier.”<sup>23</sup>

In sum, and in alignment with international standards and practices, including the many issued by ICAO and IATA discussed in **Appendix C**, CBP does not require airlines to collect and include specific information, like passenger contact information, in a PNR.

As explained in **Appendix C**, each airline would have to create and/or modify multiple systems to ensure that passenger contact information is collected and included in a PNR (or Advanced Passenger Information (“API”))<sup>24</sup> for transmission to CBP. The process to create or modify these systems is complex because the systems are interconnected—the systems, connections, and modifications must be thoroughly tested to prevent disruptions to other systems and uses (*e.g.*, security screening), as well as coordinated with third parties, including governments, OTAs, GDSs, and other airlines. For example, an airline’s passenger information systems may feed passenger data into the airline’s flight planning systems that calculate aircraft “weight and balance,” which is vital to aviation safety, including, among other factors, aircraft loading, takeoff and approach speeds, engine thrust settings, and required runway length. Accordingly, any system changes must be carefully planned, rigorously tested, and precisely executed. System errors can have serious consequences.<sup>25</sup>

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<sup>23</sup> See *supra* note 19, PNR IFR, 67 Fed. Reg. at 42,711.

<sup>24</sup> See *infra* Section III.A.2.

<sup>25</sup> See *e.g.*, Ingrid Melander and Tim Hephher, *New Computer Glitch Delays United Airlines Flights*, REUTERS (Oct. 14, 2016), available at <https://www.reuters.com/article/us-unitedairlines-delays-idUSKBN12E0N3> (reporting that an issue with United Airline’s weight reporting system delayed flights); Robert Wall and Alison Sider, *U.S. Airlines Report Delays Caused by System Fault*, The Wall Street Journal (Apr. 1, 2019), available at <https://www.wsj.com/articles/southwest-airlines-says-systemwide-technology-problem-affecting-flights-11554117011> (reporting that an issue with a third-party computer system, which helped dozens of airlines calculate aircraft weight and balance, caused substantial operating impacts); Nicholas Sakelaris, *British Airways*

As explained in Section III.C below, over one-third of major U.S. passenger airline bookings are indirectly purchased through travel agents and OTAs (and then through GDSs), which may be the only source of (limited) passenger information until the passenger checks-in with the airline, either online or at the airport. Accordingly, any passenger contact information solution developed to meet CDC's needs will have to account for the complex interoperability of both airline, ticket agent/OTA, and GDS systems to attempt to ensure that all passenger contact information is included in a PNR.

We conservatively estimate that scheduled passenger airlines need at least 12 months to ensure that all relevant systems (*i.e.*, reservation systems, kiosks, websites, mobile applications, etc.) are modified to capture and include specific passenger contact information in every PNR. Because of current operational and business processes, it is resource- and time-prohibitive to modify systems for a select population of passengers (*e.g.*, passengers traveling from a foreign country to the United States) or phase-in individual elements of passenger contact information (*e.g.*, updating the systems first for phone number and later for email address). In other words, all relevant systems must be modified for all required passenger contact information elements to be included in PNR.

We conservatively estimate that the costs to modify systems for most passenger airlines will be considerably more than \$1 million per airline and the total impact across airlines will far exceed \$164 million (based on \$1 million for each of the 183 airlines carrying passengers to the United States)<sup>26</sup>. The actual costs will be enormous—one airline estimates that the costs to

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*Cancels, Delays Hundreds of Flights After Computer Glitch*, UNITED PRESS INTERNATIONAL (Aug. 7, 2019) available at [https://www.upi.com/Top\\_News/World-News/2019/08/07/British-Airways-cancels-delays-hundreds-of-flights-after-computer-glitch/6631565185125/](https://www.upi.com/Top_News/World-News/2019/08/07/British-Airways-cancels-delays-hundreds-of-flights-after-computer-glitch/6631565185125/) (reporting that a computer glitch delayed or canceled hundreds of British Airways flights that affected more than 15,000 passengers and flights around the world).

<sup>26</sup> Based on DOT, BTS T-100 data for the period of September 2018 through August 2019, including airlines carrying one or more passengers to the United States daily.

modify its systems will be approximately \$23-46 million. Moreover, the collective costs to modify systems across the entire airline industry, including airlines, travel agents/OTAs, and GDSs, will be even greater. Importantly, these estimated costs do not include:

- Stakeholders' increased recurrent costs related to manpower, training, equipment, and programming to collect the required passenger contact information and ensure it is transmitted to airlines and then to the CDC;
- Airlines' increased real estate costs for additional airport counterspace to allow more agents to interact with passengers to get passenger contact information;
- Stakeholders' sunk costs to collect passenger contact information unnecessarily when the passenger ultimately decides not to board the aircraft to travel to the United States, including manpower to explain the passenger contact information requirement and address any privacy concerns, request that the passenger give contact information that is accurate, and collect and enter the passenger contact information;
- Stakeholders' costs to renegotiate the agreements between the following sets of stakeholders: (i) OTAs/travel agents and GDSs; and (ii) GDSs and airlines; and
- Passengers' burden to retrieve contact information that may not be readily available when booking a reservation or checking-in to their flight (*e.g.*, retrieving hotel address and phone numbers), as well as burdens on other industries to help passengers get the contact information (*e.g.*, hotel agents providing the hotel phone number and address to passengers).

It is also important that CDC recognize that airlines will have substantial operational impacts and resulting inestimable costs from the collection of passenger contact information at the airport when the passenger has not provided it to the airline (or relevant third-party) before the passenger arrives at the airport. For example, the collection of passenger contact information will result in longer wait times in airport check-in areas because the information can only be manually entered by the passenger or airline agent and cannot be automatically captured at a ticket counter or kiosk, like a scan of a passport. Airlines can only mitigate such impacts by dedicating additional resources (*i.e.*, purchase and installation of more kiosks, hiring of more agents, purchasing and installation of additional computers, etc.). For connecting passengers,

airlines will also have to dedicate additional resources at the gate. Moreover, the collection of passenger contact information at airports increases person-to-person contact between passengers and airline agents, raising the potential to spread COVID-19. The increased number of passengers waiting in unsecured terminal areas to provide the airline the passenger contact information will also raise security concerns for airlines, airports, local law enforcement, and the U.S. government.

In practice, and largely as a result of increased airline website and mobile application bookings, many airlines do collect some passenger contact information that the CDC requires in the IFR. Airlines generally collect and include the passenger's name in the PNR.

However, no airline or third-party system is designed to ensure the capture and transmission of the passenger contact information that the IFR requires via PNR. Even if an airline collects more contact information than the passenger's name, its systems may not be designed to include such information in the PNR, in part because it is not required to do so and to comply with privacy laws. As the CDC is aware, some airlines' systems do include address, phone number, and email address in the PNR. However, a PNR with multiple passengers may contain a single address, phone number, and email address, which may belong to one of the passengers or, as discussed in Section III.C.2 below, to a travel agency.

We understand from discussions with the U.S. government that it believes that airlines include a phone number in approximately 74% of PNRs and an email in approximately 54% of PNRs. The U.S. government has not explained the nature of the contact information gaps that it asserts are present, nor has it not committed to working with the airlines and other stakeholders to identify the gaps and the root causes for any gaps.

Some airlines can manually input passenger contact information into an existing PNR, which we are doing to ensure compliance with the IFR and the related CDC order. However, this manual entry is only possible on an extremely de minimis scale (*i.e.*, 50-100 people per day, per airline) because of operational processes and available resources. Specifically, airlines have largely automated the booking and check-in processes (*e.g.*, websites, mobile applications, and kiosks) to allow passengers to have a seamless and more efficient travel experience and reduce face-to-face interaction with airline agents. Because many passengers use these automated portals (and doing so reduces face-to-face interactions between passengers and airline agents that could spread COVID-19), airlines have reduced staffing that serves customers on a one-on-one basis and have limited personnel available at airports and airline call centers. Any increase of the manual collection of passenger contact information at airports and entry into existing PNRs, at any scale, would cause massive operational disruptions (*e.g.*, extremely long check-in lines, boarding processes, and call center wait times), require an increase in airline agents at the airport, and cause passengers to miss flights and connections.

Additionally, only limited numbers of airline agents have access to and are trained in updating PNR data. For example, some airlines do not allow new bookings at airport ticket counters or kiosks; customers must contact the airline's call center to book a flight. Therefore, airline agents at airport ticket counters or passengers at kiosks may be unable to update passenger contact information in the passenger's PNR. Also, airlines use common-use (*i.e.*, non-exclusive) aircraft gates that may not have the capability to update passenger contact information in an existing PNR because the shared-use computer at the gate is not connected to the necessary airline systems. An example scenario may play out as follows: a passenger is connecting from one airline to another, but the first airline has not collected, coordinated, or shared any passenger

contact information with the second airline because the first airline does not serve the United States. Therefore, the first opportunity for the passenger to share his or her contact information with the second airline (the airline transporting the passenger to the United States) is at a common-use gate, where the airline agent may not have access to the necessary systems to update the PNR with the passenger's contact information.

Even if an airline agent has the capability and is trained to make a change to passenger contact information in an existing PNR, the resulting delays in gate check-in and boarding would have significant impacts, including increased aircraft gate times; the rearrangement of slots and flight schedules; and, burdens on passengers (*e.g.*, increased passenger connection time and disrupted schedules). To avoid such impacts, airlines would have to implement unreasonable and costly mitigation efforts that cannot be accomplished in the short-term for COVID-19 (*e.g.*, adding personnel and computer resources at gates (common-use and exclusive)).

In fact, many passengers traveling to the United States from foreign destinations travel through multiple connections and travel on multiple airlines. Closing all passenger contact information sharing gaps between airlines, as well as between airlines and GDSs, including to attempting to improve the accuracy of passenger contact information, will take significant time, resources, and funding, and is impossible in a reasonable time to address immediate COVID-19 needs. Despite closing these gaps, the airline industry still cannot ensure the accuracy of the passenger contact information. For example, the second airline (the airline transporting a passenger to the United States) will not always have passengers' contact information from a connecting airline or ticket agent/OTA and will therefore have to solicit unverified contact information directly from passengers at the gate, which will result in delays.

It is important to recognize that substantial operational impacts would likely occur in any circumstance under the IFR, including more automated airline industry solutions or where an airline agent must manually collect passenger contact information directly from the passenger, regardless of the system through which the airline delivers the data to the U.S. government.

## 2. *Advance Passenger Information*

In ATSA, Congress required airlines to transmit passenger and crewmember manifests of international flights electronically to Customs before landing in the United States in a Customs-prescribed manner, time, and form, and containing full names, date of birth, citizenship, gender, passport number and country of issuance, and (if applicable) visa or resident alien card number of each passenger and crewmember.<sup>27</sup> This information is called API. Congress also acknowledged that airlines may provide API through the Advanced Passenger Information System (“APIS”), further described in **Appendix D**.<sup>28</sup> In 2002, Congress added the requirement that API include the individual’s U.S. address while in the United States.<sup>29</sup> CBP does not require the address for U.S. citizens, lawful permanent residents, or persons who are in transit to a location outside the United State.<sup>30</sup>

Key facts about API include:

- For contact information, airlines only transmit the passenger’s self-reported name and address (of a foreign national’s first night’s stay in the United States) through APIS to CBP, but the address information is unverified, and may include a general description of the location in the United States, if it is unknown by the passenger, and API only includes the

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<sup>27</sup> Pub. L. No. 107-71 § 115 (2001) (codified at 49 U.S.C. § 44909) (hereinafter “ATSA”). The Customs Service implemented this requirement in December 2001. *See* Customs Service, Passenger and Crew Manifests Required for Passenger Flights in Foreign Air Transportation to the United States, 66 Fed. Reg. 67,482 (Dec. 31, 2001) (Interim rule). Before ATSA, airlines were only required to send passenger manifests to the U.S. government following an aviation disaster outside of the United States. *See* 49 U.S.C. § 44909 (2000), **Attachment 6**.

<sup>28</sup> *See supra* note 27, ATSA § 115. Congress also provided that Customs may share this information with other Federal agencies for the purposes of protecting national security. *Id.*

<sup>29</sup> *See* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 § 402.

<sup>30</sup> *See* 19 C.F.R. § 122.49a.

permanent residence for crewmembers (not the location while in the United States).

- API does not include phone numbers or email addresses.
- API contains non-contact information (*e.g.*, passport information) that the U.S. government can leverage to identify passenger contact information that the U.S. government already has in its possession, including through the U.S. government systems discussed in Sections III.A.3-5 below.
- The foundational data element of APIS is the information from passports, which are machine-readable to facilitate data entry and reduce errors. Additional passenger contact information beyond what is already contained in API will not be machine readable—all information must be entered manually, substantially increasing booking and check-in times, as well as the potential for errors.
- Airlines compile API from multiple systems that would need to be modified to ensure capture and inclusion of specific passenger contact information in API and transmission to CBP. CBP, OTAs, and GDSs would also need to modify their systems to capture, transmit, and/or receive the contact information that is not already required by the APIS regulations (*i.e.*, phone numbers, email, and a crewmember's address in the United States).
- Despite very close collaboration between all stakeholders, APIS changes have historically taken years to develop and implement because APIS is designed to collect verifiable biographic information which can be collected in an automated manner. Modification of the APIS framework to include manually entered and unverifiable passenger contact information for purposes of CDC's contact tracing would represent a significant departure from the API framework and standards.

Like PNR systems, we anticipate that airlines will need at least 12-18 months to modify their systems to transmit the CDC-required passenger contact information as API. And, like PNR, this timeframe is exclusive of the time it will take to ensure that all APIS-related systems remain interoperable, including those of CBP, travel agents/OTAs, GDSs, and other airlines. Unlike PNR, APIS changes will also require implementation of changes by CBP, for which the timeframe and costs are unclear. Also, airlines that do not have automated systems to collect passenger contact information and transmit it through APIS (*i.e.*, some charter or smaller



airlines) will likely require a longer time to develop the requisite systems that collect the information, process it, connect with CBP, and transmit the information to the CBP.

We conservatively estimate that the system modification costs per airline will easily exceed \$1 million per airline and the total cost to the airline industry, including all the airlines (passenger and cargo), travel agents/OTAs, and GDSs will far exceed \$164 million. Like PNR, this estimate is exclusive of other indirect costs to and operation impacts on airlines and passengers. The indirect costs and operational impacts associated with PNR (*e.g.*, increased recurrent costs, real estate costs, sunk costs, passenger burdens, increased wait times, etc.), discussed in Section III.A.1 above, will also be incurred if CDC requires that the IFR passenger contact information be sent as API.

Unlike scheduled passenger airlines, which collect passenger information in various forms and systems, charter airlines typically limit their collection of passenger information to the data elements required as API and submit such data via APIS. Accordingly, charter airlines are unable to unilaterally modify their API submissions—CBP will have to modify systems before charter airlines can submit the CDC-required passenger contact information as API.

### 3. *Electronic System for Travel Authorization (“ESTA”)*

The Secure Travel and Counterterrorism Partnership Act of 2007 required that the DHS implement an electronic travel authorization system and other measures to enhance the security of the Visa Waiver Program (“VWP”).<sup>31</sup> Pursuant to this mandate, CBP developed ESTA—“an automated system used to determine the eligibility of visitors to travel to the United States under the [VWP] and whether such travel poses any law enforcement or security risk.”<sup>32</sup>

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<sup>31</sup> Pub. L. No. 110-53 § 711 (Subtitle B of the Implementing Recommendations of the 9/11 Commission Act of 2007).

<sup>32</sup> CBP, ESTA Frequently Asked Questions, *available at* <https://esta.cbp.dhs.gov/faq> (hereinafter “ESTA FAQ”) (What is the Electronic System for Travel Authorization?), **Attachment 7**.

Passengers traveling under the VWP must submit biographic (including contact) and travel information to ESTA to apply for an ESTA authorization.<sup>33</sup> CBP has confirmed that a passenger must specifically provide, among other information:

- Name (first name and surname), date of birth, country of citizenship and residence;
- Passport information (number and issuing country);
- Telephone number (home or cellular) and email address;
- Contact phone number and email address;
- Destination address; and
- Employment address, phone number, and email.

