



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

Issued by the Department of Transportation
on the 5th day of May, 2016

**Aeroenlaces Nacionales, S.A. de C.V., t/a
VivaAerobus**

**Violations of 49 U.S.C. § 41712 and
14 CFR 399.84(a), 399.84(c), 399.85(d)**

Docket OST-2016-0002

Served May 5, 2016

CONSENT ORDER

This order concerns violations by Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus (“VivaAerobus”) of the full-fare advertising rule, 14 CFR 399.84(a); the rule prohibiting use of the opt-out method of selling ancillary services, 14 CFR 399.84(c); the disclosure of baggage fees and other fees rule, 14 CFR 399.85(d); and the statutory prohibition against unfair and deceptive trade practices, 49 U.S.C. § 41712. It directs VivaAerobus to cease and desist from future similar violations and assesses the carrier \$150,000 in civil penalties.

Applicable Law

As a foreign air carrier, VivaAerobus is subject to the provisions of Part 399 of the Department’s rules. To ensure that consumers are not deceived and are given accurate and complete fare and optional services information on which to base their airline travel purchase decisions, the Department has enacted rules regarding full fare advertising, disclosure of fees for optional services, and the use of opt-out method for the sale of optional services.

The Department’s full-fare advertising regulation, opt-out prohibition, and optional services fee disclosure rule covers foreign air carrier websites selling air transportation marketed to U.S. consumers.¹ The Office of Aviation Enforcement and Proceedings (Enforcement Office) has issued detailed guidance regarding the applicability of the full-fare rule. To determine whether a particular advertisement or website is marketed to U.S. consumers, the Enforcement Office looks

¹ See *Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections*, Section IX, Questions 1 and 4, (Last updated on May 8, 2015), available at http://www.dot.gov/sites/dot.gov/files/docs/EAPP_2_FAQ_1.pdf.

to various factors, including whether the seller has an option on its website that differentiates sites or pages designed for U.S. or other consumers.²

Full-Fare Advertising Rule – 14 CFR
399.84(a)

Section 399.84(a) requires that advertisements specifying airfares and air tour package prices state the entire price to be paid by the consumer.³ Furthermore, when advertising a fare, a carrier must have a reasonable number of seats available at that fare for the period during which the fare is being offered. This means that in addition to having a reasonable number of seats available each time an advertisement is run, the carrier must also ensure that, during the overall period within which the fare is offered, there is no lengthy period of time when no seats are available. Once the carrier determines that a reasonable number of seats is no longer available, it must take prompt action to discontinue the advertisement, or to modify the ad. In the context of fare displays on a carrier's own website, the carrier must ensure it is displaying accurate fare information to make clear to which destinations or date ranges the advertisement applies. Failure to have a reasonable number of seats available at the advertised fare violates section 399.84(a) and constitutes an unfair and deceptive trade practice under 49 U.S.C. § 41712.

“Opt-out” Rule – 14 CFR
399.84(c)

Section 399.84(c) states that an airline may not offer optional services in connection with air transportation whereby the optional service is automatically added to the consumer's purchase if the consumer takes no other action, i.e., if the consumer does not opt-out. The consumer must affirmatively “opt in” (*i.e.*, agree) to such a service and associated fee before that fee is added to the total price for the air transportation-related purchase. For purposes of this rule, “optional services” is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. The use of the “opt-out” method violates section 399.84(c) and constitutes an unfair and deceptive trade practice under 49 U.S.C. § 41712.

Disclosure of Optional Additional Services Fees – 14 CFR
399.85(d)

Section 399.85(d) requires that, if a foreign carrier has a website marketed towards U.S. consumers, the carrier must prominently disclose on its website information on fees for all optional services that are available to a passenger purchasing air transportation. Such disclosure must be clear, with a conspicuous link from the carrier's homepage directly to a page or a place on a page where all such optional services and related fees are disclosed. For purposes of this

² Those factors include but are not limited to whether the fares are displayed in U.S. dollars, whether sales can be made to persons with addresses or telephone numbers in the United States, whether the website is in English, whether the seller uses banner advertisements or highlights special deals for flights to or from the United States, and whether the seller has an option on its website that differentiates sites or pages designed for U.S. or other consumers. *See id.*

³ Although charges included within the single total price listed, e.g., government taxes, may be stated separately or through links or “pop ups” on websites that display the total price, such charges may not be false or misleading, may not be displayed as prominently as the total price, may not be presented in the same or larger size as the total price, and must provide cost information on a per-passenger basis that accurately reflects the cost of the item covered by the charge.

rule, “optional services” is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. Failure to provide the required disclosures violates 399.85(d) and constitutes an unfair and deceptive trade practice under 49 U.S.C. § 41712

Facts and Conclusions

In response to a consumer complaint, the Enforcement Office investigated the advertising of full fares, the disclosure of fees for optional services, and the manner by which VivaAerobus sells optional services on its U.S. facing website. The Enforcement Office found that VivaAerobus advertised fares in its initial fare matrix that did not include a mandatory fee, the issuance fee. At the conclusion of the booking process, the consumer was required to select from one of several methods to purchase the ticket for air travel, such as paying the full amount with a credit card, paying in interest-free monthly installments, paying with a debit card, or paying cash through a Mexican pre-paid account. An “issuance fee” was added for each method of payment. The amount charged varied by the payment method chosen but could not be avoided, and was not disclosed to the passenger until the final step in the booking process. By not advertising the full-fare to be paid by the consumer in the initial fare matrix on its U.S. website, VivaAerobus violated 14 CFR 399.84(a) and engaged in unfair and deceptive trade practices in violation of 49 U.S.C. § 41712.

