



**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**

TAP Air Portugal

**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 has determined that TAP Air Portugal (TAP) 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 has received over 5,000 complaints alleging that TAP failed to provide refunds after cancelling or significantly changing consumers' flights to or from the U.S. The airline has received tens of thousands more complaints and refund requests from passengers directly. In April 2020, TAP began offering refunds to all consumers holding non-refundable tickets on flights to and from the United States that were cancelled or significantly changed by the carrier. However, approximately 25% of the refund requests took longer than a hundred days to process. This order directs TAP to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and assesses the carrier \$1,100,000 in 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 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 practices 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.

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 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).

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.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

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.

Facts and Conclusions

TAP, a foreign air carrier, holds a foreign air carrier permit to operate flights to and from the United States pursuant to 49 USC 41301. TAP uses at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of TAP's foreign air carrier permit is that TAP "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, TAP is subject to the requirements in 49 U.S.C. § 41712 and 14 CFR 259.5.

An investigation by OACP revealed that beginning on or about March 17, 2020, TAP did not provide refunds to consumer 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, unless the passenger had specifically purchased a "refundable" ticket, instead providing travel vouchers to all impacted consumers. Thousands of consumers complained to OACP that TAP failed to provide requested refunds for flights that the carrier cancelled or significantly changed due to the COVID-19 pandemic and associated governmental restrictions. Tens of thousands more consumers contacted TAP directly for refunds. At the end of March 2020, TAP had begun cancelling all passenger services between the U.S. and Europe, scheduled through June 2020, resulting in 2,019 canceled flights. However, TAP continued to provide only vouchers until on or about April 9, 2020, after which TAP began offering refunds to all consumers holding non-refundable tickets on flights to and from the United States that were cancelled or significantly changed by the carrier. Although TAP's revised policy included allowing consumers that had previously received vouchers to obtain refunds, by the time TAP began providing refunds, staffing and technical issues and the large number of refund requests led to consumers waiting for many months before receiving the refunds to which they were entitled. As a result, thousands of consumers experienced significant harm from extreme delay in providing refunds to those consumers.

Response

In response, TAP states that it made good faith efforts to process passenger refunds as promptly as possible during the extraordinarily challenging circumstances caused by the global COVID-19 pandemic. TAP states that due to the pandemic and associated governmental travel bans, TAP essentially stopped operating as a passenger airline during the early months of the pandemic and drastically reduced its workforce, furloughing 90% of its staff. TAP states that given the shutdown of services, TAP began receiving an avalanche of refund requests and its call center was quickly overwhelmed. TAP states that while its refund process was up to the task prior to the pandemic, its reduced staff was unable to timely handle the massive and unprecedented number of requests.

TAP explains that its internal pre-pandemic refund and associated payment systems were mostly manual, requiring staff members to process and approve requests, enter payment details and return payment values to credit cards. TAP states that, in addition, like other airlines, its central automated refund process for tickets purchased through travel agents was shut down early in the pandemic to prevent duplication and fraud from refund requests being made through multiple

¹¹ DOT Order 2010-1-7 (January 13, 2010), paragraph 11.

channels and avoid default, creating more manual work. TAP states that refunds were further complicated by multiple ticket reissuances as passengers rebooked their travel (sometimes repeatedly) in an ever-changing pandemic environment; requests for refund of vouchers or tickets issued using vouchers, which raised payment issues; conflicts in refund channels; various technical issues with processing payments to credit cards, stemming in part from the huge influx of requests being processed; and inaccessibility of original customer payment information due to customer privacy protections, requiring TAP to contact and obtain payment information from passengers. TAP adds that following the April 3, 2020, Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, TAP timely contacted passengers who had been provided vouchers and notified them that they had the option of a refund, and TAP reviewed with its personnel the Department's refund policy.

TAP states that the pandemic forced the airline into a restructuring. TAP explains that it nonetheless hired staff when feasible to handle refund requests and developed tools to address refund requests and to automate more of the refund process going forward. TAP states that during the pandemic it added functionality to its website to allow passengers to reschedule their trips online, request a refund to the original form of payment, request a voucher and check the status of a pending refund request, among other upgrades. TAP states that it also implemented automated solutions to facilitate refunds, such as new systems to allow tickets, including reissued tickets, to be valued automatically for refund purposes. TAP states that it fully reinstated its participation in the automatic refund clearinghouse for tickets purchased through travel agencies. Finally, TAP states that it takes seriously the Department's rules and its refund obligations to its passengers, as demonstrated by its good faith efforts and the measures taken to improve its refund process during this exceedingly difficult time.

Decision

OACP views seriously TAP's violations of 49 U.S.C. § 41712 and 14 CFR Part 259. Accordingly, after carefully considering all the facts in this case, including those set forth above, OACP believes that enforcement action is warranted. In order to avoid litigation, TAP 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 \$1,100,000 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 TAP 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 TAP Air Portugal cancelled or significantly changed, TAP Air Portugal 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, TAP Air Portugal violated 14 CFR 259.5(b)(5), which also constitutes a violation of 49 U.S.C. § 41712;
4. We order TAP Air Portugal 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 TAP Air Portugal \$1,100,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above; Of this total amount, \$550,000 shall be due and payable within 30 days of the issuance of the order. The remaining \$550,000 shall be credited to TAP Air Portugal for refunds that TAP Air Portugal 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 TAP Air Portugal 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 TAP Air Portugal 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

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