Additionally and importantly, applicants must answer whether the applicant has any communicable diseases.<sup>34</sup>

All passengers traveling under the VWP, even if merely transiting through the United States, must apply and have an ESTA authorization.<sup>35</sup> The passenger should apply no later than 72 hours before departing for the United States and the authorization is valid for two years or until the passenger's passport expires.<sup>36</sup> The average time at which passengers submit the application to CBP before their travel is unclear.

In April 2007, leveraging the collaborative development of APIS Quick Query ("AQQ") messaging,<sup>37</sup> the airline industry became involved in the development of the ESTA program because CBP and airlines sought to incorporate a prospective VWP passenger's ESTA status as a component of the passenger's boarding eligibility status.<sup>38</sup> Approximately 14 months later in

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<sup>33</sup> See 8 C.F.R. § 217.5(a).

<sup>34</sup> See DHS, Privacy Impact Assessment Update for the Electronic System for Travel Authorization 8 (ESTA) (Feb. 17, 2016) (adding severe accurate respiratory illness capable of transmission to other persons and likely to cause mortality to the list of communicable diseases in the ESTA application), **Attachment 8**.

<sup>35</sup> See *supra* note 32, ESTA FAQ (Do I need to apply if I'm only transiting the United States en route to another country?).

<sup>36</sup> See *id.* (How long is my ESTA valid for?).

<sup>37</sup> See *infra* Appendix D at 1-2.

<sup>38</sup> See CBP, Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program, 73 Fed. Reg. 32,440, 32,443 (June 9, 2008) (Interim final rule).

June 2008, CBP issued an ESTA interim final rule that became effective 2 months later in August 2008, at which point ESTA was available to travelers.<sup>39</sup> ESTA authorization did not become mandatory for all non-immigrant aliens traveling under the VWP until January 2009.<sup>40</sup> Because the airline industry was working collaboratively to develop the requisite systems and electronic messaging, CBP supported a period of informed compliance to increase awareness for the traveling public and to give the industry an opportunity to modify their systems. In mid-January 2010, the CBP announced a 60-day transition period from informed compliance to full compliance enforcement on March 21, 2010.<sup>41</sup> In the end, it took CBP and the airline industry nearly three years from the inception of ESTA to full implementation.

#### 4. *Electronic Visa Update System (“EVUS”)*

EVUS is an automated system that determines eligibility to travel to the United States for temporary business or pleasure on a U.S. visitor Visa, class B1, B2, or B1/B2, which are generally valid for 10 years.<sup>42</sup> EVUS enrollment is required for citizens and nationals of the People's Republic of China (“China”).<sup>43</sup> Eligible passengers must enroll with EVUS at any time prior to boarding for travel to the United States.<sup>44</sup> Notably, like ESTA, the purpose of EVUS is for the U.S. government to obtain updated biographic information from repeat visitors who travel

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<sup>39</sup> *Id.*

<sup>40</sup> See CBP, The Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program 73 Fed. Reg. 67, 354 (Nov. 13, 2008) (General notice).

<sup>41</sup> See Letter from T. Goyer, Exec. Dir. Admissibility and Passenger Programs, CBP, to B. Kostuk, Managing Dir. Of Passenger Facilitation, Air Transport Assoc. (Dec. 18, 2009), **Attachment 9**. CBP issued final rules for ESTA in 2015. See CBP, Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program and the Fee for Use of the System, 80 Fed. Reg. 32,267 (June 8, 2015) (Final rule).

<sup>42</sup> See CBP, EVUS Frequently Asked Questions, *available at* <https://www.evus.gov/#/faq> (hereinafter “EVUS FAQ”), **Attachment 10**.

<sup>43</sup> *Id.* (Who is required to enroll with EVUS?).

<sup>44</sup> *Id.* (If I have made travel plans, when should I enroll with EVUS?).

to the United States multiple times over the span of a long-term visa.<sup>45</sup> CBP has confirmed that to enroll in EVUS, a passenger must provide, among other information:

- Name (first name and surname), date of birth, and country of citizenship and residence;
- Address, telephone number (home or cellular), and email;
- Destination address; and
- Communicable disease(s).

An EVUS notification of compliance, which is the EVUS approval, is valid for two years.<sup>46</sup> The average time at which a passenger submits the application to CBP before their travel to the United States is unclear.

Like ESTA, airlines were instrumental in the development and implementation of EVUS. It took approximately 13 months from initial outreach to the industry to reach full implementation of EVUS. It is important to recognize, however, that the implementation of EVUS was largely facilitated by leveraging the existing AQQ systems and messaging that was implemented with ESTA (which took nearly three years to fully implement). Despite leveraging existing systems and messaging, the implementation was resource intensive. For example, one airline expended approximately 460 hours (or 58 eight-hour days) to update the airline's mainframe systems to recognize the EVUS messaging and properly action it. It took additional time for the airline to update check-in applications to recognize EVUS messaging. Some airlines required even more time to update their systems to recognize the EVUS-specific messaging.

##### 5. *U.S. Passport and Visa Application Information*

Another U.S. government collection point for traveler information are the application processes for a U.S. passport or a U.S. visa. These application processes generally capture contact information that must be accurate under penalty of law. In the IFR, it is unclear:

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<sup>45</sup> See DHS, Establishment of the Electronic Visa Update System, 81 Fed. Reg. 72,481, 72,482 (October 20, 2016).

<sup>46</sup> See 8 C.F.R. § 215.24

- Whether the CDC has considered the contact information that is available in these applications and/or determined the currency of such information (*i.e.*, time between application and travel);
- Whether the CDC and relevant agencies have examined the possibility of requiring applicants to update their contact information in the applications to capture the contact information that the CDC requires of airlines in the IFR; or
- Whether the CDC and relevant agencies have explored the possibility of creating systems akin to EVUS or ESTA through which passport and visa application information could be updated to ensure timely collection of contact information from travelers.

B. Crewmembers

Generally, airlines have contact information for their crewmembers, including home address, phone number, and email address. Airlines also typically have an address for crewmembers who are traveling as an operating crewmember away from their home, such as the hotel where the crewmembers are staying. However, on a flight-by-flight basis, airlines do not collect and/or validate the crewmembers' contact information that an airline has in its files.

A PNR is not created for operating crewmembers. Apart from APIS, discussed in Section III.A.2 above, airlines simply do not have systems or processes to collect, update, and transmit through existing channels on a flight-by-flight basis, a crewmember's contact information, and especially not the phone numbers or email addresses that may be the best way to contact them while they are in the United States.

We also note that airlines have taken measures to protect crewmembers who travel to locations subject to a travel restriction or warning. These programs, which are based on Federal Aviation Administration ("FAA") and CDC guidance,<sup>47</sup> ensure crewmembers are protected while on duty and during rest, and monitor crewmembers' health on an ongoing basis. As such,

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<sup>47</sup> See *e.g.*, FAA, SAFO 20003 (Mar. 12, 2020) (2019 Novel Coronavirus: Interim Health Guidance for Air Carrier and Crews), **Attachment 11**.

the CDC should regard flight crewmembers operating with health protections differently from ordinary travelers.

As we have advocated since the CDC issued the IFR, we maintain that crewmembers should be exempt from the IFR and any related CDC order because of the health services already provided by airlines and the burdens of creating or modifying systems to track pilot information on an individual flight basis.

C. Third-Party Bookings Through Other Airlines, OTAs, and GDSs

It is critical that CDC understand the third-party booking process and the complex interplay between multiple airlines, OTAs, and GDSs, particularly given the substantial volume of bookings through OTAs and travel agents.<sup>48</sup>

1. *Bookings Through Other Airlines*

Airlines enter into various agreements that allow flights of multiple airlines to be booked on a single itinerary and in many cases have infrastructure to allow seamless connections between those flights. This includes interline and codeshare arrangements. An interline arrangement can, among other things, help airlines transfer a passenger and their baggage between the airlines when the passenger connects from one airline to the other, preventing the passenger from having to get tickets from each airline and retrieve their checked baggage between the flights. Because this is the most basic relationship between airlines, an interline arrangement typically involves the least amount of shared information and it is less likely that the airlines' systems are designed to collect, much less share, passenger contact information. Furthermore, if the first airline of the passenger's travel does not serve the U.S. directly, it is

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<sup>48</sup> Based on publicly available information and A4A research, approximately 36% of all bookings with A4A members are indirect bookings (e.g., OTAs) and some of A4A's individual members' bookings are approximately 50% indirect.

very likely that such airline will never collect the passenger contact information required by the CDC. If the second airline is transporting the passenger from a foreign destination to the United States, that second airline will likely have to solicit the passenger's contact information directly from the passenger at the gate, which will have substantial implications that are discussed in Sections III.A.1-2 above.

A codeshare arrangement allows two or more airlines to publish and market a single flight operated by one of the airlines using the marketing airline's code. The scope and depth of the cooperation between airlines varies under the codeshare arrangement—from a simple bilateral codesharing to complex alliances involving many airlines—although, the relationship is typically more cooperative than a basic interline arrangement. It is important to note, however, that no two arrangements, whether interline or codeshare, are identical, and the scope and depth at which information is shared between the airlines is dependent upon the arrangement and the airlines' existing systems.

Additionally, airlines may be hosted by other airlines and/or on different systems at different airports, bringing more systems and complexity into consideration before any modification can be made for the IFR to capture and transmit passenger contact information. For example, a U.S. airline may rely on the personnel and/or systems of their codeshare partners at a foreign airport, requiring additional coordination between the airlines.

In sum, before modifying systems to capture and include specific passenger contact information in PNR or API, airlines would need to assess their arrangements and system connections with each and every airline with whom the airlines share passengers in each and every country the airline serves. Each airline would have to determine interoperability and potential obstacles to ensure that transfer of every passenger's contact information is successful.

Additionally, many regional airlines that codeshare and operate under their mainline partners flight numbers typically do not own reservation systems. This means that these regional airlines do not own or have access to passenger information. Therefore, these regional airlines are only responsible for submitting crewmember information to CBP and complying with the API requirements. It is illogical to hold such regional airlines responsible for providing passenger contact information that we simply do not have and penalizing them for lacking the infrastructure to capture and share passenger contact information with the U.S. government.

## 2. *Bookings Through OTAs/Travel Agents/GDSs*

Traditional travel agencies and OTAs typically connect through GDSs to book travel with an airline. Except the information that an airline requires for booking, the information that is exchanged between the travel agent/OTA and the GDS (*e.g.*, contact information) depends upon the arrangement and the interoperability of systems between the travel agent/OTA and GDS. We expect that the scope of exchanged information varies widely and submit that the CDC must ask travel agents/OTAs and GDSs about the details regarding their relationships and data exchange.

Travel agents/OTAs are not subject to the IFR and face no consequence for not sharing complete or accurate passenger contact information. In fact, we believe that travel agents/OTAs are disincentivized to share passenger contact information because they want to keep that information confidential and maintain the relationships with their customers. To require that travel agents/OTAs provide passenger contact information, we expect that every relevant system would need to be updated (including airlines, GDSs, and travel agents/OTAS) and contracts would need to be amended to attempt to ensure compliance. Moreover, private entities, especially those outside of the United States, are unlikely to agree to contractual changes unless they are subject to a government mandate for every party to do so. Notably, thousands of travel



agents and OTAs exist around the world and we expect that it would take years to ensure all travel agents and OTAs were up-to-date and compliant. We do not expect that it could be accomplished to respond to COVID-19. And, even if CDC and HHS have the authority to regulate OTAs, travel agents, or GDSs, and it is unclear that they do, the airlines would still be unable to validate the accuracy or meaningfully mandate compliance by these third parties.

The same complexities exist at the next level between GDS and the 183 passenger airlines that operate to and within the United States. Each GDS has its own system that would have to be modified to capture passenger contact information. That modification would have to be tested against each airline system (and travel agents/OTAs systems) after the airline system has been updated to receive the passenger contact information. Each GDS has an arrangement with each airline, which would have to be reviewed and possibly amended to ensure that any passenger contact information that the GDS captures is then shared with the airline.

We also note that, if CDC does not expect that travel agents, OTAs, or GDSs are part of the solution to collect passenger contact information—which would make the airlines the only parties responsible for collecting the information, we expect that the rules will have a real and substantial impact on passengers. Specifically, many passengers that book through travel agents/OTAs will have to provide their contact information to the airline(s) upon check-in or before departure, which will add a substantial amount of time to that passenger's itinerary. This could lead to missed flights and duplicative collection of passenger contact information that passengers already provided to travel agents/OTAs but was not subsequently shared with the airlines.

D. Section 71.4 History and Airline Compliance

The CDC twice considered imposing rules that require that airlines collect passenger contact information that the airlines do not ordinarily collect in their existing processes and

disclose such information to the CDC. In each instance, the CDC undertook a full APA rulemaking process and never determined that airlines must collect more passenger contact information than we already collect and maintain.

1. *2005 CDC Rulemaking*

In 2005, CDC proposed that each airline must develop a plan to ensure that it would solicit information from passengers and crewmembers on domestic flights operating out of certain airports and on all international flights.<sup>49</sup> The proposal was not limited to passengers who may be at risk of exposure to a communicable disease.<sup>50</sup> If the rules had been finalized, airlines would have been required to submit a plan six months after the final rule and prepared to transmit the information electronically to the CDC two years after completion of the plan.<sup>51</sup> In the preamble to the proposed rules, the CDC acknowledged the airlines' history of cooperation and that the "primary responsibility for locating passengers rests with public health authorities."<sup>52</sup>

A4A (then called Air Transport Association, Inc.) and IATA submitted extensive comments, **Attachments 12 and 13**, which echo many of the facts and concerns that are raised in these comments to the IFR. Notably similar issues that were raised include, but are not limited to: information validation issues; inadequate consideration of less costly alternatives, including a U.S. government-controlled portal for direct submission from passengers; issues with

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<sup>49</sup> See CDC, Control of Communicable Diseases, 70 Fed. Reg. 71,892 (Nov. 30, 2005). The information included (in order of the relative utility of each piece of data for contact tracing): full name, emergency contact information, flight information, at least one current phone number (in order of preference: mobile, home, pager, or work), email address, current home address, passport number or travel document number, name of traveling companions or group, returning flight (date, airline number, and flight number), and if necessary to prevent introduction, transmission, or spread of communicable disease, additional information in the airlines possession.

*Id.*

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

<sup>51</sup> *Id.* at 71,931

<sup>52</sup> *Id.* at 71,898.

travel agents and GDSs; the disconnect between the rules and CDC's stated intent, including an overly broad scope; the inadequate consideration of information already collected by the U.S. government; and privacy concerns.

Without explanation, the CDC abandoned the 2005 rulemaking and the CDC has not provided any apparent basis to now shift the responsibility of collecting contact information to the private sector, let alone to one specific segment of the industry.

## 2. 2016 CDC Rulemaking

In 2016, the CDC proposed Section 71.4.<sup>53</sup> Notably, the information that CDC directed airlines to report is limited to that which is “already available and maintained by the airline,” and the transmission of such information must be in a format “available and acceptable to *both* the airline and the CDC.”<sup>54</sup>

The only change between the proposed and final rules was the inclusion of Section 71.4(c), requiring the CDC to publish and seek comment on a report evaluating the burden of Section 71.4 on affected entities and duplication of activities in relation to mandatory passenger data submissions to DHC/CBP.<sup>55</sup> The CDC was also required to include recommended actions to streamline and facilitate the use and transmission of any duplicate information collected.

In the preamble to the proposed rules, the CDC acknowledged that, under the process that was in effect before 71.4, airlines may not be in possession of the passenger contact information sought by HHS/CDC and may not be able to transmit contact data to HHS/CDC in a timely manner.<sup>56</sup> It stated that the purpose of the rulemaking was to codify the existing practice at that

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<sup>53</sup> See CDC, Control of Communicable Diseases, 81 Fed. Reg. 54,230 (Aug. 15, 2016) (hereinafter “2016 NPRM”); CDC, Control of Communicable Diseases, 82 Fed. Reg. 6,890 (Jan. 19, 2017) (hereinafter “2017 Final Rule”).