The Enforcement Office further found that VivaAerobus failed to have a reasonable number of seats available for an advertised fare or to take prompt action to discontinue the advertisement of a fare when a reasonable number of seats was no longer available. VivaAerobus does not offer pre-assigned seating on any of its flights. Instead, VivaAerobus boards passengers in one of five zones, “VIP,” Zone 1, 2, 3, and 4. Only Zone 4 has no additional fee and a limited number of Zone 4 boarding slots are available per flight. Consumers chose a zone when booking. If available, consumers may book Zone 4 for free or pay for one of the other upgraded zones. Once space in Zone 4 is full, consumers must choose one of the remaining zones in order to complete their purchase. This amounts to an additional fee not previously disclosed to the consumer added to the cost of the ticket. By failing to have a reasonable number of seats available for an advertised fare, VivaAerobus violated 14 CFR 399.84(a) and engaged in unfair and deceptive trade practices in violation of 49 U.S.C. § 41712.

Additionally, for a period of time, VivaAerobus utilized the opt-out method for selling optional services. When making a reservation on its U.S. website, after selecting the desired flight for each leg of the trip, a cost was displayed. However, after passenger information was entered, the cost of several optional services was automatically added to the cost of the ticket. The optional services had been pre-selected and to remove them from the booking, the consumer had to “opt out” of these automatically selected services. By utilizing the opt-out method for selling optional services, VivaAerobus violated 14 CFR 399.84(c) and engaged in unfair and deceptive trade practices in violation of 49 U.S.C. § 41712.

Finally, VivaAerobus did not prominently disclose on its U.S. facing website information on fees for all optional services that were available to a passenger purchasing air transportation. By

failing to prominently disclose on its website information on fees for all optional services that are available to a passenger purchasing air transportation, VivaAerobus violated 14 CFR 399.85(d) and engaged in unfair and deceptive trade practice in violation of 49 U.S.C. § 41712.

Response

VivaAerobus states that it takes compliance with the Department's consumer regulations very seriously. VivaAerobus makes every effort to ensure its U.S. website complies with U.S. law. Any non-compliance would have been inadvertent when a new Spanish-language website design was developed based on Mexican law. VivaAerobus further states that as soon as the carrier became aware of the Department's concern over availability of free seats at the lowest advertised price – Zone 4 boarding – it revised its U.S. website so any passenger who wanted to board in Zone 4 could do so for free. In addition, its U.S. website used the “opt-in” method for optional services, but was briefly and mistakenly changed to the “opt-out” method. A full list of optional services and their cost is available from a clear link on the Homepage.

VivaAerobus states it fully cooperated with the Department and promptly implemented remedial measures to avoid any violations of the Department's consumer rules and 49 U.S.C. § 41712. Its U.S. website now fully complies with all applicable Departmental consumer regulations. The carrier states that until now, it has never been subject to a civil penalty through an enforcement action brought by the Department.

Decision

The Enforcement Office has carefully considered the information provided by VivaAerobus, but continues to believe enforcement action is warranted. In order to avoid litigation, VivaAerobus has agreed to settle this matter with the Enforcement Office and enter into this consent order directing VivaAerobus to cease and desist from future similar violations of 14 CFR 399.84(a), 399.84(c), 399.85(d), and 49 U.S.C. § 41712, and assessing \$150,000 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 against future similar unlawful practices by VivaAerobus 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 Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus violated 14 CFR 399.84(a) by failing to include a mandatory fee in the initial fare matrix display on its U.S. facing website and by failing to have a reasonable number of seats available at an advertised fare;
3. We find that Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus violated 14 CFR 399.84(c) by utilizing the opt-out method to sell optional services on its U.S. facing website;

4. We find that Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus violated 14 CFR 399.85(d) by failing to prominently disclose on its U.S.-facing website information on fees for all optional services that are available to a passenger purchasing air transportation; and

5. We find that by engaging in the conduct described in ordering paragraphs 2, 3, and 4, above, Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus engaged in unfair and deceptive trade practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

6. We order Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus, its successors and assigns, to cease and desist from further similar violations of 49 U.S.C. § 41712 and 14 CFR 399.84 and 399.85 as described in ordering paragraphs 2, 3, and 4 above;

7. We assess Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus \$150,000 in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2, 3, and 4 above. Of that amount, \$15,000 shall be due and payable within 30 days of the date of issuance of this order. Four additional equal payments of \$15,000 shall be due and payable on the following days: July 1, 2016; August 14, 2016; November 14, 2016; and February 16, 2017. The remaining amount, \$75,000, will be due and payable if, within one year of the date of issuance of this order, Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus violates the order's cease and desist provision or fails to comply with the order's payment provision, in which case, Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus may be subject to additional enforcement action for violation of this order; and

8. We order Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus to remit the payment assessed in paragraph 7, above, within 30 days of the issuance of this order. Payment shall be made through Pay.gov to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus 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:

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