



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

Issued by the Department of Transportation  
On the Thirty-First day of December, 2012

**Virgin America Inc.**

**Violations of 14 CFR 259.4  
and 49 U.S.C. § 41712**

**Docket OST 2012-0002**

**Served December 31, 2012**

**CONSENT ORDER**

This consent order concerns violations of 14 CFR Part 259 and 49 U.S.C. § 41712 by Virgin America Inc. (Virgin America) when it failed to inform passengers on a flight delayed at the gate for a lengthy period of time of the opportunity to deplane. This order directs Virgin America to cease and desist from future similar violations of Part 259 and section 41712 and assesses the carrier \$55,000 in civil penalties.

**Applicable Law**

Pursuant to section 259.4 of the Department's rules (14 CFR 259.4) any covered carrier, which includes any U.S. certificated carrier conducting scheduled passenger service or public charter service with at least one aircraft having a designed seating capacity of 30 or more seats, is required to adopt, implement, and adhere to contingency plans for lengthy tarmac delays at each large hub, medium hub, small hub, and non-hub airport.<sup>1</sup> Specifically, pursuant to section 259.4(b)(6), for all flights, a carrier must provide the assurance that the passengers on the delayed flight will be notified beginning 30 minutes

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<sup>1</sup> On April 25, 2011, the Department issued a set of rules designed to enhance protection for air travel consumers that, among other items, expanded the requirements under the Department's rule on contingency plans for lengthy tarmac delays. 76 Fed. Reg. 23110 (April 25, 2011).

after scheduled departure time and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists. A carrier's failure to comply with the assurances required by Part 259 and as contained in its contingency plan for lengthy tarmac delays is considered to be an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712.

### **Facts and Conclusions**

Virgin America is an air carrier as defined by 49 U.S.C. § 40102(a)(2)<sup>2</sup> that operates scheduled service at Chicago O'Hare International Airport (ORD), and many other large hub airports, using aircraft having a design capacity of more than 30 passenger seats. Virgin America has adopted a contingency plan for lengthy tarmac delays covering its scheduled passenger operations. Virgin America's contingency plan stipulates that the carrier will ensure that passengers on the delayed flight receive notifications beginning 30 minutes after the scheduled departure time and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists.

Virgin America operated flight 211, an Airbus A320 with 126 passengers on board, from ORD to San Francisco International Airport (SFO) on July 18, 2012. Flight 211 was scheduled to depart ORD at 8:20 p.m. and arrive in San Francisco at 12:45 a.m., local time; however, boarding was delayed by 50 minutes because of a late inbound aircraft arrival. The boarding process was complete at 8:57 p.m., yet inclement weather over Chicago resulted in an additional delay while the aircraft was parked at the gate. During this gate delay, passengers remained on board the aircraft with the door to the aircraft open and the jet bridge attached. The delay at the gate lasted two hours and 16 minutes, until the door to the aircraft was closed and the aircraft left the gate. A passenger on board flight 211 filed a complaint with the Department's Aviation Consumer Protection Division alleging that the aircraft sat on the tarmac for more than four hours.

In response to an investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office), Virgin America states that while none of the flight and in-flight crews recall specifically notifying passengers that they had the opportunity to deplane the aircraft while it was parked at the gate, the crew members and airport personnel affirmed that they would have allowed any passenger who asked to deplane the opportunity to do so.

Section 259.4(b)(6) requires that carriers announce that passengers have the opportunity to deplane from an aircraft when the flight is delayed and the aircraft is at a gate or another disembarkation area with the door open if the opportunity to deplane exists. A tarmac delay begins when passengers no longer have the option to get off an aircraft, which usually occurs when the doors of the aircraft are closed. Section 259.4(b)(6) was promulgated to address the issue of when a tarmac delay has not yet begun because the

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<sup>2</sup> 49 U.S.C. § 40102(a)(2) defines an air carrier as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."

doors remain open at a gate or another disembarkation area, and yet passengers may be unaware that the door to the aircraft is open and that they have the option to deplane. Carriers are not required to provide passengers the opportunity to deplane in less than three hours but if that opportunity does exist the rule requires that the carrier simply inform passengers of the option to deplane. The Department has encouraged carriers to also remind passengers that they are deplaning at their own risk and that the flight could depart at any time without them if that is in fact the case.

