



**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**

EL AL Israel Airlines Ltd.

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

Docket OST-2022-0001

Served November 14, 2022

CONSENT ORDER

The U.S. Department of Transportation's Office of Aviation Consumer Protection (OACP) has determined that EL AL Israel Airlines Ltd. (EL AL) 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 March 2020, the Department received a large number of complaints alleging that EL AL failed to provide refunds after cancelling or significantly changing consumers' flights to or from the United States. Based on these complaints, OACP initiated an investigation into EL AL's policies and practices for providing refunds during the COVID-19 pandemic. Based on this investigation, the Department has determined that EL AL took over 100 days to provide refunds to thousands of consumers. This order directs EL AL 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 civil penalties.¹

Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier² may provide foreign air transportation³ only if the foreign air carrier holds a permit from the Department authorizing the foreign air

¹ This order is a settlement by the Department and EL AL of all 49 U.S.C. § 41712 and Part 259 violations related to failure to provide timely refunds in instances where EL AL cancelled or significantly delayed a flight from the beginning of the COVID-19 pandemic, March 1, 2020, through the issuance date of this order.

² 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."

³ 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.⁴ 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.

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 and airlines 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 timely 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 through no action or fault of the consumer. Reasonable consumers understand that "refundable"

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."

⁴ 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.

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).

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 providing delayed refunds.

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 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 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

EL AL, a foreign air carrier, operates pursuant to an exemption and amended foreign air carrier permit granted by the Department¹¹ and operates flights to and from the United States using at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of EL AL's authority is that EL AL "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."¹² Accordingly, EL AL 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 Notice of Action Taken in Docket DOT-OST-2007-0095 issued on August 23, 2022; Order 86-3-58.

¹² *Id.*

Since March 1, 2020, a large number of consumers complained to OACP alleging that EL AL 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. Based on these complaints, OACP conducted a thorough investigation, which included reviewing EL AL's refund policies and procedures, data provided by the carrier, and consumer complaint files, among other information. The investigation revealed that throughout 2020 and 2021, EL AL 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. As a result, consumers experienced significant harm from the extreme delay in receiving their refunds.

Response

In response, EL AL states that it disagrees with the Department's conclusion in this order that this assessed penalty appropriately reflects the situation faced by EL AL during the COVID-19 pandemic. EL AL states that it believes that at all times it has acted in good faith towards its customers regarding the provision of refunds for flights that EL AL cancelled or significantly delayed. EL AL notes that it was cooperative with all Departmental requests related to this matter. EL AL believes, based on its good faith efforts towards its customers, that it was compliant with the Department's guidance. EL AL states that it made good faith efforts, and the Department has not made any finding that it acted in bad faith towards its customers. EL AL states that it was simply impossible to timely process refunds due to the dramatic and grave consequences the COVID-19 public health emergency had on EL AL's staffing and operations.

EL AL states that the COVID-19 public health emergency was unprecedented in its impacts on EL AL's operations from both a personnel and financial standpoint. EL AL states that at the height of the pandemic, 95% of its workforce were placed on unpaid leave, including the workforce with responsibility for responding to passenger requests. EL AL states that due to government lockdowns and restrictions in Israel, even when EL AL was able to bring a limited, skeleton staff into the office, its customer service staff was still only at 20% its pre-pandemic operating level, while its finance department was at 50% its pre-pandemic operating level. EL AL states that even in the face of extreme financial hardship, it declined to impose change and cancellation fees on passengers who voluntarily changed their travel, forfeiting nearly \$10 million in revenue. EL AL prioritized refunds for U.S. passengers but was simply unable to meet the Department's timeframes due to the extreme pressure the COVID-19 public health emergency had on its personnel and its finances. EL AL states that it never had a policy to deny refunds, and it states that it never took the position that it was not required to refund passengers. EL AL states that it did not try to retroactively apply a more restrictive practice or policy to the processing of refunds. EL AL believes that it devoted what resources it had available to timely processing refunds. EL AL at all times made decisions to ensure that it would be able to continue operations to provide excellent service to passengers. EL AL's commitment to its passengers and to providing refunds in a timely manner is evidenced by the fact that once it received financial assistance from its homeland government, it was able to quickly and efficiently clear the backlog of refund requests. Ultimately, EL AL's decisions enabled it to survive the pandemic while ensuring that all customers received appropriate refunds.

Decision

OACP views seriously EL AL'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. EL AL does not believe that enforcement action is warranted in this case but, nevertheless, in order to avoid litigation, EL AL 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. 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 EL AL 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 EL AL Israel Airlines Ltd. cancelled or significantly changed, EL AL Israel Airlines Ltd. engaged in an unfair practice in violation of 49 U.S.C. § 41712;
3. We find that failing to adhere to its customer commitment related to providing prompt refunds, EL AL Israel Airlines Ltd. violated 14 CFR 259.5(b)(5) which also constitutes a violation of 49 U.S.C. § 41712;
4. We order EL AL Israel Airlines Ltd. 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 EL AL Israel Airlines Ltd. \$900,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above. Of this amount:
 - a. \$100,000 shall be due and payable within 90 days of the issuance of the order;
 - b. \$150,000 shall be due and payable within 120 days of the issuance of the order;
 - c. \$200,000 shall be due and payable within 300 days of the issuance of the order; and
 - d. \$450,000 shall be credited to EL AL upon the issuance of the order in consideration of refunds it provided to passengers with non-refundable tickets for flights to or from the United States who chose not to travel and were not entitled to refunds under U.S. law.

6. We order EL AL Israel Airlines Ltd. to pay, under the installment plan described in order 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 EL AL Israel Airlines Ltd. 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:

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