<sup>54</sup> See 42 C.F.R. § 71.4(a) (emphasis added).

<sup>55</sup> See CDC, Report as Required by the 2017 Control of Communicable Diseases Final Rule (hereinafter “CDC 2017 Report”), available at <https://www.cdc.gov/quarantine/42-cfr-71.html>, **Attachment 14**.

<sup>56</sup> See *supra* note 53, 2016 NPRM at 54,251.

time. The CDC also acknowledged that “airlines are not required to verify the accuracy of the information collected, and airlines are not required to collect additional information from passengers than already collected and maintained by the carrier.”<sup>57</sup> It stated that “[b]ecause airline manifest data are often insufficient to contact potentially exposed travelers reliably, CDC will supplement these data with information from CBP, including APIS and Passenger Name Record (PNR), consistent with current practice.”<sup>58</sup> Notably, according to the CDC’s subsequent report, discussed in Section III.D.3 below, it appears that the CDC was successful in getting at least some contact information for each passenger through this process.

In joint comments, the airline trade associations responded to the CDC’s proposed rules, **Attachment 15**, which raised issues similar to those made herein.

In the final rules, the CDC reiterated the acknowledgement that airlines were not required to verify accuracy or collect additional information already maintained by the airlines.<sup>59</sup> Notably, just over three years ago, the CDC concluded that the final rules were “the *best* solutions for protecting U.S. public health while allowing for continued travel,” while also being compliant with the policy that the U.S. government’s regulatory system must protect public health, welfare, and safety while promoting economic growth, innovation, competitiveness, and job creation, while being based on the best available science.<sup>60</sup> The CDC also acknowledged that “passengers are not required by HHS/CDC to submit specific data elements provided by

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<sup>57</sup> *Id.* at 54,251. In the rulemaking, CDC also considered the alternative of airlines voluntarily complying with the data sharing requirements and HHS/CDC would not solicit contact data from airlines. The CDC determined that the proposed rules met their contact tracing requirements. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *supra* note 53, 2017 Final Rule at 6,928.

<sup>60</sup> *Id.* at 6,930.

passengers.”<sup>61</sup> In other words, passengers are not obligated to provide their contact information to airlines. This remains true under the IFR.

3. *CDC Report on Section 71.4(a) and Airlines Compliance under Section 71.4(a)*

Pursuant to the 2017 final rules, the CDC issued a report evaluating the burden of Section 71.4 and the potential duplicative burdens that the regulatory provisions have on the airline industry.<sup>62</sup> In the report, the CDC acknowledged that it makes use of information from CBP’s National Targeting Center (“NTC”) via APIS with two analysts co-located at NTC who conduct data searches to supplement passenger contact information provided by airlines. According to the report, the CDC signified that it intended to maintain its current practice of obtaining information from CBP to minimize requests on airlines. The report also indicated that after the effective date of the final rules, airlines sent passenger information to the CDC in a relatively timely manner for urgent requests, with all airlines responding within 72 hours and most responding within 24 hours. Additionally, the CDC confirmed that it was able to provide at least one piece of contact information to health departments for 99.9% of travelers both before and after the regulations went into effect. It also confirmed that it had increased the amount of data sent to health departments after supplementing the data received from airlines with additional data obtained from CBP’s NTC. According to the report, the CDC is able to provide the contact information elements to health departments at the rates in **Table 1** below.

Since the promulgation of Section 71.4(a), airlines have been compliant with CDC’s requests for information. We are not aware of any instance in which an airline has refused to

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<sup>61</sup> *Id.* at 6,928.

<sup>62</sup> *See supra* note 55, CDC 2017 Report at \*8. Based on the responses of industry participants, CDC did not identify any increased burden or duplication of effort as a consequence of the 2017 final rule. *Id.* at \*3.

give the contact information required under Section 71.4(a). Airlines have been fully compliant with the requirements of 71.4(a) for COVID-19.

**Table 1. CDC Report on 71.4 – Rate CDC Shared Passenger Contact Information to Health Departments**

<b>Passenger Contact Information Element</b>	<b>Post-2017 Rate CDC Provided Information to Health Departments</b>
U.S. Address Category 1 (any address information)	95.1%*
U.S. Address Category 2 (complete address information)	98.8%*
Email Address	79.9%
Single Phone Number	91.1%
Two or more phone numbers	53.8%*

\* indicates that differences were significant at the 95% level based on both Fishers exact test for pairwise comparisons and logit models that controlled for urgency of requests and for foreign v. domestic carriers.

#### **IV. THE IFR SIDESTEPS REQUIRED STATUTORY PROCEDURE**

The aforementioned circumstances, including the impossibility of airlines to meet CDC’s goal to collect *accurate* passenger contact information for COVID-19, which was well-known to the CDC, underscores the critical need for the CDC to have undertaken a fully informed rulemaking process. Moreover, the shortcomings of the IFR will become increasing apparent and problematic for airlines, including their capability to comply and increased potential for unavoidable liability, especially as the CDC issues more orders under the IFR.

##### **A. CDC Failed to Provide Sufficient Public Notice and an Opportunity to Comment**

The APA requires an agency to give advance notice of a proposed rulemaking and an opportunity for all “interested persons” to comment.<sup>63</sup> The APA also requires that a substantive

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<sup>63</sup> See 5 U.S.C. § 553(c). Federal agencies are required, prior to the promulgation of any regulation, to publish in the Federal Register a general notice of proposed rulemaking that includes: (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id.* at § 553(b).

rule be published at least 30 days before it becomes effective.<sup>64</sup> By issuing the IFR without notice and comment, the CDC did not provide stakeholders an opportunity to request clarification and necessary changes to the burdensome and vague rule, in violation of fundamental principles of agency rulemaking.<sup>65</sup>

Airlines appreciate that COVID-19 poses a serious public health event and poses certain logistical challenges to various government agencies, including CDC, but the COVID-19 outbreak does not justify an exception to notice and comment rulemaking for this particular rule. CDC's invocation of the APA's good-cause exception<sup>66</sup> is not well taken considering the CDC's past rulemakings and the CDC's preexisting expectation that upcoming global communicable disease threats will require passenger contact information.<sup>67</sup> Moreover, the movement of people and goods in international air transportation, which has been occurring for more than eight decades, is neither an emergency nor the basis of a good-cause exception that justifies a rule of general and indefinite applicability bypassing the procedural protections of the APA.

Additionally, the exception generally applies where Congress has specifically authorized an exception or mandated rulemaking on such an expedited schedule that public notice and comment would be impracticable.<sup>68</sup> Neither of those predicates exists here. Congress has not

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<sup>64</sup> *Id.* at § 553(d).

<sup>65</sup> *See id.* § 553.

<sup>66</sup> In issuing the IFR, CDC improperly claimed the “good cause” exception to § 553 applied: “HHS and CDC therefore conclude that there is good cause to dispense with prior public notice and the opportunity to comment on this rule before finalizing this rule. For the same reasons, HHS and CDC have determined, consistent with section 553(d) of the APA, that there is good cause to make this interim final rule effective immediately upon filing at the Office of the Federal Register.” *See supra* note 2, IFR at 7,878.

<sup>67</sup> *Cf. Am. Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983) (rejecting an argument that an IFR was necessary because “any delay would leave lives at risk” and “[s]uch an argument could as easily be used to justify immediate implementation of any sort of health or safety regulation, no matter how small the risk for the population at large or *how long-standing the problem.*”) (internal citations omitted and emphasis added).

<sup>68</sup> *See* 5 U.S.C. § 553(d) (excepting notice and comment “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

authorized the CDC to promulgate the current rule as an IFR. Whereas Congress specifically gave the CDC interim final rulemaking authority in various other statutory provisions, it did not bestow the statutory authority on which the CDC relied in issuing the IFR. That distinction by itself is determinative: the CDC has no inherent authority to act in a manner inconsistent with the authority granted to it by Congress.<sup>69</sup> Nor does Congress require the CDC to impose regulations within a certain time frame in this instance.

By failing to provide notice and an opportunity to comment, the CDC violated this central procedural requirement of the APA.<sup>70</sup> CDC's justification for the IFR obfuscates the considerable procedural flaws of CDC's action. Exceptions to the APA's notice requirement for "good cause" are "to be narrowly construed and only reluctantly countenanced."<sup>71</sup> As a general matter, the opportunity for the regulated community to comment is itself in the public interest.<sup>72</sup>

Airlines' objection to the procedural flaws of the IFR is no mere formalism. The notice requirements of 5 U.S.C. § 553 "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give

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<sup>69</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (explaining that interim final rulemaking is an exception to notice and comment allowed as "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm.").

<sup>70</sup> See *Ass'n of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 461 (D.C. Cir. 2012) (agency violates the APA when it does not give notice of provisions of a regulation, thus depriving the public of the chance to comment on those provisions); *Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009) (explaining that the deprivation of procedural notice and comment protections under the APA is actionable harm).

<sup>71</sup> *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (internal citations omitted). Courts carefully scrutinize an agency's justification for invoking the "good cause" exception. See *Mid-Tex Elec. Co-op., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("[O]ur inquiry should be a close one."); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) ("[C]ircumstances justifying reliance on this exception are 'indeed rare' and will be accepted only after the court has 'examine(d) closely proffered rationales justifying the elimination of public procedures.'" (quoting *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1157 n. 6 (D.C. Cir. 1981))).

<sup>72</sup> See *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012) ("The public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."); *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018) (regarding notice and comment as beneficial to the public interest).



affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”<sup>73</sup> After such notice is published, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>74</sup> Agencies must consider the comments presented and provide a “concise general statement” of the basis and purpose for the final rules.<sup>75</sup>

Here, CDC’s failure to engage industry prior to issuing a rule that is detached from the realities of modern aviation has left the industry flummoxed (not to mention vulnerable to significant civil and criminal penalties for non-compliance).<sup>76</sup> As indicated by the requests for clarification, the IFR contains multiple provisions that are unclear, inconsistent, or require additional information and explanation before airlines can comply. Even as these comments are submitted, CDC has not provided a full response to industry questions and has failed to address certain questions, the answers to which are essential to stakeholders responding to the impact of the IFR meaningfully. Because CDC failed to provide the opportunity for comment that is fundamental under the APA, the IFR is fatally defective.

CDC has not adequately explained the importance of the public interest or even alleged a systemic threat that could constitute good cause.<sup>77</sup> CDC did not point to any separate statutory

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<sup>73</sup> *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

<sup>74</sup> See 5 U.S.C. § 553(c).

<sup>75</sup> *Id.*

<sup>76</sup> Meanwhile, the government’s action of imposing an unfeasible, immediate burden on airlines has also caused industry to be portrayed unfairly in the press, as though it is not taking the concerns posed by COVID-19 seriously, which cannot be further from the truth. See, e.g., <https://www.washingtonpost.com/business/2020/03/02/airline-data-cdc-coronavirus/>, **Attachment 16**.

<sup>77</sup> See, e.g., *Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 709 (D.C. Cir. 2014) (Agency must “articulate a satisfactory explanation for its action.”). See also *Mobil Oil Co. v. Dep’t of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (“It is axiomatic that a mere recital of good cause does not create good cause. Similarly, a desire to provide immediate guidance, without more, does not suffice for good cause.... [I]f the conclusory statement that normal procedures were not followed because of the need to provide immediate guidance and

authority allowing it to promulgate the IFR on an interim basis, and as noted, CDC does not have that authority. The Public Health Service Act<sup>78</sup> (“PHSA”), on which CDC relies for its authority, is clear when it provides CDC with the authority to promulgate interim final rules.

Congress did not extend that authority to public health emergencies or quarantine. For example:

- § 239b. Smallpox vaccine injury table: “The Secretary shall establish by interim final regulation ....”
- § 247d–6d. Targeted liability protections for pandemic and epidemic products and security countermeasures (c)(2)(A): “The Secretary ... shall promulgate regulations, which may be promulgated through interim final rules ....”
- § 300gg–92. Regulations: “The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter. The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.”

Unlike those statutory provisions, the PHSA sections cited by CDC in the IFR do not convey authority to promulgate interim final rules under the circumstances at issue here.

Furthermore, even if the COVID-19 outbreak may justify a COVID-19 specific IFR, the IFR itself is not keyed only to COVID-19—it applies far more broadly, and CDC offers no justification for why a broadly sweeping and generally-applicable rule that will remain inscribed in the CFR indefinitely as binding regulations should not first be subject to notice and comment rulemaking. In fact, the CDC has admitted that the IFR will extend beyond COVID-19.<sup>79</sup> The

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information . . . constitutes good cause, then an exception to the notice requirement would be created that would swallow the rule.” (internal quotation omitted)).

<sup>78</sup> See 42 U.S.C. § 201 *et seq.*

<sup>79</sup> See *supra* Section II. See also IFR, *supra* note 2 at 7,875 (noting that CDC needs to identify travelers to control the spread of diseases “*such as* 2019-nCoV,” (emphasis added) and that “[c]ontact tracing is effective at reducing cases of communicable disease at the early stages of a potential outbreak ... when the first ill passengers arrive,” but that such stage had already passed in the U.S. and “a public health emergency has existed in the United States as a result of confirmed cases” of COVID-19); *id.* at 7,876 (choosing to collect information from airlines instead of passengers because collection from passengers “unless conducted at all times for all passengers – would inevitably mean that CDC would not have information ... for those individuals who were on flights at the beginning of or before an outbreak.” and noting that “it is impossible to predict outbreaks, and ... the information from the earliest affected flights would be critical” so the information must be “continually collected”); *id.* at

very fact that CDC has gone down the rulemaking path before on the same subject matter is evidence that CDC knows it must adhere to notice and comment.

Moreover, by the time airlines, travel agents/OTAs, GDSs, and CBP are able to develop and implement the system modifications the IFR will require—which, for the reasons explained above, will undoubtedly take at least a year—it is doubtful the IFR will serve any effective purpose as it relates to COVID-19. The U.S. government has essentially acknowledged this shortcoming to airlines, while admitting that it still wants such information. The IFR is also not “interim”: it amends the CFR and nothing in its language suggests it will have a short shelf-life. Although the preamble states that the rule will expire when COVID-19 ceases spreading or CDC determines it is no longer needed, the rule itself contains no sunset provision. The preamble, the text of the IFR, and CDC’s statements to airlines contemplate that the rule will become a permanent fixture within the CFR.

If CDC is serious about its longer-term ability to obtain passenger contact information, it should withdraw the IFR and restart with a notice of proposed rulemaking or, even more appropriately, a request for information. Airlines appreciate that CDC is affording industry the opportunity now to comment, but as many courts have pointed out, a post-promulgation comment period is no substitute for a pre-promulgation comment period. This is because agencies have substantially less incentive to give serious consideration to any *ex post facto* comments that may be received. As the D.C. Circuit aptly put it: “[P]ermitting the submission of views after the effective date of a regulation is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a

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7,878 (requesting comment regarding CDC’s authority to require submission of data prior to declaring a public health emergency, despite fact that COVID-19 was declared an emergency approximately two weeks before issuance of the IFR, indicating CDC asked this question because it foresees this regulation applying to future diseases).

meaningful way.”<sup>80</sup> The point of the pre-promulgation comment period is to allow for “criticisms which the Agency might find convincing.”<sup>81</sup>

B. A Critical Component of the IFR Was Improperly Left Out of the Rule Itself

The IFR is procedurally defective for the added reason that it compels airlines to provide the requested data “in a format acceptable to the Director” yet does not specify that format in the rule itself, leaving it to the ad hoc judgment of CDC as the perceived need arises. Inasmuch as the “format” of data collection is every bit as much a rule as the required information,<sup>82</sup> the specified format itself must be subject to notice and comment rulemaking. Without further information from CDC on how to comply, it is extremely difficult for airlines to determine how to properly collect and organize the information for purposes of transmission to CDC, and we may well be deprived of fair notice of what is expected of us when the time comes.

