



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

**Issued by the Department of Transportation
on the 14th day of November, 2022**

Aerovias de Mexico, S.A. de C.V.

Docket OST-2022-0001

**Violations of 49 U.S.C. § 41712 and
14 CFR Part 259**

Served November 14, 2022

CONSENT ORDER

The U.S. Department of Transportation’s Office of Aviation Consumer Protection (OACP) has determined that Aerovias de Mexico, S.A. de C.V. (Aeromexico) routinely failed to provide timely refunds to passengers for flights to and from the United States that the carrier cancelled or significantly changed in violation of 49 U.S.C. § 41712 (Section 41712) and 14 CFR Part 259. Since June 30, 2020, the date the carrier filed a petition for relief in the U.S. Bankruptcy Court for the Southern District of New York, the Department has received over 760 complaints alleging that Aeromexico failed to provide refunds after cancelling or significantly changing consumers’ flights to or from the United States. The airline has received thousands more complaints and refund requests directly from passengers, of which nearly 3,000 took longer than a hundred days to process. This order directs Aeromexico to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and assesses the carrier \$900,000 in compromise civil penalties.

Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier¹ may provide foreign air transportation² only if the foreign air carrier holds a permit from the Department authorizing the foreign air

¹ 49 U.S.C. § 40102(a)(21) defines a “foreign air carrier” as “a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.”

² 49 U.S.C. § 40102(a)(5) defines “air transportation” as “foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.” 49 U.S.C. § 40102(a)(23) defines “foreign air transportation” as “the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of

transportation or has a valid exemption from that section.³ A foreign air carrier that holds a foreign air carrier permit from the Department is subject to the requirements of 49 U.S.C. § 41712, which prohibits an air carrier, foreign air carrier, or a ticket agent from engaging in an unfair and deceptive practice in air transportation or the sale of air transportation. Section 41712 authorizes the Department to investigate and decide whether a carrier or ticket agent is engaging in an unfair or deceptive practice, and if so, to prohibit such a practice.⁴

In April and May 2020, in response to the high volume of air travel service complaints received, many of which concerned refunds, OACP issued notices to help consumers understand their rights and emphasize to airlines that the unprecedented impact COVID-19 has had on air travel has not changed the airlines' obligation under Section 41712 to refund passengers for flights that airlines cancel or significantly change.⁵ Then, in December 2020, the Department published in the Federal Register a final rule titled "Defining Unfair or Deceptive Practices."⁶ The rule defined the terms "unfair" and "deceptive" for purposes of Section 41712. Pursuant to the rule, a practice is "unfair" to consumers within the meaning of Section 41712 if it causes substantial harm to consumers, the harm is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.⁷ For the reasons set forth below, the practice of cancelling or significantly changing a flight to or from the United States without providing a refund is "unfair" as that term is defined by regulation, irrespective of the reason for the cancellation.

First, the practice imposes substantial harm to consumers because they paid money to the carrier for a service that the carrier did not provide. Consumers incur harm from delays in receiving refunds, as well as from the time, effort, and expense involved in seeking a refund.

Second, the harm is not reasonably avoidable. A consumer acting reasonably would believe that he or she was entitled to a refund under U.S. law if the carrier cancelled or significantly changed the flight whatever the reason for the cancellation or significant change. Moreover, a reasonable consumer would not believe that it is necessary to purchase a more expensive refundable ticket in order to be able to recoup the ticket price when the *airline* fails to provide the service paid for

mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft."

³ The authority required by section 41301 is separate and distinct from the operations specifications and approvals that such an entity must obtain from the Federal Aviation Administration (FAA) for operations to and from the United States.

⁴ The Department's regulations impose obligations on airlines that cannot be avoided through contractual provisions. See *Spirit Airlines vs. DOT*, 687 F.3d 403, 416 (D.C. Cir. 2012) (DOT may implement rule that airlines must change their policies to permit a passenger to cancel a reservation without penalty within 24 hours, based on DOT's finding that existing practices were unfair or deceptive).

⁵ "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (April 3, 2020), available at https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020; "Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (May 12, 2020), available at https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020;

⁶ 85 Fed. Reg. 78707 (December 7, 2020).

⁷ 14 CFR 399.79(b)(1).

through no action or fault of the consumer. Reasonable consumers understand that “refundable” tickets are valuable because they ensure a refund if the *passenger* cancels their own flight reservation.

Third, the harm is not outweighed by countervailing benefits to consumers or competition. The Department seeks to regulate practices that are injurious to consumers in their net effects.⁸ In enforcing Section 41712, which is modeled on Section 5 of the Federal Trade Commission (FTC) Act, the Department recognizes, like the FTC, that practices may be harmful to consumers in some ways, but beneficial in others. For example, offsetting benefits may include lower prices or a wider availability of products and services resulting from competition.⁹ Here, there are no offsetting benefits to consumers that would outweigh the harm of retaining passengers’ funds for lengthy periods of time.

