



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

**Issued by the Department of Transportation  
on the 3<sup>rd</sup> day of June, 2024**

**South African Airways (PTY) Limited**

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

**Docket OST-2024-0001**

**Served June 3, 2024**

**CONSENT ORDER**

The U.S. Department of Transportation's Office of Aviation Consumer Protection has determined that South African Airways (SAA) failed to provide timely refunds to passengers for flights to and from the United States that were cancelled or significantly changed by SAA in violation of 49 U.S.C. § 41712 (Section 41712) and 14 CFR Part 259. Since March 2020, the Department received over 400 complaints alleging that SAA failed to provide timely refunds after cancelling or significantly changing consumers' flights to or from the United States. SAA took more than 100 days to process many refunds but was unable to provide the Department information regarding the exact length of time that it took to process the thousands of refund complaints or requests that it received directly from passengers. SAA has acknowledged that it did not begin to process the majority of its backlog of outstanding refund requests it received throughout the pandemic for flights cancelled or significantly changed by the carrier until approximately May 2021. This order directs SAA to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and assesses the carrier \$300,000 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

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<sup>1</sup> 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."

<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."

transportation or has a valid exemption from that section.<sup>3</sup> 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.<sup>4</sup>

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 Office of Aviation Consumer Protection (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.<sup>5</sup> Then, in December 2020, the Department published in the Federal Register a final rule titled "Defining Unfair or Deceptive Practices."<sup>6</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>7</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 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"

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<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> 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).

<sup>5</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>6</sup> 85 Fed. Reg. 78707 (December 7, 2020).

<sup>7</sup> 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.<sup>8</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>9</sup> 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.<sup>10</sup>

### **Facts and Conclusions**

SAA, a foreign air carrier, holds authority by a valid exemption 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 SAA's operating authority is that SAA "[c]omply 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>11</sup> Accordingly, SAA is subject to the requirements in 49 U.S.C. § 41712 and 14 CFR 259.5.

Since March 1, 2020, over 400 consumers complained to OACP that SAA failed to provide requested refunds for flights to or from the United States that the carrier cancelled or significantly

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

<sup>9</sup> See *Id.*

<sup>10</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.

<sup>11</sup> See Docket DOT-OST-1999-6555; Docket DOT-OST-2000-6756.

changed due to the COVID-19 pandemic and associated governmental restrictions. In addition, SAA received thousands more of such complaints and refund requests directly from consumers.

An investigation by OACP revealed that from approximately March 20, 2020, through April 30, 2021, SAA received thousands of refund requests and did not provide timely refunds to many consumers for flights to or from the United States that were cancelled or significantly changed by the carrier in response to the impacts of the carrier's Business Rescue proceedings and the COVID-19 pandemic, which resulted in many refunds taking more than 100 days to process. SAA did process a limited number of requested refunds during this time frame, mostly in response to potential litigation and consumer complaints that were received directly from government regulators, such as DOT. After exiting its Business Rescue in South Africa, which commenced prior to the COVID-19 pandemic, in May 2021 SAA began to process its backlog of outstanding refund requests that it received throughout the pandemic for flights cancelled or significantly changed by the carrier. As a result, many consumers experienced significant harm from the extreme delays in receiving their refunds.

### **Response**

In response, SAA states that on December 5, 2019, SAA was placed under Business Rescue pursuant to the South African Companies Act, as a consequence of its on-going financial challenges. SAA states that the Business Rescue shifted control of the company from the then-employed Directors and Officers of SAA, into the hands of two court-appointed Business Rescue Practitioners. SAA states that the Business Rescue also placed a temporary legal moratorium on the rights of claimants against the company while a Business Rescue Plan was developed to restructure the business's affairs, property, debt, equity, and other liabilities, in a manner that maximizes the likelihood of continued solvency.

SAA states that when the COVID-19 pandemic hit, a series of governmental orders declared a national state of disaster and placed South Africa into lockdowns. SAA confirms that the lockdowns included a prohibition on scheduled commercial flights, and resulted in all of SAA's employees, including its entire Customer Relations Department, being prohibited from reporting to work beginning March 27, 2020. SAA states that as it is owned and controlled by the government of South Africa, the government-imposed lockdown, and related suspension of SAA business operations, applied to all SAA offices globally, including its U.S. offices responsible for making refunds. SAA states the hard lock down was compounded by the acute financial crisis facing SAA. SAA states that by May 1, 2020, all SAA employees globally had been put on special leave of absence, including those emergency personnel still reporting to work, as the company did not have the funds to continue with business operations.

SAA asserts that, notwithstanding the challenges of Business Rescue and the COVID-19 pandemic, beginning in early 2021 SAA made significant progress in processing refunds for passengers whose flights were cancelled or significantly delayed by SAA. SAA contends that its efforts included personnel dedicated to processing refunds for U.S. customers and taking the extraordinary step of obtaining Board of Directors approval to rehire furloughed employees and reopen its U.S. Refund Accounting Department. SAA further asserts that reconciling refund requests against credit card chargebacks that already had been completed was a time consuming but necessary process.

SAA asserts that even though SAA's Business Rescue proceedings were discharged in April 2021 and SAA has re-commenced limited flight operations, its financial position has not yet stabilized and government funding remains limited. SAA believes that the harsh circumstances it faced militate against any enforcement action in this instance, that it for some time was barred as a matter of law from making refunds, and that it took all necessary steps to comply with DOT policies. Nevertheless, SAA accepts the imposition of a civil penalty in this instance.

### **Decision**

OACP views seriously SAA'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, SAA 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 \$300,000 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.<sup>12</sup> It establishes a strong deterrent to future similar unlawful practices by SAA 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 SAA cancelled or significantly changed, SAA 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, SAA violated 14 CFR 259.5(b)(5) which also constitutes a violation of 49 U.S.C. § 41712;
4. We order SAA 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 SAA \$300,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above;
6. We order SAA to pay the penalty assessed in ordering paragraph 5, above, through Pay.gov to the account of the U.S. Treasury as follows:
  - a. \$50,000 shall be due and payable within 90 days of the issuance date of this order;

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<sup>12</sup> OACP notes that during this investigation, SAA has maintained that the carrier experienced significant difficulties and on-going financial instability through the time of this consent order. SAA asserts that such difficulties have resulted in major cuts to SAA's aircraft fleet size, flight operations, staffing, and general funding, among other things. OACP has taken this into consideration when settling this matter.

- b. \$50,000 shall be due and payable within 180 days of the issuance date of this order;
- c. \$50,000 shall be due and payable within 270 days of the issuance date of this order;
- d. \$50,000 shall be due and payable within 360 days of the issuance date of this order;
- e. \$50,000 shall be due and payable within 450 days of the issuance date of this order;
- f. \$50,000 shall be due and payable within 540 days of the issuance date of this order.

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 SAA 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:**

**KIMBERLY GRABER**  
**Deputy Assistant General Counsel**  
**for the Office of Aviation Consumer Protection**

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