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14 CFR Part 330

Procedures for Compensation of Air Carriers; Final Rule and Proposed Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 330

[Docket OST–2001–10885]

RIN 2105–AD06

Procedures for Compensation of Air Carriers

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; response to comments.

SUMMARY: On September 22, 2001, President Bush signed into law the Air Transportation Safety and System Stabilization Act (''the Act''). The Act makes available to the President funds to compensate air carriers, as defined in the Act, for direct losses suffered as a result of any Federal ground stop order and incremental losses beginning September 11, 2001, and ending December 31, 2001, resulting from the September 11 terrorist attacks on the United States. In order to fulfill Congress' intent to expeditiously provide compensation to eligible air carriers, the Department used procedures set out in Program Guidance Letters to make initial estimated payments amounting to about 50 percent of the authorized funds. On October 29, 2001, the Department published a final rule and request for comments establishing application procedures for air carriers interested in requesting compensation under this statute. This document makes amendments to the rule and otherwise responds to the comments the Department received.

DATES: This rule is effective January 2, 2002.

FOR FURTHER INFORMATION CONTACT: Steven Hatley, U.S. Department of Transportation, Office of International Aviation, 400 7th Street, SW., Room 6402, Washington, DC 20590. Telephone 202–366–1213.

SUPPLEMENTARY INFORMATION: As a consequence of the terrorist attacks on the United States on September 11, 2001, the U.S. commercial aviation industry suffered severe financial losses. These losses placed the financial survival of many air carriers at risk. Acting rapidly to preserve the continued viability of the U.S. air transportation system, President Bush sought and Congress enacted the Air Transportation Safety and System Stabilization Act (''the Act''), Public Law 107–42.

Under section 101(a)(2)(A–B) of the Act, a total of $5 billion in compensation is provided for ''direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such stoppage; and the incremental losses incurred beginning September 11, 2001 and ending December 31, 2001, by air carriers as a direct result of such attacks.'' The Department of Transportation previously disbursed initial estimated payments of nearly $2.5 billion of the $5 billion amount that Congress authorized, using procedures set forth in the Department's Program Guidance Letters that were widely distributed and posted on the Department's Web site.

On October 29, 2001 (66 FR 54616), the Department published in the **Federal Register** a final rule and request for comments to establish procedures for air carriers who had received or wished to receive compensation under the Act. The rule covered such subjects as eligibility, deadlines for application, information and forms required of applicants, and audit requirements. The Department has received submissions from many carriers pursuant to this rule and is continuing to process requests for compensation.

The Department received 18 comments on the rule during the comment period; correspondence, memoranda of meetings, and late filed comments, have also been entered into the docket. The following portion of the preamble summarizes the comments that we received and describes the Department's responses to those comments, including, where appropriate, amendments that the Department is making to the October 29 final rule.

Wet Lease Issues

Several commenters disagreed with the rule's provisions concerning how RTMs are counted in cargo ''wet lease'' situations. In a wet lease, one air carrier (the lessor) provides an aircraft, crew, maintenance, and insurance (ACMI) for another air carrier (the lessee). The rule, consistent with an existing regulatory definition of an RTM and Bureau of Transportation Statistics (BTS) guidance concerning it, provided that for purposes of the statutory formula for determining the proper amount of compensation for which an air carrier is eligible, RTMs would be attributed to the lessee who had reported the RTMs to the Department. This approach, the preamble to the rule said, was in keeping with the statutory direction to rely on RTMs ''as reported to the Secretary.''

Comments on this subject included letters from Atlas Air, Southern Air, Cargo Airline Association (CAA), Custom Air Transport (CAT), National Air Carrier Association (NACA), Air Transport Association (ATA), Congressman James P. McGovern, and a group of six members of the Florida Congressional delegation. They were in agreement that the Department's approach to this issue should be changed.

These commenters asserted that there would not be a ''double-counting'' situation to fear by granting wet lessors compensation. Atlas claims this is because ''scope clauses in labor agreements typically prevent U.S. carriers from utilizing ACMI services''; thus, ''virtually all ACMI business is with foreign carriers, which by definition are not entitled to compensation under the Act.'' Consequently, they said, the Department's rule would unreasonably preclude any compensation for certain flights, since foreign carrier lessees are not eligible for compensation and the lessors could not count the RTMs involved for compensation purposes.

These commenters also made the point that the Department's rule elsewhere emphasizes (in denying compensation to indirect air carriers) the role of the direct air carrier in actually flying the aircraft and in fact specifies that RTMs must be flown by the air carrier submitting the claim. In this context, wet lessors better meet these standards than their lessees, they said, since the lessor is the party that actually flies the aircraft.

A number of these comments said that it was unreasonable for the Department to rely on the way RTMs are reported to the Department on the BTS ''Form 41,'' since they viewed this report as being provided for unrelated purposes. In addition, some pointed out, the Department had previously proposed a rule that would change reporting requirements so that operating carriers (i.e., the lessor in a wet lease situation) would report the RTMs.

Some of these comments referred to the ''other auditable measure'' language in the Act, saying that this language provided greater flexibility than the Department had provided in the rule. However, none of the commenters suggested any other auditable measures. Instead, several requested that they be able to count what they believed were their own RTMs for operating as wet lessors, even though these RTMs had previously been reported to the Department by the lessees.

In a late-filed comment, CAT urged that the Department reverse its position

that wet lessees, rather than wet lessors, be credited with RTMs. CAT is a wet lessor that operates flights on behalf of other U.S. carriers. CAT asserted that it is irrelevant who reports RTMs to the Department; what should be dispositive in all cases, in CAT's view, is who actually operated the flights. This is just as true in the case of situations in which U.S. carriers are the lessees as in which foreign carriers are the lessees.

