



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

**Issued by the Department of Transportation  
on the 14<sup>th</sup> day of November, 2022**

**Avianca**

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

**Docket OST-2022-0001  
Docket OST-2020-0248**

**Served November 14, 2022**

**CONSENT ORDER AND ORDER OF DISMISSAL**

This consent order concerns violations by Aerovías del Continente Americano – Avianca S.A., Taca International Airlines, S.A. (TACA), Avianca Guatemala (f/k/a Aviateca), and Avianca Costa Rica (f/k/a LACSA) (collectively, “Avianca”) of 49 U.S.C. § 41712 and 14 CFR Part 259. Specifically, Avianca failed to provide timely refunds to passengers for flights to and from the United States that the carrier cancelled or significantly changed as a result of the COVID-19 pandemic. Based on the large number of complaints received by the U.S. Department of Transportation (“Department” or “DOT”) against Avianca for failing to provide refunds after cancelling or significantly changing consumers’ flights to or from the U.S., the Office of Aviation Consumer Protection (“OACP”) initiated an investigation into Avianca’s refund policy and practices. This order directs Avianca to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and assesses \$750,000 in civil penalties.

## Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier<sup>1</sup> may provide foreign air transportation<sup>2</sup> only if the foreign air carrier holds a permit from the Department authorizing the foreign air transportation or has a valid exemption from that section.<sup>3</sup> A foreign air carrier that holds a foreign air carrier permit or exemption authority 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 determine whether a carrier or ticket agent is engaging in an unfair or deceptive practice, and if so, to prohibit such a practice.

In April and May 2020, in response to the high volume of air travel service complaints received, many of which concerned refunds, the Department's OACP issued notices to help consumers and air carriers 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.<sup>4</sup> Then, in December 2020, the Department published in the Federal Register a final rule titled "Defining Unfair or Deceptive Practices."<sup>5</sup> 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.<sup>6</sup> For the reasons set forth below, the practice of cancelling or significantly changing a flight to or from the United States without providing a timely refund is "unfair" as that term is defined by regulation, irrespective of the reason for the cancellation.

---

<sup>1</sup> 49 U.S.C. § 40102(a)(2) 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."

<sup>2</sup> 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 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."

<sup>3</sup> 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.

<sup>4</sup> "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](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](https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020).

<sup>5</sup> 85 Fed. Reg. 78707 (December 7, 2020).

<sup>6</sup> 14 CFR 399.79(b)(1).

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 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.<sup>7</sup> 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.<sup>8</sup> Here, there are no offsetting benefit to consumers that would outweigh the harm of delaying refunds 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 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 in a timely manner 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 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.<sup>9</sup>

---

<sup>7</sup> See <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

<sup>8</sup> See *id.*

<sup>9</sup> 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.

## **Facts and Conclusions**

Avianca consists of four affiliated foreign air carriers which hold operating authority from the Department to operate flights to and from the United States pursuant to 49 U.S.C. § 41310. Avianca uses at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of Avianca's operating authority is that Avianca "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."<sup>10</sup> Accordingly, Avianca is subject to the requirements in 49 U.S.C. § 41712 and 14 CFR 259.5.

Avianca and various affiliates filed voluntary petitions for relief in the U.S. Bankruptcy Court for the Southern District of New York, commencing cases (the "Chapter 11 Cases") under chapter 11 of the Bankruptcy Code on May 10, 2020 (the petition date). Pursuant to Article II.A of the Further Modified Joint Chapter 11 Plan of Reorganization, entered by the Bankruptcy Court on November 2, 2021, each "holder of an Allowed General Administrative Expense [who] has not already been paid" is entitled to receive payment "when such payment otherwise becomes due in the . . . ordinary course of business without further notice to or order of the Bankruptcy Court." Moreover, under Article II.B, Avianca has the authority to "settle any Disputed Claim without further notice to or action, order, or approval by the Bankruptcy Court [] unless otherwise agreed by the holder of such General Administrative Expense and the applicable Debtor or Reorganized Debtor." This consent order concerns violations of section 41712 and 14 CFR 259.5 occurring after the petition date.

An investigation by OACP revealed that throughout 2020 and 2021, Avianca did not provide prompt 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. Although Avianca retained its policy of providing refunds to U.S. consumers for cancelled or significantly delayed flights to or from the United States, in practice Avianca did not provide timely refunds. Avianca acknowledged that refunds were delayed and identified the effects of the COVID-19 pandemic on operations, including the declaration of bankruptcy, limited cash flow and reduced staffing, as the primary cause of the delays. Thousands of consumers experienced significant harm from the extreme delay in receiving their refunds.<sup>11</sup>

## **Response**

In response, Avianca states that it carefully reviewed the Department's April 2020 and May 2020 guidance regarding the Department's refund policy and in good faith believed it was compliant. Avianca believes that it did make good faith efforts to provide timely refunds consistent with the Department's guidance considering the totality of the circumstances facing it

---

<sup>10</sup> See, e.g., Docket DOT-OST-2012-0137-005 (Jan. 28, 2013) (timely renewal pending).