In sum, section 259.4(b)(6) is in place to address the precise incident that occurred on flight 211. Beginning thirty minutes after the revised scheduled departure time and every thirty minutes thereafter until the doors closed, Virgin America was required to notify passengers that they could deplane the aircraft if they wished to do so. The failure by Virgin America to make the proper notifications is a violation of 14 CFR 259.4(b)(6) as well as 49 U.S.C. § 41712.

### **Mitigation**

Virgin America states that it takes its regulatory responsibilities very seriously and is especially concerned about its passengers' safe travel, including ensuring that any passenger who wishes to deplane prior to departure has that opportunity. According to Virgin America, during the ground delay, water and food were distributed, lavatories remained operable, and the flight crew provided updates regarding the status and reasons for the delay during the severe weather incident. Although provided for in Virgin America's Delay Contingency Plan, Virgin America states that it was unable to clearly establish that passengers were expressly offered an opportunity to deplane every 30 minutes while the aircraft was at the gate. As noted above, Virgin America explained that regular announcements were made updating passengers and inviting them to approach crewmembers with any questions they may have had. Virgin America asserts that had anyone asked to deplane, he or she would have been given the opportunity. No one, however, asked to deplane.

Virgin America further asserts that in response to this inadvertent oversight it took several significant corrective actions to ensure this does not recur. First, all the crewmembers on flight 211, as well as the airport personnel involved with the delay, were verbally coached/counseled concerning the need to inform passengers at least every 30 minutes that an opportunity to deplane exists. Second, reminder briefings were issued to all departments involved. Third, enhancements were made to the carrier's tarmac delay program information documentation, including the creation of a Tarmac Delay Flow Chart that is now included in the pilot's Quick-Reference Handbook and a wallet-sized Tarmac Delay Program Reminder that has been issued to each InFlight team member.

### **Decision**

The Enforcement Office has carefully considered the information provided by Virgin America but continues to believe enforcement action is warranted. The Enforcement

Office and Virgin America have reached a settlement of this matter in order to avoid litigation. Without admitting or denying the violations described above, Virgin America consents to the issuance of this order to cease and desist from future violations of 14 CFR 259.4 and 49 U.S.C. § 41712 and to the assessment of \$55,000 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 Virgin America and other carriers.

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

ACCORDINGLY,

1. Based on the above information, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Virgin America Inc. violated section 259.4(b)(6) by failing to properly notify passengers that they had the opportunity to deplane the aircraft that was at the gate for a lengthy period with the door open;
3. We find that by engaging in the conduct described in ordering paragraph 2, above, Virgin America Inc. engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
4. We order Virgin America Inc., and all other entities owned or controlled by, or under common ownership and control with Virgin America Inc., its successors, affiliates, and assignees, to cease and desist from further violations of 14 CFR 259.4 and 49 U.S.C. § 41712;
5. Virgin America Inc. is assessed \$55,000 in compromise of civil penalties that might otherwise be assessed for the violations described, above, as follows:
  - a. \$19,500 of the assessed civil penalty amount shall be due and payable within 30 days of the date of issuance of this order;
  - b. Up to \$8,000 shall be credited to Virgin America Inc., contingent on it providing a \$75.00 travel voucher to each of the passengers on flight 211 that may be used to acquire transportation on Virgin America Inc. flights and upon Virgin America Inc. submitting supporting documentation including detailed accounting verifying the issuance of the travel vouchers. The documentation should also be accompanied by a sworn statement from a company official attesting to the accuracy of the documentation, including the accounting and the claim by March 1, 2013, and the Office of Aviation Enforcement and Proceedings notifying Virgin America Inc. of the acceptability of the credit request. Failure to comply with this paragraph will result in the immediate assessment of \$8,000; and

- c. The remaining amount will become due and payable, if within one year of the date of the issuance of this order, Virgin America Inc. violates the order's cease and desist provisions or fails to comply with the order's payment provisions, in which case Virgin America Inc. may be subject to additional enforcement action for violation of this order; and
6. We order Virgin America Inc. to pay the penalty 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 Virgin America Inc. 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:**

**SAMUEL PODBERESKY**  
**Assistant General Counsel for**  
**Aviation Enforcement and Proceedings**

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