The February 18 Order illustrates, among other things, the shortcomings of not spelling out in the IFR what CDC means by “acceptable” format. In fact, the February 18 Order provides no further clarification of that point. That Order directs airlines to use “existing data-sharing channels” to transmit the required information, but the terms of the Order make clear that data-

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<sup>80</sup> *Am. Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (citation omitted); *see also New Jersey v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (“Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.”); *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979) (“Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way .... ‘We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *Fait accompli*.’”) (citation omitted); *Sharon Steel v. EPA*, 597 F.2d 377, 381 (3rd Cir. 1979) (“If a period of comments after issuance of a rule could cure a violation of the APA’s requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation.”).

<sup>81</sup> *USWA v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980).

<sup>82</sup> *See Am. Tort Reform Ass’n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (describing a “legislative rule” requiring notice and comment as agency actions that, *inter alia*, “impose obligations”). Mandating that airlines comply with the Director’s format for transmitting the required data certainly imposes an additional obligation that does not currently exist.

sharing channels are just a “means of transmission,” not a format for compiling the information.

Airlines are left wondering whether we are in compliance, even as we transmit the required data.

## V. THE IFR IS ARBITRARY AND CAPRICIOUS

CDC’s proposal is arbitrary and capricious on numerous grounds. For the reasons given in the comments in Section IV, above, CDC has failed to satisfy fundamental principles of rulemaking. As the Supreme Court has explained:

[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S., 281, 285 (1974). . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>83</sup>

The IFR fails this basic test.

### A. The IFR Creates Substantial Burdens While Failing to Solve the Problem that Purportedly Necessitates the Rule

The new requirements imposed on industry regarding the collection, storage, and transmission of passenger data create unwarranted and unsupportable burdens. CDC has not provided adequate discussion of, or apparently given any consideration to, alternatives that could accomplish the same public health goals with greater efficiency and effectiveness, and at a lower cost. CDC failed to sufficiently consider less-burdensome alternatives, and the IFR is unreasonable, vague, and ambiguous on its face; and it disregards operational reality.

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<sup>83</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Ins.*, 463 U.S. 29, 43 (1983); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009) (requiring the agency to “provide reasoned explanation for its action”).

For example, the IFR obligates airlines to collect data, but does not obligate airlines to store data, implying that airlines must keep the passenger contact information indefinitely or for an indeterminate period until the CDC requests the information. Without further information, an airline may inadvertently act in a manner contrary to CDC's expectations or ad hoc requests for information by disposing of passenger contact information or not designing systems to keep passenger contact information. This may subject the airlines to unforeseen enforcement actions and penalties without explanation. Notably, as CDC has explained in its previous rulemakings: the incubation period is the time when contact tracing is beneficial, otherwise the benefits are severely reduced. And, in 2005, the CDC proposed a 60-day storage period. However, the CDC fails to address the information storage requirement for airlines in any way, nor does it consider the cybersecurity or privacy risks and liabilities associated with the collection and storage of passenger contact information.

The airlines have proposed multiple alternatives that accomplish CDC's goals, some using faster, more efficient, and more effective methods, for example:

- As discussed above, CDC could set up a website and mobile application for passengers to connect directly to CDC to provide relevant contact tracing. This online option would eliminate the need for the airlines to act as an intermediary, and it would create a government-mandated one-on-one, more immediate and enforceable relationship between a passenger and CDC.
- CDC could form an interagency contact tracing cell at CBP's National Targeting Center to collate relevant information sets rapidly so such information sets may be leveraged.
- Airlines offered to hand out a public health locator form for passengers on flights when it is clear that a passenger on board has either been to or transited the People's Republic of China or the Islamic Republic of Iran. These forms could then be delivered to CDC, much like I-94 immigration forms are delivered to CBP.

The failure to consider alternatives adequately is especially apparent given the CDC's imprudent approach to COVID-19. First, the CDC issued a Paperwork Reduction Act ("PRA") notice regarding its collection of information from passengers to detect individuals who are ill or at risk of being ill with COVID-10. Curiously, not only did the CDC open the comment period for 60-days giving time for notice and comment (despite having explicit statutory authority to waive such process), it did not raise this review in the IFR at all.

Second, the CDC has previously obtained approval for the use of the World Customs Organization ("WCO") Passenger Locator Form for use by airlines.<sup>84</sup> Although this machine-readable form may not be ideal in the long term, it represents an immediate solution to the immediate problem of known gaps in passenger contact information, without forcing undue burdens on the airlines. It does not appear that the CDC has considered this alternative here as an approved form to conduct contact tracing.

Third, the CDC acknowledges its explicit authority to compel individuals to give the CDC contact information, but narrowly and unnecessarily limits its consideration of this authority, without explanation, by focusing on the anticipated effort for CDC to process contact information received through paper forms. The CDC simply ignores airlines' repeated suggestions, in past rulemakings and during the COVID-19 threat, that CDC should adopt a digital portal through which passengers could submit contact information directly to the CDC.

The IFR is arbitrary and capricious because it lacks a rational connection between the factual premise (CDC's need for the required information on a 24-hour basis) and the option CDC selected to implement its passenger contact information collection mandate (imposing the

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<sup>84</sup> See **Attachment 12**, at 6. See also, CDC, Proposed Data Collections Submitted for Public Comment and Recommendations, 70 Fed. Reg. 58,416 (Oct. 6, 2005).

electronic collection and reporting requirement on airlines, as opposed to passengers or obtaining the information from other existing government databases). The burdens and uncertainties are extensive, such as:

- The impossibility of airlines' being able to comply on a wide-scale basis in the near future to address the COVID-19 issue—the purported justification for the rule. Full implementation would take at least twelve months.
- CDC requires the collection of information that may never be used and is unreliable—knowing that airlines cannot compel passengers or third parties to give accurate information, which would be critical for addressing problems CDC claims to have identified with the information that airlines currently provide.
- The scope is overly broad, giving authority to CDC to extend the requirements to all international and domestic flights, to an ambiguous population of those who are at risk of exposure, and for an unclear period of applicability.
- What constitutes an acceptable format for transmission of the data is not addressed.

Furthermore, while CDC states that gaps in its existing regulations (42 C.F.R. §§ 71.4 and 71.20) frustrate its ability to contact individuals in a timely and accurate manner about potential exposure to communicable diseases, the IFR as phrased does nothing to close those very gaps, instead it perpetuates them: it requires the information in the five identified data fields only “to the extent that such information exists for the individual.”<sup>85</sup> The airlines themselves have no authority (and no business need) to compel passengers to provide all of the requested information. So, the CDC is using the COVID-19 outbreak to make airlines spend hundreds of millions of dollars to create new systems or modify old systems to accommodate the passenger contact information that cannot be validated and will not likely provide any practical utility for

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<sup>85</sup> See IFR, *supra* note 2 at 7,876.



addressing COVID-19 (because of timing) nor address the information gaps that the CDC has identified as rationale for issuing its IFR.

Airlines are meanwhile subject to potential enforcement and penalties (and burdens of proof) if passengers do not provide the information, despite airlines having no effective means to ensure that passengers provide accurate contact information, because contact information is found nowhere on government-issued identity documents.<sup>86</sup> For the reasons stated elsewhere in these comments, CDC could address its perceived “problem” by requiring the information directly from passengers (42 CFR § 71.20) or by working with its counterpart U.S. government agencies, which the 2017 CDC report proves and the 2016 final rulemaking articulate plainly, has been effective in the past.

The justifications for the IFR as articulated in its preamble are further undermined by contradictory and conflicting agency comments made as part of the rollout.<sup>87</sup> Specifically, the CDC explained that the collection of the information required in the IFR was an urgent and immediate need for widespread contact tracing for individuals identified as having COVID-19, but was unwilling to entertain proposals for viable short-term alternatives to the time-consuming modification of airline and GDS/OTA systems necessary to facilitate collection and transmission of unvalidated information to CBP. CDC/HHS subsequently articulated that the information collected would be used for purposes of case management of patients and useful for providing contact information to state and local public health officials for continued case management. But the IFR is silent on this purpose, leaving the public and regulated stakeholders guessing as to

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<sup>86</sup> See *supra* note 9, February 18 Order at 10,440. (The Order directs airlines to inform CDC of every passenger who refused to or could not provide the required information.) This potentially sets up airlines for conflict with their passengers if CDC intends to take enforcement measures.

<sup>87</sup> See, e.g., *Sorenson Commc'ns Inc.*, 755 F.3d at 706 (finding that no good cause existed when the agency failed to establish facts supporting a claimed “threat of impending fiscal peril” and lacked “record support proving the emergency”).

CDC's true intent. Additionally, notwithstanding the CDC's attempt to use COVID-19 as a justification, by the IFR's clear terms, the CDC designed and intended for the IFR to be used for communicable diseases other than COVID-19.

B. The IFR Implicates Privacy Laws and May Cause Airlines to Run Afoul of International Legal Requirements

The IFR also implicates the General Data Protection Regulation ("GDPR") and the The Agreement between the United States and the European Union on the Use and Transfer of Passenger Name Records of 2011 to the United States Department of Homeland Security ("US-EU PNR Agreement"),<sup>88</sup> for which—like the IFR—airlines could bear the risk of penalty for violations of GDPR despite the inability to help the CDC in its mission of getting accurate information to conduct contact tracing for the immediate COVID-19 situation. There is also a significant chance that the rules conflict with other data privacy laws around the world, whereby airlines may face diametrically opposite government mandates. The CDC cannot give airlines comfort because it has failed to consider these implications or consulted with other U.S. government or EU officials before implementing the rules.

As explained in Section VIII, below, we believe that the IFR triggers GDPR protections for which no blanket exceptions are likely available and potential defenses are unclear, requiring airlines to honor the GDPR safeguards (which are totally absent from the IFR) unnecessarily and creating potential violations, liabilities, and costs for the airlines which the CDC has not apparently considered.

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<sup>88</sup> See *infra* note 104 and accompanying text.

C. The IFR Violates Other Statutory Requirements

The IFR is arbitrary and capricious in its failure to comply with the Unfunded Mandates Reform Act, various executive orders, and the Information Quality Act.

1. *Unfunded Mandates Act*

The CDC correctly acknowledges that, under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1532, it must prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that results in expenditures exceeding \$164 million. However, the CDC's analysis that the IFR will not meet the threshold is woefully incorrect.

As explained above, approximately [190] airlines will likely have to spend at least \$1 million per airline, and up to \$23-46 million for one airline, in system modifications to ensure that each airline collects, stores, and can transmit passenger contact information to the U.S. government, as well as the other entities with which it may exchange information. Moreover, each third-party participant in the booking process, *e.g.*, GDSs, will inevitably need to make updates to their systems, which will incur additional substantial costs. Accordingly, regardless of how the CDC wants to require airlines to transmit passenger contact information—either through PNR or APIS—the threshold is easily met and the CDC must prepare a budgetary impact statement and specifically address the regulatory alternatives considered.

2. *Executive Order 12866*

Executive Order 12866 requires an agency to “assess both the costs and the benefits of the intended regulation,” and propose a new regulation only after a reasoned determination that the benefits warrant the costs.<sup>89</sup> The CDC has acknowledged that the IFR is a significant

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<sup>89</sup> Exec. Order No. 12866 § 1(b)(6) (1993).

regulatory action subject to this executive order, but it has not conducted the necessary cost-benefit analysis. First, the CDC does not explain any basis on which it is exempt from this executive order. The IFR explains the perceived exemption to the Regulatory Flexibility Act, but it does not identify an exemption to E.O. 12866, nor could it do so. The only exception the CDC may wish to apply is the emergency exemption, but, as discussed in Section IV, above, the IFR by its terms does not target an emergency—it creates a broadly applicable set of new requirements that are not limited to COVID-19 and cannot possibly be implemented in time to address the COVID-19 situation, when CDC could have taken the opportunity to employ notice and comment rulemaking, including a cost-benefit analysis. This cost-benefit analysis would have shown the wasteful and impractical nature of this rule.<sup>90</sup> In addition to a consideration of the costs and benefits, the IFR failed to consider alternatives to the IFR, as required by E.O. 12866. The failure to consider alternative proposals is especially troubling here, where A4A, and other industry members have presented CDC with reasoned alternatives to CDC’s substantially similar proposals in 2005 and 2016, including a CDC website and paper alternatives. The comments to CDC’s prior proposed rules identified the costs that CDC ignores in the IFR as well as alternatives that alleviate these costs while ensuring public health. Industry explained that this proposed data collection approach requires changes to various industry platforms, training, and additional customer support time, but a far smaller change to government systems would easily provide the same information. Thus, CDC could have developed a better rule by considering the known alternatives. CDC’s failure to do so is not just wrong; it is in

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<sup>90</sup> See *supra* Section III.

violation of E.O. 12866. CDC was obligated to apply the known information to “tailor its regulations to impose the least burden on society.”<sup>91</sup>

As demonstrated herein, the choice that CDC made in the IFR is far from imposing the least burden on society. In fact, compared to the feasible, effective, and efficient solution put on the table by the airlines (*i.e.*, website and mobile application for direct passenger input to CDC), the IFR is undoubtedly one of the most costly, and least effective, approaches to get the contact information that CDC needs to conduct public health follow-up.

### 3. *Executive Order 13771*

Contrary to CDC’s statement in the IFR, the IFR is subject to Executive Order 13771. The pertinent exemption requires a rule to meet two criteria. First, “[t]he benefit-cost analysis demonstrates that the regulation is anticipated to improve national security as its primary direct benefit.” OMB M-17-21. This IFR is designed to protect the public health, not national security, so the exemption is inapplicable. Additionally, to be exempt, “OIRA and the agency [must] agree the regulation qualifies for a ‘good cause’ exception under 5 U.S.C. 553(b)(3)(B).”<sup>92</sup> CDC has not addressed this requirement, and nowhere does the agency claim OIRA has reviewed the IFR and agreed that the good cause exception applies. Lacking such oversight and approval, Executive Order 13771 applies, and CDC must identify additional regulations for repeal and ensure that the net costs be no greater than zero.

### 4. *Information Quality Act (“IQA”)*

CDC’s reliance on faulty information violates the IQA and demonstrates the arbitrary nature of the IFR. The IQA requires agencies to manage their information to improve its integrity

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<sup>91</sup> See Exec. Order No. 12866 § 1(b)(11).

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

and quality. The IFR's inclusion of sub-par data, and CDC's failure to disseminate useful and objective scientific evidence in support of the IFR is a substantial deviation from the data quality standards mandated by the IQA and the HHS information quality guidelines that implement the IQA.

In 2005 and 2016, in response to CDC's proposals which were akin to the IFR, industry provided comments that reinforce what passenger data is available and the systems through which the data can be obtained. The CDC seems to have ignored this information, and once again asks "[t]he extent to which airlines currently collect . . . the data"<sup>93</sup> and assumes a low burden for airlines to gather the information. Contrary to the IQA, the IFR lacks accurate, clear, objective, and unbiased information supporting CDC's mandate to collect passenger data elements. In fact, in the IFR, the CDC once again cites a June 2004 Harvard study that the International Air Transport Association thoroughly critiqued in their 2006 comments to CDC's earlier versions of this rule. Had the CDC weighed the quality of the information it disseminated in the IFR against the standards contained in CDC's Guidelines, it would have concluded that the information does not justify the IFR and its corresponding impact on airlines.

Even more inexcusable is that CDC, a science-based agency, is choosing to turn a blind eye to well-known and U.S. government-acknowledged facts that: (i) airlines cannot provide the desired contact information in a timeframe that meets CDC's immediate COVID-19 needs; and (ii) airlines cannot provide information that is validated or reliable—leaving the CDC in the same position where it was when it issued the IFR. Instead of using its resources to create an effective solution that would address COVID-19 in the short-term, like a website or mobile application, which airlines suggested in 2005, it chose to use its resources to a force solution

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<sup>93</sup> See *supra* note 2, IFR at 7,878.

through the airline industry, and only the airline industry, that the CDC has been unable to implement for over 15 years.