<sup>11</sup> OACP received two formal complaints relating to this matter. *Libersohn v. Avianca*, Docket DOT-OST-2020-0099, and *Ossowiecki v. Avianca*, Docket DOT-OST-2020-0248. OACP has issued a separate order of dismissal with respect to Docket DOT-OST-2020-0099. OACP will dismiss the complaint in Docket DOT-OST-2020-0248 through this consent order.

as a result of the COVID-19 pandemic.<sup>12</sup> Avianca states it is agreeing to this settlement solely to avoid the expense of litigation and as part of its efforts to focus the Company's resources on providing excellent service for its customers after the pandemic and after Avianca's successful emergence from bankruptcy.

Avianca states that it never had a policy in place to retain or deny refunds, nor did it attempt to retroactively change its rules to deprive passengers of refunds owed. Next, Avianca states that it made good faith efforts to address the unprecedented influx of refund requests it received due to pandemic-related cancellations. Avianca states that it devoted significant and scarce resources to handling the flood of pandemic-related refund requests, all while operating in bankruptcy. In total, Avianca states that it had to process approximately seven-years' worth of refund requests in one year with reduced staffing. Avianca states that any delay in processing refunds was outside of its control and was solely attributable to sheer volume of refund requests caused by the pandemic. When it was able, Avianca states that it hired temporary workers to assist in addressing the refund request backlog. In addition to hiring temporary workers to assist in processing the backlog, Avianca states that it also diverted personnel from their existing duties to also address the backlog. Avianca states that addressing the backlog of refund requests was a top priority for its leadership, which met at least once a week for over a year to discuss the refund processing progress. Avianca states that these meetings included top-level Avianca leaders, including the Chief Financial Officer and the Vice President of Accounting.

Avianca states that in addition to taking the good faith steps of hiring additional workers to address refund requests, it also invested a substantial amount in IT infrastructure to streamline both the customer-facing refund website as well as Avianca's backend accounting software. Avianca states that it was so concerned with compliance with U.S. refund requirements that it diverted resources from other customer service functions addressing non-U.S. customer needs towards refunds for customers affected by U.S. flight cancellations.

Avianca states that it is looking forward to its future and is planning for circumstances that may occur which could result in higher level of refund requests. Avianca states that it has committed to investing \$2 million in further upgrades to its refund accounting system to ensure that the system can handle massive influxes of refund requests in the future. Avianca believes that it always acted in good faith, and that a large, punitive penalty is inappropriate given the dire circumstances facing Avianca during the COVID-19 public health emergency, which included filing for bankruptcy protection. Avianca does not believe that this type of punitive action against a carrier who attempted to act in good faith but was subjected to unforeseen circumstances entirely outside its control, sets an appropriate precedent.

### **Decision**

OACP views seriously Avianca'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. Avianca does not believe that enforcement action is warranted in this case but, nevertheless, in order to avoid the cost of litigation and to better be able to focus resources on its consumers, it consents to the issuance of this order to cease and desist from future violations of 49

---

<sup>12</sup> OACP does not view Avianca's actions as being consistent with the May 2020 guidance.

U.S.C. § 41712 and 14 CFR Part 259 and to the assessment of \$750,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. The Department states that the compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. The Department believes that the compromise assessment establishes a strong deterrent to future similar unlawful practices by Avianca 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 Avianca cancelled or significantly changed, Avianca 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, Avianca violated 14 CFR 259.5(b)(5), which also constitutes a violation of 49 U.S.C. § 41712;
4. We order Avianca 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 Avianca \$750,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above. Of this amount:
  - a. \$187,500 shall be due and payable within 45 days of the service date of this order;
  - b. \$187,500 shall be due and payable within 120 days of the service date of this order; and
  - c. \$375,000 shall be credited to Avianca upon the service date of this order in consideration of the approximately \$4.4 million in refunds it provided to passengers with non-refundable tickets for flights to or from the U.S. who chose not to travel and were not entitled to refunds under U.S. law.
6. We order Avianca to pay the assessed penalty under the terms of this consent order, consistent with Article II.A and II.B and other relevant provisions of the Plan;
7. Proofs of claim 4130 through 4134, filed by the Department in the Chapter 11 Cases, shall each be allowed in the amount of \$750,000. Avianca's acceptance of this consent order is in full satisfaction of all of the Department's claims in the Chapter 11 Cases, including proofs of claim 4130 through 4134; and
8. We dismiss, with prejudice, the complaint filed in Docket DOT-OST-2020-0248.

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:**

**BLANE A. WORKIE**  
**Assistant General Counsel**  
**for the Office of Aviation Consumer Protection**

*An electronic version of this document is available at*  
[www.regulations.gov](http://www.regulations.gov)