



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
On the Second day of June, 2011

**Continental Airlines, Inc.**

**Violations of 49 U.S.C. § 41712 and  
14 CFR 399.84**

**Docket OST 2011-0003**

**Served June 2, 2011**

**CONSENT ORDER**

This consent order concerns violations by Continental Airlines, Inc., (Continental) of the full-fare advertising requirements specified in 14 CFR 399.84 and the statutory prohibition against unfair and deceptive practices, 49 U.S.C. § 41712. This order directs Continental to cease and desist from future violations of section 399.84 and section 41712, and assesses the carrier a compromise civil penalty of \$120,000.

**Applicable Law**

As an air carrier, Continental is subject to the advertising requirements of Part 399 of the Department's rules. To ensure there is no unfair or deceptive practice in the purchase of air transportation and consumers are given accurate and complete fare information on which to base their airline travel plans, 14 CFR 399.84 requires that advertisements specifying airfares state the full price to be paid by the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from the base fare in advertisements, so long as such taxes and fees are levied by a government entity, and are not *ad valorem* in nature, i.e., not assessed as a percentage of the fare price, are collected on a per-passenger basis, and their existence and amounts are clearly indicated at the first point in the advertisement where a fare is

presented.<sup>1</sup> Thus, for example, fare advertisements that 1) fail to identify the existence and amount of separate additional taxes and fees, 2) include only general statements regarding the existence of such taxes or fees, or 3) separately state carrier-imposed fees, such as fuel surcharges, do not comply with section 399.84 or the Department's enforcement case precedent. Violations of section 399.84 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712.<sup>2</sup>

In print advertisements, an asterisk or other symbol placed proximate to the advertised fare may refer the reader to the bottom of the advertisement where the nature and amount of the fees that may be stated separately are shown. In Internet advertising displays, taxes and fees that are permitted to be stated separately from the advertised fare may be disclosed through a prominent link placed adjacent to the stated fare that notes that taxes and fees are extra and directly takes the viewer to the bottom of the screen, to a pop up, or to a place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed.<sup>3</sup>

### Facts and Conclusions

A recent review of Continental's website by the Office of Aviation Enforcement and Proceedings (Enforcement Office) disclosed instances where Continental failed to comply with the Department's full-fare advertising rule with respect to fuel surcharges for the "nearest airports" feature on its website. As an example, a consumer conducting a search for round-trip airfare from San Jose, California, to San Salvador, El Salvador, was taken to a landing page titled "Select Departing Flight," showing flights operating on that route. On the landing page above the list of available flights, the consumer was given the option for fares from "nearby airports" from \$298, excluding taxes and fees. Upon selecting the "nearby airports" option, the consumer was taken to another landing page listing flights and corresponding fares, where a flight departing from San Francisco was listed for \$298, excluding taxes and fees. If the consumer selected that flight, he or she was taken to a third page, where the lowest fare for that flight was now listed as \$538,

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<sup>1</sup> On April 20, 2011, the Department issued a rule changing its enforcement policy with respect to section 399.84 to require that airlines and ticket agents comply with the rule as written. Under this new enforcement policy, which is effective October 24, 2011, airlines and ticket agents must include all government taxes and fees in every advertised fare. The Department's long-standing prohibition on omitting carrier- or agent-imposed charges, such as fuel surcharges or convenience fees, from advertised fares remains in effect.

<sup>2</sup> See, e.g., *Air Jamaica, Ltd., Violations of 49 U.S.C. § 41712 and 14 CFR 399.84*, Order 2008-12-25 (December 30, 2008).

<sup>3</sup> For example, a carrier or ticket agent could advertise a flight in the following manner: "\$260 + Taxes and Fees" with the phrase "Taxes and Fees" set off as a hyperlink that takes the viewer directly to the bottom of the screen or to a place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed. See, Department notices entitled "Disclosure of Air Fare Variations: Web vs. Other Sources, Surcharges that May be Listed Separately in Advertisements," dated November 4, 2004; "Disclosure of Additional Fees, Charges, and Restrictions on Air Fares in Advertisements, Including 'Free' Airfares," dated September 4, 2003; and "Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet," dated January 18, 2001, available at: <http://airconsumer.ost.dot.gov/rules/guidance.htm>.

excluding taxes and fees, rather than \$298. This significant difference was due to Continental having excluded so-called “fuel surcharges” of \$240 from the fare of \$298 that it initially advertised. During the time period when the fuel surcharges were omitted from the initial fare advertised through Continental’s “nearby airports” option, a significant number of consumers reviewed the option and purchased their airfare through the option.

By failing to include fuel surcharges in the advertised fare where it was first presented Continental violated the full-fare advertising requirements specified in 14 CFR 399.84 and the statutory prohibition against unfair and deceptive practices, 49 U.S.C. § 41712.

### **Mitigation**

In mitigation, Continental states that it is fully committed to compliance with the Department’s full-fare advertising requirements and the deficiencies in the “nearby airports” feature of its website were unintentional and inadvertent technology failures and were promptly and fully corrected. Although these failures existed on Continental’s website involving this “nearby airports” feature, Continental states that other booking paths available on the website included the fuel surcharge in the advertised amount of the fare. Continental further states that its website also advises the consumer in numerous locations throughout the booking path that additional taxes and fees, including fuel surcharges, may apply, and certain booking paths may advise a consumer up to seven different times of the potential for additional taxes and fees to be paid by the consumer, and all such notices are given in advance of the consumer making a purchase. According to Continental, all of these facts demonstrate Continental’s commitment to full compliance and its website design has been based on disclosures that fulfill the Department’s full-fare advertising rule.

### **Decision**

The Enforcement Office has carefully considered the information provided by Continental and continues to believe that enforcement action is warranted. The Department views compliance with the Federal aviation statutes and Department regulations and orders very seriously. The Enforcement Office and Continental have reached a settlement of this matter in order to avoid litigation. Without admitting or denying the violations described above, Continental consents to the issuance of this order to cease and desist from future violation of 49 U.S.C. § 41712 and 14 CFR 399.84, and to the assessment of \$120,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent against future noncompliance with the Department’s advertising requirements by Continental and other sellers of air transportation.

This order is issued under the authority in 49 CFR 1.57a and 14 CFR 385.15.

## ACCORDINGLY,

1. Based on the above information, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Continental Airlines, Inc., violated 14 CFR 399.84 by advertising in a manner that failed to include the fuel surcharge in the advertised fare;
3. We find that, by engaging in the conduct described in paragraph 2 above, Continental Airlines, Inc., engaged in unfair and deceptive trade practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
4. We order Continental Airlines, Inc., and all other entities owned or controlled by, or under common ownership and control with Continental Airlines, Inc., their successors, affiliates, and assigns, to cease and desist from further similar violations of 49 U.S.C. § 41712 and 14 CFR 399.84;
5. Continental Airlines, Inc., is assessed \$120,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of this total amount, \$60,000 shall be due and payable within 30 days of the date of issuance of this consent order. The remaining \$60,000 shall become due and payable immediately only if Continental Airlines, Inc., violates this order's cease and desist or payment provisions during the 12 months following the service date of this order, and Continental Airlines, Inc., also may be subject to further enforcement action for failure to comply with this order; and
6. We order Continental Airlines, Inc., to pay the compromise civil penalty assessed in ordering paragraph 6, above, by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise penalty assessment as ordered will subject Continental Airlines, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

**BY:**

**ROSALIND A. KNAPP**  
**Deputy General Counsel**

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