## **VI. IFR IS AN ABUSE OF DISCRETION AND EXCEEDS CDC'S AUTHORITY**

The CDC has a duty to examine the relevant data and articulate a satisfactory explanation for its action that demonstrates a rational connection between the facts found and the choice made. It has not done so in the IFR and has failed to adequately explain how it arrived at its conclusions.

In carrying out rulemaking, an agency is required to “disclose the basis of its order” and “give clear indication that it has exercised the discretion with which Congress has empowered it.”<sup>94</sup> The PHSA and other legal authority discussed in the IFR do not authorize regulations that are unnecessary, discriminatory, or impose an unreasonable burden on airlines. And, as noted, the CDC does not have statutory authority to amend 42 C.F.R. § 71.4 via an IFR. As explained above, Congress knows how to grant interim final rulemaking authority and did so for CDC in specific provisions not at issue here (*e.g.*, 42 U.S.C. §§ 239b, 247d-6d, and 300gg-92). An agency has no authority beyond that which Congress grants to it, and there is no reason to infer interim final rulemaking authority here where Congress, having granted the CDC interim final rulemaking authority in other statutory provisions, chose to omit it in 42 U.S.C. § 264.

We support actions by the government to increase public health and safety using lawful, well-crafted, and well-reasoned rules that are rooted in the realities of our global industry. Airlines have voluntarily worked with the CDC to provide timely passenger information, often at substantial expense and exceeding regulatory requirements. The IFR is flawed both in its lack of

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<sup>94</sup> *Burlington Truck Lines*, 371 U.S. at 167-168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”)

statutory authority and the impossibility of its requirements. Having failed in this fundamental regard, the CDC should withdraw the IFR and provide a full and fair opportunity for stakeholders to comment on a new proposed regulation, including consideration of all issues, or continue voluntary cooperation.

## VII. THE IFR, AS ENACTED, CANNOT BE ENFORCED

The IFR is unenforceable as written because its adoption violates the PRA and the Regulatory Flexibility Act (“RFA”).

### A. Paperwork Reduction Act

The PRA forbids agencies from requiring the submission of information unless OMB has approved the collection. The IFR points to the fact that OMB has approved the collection of information related to “any passenger who has departed from, or was otherwise present within,” China within 14 days of a flight to the U.S. (“Designated Passengers”).<sup>95</sup> The OMB-approved collection does not cover anyone other than a Designated Passenger; crewmembers or any passengers who are not returning to the U.S. after recent time in China are not included in the OMB-approved collection. But, the IFR is far broader. Any additional requirements in the IFR beyond those in OMB Control No.: 0920-1180 cannot impose obligations on the airline.<sup>96</sup> Currently, OMB has only authorized the collection of information on Designated Passengers, and as such, airlines cannot be required to collect the contact information of others.

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<sup>95</sup> See *supra* note 9, February 18 Order, **Attachment 17**.

<sup>96</sup> See *United States v. Hatch*, 919 F.2d 1394, 1398 (9th Cir. 1990) (finding defendant could not be liable for failure to submit information because “the Forest Service did not comply with the PRA and since therefore Hatch cannot be subject to any penalty”); see also, 44 U.S.C. § 3507(h)(3) (“An agency may not make a substantive or material modification to a collection of information after such collection has been approved by the Director, unless the modification has been submitted to the Director for review and approval under this subchapter.”); see also, 44 U.S.C. § 3512(a) (“[N]o person shall be subject to any penalty for failing to comply with a collection of information ... if ... the collection of information does not display a valid control number.”).



If the CDC were to argue that its IFR only seeks information regarding these Designated Passengers, then the IFR is written too broadly, and there is no good cause for this broad emergency action.

B. Regulatory Flexibility Act

The RFA requires that agencies determine their rules' economic impact on small entities, explore regulatory options for reducing these impacts, and explain their ultimate choice. The CDC acknowledges that it has not done this.<sup>97</sup>

CDC's position that it can wait up-to 180 days to fulfill its obligation under the RFA is incorrect. The RFA obligations may only be delayed if "the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable."<sup>98</sup> As discussed in Section IV, above, after ignoring the immediately effective alternatives to address the COVID-19 situation, this rule simply is an attempt to implement provisions that the CDC has coveted for over a decade and with which airlines will be incapable of complying for months to come. Because the IFR was unnecessary and will not expedite compliance or the receipt of complete and reliable passenger contact information, the CDC could and should have taken time to comply with the RFA. Its failure to do so violates the act.

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<sup>97</sup> If the CDC had fulfilled these obligations, it would realize that the regulation contradicts the Trade Agreements Act. 19 U.S.C. §§ 2531-2533. The Trade Agreements Act prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States and requires agencies to consider and, where possible, adopt international standards. *Id.* There are relevant international standards in this space. It is internationally-recognized that "states should not require or hold an airline responsible for the submission of PNR data that are not already collected or held in the operator's reservation or DCS. An operator should be held responsible only for data that are available in its reservation system or DCS." *See supra* note 13, ICAO Doc. 9944 at ¶ 2.5.2. Thus, international standards recognize that the data elements that CDC mandates in the IFR are not required and that passenger data will not necessarily be available from airlines. *See also* WCO/IATA/ICAO, Guidelines on Advance Passenger Information § 8.1.5 (2014) (hereinafter "API Guidelines"), **Attachment 18**. Additionally, as discussed below, GDPR establishes privacy standards that are violated by the IFR. By deviating from these existing international standards, the IFR violates principles of the Trade Agreements Act.

<sup>98</sup> *See* 5 U.S.C. § 608(a).

Even if the COVID-19 emergency justifies the IFR, the CDC must complete the required review within 180 days of publication of the IFR. Failure to do so would invalidate the IFR. When the CDC conducts the necessary analysis, it will be apparent that the CDC failed to conduct an adequate analysis before adopting the IFR, and the CDC did not fairly consider major alternative options and weigh their probable effects.<sup>99</sup> The IFR will have a severe impact on small business airlines, and the agency has not explained and cannot explain why this option is better than the myriad of alternatives.

In general, this IFR poorly defines airlines and fails to acknowledge different types of airline operations. As previously discussed above, many regional airlines that operate codeshare flights under their mainline partners' flight number do not even own or have access to passenger information and cannot be held accountable for not providing passenger contact information.

In addition, there are small airlines that provide international services between the United States and its neighboring countries, including Caribbean destinations. These airlines who could be operating under various FAA regulations, including 14 C.F.R. part 135, 14 C.F.R. part 121, or other applicable FAA air carrier certificate regulations, must comply with proposed requirements regardless of the size and type of operations. Some airlines offer several flights a day between the United States and these destinations using aircraft with few seats. In fact, some of these airlines operate as few as 9 aircraft and have far fewer than 500 employees.

Given the substantially smaller relative size of these airlines and the cost burdens relative to that size, the IFR is unjustified without adequate discussion or consideration of alternatives

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<sup>99</sup> See *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 42-44 (D.D.C. 2000) (remanding to the agency because HHS did not obtain data or analyze available data on the impact of the final rule on small entities, nor did it properly assess the impact the final rule would have on small entities, so it failed to comply with the RFA).

that could accomplish the same public health goals with greater efficiency and at a lower cost.

One option is for the U.S. government to share and use already-available information more effectively and broadly. Alternatively, the CDC could provide passengers with machine-scannable forms, permitting direct responses that can be used in a timely fashion without imposing significant harm on small airlines. In fact, this solution has already been approved by the CDC and OMB.

### VIII. COMPLIANCE WITH FORUM DATA PROTECTION REQUIREMENTS

While we appreciate the need for airlines to help collect personal information from passengers for public health and contact tracing purposes, we have serious concerns about the risks to data protection and privacy compliance posed by the breadth of the IFR.<sup>100</sup> Our concerns principally relate to the European Union (EU) General Data Protection Regulation (GDPR),<sup>101</sup> but they may also arise under other data privacy laws (of which there are at least 107 frameworks globally).<sup>102</sup> We assert these concerns notwithstanding the WHO's declaration of a "public health emergency of international concern" for COVID-19. In our view, the IFR will create a compliance dilemma for the airlines, where operationalization of and compliance with the IFR may result *ipso facto* in violations of data privacy obligations to which we are subject. Such obligations govern how airlines may collect, use, and transfer personal data, including

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<sup>100</sup> See *supra* Section V.A.

<sup>101</sup> See Regulation (EU) 2016/679 (Apr. 6, 2016), available at <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (hereinafter "GDPR").

<sup>102</sup> We are aware of 107 national jurisdictions that have data privacy laws according to the UN (2020 publication). See United Nations Conference on Trade and Development, Data Protection and Privacy Legislation Worldwide, available at [https://unctad.org/en/Pages/DTL/STI\\_and ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx](https://unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx), **Attachment 19**. Due to the enactment of the Data Protection Act 2018 by the UK Parliament, which locally enacted the GDPR in the United Kingdom, privacy obligations substantively equivalent to the GDPR will continue to apply in the United Kingdom once the United Kingdom withdrawal from the EU is complete. For expedience, discussion of the "EU" herein may be understood to include the United Kingdom, and "GDPR" herein may be understood to mean both the EU and the substantively equivalent post-Brexit UK privacy obligations of airlines.

passenger contact information, and the actions airlines can take if a passenger refuses to provide the required information.

One of the difficulties is that the IFR (like the February 18 Order) requires systematic, wholesale transmission of passenger data to the CDC, which the CDC expects to be transmitted through PNR or APIS. This transmission is clearly distinguishable from case-by-case contact tracing requests with respect to particular individuals or limited group of individuals on particular flights, which CDC can request under its pre-IFR authority under Section 71.4(a).<sup>103</sup> It is this wholesale, automated processing and transmission of personal data that falls squarely within the ambit of data privacy law and privacy rights.

Specifically, we submit that the IFR raises serious privacy law concerns. We strongly encourage the CDC to consider reconciling the following before taking any regulatory action:

- (i) The GDPR applies to PNR or API transmissions as required under the IFR;
- (ii) No blanket exception to the GDPR is available for public health emergencies;
- (iii) An airline is responsible for ensuring a lawful basis for its data processing, as well as the lawful basis for any legal entity to which it transfers personal data—a lawful basis is unclear with the IFR;
- (iv) Even with an identified lawful basis, airlines, as data controllers, have substantive obligations regarding (a) transfers beyond the EU and (b) certain processing principles that will likely be difficult to honor in the context of the IFR; and
- (v) The US-EU PNR Agreement,<sup>104</sup> **Attachment 20**, is highly relevant material for consideration on questions relating to legal basis and safeguards.

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<sup>103</sup> In other countries this authority is usually supported by reference to local statutory powers or a court order.

<sup>104</sup> Dec. 14, 2011 (hereinafter “US-EU PNR Agreement”).

A. The GDPR Applies to PNR or API Transmissions of Passenger Contact Information

In the EU, the protection of natural persons in relation to the processing of personal data is a fundamental right.<sup>105</sup> The right to the protection of personal data is not absolute, however: it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

The GDPR was adopted with the objective to strengthen individuals' fundamental rights and to clarify rules for companies that deal with personal data.<sup>106</sup> The GDPR aims to achieve this through a single framework of rules applicable across the EU and also outside the EU in circumstances described in Article 3 of the GDPR, as discussed below.<sup>107</sup> For the purposes of the GDPR, airlines are likely considered to be data "controllers" as discussed under Section VIII.C below, meaning we may be responsible for compliance with such regulatory framework governing how airlines process passenger contact information and may be held liable for how passenger contact information is processed or transferred outside the EU.<sup>108</sup> The passenger contact information and the airlines requirements under the IFR clearly fall within the broadly applicable protections of the GDPR.

*Personal Data.* The material scope of the GDPR is broad:

- The GDPR "applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system";<sup>109</sup> and

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<sup>105</sup> Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union provide that everyone has the right to the protection of personal data concerning him or herself. *See supra* note 101, GDPR, Recitals 1-4.

<sup>106</sup> GDPR repealed the former Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995. *See supra* note 101, GDPR, Art. 171. The GDPR was adopted in May 2016 and applies as of May 25, 2018.

<sup>107</sup> *See supra* note 101, GDPR, Recitals 3 and 9-11.

<sup>108</sup> *Id.*, Art. 4(7).

<sup>109</sup> *Id.*, Art. 2.

- Personal data is defined as “any information relating to an identified or identifiable natural person [ . . . ] in particular by reference to an identifier such as a name, an identification number, location data, [or] an online identifier . . . .”<sup>110</sup>

The information required for passengers by the IFR (Designated Data) includes the passenger’s full name, a primary contact phone number while in the United States, a secondary contact phone number, an address while in the United States, and an email address. These elements all fall under the definition of “personal data” and therefore fall within the scope of the GDPR.<sup>111</sup>

*Processing.* The GDPR broadly defines processing of personal data and states:

Processing means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available...<sup>112</sup>

The IFR requires that the Designated Data be transmitted to the CDC “in a format acceptable to the Director” and the CDC has stated that these channels can include the PNR or APIS.

Additionally, the February 18 Order requires that airlines must “produce, using existing data-sharing channels, the Designated Information.” The use of such systems to collect, store, retrieve and transmit such information clearly falls within the GDPR’s definition of “processing” under Article 4(2).

*Extraterritorial Application.* EU Regulators assert that the GDPR broadly applies to activities and circumstances outside the territory of the EU, based on Article 3 of the GDPR:

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<sup>110</sup> *Id.*, Art. 4(1). An identifiable natural person is one who can be identified, directly or indirectly. *Id.*

<sup>111</sup> *See also, id.*, Art. 4(1) (“personal data means any information relating to an identified or identifiable natural person [ . . . ]; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”).

<sup>112</sup> *Id.*, Art. *See also, id.*, Art. 3. For all airlines (regardless of whether they are an “establishment” in the EU), the GDPR would apply, at a minimum, to processing related to the offering of goods or services to customers in the EU.

- (1) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
- (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
  - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
  - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.<sup>113</sup>

This asserted application includes entities established outside of the EU, whenever those entities process personal data related to their offering of goods or services to customers in the EU.<sup>114</sup>

Accordingly, the GDPR likely applies not only to airlines based in the EU, but also to the processing of EU-located individuals' personal data by a non-EU airline. The GDPR can consequently be assumed to apply to significant numbers of EU, U.S., and other airlines, and, as such, is a global concern for A4A and IATA members.

B. No Blanket Exception to the GDPR for Public Health Emergencies

No blanket exception exists for public health emergencies in the GDPR. Mere references to contagious disease and contact tracing in the preamble to the GDPR do not create an exception.

1. *The Four Explicit Exceptions to the GDPR are Inapplicable*

The GDPR has four explicit exceptions to the processing of personal data, specifically for processing:

- (a) in the course of an activity which falls outside the scope of Union law;
- (b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the [Treaty of the European Union];<sup>115</sup>

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<sup>113</sup> See *id.*, Art. 3(1).

<sup>114</sup> See *id.*, Art. 3(2).

<sup>115</sup> Chapter 2 of Title V of the Treaty of the European Union relates to activities to carry out foreign and security policy under the Treaty of the European Union.

- (c) by a natural person in the course of a purely personal or household activity;
- (d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.<sup>116</sup>

None of these exceptions applies in the case of a public health emergency, like the COVID-19 outbreak. More specifically, they do not apply to the IFR because personal data for flights originating in the EU would need to be collected within the EU (and thus would be collected within the scope of EU law) and because the IFR is an activity by a non-EU government. In other words, the collection of the Designated Data by airlines under the IFR would fall within the scope of EU law (Article 2(a)) and an airline is neither a Member State (Article 2(b)), a natural person (Article 2(c)), nor a Competent Authority (Article 2(d)) under these exceptions.

