



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

Issued by the Department of Transportation  
On the Seventh day of February, 2011

**Virgin America, Inc.**

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

**Docket OST 2011-0003**

**Served February 7, 2011**

**CONSENT ORDER**

This consent order concerns Internet advertisements by Virgin America, Inc., (Virgin America) that violate the advertising requirements specified in 14 CFR Part 399, as well as 49 U.S.C. § 41712, which prohibits unfair and deceptive practices. It directs Virgin America to cease and desist from future violations of Part 399 and section 41712, and assesses the carrier a compromise civil penalty of \$40,000.

**Applicable Law**

As an air carrier, Virgin America is subject to the advertising requirements of Part 399 of the Department's rules. To ensure that consumers are not deceived and are given accurate and complete fare information on which to base their airline travel plans, 14 CFR 399.84 requires that advertisements specifying airfares state the full price to be paid by the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from the base fare in advertisements, so long as such taxes and fees are levied by a government entity, and are not *ad valorem* in nature, i.e., not assessed as a percentage of the fare price, are collected on a per-passenger basis, and their existence and amounts are clearly indicated at the first point in the advertisement where a fare is presented. Thus, fare advertisements that fail to

identify the existence and amount of separate additional taxes and fees or include only general statements regarding the existence of such taxes or fees, do not comply with section 399.84 or the Department's enforcement case precedent. Violations of section 399.84 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712.<sup>1</sup>

In print advertisements, an asterisk or other symbol placed proximate to the advertised fare may refer the reader to the bottom of the advertisement where the nature and amount of the fees that may be stated separately are shown. In Internet advertising displays, taxes and fees that properly may be stated separately from the advertised fare may be disclosed through a prominent link placed adjacent to the stated fare that notes that taxes and fees are extra and directly takes the viewer to the bottom of the screen, or to a place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed.<sup>2</sup>

### **Facts and Conclusions**

For a period of time during the summer of 2010, Virgin America's internet website homepage contained three banner advertisements entitled "Next up," "Virgin America Does Dallas," and "Texas Sized 3 Day Sale." Each advertisement stated a fare that did not include additional non-*ad valorem* taxes and fees. Although each advertisement included an asterisk in the bottom right-hand corner of the banner next to the statement "See fare rules," there was no specific information alerting a consumer to the fact that taxes and fees were in fact not included in the advertised fare. Rather, once the consumer clicked on the advertisement, he or she was taken to a landing page where the itinerary and price with an asterisk were displayed, and the consumer was required to scroll down to the fine print on the bottom of the page in order to learn of the nature and exact amounts of taxes and fees.

By failing to provide adequate notice of taxes and fees that were not included in its advertised fares as described above, Virgin America violated 14 CFR 399.84 and engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

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<sup>1</sup> See, e.g., *Air Jamaica, Ltd., Violations of 49 U.S.C. § 41712 and 14 CFR 399.84*, Order 2008-12-25 (December 30, 2008).

<sup>2</sup> For example, a carrier or ticket agent could advertise a flight in the following manner: "\$260 + Taxes and Fees" with the phrase "Taxes and Fees" set off as a hyperlink that takes the viewer directly to the bottom of the screen or to the place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed. See Department notices entitled "Disclosure of Air Fare Variations: Web vs. Other Sources, Surcharges that May be Listed Separately in Advertisements," dated November 4, 2004; "Disclosure of Additional Fees, Charges, and Restrictions on Air Fares in Advertisements, Including 'Free' Airfares," dated September 4, 2003; and "Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet," dated January 18, 2001, available at: <http://airconsumer.ost.dot.gov/rules/guidance.htm>.

### **Mitigation**

Virgin America notes that it takes its obligations under the Department's advertising requirements very seriously and always structures its internet advertisements so that consumers can easily determine the full price to be paid. The airline further maintains that the advertisements at issue did not mislead or otherwise have the potential to confuse a reasonable consumer as to the full price to be paid. In this regard, Virgin America is not aware of any consumer complaints regarding the banners. Nevertheless, as soon as Virgin America learned of the Department's concerns, the airline promptly changed the Internet banner advertisements to address those concerns.

### **Decision**

The Enforcement Office has carefully considered the information provided by Virgin America and continues to believe that enforcement action is warranted. The Department views compliance with the Federal aviation statutes and regulations very seriously. 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 49 U.S.C. § 41712 and 14 CFR 399.84, and to the assessment of \$40,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent against future noncompliance with the Department's advertising requirements.

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

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 the full fare advertising requirements in 14 CFR 399.84 as discussed above;
3. We find that Virgin America, Inc., engaged in unfair and deceptive trade 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., their successors, affiliates, and assigns, to cease and desist from further similar violations of 49 U.S.C. § 41712 and 14 CFR 399.84. Failure to comply with this cease and desist provision shall subject Virgin America, Inc., and its successors and assignees to further enforcement action;

5. We assess Virgin America, Inc., \$40,000 in compromise of civil penalties that might otherwise be assessed for the violations described above. Of this total penalty amount, \$20,000 shall be due and payable within 30 days of the date of issuance of this order. The remaining \$20,000 shall become due and payable immediately if Virgin America, Inc., violates this order's cease and desist provisions within one year following the date of issuance of this order, or fails to comply with the order's payment provisions; and
6. We order Virgin America, Inc., to remit the payment ordered in paragraph 5 above, by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," 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 Virgin America, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible additional enforcement action for failure 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:**

**ROSALIND A. KNAPP**  
**Deputy General Counsel**

(SEAL)

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