In addition to the general prohibition on unfair and deceptive practices, pursuant to 14 CFR 259.5, U.S. and foreign air carriers operating at least one aircraft having a designed seating capacity of 30 or more seats must adopt a Customer Service Plan and adhere to the Plan’s terms. Customer Service Plans represent a baseline, uniform, minimum level of service to which all covered carriers operating flights to and from the United States must comply. The Customer Service Plan must include certain commitments relating to the payment of refunds to passengers when required by Section 41712. Section 259.5(b)(5) requires: “Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and [Regulation Z, 12 CFR Part 1026] for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation.” OACP’s position is that refunds are “due” when failure to provide them would constitute an unfair or deceptive practice under Section 41712. Regulation Z states, at 12 CFR 1026.11(a)(2), that for credit card purchases, refunds must be provided within seven business days of receipt of a written request from the consumer. Pursuant to 14 CFR 374.3(b), violations of Regulation Z constitute violations of 49 U.S.C. Subtitle VII.¹⁰

Facts and Conclusions

Aeromexico, a foreign air carrier, holds a foreign air carrier permit to operate flights to and from the United States pursuant to 49 U.S.C. § 41310. Aeromexico uses at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of Aeromexico’s foreign air carrier permit is that Aeromexico “comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.”¹¹ Accordingly, Aeromexico is subject to the requirements in 49 U.S.C. § 41712 and 14 CFR 259.5.

⁸ See <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁹ See *Id.*

¹⁰ In enforcement orders, DOT has clarified that violations of section 259.5 are violations of Section 41712 specifically, not just 49 U.S.C. Subtitle VII generally. See, e.g., *American Airlines*, DOT Order 2017-7-9.

¹¹ See DOT Order 2016-3-5 in docket DOT-OST-2016-0209.

Aeromexico filed voluntary petitions for relief in the U.S. Bankruptcy Court for the Southern District of New York under chapter 11 of the Bankruptcy Code on June 30, 2020 (the petition date).

This consent order concerns violations of section 41712 and 14 CFR 259.5 occurring after the petition date. After the petition date, over 760 consumers complained to OACP that Aeromexico failed to provide requested refunds for flights to or from the United States that the carrier cancelled or significantly changed due to the COVID-19 pandemic and associated governmental restrictions. An investigation by OACP, which included reviewing Aeromexico's refund policies and procedures, data provided by the carrier, and consumer complaint files, among other information, revealed that from July 1, 2020 to December 21, 2021, Aeromexico's refund policy was that refunds would be processed 12 months after receipt of the request. As a result, throughout 2020 and 2021, Aeromexico did not provide timely refunds to thousands of consumers for flights to or from the United States that were cancelled or significantly changed by the carrier in response to the impact of the COVID-19 pandemic. In fact, Aeromexico took over a hundred days to process approximately 3,000 of these refunds. Accordingly, consumers experienced significant harm from the extreme delay in receiving their refunds.

Response

In response, Aeromexico acknowledges that many of its passengers were affected adversely by its flight cancellations; it observes that similar conditions affected airlines and passengers worldwide as a result of the COVID-19 global pandemic and government restrictions on travel. Aeromexico asserts that as it faced the possibility that it would need to cease operations, it made the difficult decision to limit how passengers holding nonrefundable tickets could recover the value of those tickets - through travel vouchers with immediate value or a refund deferred for 12 months. The carrier states that its actions were key in managing its bankruptcy estate and debtor-in-possession financing. The carrier asserts such actions preserved its service and the jobs of Aeromexico employees in the United States and other countries and allowed it ultimately to return more value to more customers than might otherwise have been possible. Given the totality of these circumstances, and for the reasons set forth below, Aeromexico respectfully disagrees with the Department's analysis.

In addition, Aeromexico believes that opportunities for consumers to avoid the harm associated with a delayed refund were reasonably available and legally sufficient. Aeromexico also claims that its approach resulted in meaningful benefits to consumers, as discussed above, and competition. In addition, Aeromexico notes that U.S. carriers serving the United States-Mexico market received extensive U.S. government financial subsidies during the period while Aeromexico did not receive comparable support. Aeromexico submits that its presence as a source of competitive travel options for U.S. consumers outweighed any harm associated with the actions addressed in this order.

Decision

OACP views seriously Aeromexico's violations of 49 U.S.C. § 41712 and 14 CFR Part 259. Accordingly, after carefully considering all the facts in this case, OACP believes that enforcement action is warranted. In order to avoid litigation, and without admitting any violation including those described above, Aeromexico consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and to the assessment of \$900,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. Aeromexico agrees that the assessment, which is a post-petition obligation of Aeromexico (including in its capacity as reorganized debtor) was not discharged in, enjoined by, or otherwise altered or affected by Aeromexico's chapter 11 cases. The compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It establishes a strong deterrent to future similar unlawful practices by Aeromexico and other carriers.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that by significantly delaying the payment of refunds to passengers for flights to or from the United States that Aerovias de Mexico, S.A. de C.V. cancelled or significantly changed, Aerovias de Mexico, S.A. de C.V. engaged in an unfair practice in violation of 49 U.S.C. § 41712;
3. We find that by failing to adhere to its customer commitment related to providing prompt refunds, Aerovias de Mexico, S.A. de C.V. violated 14 CFR 259.5(b)(5) which also constitutes a violation of 49 U.S.C. § 41712;
4. We order Aerovias de Mexico, S.A. de C.V. and its successors and assigns to cease and desist from further violations of 49 U.S.C. § 41712 and 14 CFR 259.5;
5. We assess Aerovias de Mexico, S.A. de C.V. \$900,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above. Aerovias de Mexico, S.A. de C.V. will make the payment as a post-petition obligation (including in its capacity as reorganized debtor) that was not discharged in, enjoined by, or otherwise altered or affected by Aerovias de Mexico, S.A. de C.V.'s chapter 11 cases; and
6. We order Aerovias de Mexico, S.A. de C.V. to pay within 30 days of the issuance of this order the penalty assessed in ordering paragraph 5, above, through Pay.gov to the account of the U.S. Treasury. Payment shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Aerovias de Mexico, S.A. de C.V. to the assessment of interest, penalty, and

collection charges under the Debt Collection Act and to further enforcement action for failing 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:

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