## 2. *Recitals Are Not Blanket Exceptions for Public Health Emergencies*

Recitals are not operative provisions under EU law and, as such, recital references to contact tracing and contagious disease offer little support for any argument for a blanket exception to the GDPR.

Recital 112 of the GDPR specifically refers to the application of “derogations (...) to data transfers required and necessary for important reasons of public interest, for example (...) for public health, for example in the case of contact tracing for contagious diseases.” This recital must, however, be read in conjunction with other recitals, one of which states:

In any case, the controller [the airlines] should make use of solutions that provide data subjects [the passengers] with enforceable and effective rights as regards the processing of their personal data in the Union once those data have been transferred so that they will continue to benefit from fundamental rights and safeguards.<sup>117</sup>

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<sup>116</sup> *See id.*, Art. 2.

<sup>117</sup> *See id.*, Recital 114. Also, the recitals state “Provision should be made for the possibility for transfers where important grounds of public interest laid down by *Union or Member State law* so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest.” *Id.*, Recital 111 (emphasis added).



In other words, the expectation under GDPR is that airlines relying on the derogations must still ensure that adequate safeguards are in place to protect transferred personal data. Importantly, these recitals should be understood as interpretative aids to derogations from the specific rules applicable to transfers of data outside of the EU (in Chapter 5), and not as a general exemption or ‘carve-out’ to the framework of regulation applied by the GDPR. Recital 112 cannot be the basis for a broad exception based on emergency circumstances.<sup>118</sup>

In sum, the GDPR recital that references contact tracing and communicable disease does not offer a wholesale safe-harbor for airlines to comply with the IFR without application of the GDPR.

### C. Obligations for Ensuring a Lawful Basis for Processing Personal Data

Where the GDPR applies, any organization involved in the processing of personal data must assess whether it falls under the definition of a “controller” or a “processor.” A controller, to which most of the obligations under the GDPR apply, means “the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.”<sup>119</sup>

Airlines are likely controllers under the GDPR with respect to PNR or API. As controllers, airlines will be accountable for demonstrating compliance with fundamental principles of the GDPR, including Article 5 of the GDPR, which states:

Personal data shall be:

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<sup>118</sup> Such an interpretation that such a broad exception exists is also unsupported by the relevant treaties in the EU, which establish privacy as a fundamental right and apply specific balancing tests to any derogation of fundamental rights. *See e.g.*, Article 52 of the EU Charter of Fundamental Rights (“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”)

<sup>119</sup> *See supra* note 101, GDPR, Art. 4(7).

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (**‘lawfulness, fairness and transparency’**);
- (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (**‘purpose limitation’**);
- (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (**‘data minimization’**);
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (**‘accuracy’**);
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (**‘storage limitation’**);
- (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (**‘integrity and confidentiality’**).

When processing the IFR Designated Data for disclosure to the CDC, an airline would be bound to observe all of these key principles regardless of a global public health emergency and pandemic.

One of the most critical elements is for the airline to identify a legal basis (also referred to as “lawfulness”) for the processing of the data.

Article 6 of the GDPR sets out six possible grounds under which personal data can lawfully processed. This means an airline can lawfully collect and transfer EU-located passengers’ personal data to the CDC only if, at least, one of the six following grounds applies: (emphasis added)

- (a) The data subject has given *consent* to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the *performance of a contract* to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a *legal obligation* to which the controller is subject;
- (d) processing is necessary in order to protect the *vital interests* of the data subject or of another natural person;
- (e) processing is necessary for *the performance of a task carried out in the public interest* or in the exercise of official authority vested in the controller;

- (f) processing is necessary for the purposes of the *legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject* which require protection of personal data, in particular where the data subject is a child.

While these provisions may initially appear broad, they are qualified in many respects by other provisions of the GDPR. For the purposes of our analysis, it is convenient to bifurcate a treatment of these grounds by their potential utility for the IFR.

1. *Some Lawful Bases for Justifying the IFR are Unavailable*

Some grounds appear unavailable as a basis upon which to conduct the processing required by the IFR. For example, consent is not a viable ground for the IFR because

- **Consent** as a ground under Article 6(1)(a) is subject to strict scrutiny under GDPR. Article 7 of the GDPR defines the conditions for consent, providing that “the request for consent shall be presented in a manner which is distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. (...) The data subject shall have the right to withdraw his or her consent at any time.” Fine print and automatically checked boxes, for example, will not be enough<sup>120</sup>. Importantly, consent shall be “informed”, meaning that the individual should have a clear understanding of the purposes for which their personal data will be processed.

In Guidelines on Consent under Regulation 2016/679<sup>121</sup>, the Article 29 Working Party (now the European Data Protection Board) wrote that “Generally, consent can only be an appropriate lawful basis if a data subject is offered control and is offered a genuine choice with regard to accepting or declining the terms offered or declining them without detriment. (...) Inviting people to accept a data processing operation should be subject to rigorous requirements, since it concerns the fundamental rights of data subjects and the controller wishes to engage in a processing operation that would be unlawful without the data subject’s consent.” The Working Party emphasized the element “free” implies the need for real choice on the part of data subjects. Any imbalance of power between the controller and the data subject shall be considered. Where the individual has no realistic alternative, there shall be no free consent. Finally, the controller needs to demonstrate that it is possible to refuse or withdraw consent without detriment or a clear disadvantage for the data subject. Accordingly:

- (i) What would the consequences be for a passenger who refuses to share their data with the CDC?

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<sup>120</sup> Article 29 Data Protection Working Party, Guidelines on Consent under Regulation 2016/679 16 (Nov. 28, 2017) (“The GDPR does not allow controllers to offer pre-ticked boxes or opt-out constructions that require an intervention from the data subject to prevent agreement (for example ‘opt-out boxes’).”) (citations omitted), **Attachment 21**.

<sup>121</sup> *Id.* at 3.

(ii) How would a passenger withdraw their consent? (Giving rise to a circumstance where the airline or the CDC would be obligated—under the GDPR—to cease processing their data.)

The practicalities of obtaining and maintaining passenger consent pose real questions. For these reasons, we submit that consent would be an objectively poor basis upon which to justify sharing information with the CDC.

- The ground of “**necessary for the performance of the contract**” under Article 6(1)(b) also raises questions. This legal ground is narrowly interpreted by the data protection regulators in Europe. In recent Guidelines, the European Data Protection Board recalls that “the processing in question must be objectively necessary for the performance of a contract with a data subject, or the processing must be objectively necessary in order to take pre-contractual steps at the request of a data subject.”<sup>122</sup> It follows that an airline might rely on this lawful basis if they need to process the passengers’ personal data: to deliver a contractual service to them; or because the passengers have asked the airlines to do something before entering into a contract. A live question is the extent to which a service is contractual; airlines are not by definition quarantine or customs clearance brokers promising to facilitate a certain process or outcome with the authorities. It is not clear that processing for a secondary purpose, related more objectively to disease control under the IFR, bears the necessary relationship to the initial contractual promise of air carriage from A to B.
- The **legal obligations** ground in Article 6(1)(c) expressly refers to obligations arising under EU law and not foreign law.<sup>123</sup> As a consequence, neither the IFR, as a non-EU legislative instrument, nor the US-EU PNR Agreement can constitute a “legal obligation.”<sup>124</sup>
- **Vital interest** is a ground under Article 6(1)(d). The concept was drafted to deal with the interests of one or more specific individuals (“the vital interests of the data subject or of another natural person”), in specific circumstances, rather than being a concept of broad application for wholesale data sharing. In Opinion 06/2014, the Article 29 Working Party considered that a “restrictive interpretation must be given to this provision” and it should be limited to “a case by case analysis.”<sup>125</sup> First, the phrase “vital interest” appears to limit the applicability of this ground to questions of life and death, or at the very least, threats that pose a risk of injury or other damage to the health of the data subject.” Second, the Working Party also questioned the ground’s scope, including whether it could justify a “preventative measure [...] on a wide scale, such as the collection of airline passengers’ data where a risk of epidemiological disease [...] has been identified” and settled on the restrictive interpretation. While this legal ground could support individual tracing

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<sup>122</sup> European Data Protection Board, *Guidelines 2/2019 on the Processing of Personal Data Under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects* ¶ 22 (version 2.0 Oct. 8, 2019), **Attachment 22**.

<sup>123</sup> Article 6(1)(c) provides as follows: “The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by: (a) [EU] law; or (b) Member State law to which the controller is subject.”

<sup>124</sup> The US-EU PNR Agreement deals with terrorism and serious transnational crime, not public health emergencies. See *infra* note 134 and accompanying text.

<sup>125</sup> Article 29 Data Protection Working Party, *Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC* 20 (Apr. 9, 2014) (hereinafter “Opinion 06/2014”), **Attachment 23**.

disclosures,<sup>126</sup> we submit that it could not support the wholesale provision of information on all passengers, regardless of whether they have been potentially infected or not.

2. *Justification Under a “Public Interest” or “Legitimate Interest” Only with Additional Clarity and Safeguards*

The grounds of “public interest” and “legitimate interest” may be more promising.

- The “**performance of a task carried out in the public interest**” is a ground under Article 6(1)(e). It may be submitted that an epidemic enlivens an obvious “public interest.” Action taken in compliance with the IFR would then arguably be a “task” carried out to further such an interest. Support might be derived from authoritative pronouncements on COVID-19<sup>127</sup> and certain recital language in the GDPR itself: recitals 46, 52 and 112 recognize that “monitoring epidemics and their spread,” “the prevention or control of communicable diseases” and “contact tracing for contagious diseases” are important reasons of public interest. Such submissions are appealing and may win in principle recognition with regulators. One obstacle however is whether the relevant public interest can be linked to EU or member state law, which is a prerequisite to the validity of the ground under Article 6(3). While the monitoring of an outbreak and the of taking preventative action could satisfy a public interest under EU law, it is not clear that the precise directives of the IFR would meet with such recognition as a foreign regulatory requirement (absent a specific endorsement from an EU or EU member state instrument). Whether or not such an argument is sustainable may depend upon authorities or courts finding creative ways to give weight to the obvious policy concern in the light of more general international legal instruments, as cited, or relevant other executive statements from EU governments.
- **Legitimate interest** is a further ground under Article 6(1)(f). Similarly, to “public interest”, airline assistance to government authorities in relation to monitoring epidemics and preventing the spread of communicable disease could be argued to further a clear “legitimate interest”. One possible advantage to this ground is that it does not require an explicit EU legal instrument in the same way as Article 6(1)(c) and (e). Moreover, legitimate interest need not be assessed from the sole perspective of the controller but can also be assessed from the perspective of a third party (such as the CDC). There is an open question on the extent to which a non-EU authority is a third party, but the point is at least arguable in the absence of definitive guidance from regulators. Accordingly, one might argue that airline controllers have a legitimate interest in sharing information with the CDC

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<sup>126</sup> Recital 46 of GDPR states: “Processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis. Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters.” However, this basis seems more suited to contact tracing of passengers where there has been a confirmed case on an aircraft and not the pro-active provision of data where there has been no confirmed case as the CDC is now requesting.

<sup>127</sup> The WHO-China Joint Mission on Coronavirus Disease 2019 has defined coronavirus as “a new pathogen that is highly contagious, can spread quickly, and must be considered capable of causing enormous health, economic and societal impacts in any setting.” World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* 18 (Feb. 16-24, 2020), **Attachment 24**.

in the context of a health emergency. There is supportive guidance from the Article 29 Working Party on this interpretation, which has written that “the fact that a controller acts not only in its own legitimate (e.g. business) interest, but also in the interests of the wider community, can give more 'weight' to that interest. The more compelling the public interest or the interest of the wider community, and the more clearly acknowledged and expected it is in the community and by data subjects that the controller can take action and process data in pursuit of these interests, the more heavily this legitimate interest weighs in the balance.”<sup>128</sup> In justifying reliance on the ground, however, it must be recalled that the relevant processing must be “necessary” for the identified legitimate interest and must not override the “interests or fundamental rights and freedoms of the data subject”—implying proportionality and balancing tests.

While “public interest” and “legitimate interest” would seem arguable bases under Article 6 of the GDPR to justify compliance with the IFR, both require interpretation in consideration of the objectives and precise terms of the IFR. Where, for example, the IFR is broader than strictly necessary, questions arise to whether the full extent of the required processing would be supported by the boundaries of these GDPR concepts. Additional clarity on the part of the IFR to identify conclusive arguments under Article 6 and achieve legal certainty for airlines. However, this is best achieved through an EU legal act providing such a basis (or, alternatively an express agreement between the US and the EU in the appropriate form may meet this requirement).

D. Airlines (as “Controllers”) Have Substantive Obligations

Controllers with a lawful basis for their activity must also satisfy additional provisions of the GDPR if they wish to transfer personal data outside the EU. They must, at all times, abide by their ongoing duties as prescribed by Article 5 and further elaborated upon by supporting provisions of the GDPR.

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<sup>128</sup> See *supra* note 125, Opinion 06/2014 at 35.

1. *Transfers*

Controllers must demonstrate compliance with Chapter V of the GDPR (“Transfers of personal data to third countries or international organizations”). As a general principle, transfers outside of the EU are prohibited by the GDPR. Transfers may however take place if the EU authorities determine that the foreign country ensures an adequate level of protection (formalized through an “adequacy decision” of the European Commission). In the absence of an adequacy decision, transfers may occur if:

- one of the safeguards listed in Article 46 is applicable; or
- as a last resort, a derogation for certain specific circumstances is applicable (as listed in Article 49).

Because there is no adequacy decision for the United States and Article 46 is not of immediate assistance, the enquiry becomes whether derogations could support the IFR transfers.

These are as follows:

- (a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;
- (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;
- (d) the transfer is necessary for important reasons of public interest;
- (e) the transfer is necessary for the establishment, exercise or defense of legal claims;
- (f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
- (g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

The public interest derogation in paragraph 49(1)(d) is the most likely cross-border transfer derogation that could apply. Recital 112 of the GDPR specifically refers to contagious diseases as follows:

Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.

Article 49(4) provides that the public interest must be recognized in EU law or the law of the relevant Member State. However, European Data Protection Board guidelines confirm that:

The existence of an international agreement or convention which recognises a certain objective and provides for international cooperation to foster that objective can be an indicator when assessing the existence of a public interest pursuant to Article 49 (1) (d), as long as the EU or the Member States are a party to that agreement or convention.

A relevant international agreement would be the International Health Regulations (2005), Article 45(2) of which states:

[...] States Parties may disclose and process personal data where essential for the purposes of assessing and managing a public health risk, but State Parties, in accordance with national law, and WHO must ensure that the personal data are:

- (a) processed fairly and lawfully, and not further processed in a way incompatible with that purpose;
- (b) adequate, relevant and not excessive in relation to that purpose;
- (c) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified; and
- (d) not kept longer than necessary.

In 2006, the Article 29 Working Party issued an Opinion on a general data sharing initiative proposed by the US (*i.e.*, not related to a specific health threat).<sup>129</sup> The Working Party

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<sup>129</sup> Article 29 Data Protection Working Party, *Opinion 4/2006 on Notice of Proposed Rule Making by the US Department of Health and Human Services on the Control of Communicable Disease and the Collection of Passenger Information of 20 November 2005 (Control of Communicable Disease Proposed 42 CFR Parts 70 and 71)* (June 14, 2006), **Attachment 25**.



determined that the proposal would not be compatible with the 1995 Directive, but in doing so provided guidance on the circumstances when such a mechanism could be, for example:

Article 26 (d) of the Directive does not apply as the transfer is not necessary or legally required on important public interest grounds of a EU Member State, but only in the US interest, unless the transfer is based on international health agreements providing for harmonized health measures at an international or European level, e.g. within the meaning of Article 2 and Article 35 of the International Health Regulation (2005), under specific conditions.<sup>130</sup>

The Opinion also includes a specific reference to Article 45 of the International Health Regulations (2005):

The WHO International Health Regulations (2005) also lay down specific requirements for the treatment of personal data: Article 45 requires health information which refers to an identified or identifiable person to be kept confidential and processed anonymously. Only where it would be essential for the purposes of assessing and managing a public health risk, as defined in the International Health Regulations (2005), State Parties and the WHO may process personal data.<sup>131</sup>

Considering these supporting materials from the EU, there appears to be some basis to support the view that the “public interest” derogation may be satisfied for certain transfers related to COVID-19. However, it is far from clear that this could support a mechanism under which wholesale transfers occur in the manner prescribed by the IFR.

