



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

**Issued by the Department of Transportation  
On the 3rd Day of April 2009**

**smarTours, Inc.**

**Violations of 49 U.S.C. § 41712 and  
14 CFR 399.84**

**Docket DOT-OST 2009-0001**

**Served April 3, 2009**

**CONSENT ORDER**

This consent order concerns advertisements by smarTours, Inc., (“smarTours”) that violate the Department’s advertising requirements specified in section 399.84 of the Department’s regulations (14 CFR 399.84) and constitute unfair and deceptive trade practices and unfair methods of competition in violation of 49 U.S.C. § 41712. This order directs smarTours to cease and desist from future violations and assesses the company compromise civil penalties of \$40,000.

As a seller of air tour packages, smarTours is subject to the advertising requirements of Part 399 of the Department’s rules. Under 14 CFR 399.84, any advertising that states a price for air transportation or an air tour is considered to be an unfair or deceptive practice in violation of 49 U.S.C. § 41712 unless the price stated is the entire price to be paid by the customer to the air carrier or ticket agent for such air transportation, tour or tour component. However, as a matter of enforcement policy, the Department has permitted air carriers and agents to state separately from the advertised price taxes and fees imposed by a government on a per-passenger basis, such as passenger facility charges, so long as their amounts appear or are indicated clearly in the advertisement so that the

consumer can determine the full price to be paid.<sup>1</sup> Taxes and fees imposed on an ad valorem basis, however, must be included in the advertised price, lest consumers be seriously confused about the total amount that must be paid. Carrier- or agent-imposed surcharges, e.g., fuel, insurance, and service charges, or other such costs, must be included in the advertised price. With respect to airfares and air tours advertised on the Internet, taxes and fees that are permitted to be excluded from the advertised price may be noted in a prominent link, placed proximately to the stated price, that takes the viewer to the bottom of the screen, or to a separate screen, where the nature and amount of such fees are displayed. (See, e.g., JTB Corporation, Order 2008-12-24, Trafalgar Tours West, Order 2007-8-24, JetBlue Airways, Inc., Order 2004-2-4, and orders cited therein, and the notice entitled: Disclosure of Additional Fees, Charges and Restrictions on Air Fares in Advertisements, Including “Free” Airfares, which is dated September 4, 2003, as well as guidance letters to the industry which can be found at: <http://airconsumer.ost.dot.gov/rules/guidance.htm>).

The comprehensive travel packages which smarTours specializes in offering include airfare, hotel, guided tours, cruises and related amenities, particularly to Europe, Russia, Central and Eastern Europe, South America, and countries in the Far East. SmarTours has promoted its airfares and air travel packages through printed advertisements, flyers, brochures and other mailers, and by means of advertisements that are published on its web site, [www.smarTours.com](http://www.smarTours.com).

An investigation by the Department’s Office of Aviation Enforcement and Proceedings (“Enforcement Office”) disclosed that the air fares and air tours promoted by smarTours in its flyers and other print advertisements, and on its web site, did not comply with Department requirements. More specifically, the listed prices for the complete air and land packages failed to include fuel surcharges imposed by air carriers, which must be included in the advertised price.

For example, in connection with its advertisement of an air travel package, entitled “Cruise of the Czars,” smarTours included the following notice at the bottom of four scrolled pages of continuous price and departure date information: “U.S. departure taxes and airline fees (\$250), port charges (\$150) and Russia visa fees are not included.” At the very bottom of the page, in smaller print, the advertisement states “for more information and reservations, please call smarTours.” When an Enforcement Office staff member spoke with a smarTours’ agent, she learned that a carrier-imposed fuel surcharge was part of the \$250 in “departure taxes and airline fees” to be added to the advertised

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<sup>1</sup> See, e.g., Order 97-11-14.

price. The same was true for the other smarTours air tour packages advertised there.

Failure to include fuel surcharges imposed by carriers, or other non-government-imposed surcharges collected by smarTours in the advertised price of an air ticket or air tour package when it is first listed violates the Department's regulations and enforcement case precedent. In addition to violating the requirements of section 399.84 and related Department precedent and enforcement policies, such practices constitute an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712.