One alternative basis for considering the derogation could be the existence of an agreement between the US and EU in line with Article 48 of the GDPR, which provides that:

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognized or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

No such agreement exists, as explained further below in Section VIII.E.

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<sup>130</sup> *Id.* at 7. As noted earlier, this Directive was the predecessor instrument to the GDPR.

<sup>131</sup> *Id.* at 8.

2. *Certain Other Processing Principles*

In addition to the requirements to comply with the core data protection principles described above, which apply to everyone, *controllers* are subject to a full set of specific obligations under the GDPR. First, as a *controller*, airlines will have to communicate information in a transparent manner to their passengers regarding the disclosure of their data, including the specific provisions, included above, that we are relying on as authority for disclosing and transferring such data to the CDC, to enable passengers to exercise their rights under Article 15 (“Right of access”), Article 16 (“Right to rectification”), Article 17 (“Right to erasure”) and Article 21 (“Right to object”), among others. Each controller must maintain a record of processing activities under the GDPR.

Article 24 of the GDPR requires controllers to “implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation.” In other words, the controller is accountable for the security of the processing and will bear the responsibility in case of breach or unauthorized access to the data. Appropriate safeguards to mitigate these risks to the privacy and the integrity of the transferred data must be considered as a matter of the highest importance.

E. US-EU PNR Agreement is Relevant for Legal Basis and Safeguards

The US-EU PNR Agreement is relevant to an analysis of the problems posed by the IFR. In particular, the US-EU PNR Agreement addresses concerns on lawful basis, transfers, and ongoing safeguards in the specific context of terrorism and transnational crime. The arrangements provided for by the Agreement should be considered closely by the CDC in making amendments to the IFR.

1. *The US-EU PNR Agreement Does Not Provide a European Legal Basis for Public Health Emergencies*

The United States and the EU entered into the US-EU PNR Agreement on December 14, 2011.<sup>132</sup> It applies to “carriers operating passenger flights between the European Union and the United States,” including “carriers incorporated or storing data in the European Union and operating passenger flights to or from the United States.”<sup>133</sup> It covers use and transfer of personal data via PNR to the US for the purpose of “preventing, detecting, investigating, and prosecuting [...] terrorist offences and related crimes”, a number of other specified criminal activities relating to terrorism or violent acts and “other crimes that are punishable by a sentence of imprisonment of three years or more and are transnational in nature.”<sup>134</sup> The US-EU PNR Agreement does not refer to other circumstances and makes no provision for the use and transfer of personal data for public health purposes. Article 1 does however state that the “purpose of this Agreement is to ensure the security and to protect the life and safety of the public,” which would appear to be plenary language. Article 4, however, is headed “Use of PNR” and is exhaustively specific in respect of the types of crime addressed by the Agreement. Article 4 must prevail over the general drafting in Article 1, which is supported by the recitals, which refer only to “terrorist offences and transnational crime” and measures to “prevent and combat terrorist offences and transnational crime.” Accordingly, the Agreement sets out the legal basis upon which systematic use and transfer can occur, following Articles 6(1)(c) and Article 48 of the GDPR. The fact that the US-EU PNR Agreement predates the GDPR (effective in 2018) is not determinative, recalling that (i) the former 1995 Directive contained similar provisions and (ii) the status of privacy as a fundamental right within the EU’s founding treaties. In sum, it is

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<sup>132</sup> See *supra* note 104, US-EU PNR Agreement.

<sup>133</sup> *Id.*, Art. 2(2) and (3).

<sup>134</sup> *Id.*, Art. 4(1).

clear that the US-EU PNR Agreement with respect to terrorism, but no other conceivable albeit important purposes, such as a public health emergency.

Notwithstanding pragmatic action on the part of governments, it is clear that a legal basis would be required for systematic public health transfers under the GDPR and that no such agreement, such as the US-EU PNR Agreement, presently exists between the United States and the EU for such transfers using the PNR or API systems. We therefore suggest that the U.S. and EU authorities begin urgent discussions to settle a legal basis that might provide legal certainty to consumers and airlines alike and crucial GDPR recognition to the IFR under Articles 6(1)(c) and 48.

2. *The PNR Agreement has Safeguards and the IFR Should Have Similar Safeguards*

One critical feature of the PNR agreement, and similar agreements, is the presence of safeguards for the use and protection of personal data transferred to the US. Chapter III of the PNR Agreement deals with these aspects. Articles 5 to 16, for instance, are headed “Data security,” “Sensitive data,” “Automated individual decision,” “Retention of data,” “Non-discrimination,” “Transparency,” “Access for individuals,” “Correction or rectification for individuals,” “Redress for individuals,” and “Oversight.”

These provisions aim to ensure that the transferred personal data is handled to generally reflect some of the broader duties imposed by the GDPR on the use and protection of personal data. It is evident that considerable energy had been put into negotiating and formalizing these safeguards, in order to ensure compatibility—from the EU’s perspective at least—with fundamental rights and the related requirements of proportionality and necessity of the EU legal order. It follows that similar safeguards are likely to be required of any future instrument for the systematic use and transfer of personal data for public health reasons. It is also clear that these

safeguards are acceptable to the U.S. government and it would therefore be reasonable to suggest that these measures could be acceptable to the U.S. government in other contexts, such as the one at hand.

Failure to comply with privacy and data protection laws can expose airlines to regulatory action and litigation including substantial financial fines and the risk of class actions lawsuits. Under the GDPR, for example, an enforcement authority is empowered to levy as much as 4% of annual global turnover as a fine for privacy violations.<sup>135</sup> While the airlines are willing to provide the most efficient and complete support to the U.S. authorities in their management of COVID-19, we also naturally desire to maintain a high level of protection of their passengers' data, consistent with their own compliance standards, GDPR and other applicable privacy law. We suggest that, at a minimum, equivalent safeguards to the US-EU PNR Agreement be introduced in the IFR. This would serve three important purposes. First, these provisions would be in place and therefore 'ready' for any legal instrument the U.S. government may choose to enter into with the EU at a later stage. Second, such provisions may offer mitigation to any suggestion that compliance with the IFR is a breach of the relevant obligations under the GDPR and therefore assist with the conflict of laws problem faced by airlines. Third, such provisions would tend to increase public confidence in, and support for, both the CDC's efforts (and those of airlines), while also allowing greater transparency to the travelling public with respect to the uses of personal data. Accordingly, and at a minimum, the CDC should consider amendments to the IFR to the effect that:

- **The transmitted personal data shall only be used for specified purposes, in accordance with the “purpose limitation” principle - CDC shall use the Designated data only for “monitoring epidemics and their spread”, “the**

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<sup>135</sup> See *supra* note 101, GDPR Art. 83.

- prevention or control of communicable diseases” and “contact tracing for contagious diseases”;
- **The integrity and confidentiality of personal data shall be guaranteed via legal means** –CDC shall process personal data in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, applying appropriate technical or organizational measures;
  - **Continued storage of personal data shall be limited in time to a specific retention period** – the IFR states the information will be deleted “when no longer required for the purposes set forth above” which may be considered insufficiently precise under the GDPR. The IFR should state the retention period for personal data collected by the CDC.

In conclusion to Section VIII, it can be presumed that the GDPR is applicable to the processing activities undertaken by airlines to comply with the IFR. The design of the IFR has material consequences for the data privacy compliance obligations of airlines and, if poorly adapted, can create a conflict of laws scenario. These concerns would be generally applicable to other data privacy legislation that follows the same approach as the GDPR. While we submit that arguments exist on a lawful basis, these require the interpretation of ambiguous provisions that are largely untested. Where a basis can be identified and satisfied, additional provisions with respect to transfers and safeguards must also be honored. Without the inclusion of further safeguards to the IFR, legitimate concerns must remain on a legal conflict with the GDPR’s requirements. A public health emergency does not allay such concerns—the IFR is broad, is not time-limited, not limited to COVID-19, and requires systematic and wholesale transmission of passenger data. Fundamental rights such as privacy cannot be dismissed under the EU legal system simply by reference to a compelling emergency.

The CDC should give close consideration to the terms of the US-EU PNR Agreement in incorporating necessary safeguards within its regulatory action. This would have the benefit of improving legal certainty for passengers and airlines, as well as reducing or mitigating conflict of

law concerns. The U.S. government should, as a matter of urgency, seek to formalize a suitable instrument or practical interim understanding with the EU to provide a sure footing for the IFR.

## **IX. CONCLUSION**

The airlines are treating COVID-19 as a top concern and priority, especially the health and safety of our passengers and crewmembers. We will take all feasible, effective, and reasonable measures to respond to the COVID-19 threats and impacts. However, we respectfully submit that the CDC must withdraw the overly broad IFR that is falsely premised on COVID-19 contact tracing and conduct a full APA rulemaking to properly consider all of the implications of CDC's proposed rules. We look forward to working with the CDC to develop feasible and effective alternatives to CDC's IFR and strongly recommend that CDC adopt our recommended website/mobile application solution that avoids unnecessary burdens and costs, increases accuracy, and can be adopted in a short time to help CDC respond to COVID-19.

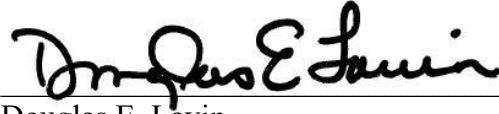
We greatly appreciate the opportunity to provide these comments and thank you for the consideration.

[NO FUTURE TEXT – SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Dated: March 13, 2020



## APPENDIX A

### **Airline Trade Association Members & Representation**

A4A's members are: Alaska Airlines, Inc.; American Airlines Group, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

IATA represents over 290 airlines in 120 countries.

RAA's members are: Air Wisconsin; CommutAir; CapeAir; Compass Airlines; Empire Airlines; Envoy; Endeavor Air; ExpressJet; GoJet Airlines; Grand Canyon Scenic Airlines; Horizon Air; Jazz; Mesa Airlines; New England Airlines; PenAir; Piedmont; Ravn Alaska; PSA Airlines; Republic Airways; Seaborne Airlines; SkyWest Airlines; and Trans States Airlines.

NACA's members are: Allegiant; AmeriJet; Air Transport International; Atlas Air Worldwide; Everts Air Cargo; Frontier Airlines; Kalitta Air; Lynden Air Cargo; Miami Air International; Northern Air Cargo; OAI; Spirit Airlines; Sun Country Airlines; SwiftAir; USA Jet Airlines; WGA; and World Atlantic Airlines.

**APPENDIX B**

**Summary of Contact Information Available to the U.S. Government Before the IFR**

(Excluding information available through U.S. passport and U.S. visa applications)

<b>Contact Information</b>	<b>PNR</b>	<b>API</b>	<b>ESTA</b>	<b>EVUS</b>
Persons Covered	All passengers	All passengers and crewmembers	Enrolled foreign national passengers eligible for VWP	Enrolled and eligible Chinese citizen passengers
Name	Yes	Yes	Yes	Yes
Address while in the United States	Maybe*	Yes**	Yes	Yes
Phone Number #1	Maybe*	No	Yes	Yes
Phone Number #2	Maybe*	No	No	No
Email	Maybe*	No	Yes	Yes
<b>Conditions &amp; Notes</b>	<ul style="list-style-type: none"> <li>Airlines cannot validate accuracy</li> <li>Not for crewmembers</li> </ul> <p>* <u>IF</u> the relevant systems (airline, GDS, OTA) capture it and include it in the PNR <u>and IF</u> the passenger or travel agent provides it</p>	<ul style="list-style-type: none"> <li>Airlines cannot validate accuracy</li> </ul> <p>**For foreign nationals only; crewmember address information is the crewmember’s permanent residence on record with the airline, which is not updated on a flight-by-flight basis</p>	<ul style="list-style-type: none"> <li>Required to be accurate by law</li> <li>Not for crewmembers</li> </ul>	<ul style="list-style-type: none"> <li>Required to be accurate by law</li> <li>Not for crewmembers</li> </ul>

## APPENDIX C

### **Passenger Name Record (PNR)**

The following summary is a general description of the information, standards, processes, and systems related to PNR. It does not reflect specific PNR information for individual airlines, which is proprietary and confidential.

#### ***PNR Creation***

The systems used to create a PNR vary widely. The systems may include, but are not limited to:

- Airline websites that are used to book reservations;
- Check-in kiosks;
- Applications (app);
- Customer service agent systems at airport check-in desks or gates;
- Reservation agent systems (*i.e.*, call centers);
- Employee check-in systems;
- Frequent flyer systems;
- Global distribution systems (GDS); and
- Travel agencies, including OTAs.

If an airline were to be required to collect and include specific information in a PNR, it would have to modify all of these systems, which are connected through complex software and networked equipment, and would require different levels of extensive programming.

The reasons an airline must modify all systems are demonstrated in the following scenarios of how passengers may provide and airlines may capture information from the passenger for a PNR:

- A passenger books and checks-in for a flight at an airport ticket counter—requiring check-in counter systems to be able to input passenger contact information;
- A passenger books a flight more than 24-hours in advance of the flight, including through the website, mobile phone application, or call center, but checks-in through another portal, such as the ticket counter, airline website, check-in kiosk, or mobile application;

- A passenger books a flight through an OTA, checks-in through the airline's website, but changes their flight through a mobile application or at a kiosk;
- An employee books a flight in advance, but checks-in at the gate.

### ***PNR Data Sources and Accuracy***

Data for a PNR is provided by the passengers themselves or by a third-party on behalf of the passenger (*e.g.*, travel agent).<sup>136</sup>

Airlines cannot validate the PNR data against any external system or source to confirm that the information is accurate.<sup>137</sup> For example, airlines cannot confirm that a phone number provided during the booking process is accurate before including that information in the PNR. Also, passenger contact information is not imbedded in any form of government-issued identity document. Accordingly, a passenger may input false or incorrect data. It is also possible that a passenger may not possess all types of contact information (such as an email address, a secondary phone number, or a known address while in the United States) required by the CDC in the IFR.

It is also the practice of some travel agents to provide the contact information of the travel agent, not the passenger, to the airline. This protects the travel agent's relationship with the passenger and prevents the airline from directly contacting the passenger.

### ***PNR Data Elements***

The scope of information in a PNR—*i.e.*, the number and nature of fields of information in the PNR—varies depending upon the systems collecting the data, the itinerary, and requirements of the passenger.<sup>138</sup> Any required PNR data elements are managed through

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<sup>136</sup> See *supra* note 13, ICAO Doc. 9944 at ¶ 2.1.2.

<sup>137</sup> See *id.* at ¶ 2.16.1.

<sup>138</sup> See *id.* at ¶ 2.1.8.

bilateral arrangements between countries and airlines, as defined by national legislation.<sup>139</sup> The U.S. government has never required airlines to collect and provide specific information in a PNR. We are not aware of any country that requires the collection and sharing of passenger contact information that is required by the CDC in the IFR.

In practice, airlines capture only limited data as key elements for the creation of PNR for their own operational business purposes, but these elements vary widely from airline to airline.<sup>140</sup> No two airlines collect and include the same information in a PNR.

Generally, airlines do include some passenger contact information in a PNR. For example, all airlines collect and include the passenger's name in a PNR. The extent to which an airline collects and includes additional passenger contact information varies widely. The largest factor is the airline's reservation and passenger information systems. For example, some airlines' systems require that a customer include a telephone number when booking a reservation, which the airline then may include in a PNR.