Moreover, once a firm quotes through its advertising a specific price for a flight, tour or tour component, the firm must charge that price to the consumer. When an air tour seller advertises a specific price for a flight, tour or tour component, it must have available a reasonable inventory at the advertised price for a reasonable time period. To preclude there being a deceptive practice issue for flyers or brochures, a firm can state in its flyer and brochures that the prices it is advertising are good "as of" or "until" a date certain, and advise the consumer that availability of the advertised fares may be limited and current fares may be higher with notice as to where the current prices can be obtained. Fares held out on the Internet or in newspapers, or orally, however, must be current and available. Prices advertised on smarTours' web site, however, were not available to consumers. For example, with respect to the 11-day tour of Eastern European Cities: "Budapest, Vienna and Prague, from \$2199 Airfare Included," Enforcement Office staff observed in late 2008 a notice about taxes and fees and fuel surcharges placed in the "General Terms and Conditions" section of the [www.smarTours.com](http://www.smarTours.com) site, which informs the reader:

Air and Land Package tour prices include fuel surcharges as assessed by the airlines through March 1, 2008. The airlines used may increase these fuel surcharges without prior notice after the tour prices have been published. [S]marTours therefore reserves the right to adjust tour prices and re-invoice clients for any increases in fuel surcharges assessed by the airlines after March 1, 2008.

Since this notice appeared many months after the March 1, 2008, effective date of any price increase, in effect, smarTours has been showing visitors to its web site air tour prices that were long out of date.<sup>2</sup> As noted above, it is a violation

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<sup>2</sup> Only if a visitor is lucky or persistent and arrives at the General Terms and Conditions hyperlink would he or she discover that those advertised prices are subject to currently applicable fuel surcharges that have not been included in the advertised air tour prices as required.

of the Department of Transportation's advertising rules to post prices that are not current on a firm's web site.

In mitigation and explanation, smarTours states that upon receipt of the Department's most recent investigation letter, smarTours immediately retained experienced counsel to evaluate the alleged violations of the full fare advertising law. SmarTours asserts that when it ultimately appeared that there were problems with its web site, smarTours voluntarily made changes to the tour disclosures accompanying the advertisement of its tour packages as well as the section entitled "Terms and Conditions," in order to avoid even the possibility of a violation of the Department's rules and regulations, and to prevent any potential consumer confusion. Furthermore, smarTours explains that it undertook to make significant and far-reaching changes to the firm's web site to ensure that it was clear to consumers that fuel surcharges were included in the quoted prices, and that the disclosure of those government-imposed taxes and fees that may be excluded from the advertised fare was done in a fashion that met every detail of the government's requirements.

The Enforcement Office has carefully considered all of the information available to it, including that provided by smarTours, but continues to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and smarTours have reached a settlement in this matter. While neither admitting nor denying the above allegations, smarTours accepts the findings and conclusions stated herein in order to avoid potential litigation. Under this order, smarTours is assessed \$40,000 in compromise of potential penalties otherwise assessable under the provisions of 49 U.S.C. § 46301. Of this total penalty amount, \$10,000 shall be due and payable within 15 days of the date of issuance of this order. An additional payment of \$10,000 shall be due 90 days after the date of issuance of this order. The remaining \$20,000 will be due and payable if smarTours violates this order's cease and desist provision within one year of the issuance of this order, or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$40,000 penalty shall become due and payable immediately, and the company may be subject to further enforcement action. The Enforcement Office believes that the assessment of a civil penalty of \$40,000 is appropriate in light of the nature and extent of the violations in question and will provide an effective deterrent to unlawful conduct in the future by smarTours and other sellers of air transportation.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

**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 smarTours, Inc., violated 14 CFR 399.84, as described above, by causing to be published advertisements that failed to state the entire price to be paid by the passenger to the firm for certain air transportation;
3. We find that by engaging in the conduct described in paragraph 2, above, smarTours, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. We order smarTours, Inc., and all other entities owned and controlled by, or under common ownership and control with smarTours, Inc., and their successors and assignees, to cease and desist from future violations of 14 CFR 399.84 and 49 U.S.C. § 41712;
5. We assess smarTours, Inc., \$40,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 of this order. Of this total penalty amount, \$10,000 shall be due and payable within 15 days of the date of issuance of this order. An additional payment of \$10,000 shall be due 90 days after the date of issuance of this order. The remaining \$20,000 shall become due and payable if smarTours violates this order's cease and desist provision within one year of the issuance of this order, or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$40,000 penalty shall become due and payable immediately, and the company may be subject to further enforcement action;
6. Failure to pay the compromise assessment as ordered will subject smarTours, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order;
7. Payments shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in

accordance with the instructions contained in the Attachment to this order; and

8. We order smarTours, Inc., to submit to the Office of Aviation Enforcement and Proceedings copies of (a) all advertisements of air tours or air tour components it causes to be published in printed format or circulates as current during the last 30 days of the one-year period following the issuance of this order; and (b) printouts of screen displays advertising air tour prices on its Internet site for the 15<sup>th</sup> day of each month during the one-year period following issuance of this order. This material shall be submitted within 15 days of the conclusion of the referenced one-year period.

This order will become a final order of the Department 10 days after its service unless a timely petition for review is filed or the Department takes review on its own motion.

**BY:**

ROSALIND A. KNAPP  
Deputy General Counsel

**(SEAL)**

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