As explained herein, all passenger contact information that is currently captured by airlines in a PNR is fully accessible to the U.S. government.<sup>141</sup>

### ***Standards Around Transmission of PNR Data***

Many governments and their agencies around the world require that airlines to share PNR data for the purpose of preventing, detecting, and investigating terrorist offences and other transnational crimes. Throughout the years, international organizations have developed international standards and guidelines to facilitate the orderly transfer of PNR data from airlines to governments. Governments adhere to those international standards, which provide the

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<sup>139</sup> See *supra* note 14, IATA Principles, at 10.

<sup>140</sup> See *supra* note 13, ICAO Doc 9944 at ¶ 2.1.7.

<sup>141</sup> See *supra* Section III.A.1.

uniformity and predictability that is needed for the aviation system to operate soundly and economically.

In March 2005, the ICAO Council adopted the following Recommended Practice for inclusion in Annex 9 to the Chicago Convention—*Facilitation*: “Contracting States requiring Passenger Name Record (PNR) access should conform their data requirements and their handling of such data to guidelines developed by ICAO.”<sup>142</sup> ICAO’s current International Standards and Recommended Practices provide that:

- Each Contracting State requiring PNR data *shall* align its data requirements and its handling of such data with the guidelines contained in ICAO Doc 9944, *Guidelines on Passenger Name Record (PNR) Data*, **Attachment 3**, and in PNRGOV message implementation guidance materials published and updated by the World Customs Organization (“WCO”) and endorsed by ICAO and IATA; and
- Contracting States requiring the transfer of PNR data *shall* adopt and implement the EDIFACT-based PNRGOV message as the primary method for airline-to-government PNR data transferal to ensure global interoperability.<sup>143</sup>

Several ICAO’s Member States, including the U.S. Government, have developed a PNR standard that will make the collection of PNR data mandatory for all countries. The proposed text of the standard will be part of Amendment 28 to the 15<sup>th</sup> Edition of Annex 9 and was endorsed by the ICAO Air Transport Committee in February 2020.<sup>144</sup> Section 9.29(a) of the new standard states: “Contracting States *shall not* require aircraft operators to collect PNR data that is not required as part of their normal operating procedures nor to filter the data prior to transmission.”<sup>145</sup>

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<sup>142</sup> See *supra* note 13, ICAO Doc. 9944 at v.

<sup>143</sup> See ICAO, Annex 9 to the Convention on International Civil Aviation, Facilitation 9-4 (15 ed. Oct 2017), available at <https://store.icao.int/products/annex-9-facilitation> (hereinafter “ICAO Annex 9”).

<sup>144</sup> See ICAO, Air Transport Committee (ATC), 219th Session – Second Meeting, Summary of Decisions (Feb. 17, 2020), **Attachment 26**.

<sup>145</sup> See ICAO, State Letter EC 6/3 – 20/14, Proposed Amendment to Annex 9 (Feb. 25, 2020) (hereinafter “ICAO State Letter”), **Attachment 27**.

To the extent that the regulations and practices of a country differ from these international standards, the country must notify ICAO of such differences.<sup>146</sup> In the case of significant differences, the country must publish such differences.<sup>147</sup>

Accordingly, to the extent that the U.S. government requires changes to the PNR data formatting or elements for purposes of collecting passenger contact information that differs from the internationally recognized standards, the U.S. government must adhere to its international obligations. For example, if the U.S. government imposes a PNR data element requirement that is specific to the passenger's address while in the United States and no international standard currently exists for such data element, the U.S. government must adhere to its obligations under the Chicago Convention regarding notice and publication of such changes.

To compliment ICAO's Standards and Recommended Practices, ICAO, the World Customs Organization (WCO), and IATA, as joint industry-government working group, have developed internationally recognized standards for PNR elements and messages, providing a consistent approach for all airlines required to provide PNR information to governments, via the PNRGOV message.<sup>148</sup> Like ICAO,<sup>149</sup> IATA also recognizes that "[t]here is no mandate for the provision of additional data not presently stored or provided within the systems."<sup>150</sup>

IATA has recognized that the standard PNR data elements are:<sup>151</sup>

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<sup>146</sup> See *supra* note 143, ICAO Annex 9 at x.

<sup>147</sup> *Id.*

<sup>148</sup> See *e.g.*, *supra* note 14, IATA Principles; IATA, Passenger and Airport Data Interchange Standards, EDIFACT Implementation Guide, PNR Data Pushed to States or Other Authorities, PNRGOV Message 26 (Ver. 16.1 2016) (hereinafter "IATA EDIFACT"), **Attachment 28**; IATA, Air Transport & Travel Industry Message Modifications: Approved Revision Process PNRGOV (version 12.1 Aug. 1, 2012) (hereinafter "Message Modification"), **Attachment 29**. The IATA standards also state, "[w]hile not currently mandated, the underlying principle guiding development of the PNRGOV message is to provide a standard message structure that may be utilized by States and Carriers." See *supra* note 14, IATA Principles at 7.

<sup>149</sup> See *supra* note 16, and accompanying text.

<sup>150</sup> See *supra* note 14, IATA Principles at 5.

<sup>151</sup> See *id.* at 11.

PNR record locator code
Date of reservation / issue of ticket
Date(s) of intended travel
Name(s) on the PNR
Available frequent-flyer information (free tickets, upgrades, etc.)
Other names on PNR, including numbers of travelers on the PNR
All available contact information (including originator information)
All forms of payment information and billing information (not including other transactions details linked to a credit card or account and not connected to the travel transaction)
Travel itinerary for specific PNR
Travel agency and Travel agent
Code share PNR information
Split / Divided PNR information
Travel status of passenger (including confirmations and check-in status)
Ticketing information including Ticket number, one-way tickets, and Automated Ticket fare quotes
All baggage information
Seat information include seat number
General remarks including OSI and SSR information
Any collected APIS information
All historical changes to the PNR listed in data types 1 to 18 above

The PNRGOV messaging standard contains an approved message segment for address information.<sup>152</sup> This address segment may be used for passenger contact information, but

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<sup>152</sup> See *supra* note 148, IATA EDIFACT at 26.



airlines may also use the segment for billing or payer address information. The standard recognizes a physical address and includes a free-text field to include phone number. IATA has also developed standards for Special Service Requests (“SSR”), as well as Other Service Information, which are supplementary elements, to populate additional passenger-related information, including passenger contact information. Passenger contact information OSI for PNR include: CTCA – Address (home or hotel); CTCB – Business phone; CTCH – Home phone; CTCT – Travel Agent phone; CTCP – Phone nature not known. SSRs relating to passenger contact information include: CTCM – Mobile Phone; CTCE – Email; and CTCR – Refused.

Because these standards are used around the world and for interfacing communications systems, including between airlines, governments, distribution systems, and ticket agents, changes to the standards must undergo a specific process. The WCO, IATA, and ICAO maintain the PNRGOV message format and have control over the authorization of modifications to the message structure.<sup>153</sup> Amendments to the message structure fall under WCO/IATA/ICAO API PNR Contact Committee, which includes representatives from the United States, ICAO, IATA, and other interested countries.<sup>154</sup> Changes are made through parallel, complimentary, and iterative WCO Data Maintenance Request (“DMR”) process and IATA process, which include technical assessments and consideration of stakeholder feedback.<sup>155</sup>

Recognizing the importance of the process in place for amending the message structure, the new ICAO PNR Standard contains a provision to the effect that—states shall, when considering requiring elements that deviate from the standard, submit a request to the

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<sup>153</sup> See *supra* note 148, IATA Message Modification at 3.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 4-5.

WCO/IATA/ICAO API PNR Contact Committee in conjunction with the WCO's Data Maintenance Request (DMR) process via a review and endorsement process for inclusion of the data element in the guidelines.<sup>156</sup>

***Additional Information***

Additional information regarding PNR can be found online at:

- ICAO, API Guidelines and PNR Reporting Standards, *available at* <https://www.icao.int/Security/FAL/SitePages/API%20Guidelines%20and%20PNR%20Reporting%20Standards.aspx>
- IATA, API-PNR Toolkit, *available at* <https://www.iata.org/en/publications/api-pnr-toolkit/>

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<sup>156</sup> See *supra* note 145, ICAO State Letter at A-3.

## APPENDIX D

### Advanced Passenger Information (API)

The following summary is a general description of the information, standards, processes, and systems related to API. It does not reflect API system information for individual airlines, which is proprietary and confidential.

The implementation of APIS has been a long and collaborative process between all industry stakeholders, particularly the airlines and CBP. In fact, before the Congressional mandate in ATSA, APIS was available for airlines to voluntarily transmit manifest information. Soon after ATSA, CBP released an interim rule on December 31, 2001 implementing the Congressionally-required passenger and crew manifest requirements, setting forth the general requirements for the electronic transmission of manifests to CBP.<sup>157</sup> In effect, all airlines were sending API to the U.S. government for each inbound flight to the United States. Implementation was facilitated by the voluntary pre-existing systems and connectivity between the airlines and CBP. Since the 2001 rulemaking, CBP has undertaken multiple rulemakings to finalize and implement APIS, including expanding the options by which airlines may transmit manifest information through APIS.<sup>158</sup>

Most recently, CBP modified the APIS rules to allow for APIS Quick Query (“AQQ”), which allowed airlines to submit passenger data to CBP as each passenger checks-in for the

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<sup>157</sup> See CBP, Passenger and Crew Manifests Required for Passenger Flights in Foreign Air Transportation to the United States, 66 Fed. Reg. 67,482 (Dec. 31, 2001).

<sup>158</sup> See e.g., CBP, Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft, 70 Fed. Reg. 17,820 (Apr. 7, 2005); CBP, Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels, 72 Fed. Reg. 48,320 (Aug. 23, 2007) (hereinafter “AQQ Final Rule”); CBP, Establishing U.S. Ports of Entry in the Commonwealth of the Northern Mariana Islands (CNMI) and Implementing the Guam-CNMI Visa Waiver Program, 74 Fed. Reg. 2,824 (Jan. 16, 2009); CBP, Establishing U.S. Ports of Entry in the Commonwealth of the Northern Mariana Islands (CNMI) and Implementing the Guam-CNMI Visa Waiver Program; Change of Implementation Date, 74 Fed. Reg. 25,387 (May 28, 2009).

flight from the beginning of the check-in process up to 15 minutes prior to departure.<sup>159</sup> The collaborative efforts of airlines and CBP to incorporate AQQ into APIS began long before CBP proposed rules to allow for airlines' use of AQQ, including written submissions, teleconferences, and in-person meetings. In fact, CBP, in coordination and with input from the airlines, issued multiple drafts of the AQQ User Guide more than a year before the CBP proposed rules.<sup>160</sup> Ultimately, CBP issued proposed rules in July 2006 and, after receiving comments from airlines, issued final rules in August 2007.<sup>161</sup> The rules did not go into effect for another six months, extending the process to over three years. Even with this long and collaborative development process to allow for AQQ, airlines were still required to submit its electronic transmission system to CBP testing and get CBP's certification that the airline's system is capable of interactively communicating with the CBP system for effective transmission of manifest data and receipt of appropriate messages.

CBP requires, among other elements, the following information in manifests that airlines send to CBP:

- Full name, date of birth, and gender;
- Citizenship and country of residence;
- Travel document type, number, and country of issuance;
- Alien registration number (if applicable);
- PNR locator, if available; and
- Flight number and date of aircraft arrival.<sup>162</sup>

CBP only requires U.S. address information for non-U.S. nationals/residents. For crewmembers, API includes the address of permanent residence.<sup>163</sup>

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<sup>159</sup> See *supra* note 158, AQQ Final Rule at 48,320.

<sup>160</sup> The first draft was issued on December 31, 2005.

<sup>161</sup> See CBP, Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, 71 Fed. Reg. 40,035 (July 14, 2006); *supra* note 158, AQQ Final Rule at 48,320.

<sup>162</sup> See 19 C.F.R. §§ 122.49a, 122.49b, and 122.49c.

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

Because airlines are not required to transmit other contact information (*e.g.*, two phone numbers, an email address, and U.S. address for U.S. nationals/residents), airline systems are not designed to require collection of and transmission of such information as API (nor typically collect it in the PNR). Also, airlines do not have to transmit active duty U.S. military passenger information, when those passengers are transported as passengers on arriving Department of Defense commercial chartered aircraft.<sup>164</sup> The Department of Defense provides very limited passenger information to charter airlines.

Airlines cannot validate address information for accuracy. To that end, CBP recognizes that the passenger (and therefore the airlines) may not know the first night stay or the general itinerary and allows for general information to be included in the address elements.<sup>165</sup> For example, the address information may be:<sup>166</sup>

- Street Address: Touring the Grand Canyon
- City: Grand Canyon
- State: AZ
- Zip Code: 99999

CBP also allows for general descriptions of locations if the exact address is unknown, such as a hotel description (*e.g.*, Washington Downtown Hotel Hilton).<sup>167</sup>

Like PNR,<sup>168</sup> airlines may collect the CBP-required API data from various automated sources, such as booking websites, mobile applications, and check-in kiosks. Each of these systems, including underlying systems like the carrier's Department Control System (DCS), would have to be modified to comprehensively capture the CDC-required passenger contact

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<sup>164</sup> See 19 C.F.R. § 122.49a.

<sup>165</sup> See CBP, Advance Passenger Information System (APIS) Final Rule Requirement (May 23, 2013), **Attachment 30**.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *supra* Section III.A.1 and Appendix A at 1.

information and successfully transmit that information to CBP via APIS. Airlines estimate that it will take at least 12-18 months to update all systems to ensure capture and arrange for transmittal to CBP. Also, GDSs and OTAs would have to update their systems to ensure capture of the contact information, as well as coordinate with each airline to ensure that the captured information was successfully transmitted to the airlines for subsequent transmittal to CBP. This additional coordination will likely prolong and add complexity to the process.

Moreover, CBP would have to update its systems to receive the additional contact information. Based on the history of developing APIS and transmission options, airlines estimate that the process will be much longer than CBP's estimate to ensure that all systems are able to capture, transmit, and receive the new contact information.

Some airlines do not have automatic information collection systems or direct connectivity to CBP for purpose of transmitting API data through APIS. For airlines that are not directly connected to CBP, CBP developed the Electronic Advance Passenger Information System ("eAPIS").<sup>169</sup> This system allows airlines to enter or upload passenger and crew manifests through a website. The manifests that airlines upload must confirm to international standards, discussed below.<sup>170</sup>

Like PNR,<sup>171</sup> API is used ubiquitously by customs agencies around the world.<sup>172</sup> Accordingly, also like PNR, international organizations (i.e., WCO, IATA, and ICAO) have issued standards and recommendations regarding the data to be transmitted. These organizations also recognize that "[n]on-standard API programme implementation may lead to operational and

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<sup>169</sup> See CBP, Electronic Advance Passenger Information System, Help, **Attachment 31**.

<sup>170</sup> *Id.* (How do I upload a manifest I created offline?)

<sup>171</sup> See *supra* Appendix C at 3.

<sup>172</sup> See *supra* note 143, ICAO Annex 9 at 9-1 ("Each Contracting State shall establish an Advance Passenger Information (API) system.").

financial implications for both government and aircraft operators,”<sup>173</sup> while recommending that the information is limited in scope to contain only limited contact information—i.e., passenger name and destination address.<sup>174</sup>

We understand from CBP that CBP has data fields available to receive the information required by CDC, including phone numbers and email address. The international organizations have also established guidelines for email and phone.<sup>175</sup> However, airlines have not included these elements into their API systems, in part because it is not required to do so and also to comply with privacy laws.

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<sup>173</sup> See *supra* note 97, API Guidelines at 3.

<sup>174</sup> See *id.* at 19-22 (regarding API data to be captured and transmitted—“The WCO, IATA, and ICAO have jointly agreed on the maximum set of API data that should be incorporated into the PAXLST message to be used for the transmission of such data by the carriers to the Border Control Agencies. It is important to note that countries should limit their data requirements to the minimum necessary and according to national legislation.”).

<sup>175</sup> See WCO/IATA/ICAO, Passenger List Message (PAXLST) Implementation Guide 19 (version 6.0 Nov. 2014), **Attachment 32**.