In the Conference Report on the Aviation Transportation Security Act (House Report 107–296 at p. 79), the managers made the following comment on this issue:

> It is the Conferees' position that the Stabilization Act's section 103 compensation formula language, ''revenue ton miles or other auditable measure'' should be broadly construed and should not restrict compensation exclusively to revenue ton miles reported on previously filed DOT Form 41s. If Air, Crew, Maintenance, Insurance lessors can provide accurate and auditable records of their revenue-ton-miles during the relevant time period, then they should be eligible for compensation based under the Stabilization Act.''

DOT Response

Double counting—compensating more than one carrier for the same operation—is contrary to the statutory scheme of the Act. Under the Act, the amount of compensation available to a carrier is not simply a function of actual documented losses. Rather, compensation availability is limited by a formula based on the available seat-miles or revenue ton-miles (or other auditable measure) as reported by the carriers. The formula approach was clearly envisioned as a way to permit carriers to participate in a finite amount of compensation based on their proportionate market shares. Market shares are not ''shared'' due to multiple carriers participating in particular operations. Indeed, permitting two or more carriers to be compensated for the same operation would give greater weight to some operations than others, contrary to the broad and proportionate distribution principle evident from the language of both section 101 and 103.

For example, suppose carrier A and carrier B both participated in operation X. Meanwhile, carrier C flew the same amount of cargo over the same route in operation Y, without the involvement of another carrier. Both operations result in 100,000 RTMs. If double counting were permitted, operation X would generate twice as much compensation as operation Y, reducing the total pool of funds available to all carriers, depriving other carriers of the proportionate amount of compensation that Congress intended them to receive.

We would also point out that there are many forms of multiple participation in operations, such as wet leases, charters, code shares, and indirect/direct air carrier relationships. Attempting to find ways of accommodating all these situations, and the variety of types of double counting that would be involved, would not only be administratively impracticable but inevitably involve multiple inequities. Congress could not have intended such a result.

We do not agree with commenters who would disregard the role of the Department's reporting requirements (i.e., the Form 41 process) in determining the appropriate carriers to receive ''credit'' for ASMs or RTMs. Knowledge of this long-standing reporting scheme can clearly be attributed to Congress, and the Act's explicit and repeated references to ASMs and RTMs ''as reported to the Secretary'' show that Congress implicitly adopted the Department's reporting requirements. There is no evidence that Congress sought to revise these requirements or nullify them for purposes of the statutory compensation formula so that, for example, wet lessors would get credit for ASMs and RTMs while wet lessees would not.

We recognize Congress did add the term ''or other auditable measure'' to the calculus with respect to RTMs. While neither the Department nor commenters have been able to suggest what such measures might be, this addition at least stands for the proposition that Congress intended some flexibility in the way that compensation was distributed among cargo carriers. That interpretation is fortified by the Conferees' statement in House Report 107–296 as cited above, which we note was directly in support of the compensation claims of wet lessors.

Working with these principles, together with the mandates of the Act itself, we believe that the comments discussed above have some merit, and that wet lessors in some circumstances can participate in compensation payments. The primary condition to that participation is that an eligible carrier with a superior claim to RTMs under our rules has not applied for compensation. This requirement is necessary in order to avoid either double counting or the displacing of the claim of another carrier (e.g., the lessee in a wet lease situation) that Congress, through its ''as reported to the Secretary'' language, intended the Department to recognize.

Therefore, we will accept applications from wet lessors if they (1) Otherwise qualify as an air carrier; (2) identify and document their status as wet lessor, explaining thereby why they have not previously reported ASMs or RTMs for the operations in question; (3) identify the wet lessees involved in these operations; (4) document that such lessees are either ineligible for compensation or voluntarily have not and will not claim such compensation with respect to the operations in question; and (5) provide accurate and auditable records of ASMs or RTMs actually flown during the relevant time period for these operations.

We recognize that it is possible that some wet lessors either did not apply for compensation because of the way that the rule addressed this issue or would seek to amend their applications to claim additional RTMs or ASMs. We are amending the application procedures of the rule to allow carriers to do so within 14 days of the publication of this amendment.

Claims to confidentiality of information provided under this provision will be carefully scrutinized. In any situation in which the Department determines that both wet lessors and wet lessees have claimed compensation for the same operations, the Department's general rule that wet lessees report RTMs will be given effect and lessees given priority.

Indirect Air Carrier Issues

A number of commenters objected to the provision of the rule that only direct air carriers are eligible for compensation. These commenters (Emery Air Freight, CAA, BAX Global, and the Association of Air Medical Services (AAMS)) pointed out, first, that indirect air carriers are within the statutory definition of ''air carrier,'' and consequently should be eligible for compensation. These commenters disagreed with the Department's contention, in the rule's preamble, that the intent of Congress was to compensate carriers who actually operated flights. Emery added that, as an air freight forwarder, it has been recognized in DOT administrative decisions as responsible for the transportation of property, even though it did not actually operate flights.

Emery also asserted that, as a lessee for air freight transportation, it suffered losses because the direct air carriers whose aircraft it leased could not fly during the period of the Secretary's September 11 ground stop order. This is exactly the sort of loss Congress intended to compensate, Emery said.

Reporting ASMs or RTMs to the Department should not be an *eligibility* requirement, these commenters said. All air carriers should be eligible for

compensation regardless of whether the Department could calculate the ''formula cap'' for compensation using RTMs, particularly since the statute allows for ''other auditable measures'' to be used in place of RTMs.

In some cases, CAA said, indirect air carriers should get credit for the RTMs involved in cargo operations, since they ''generate'' the freight carried, contract with direct air carriers for dedicated lift which requires payment regardless of how much freight is carried, and bear the entire financial risk for the operation. Emery also said that it, rather than the direct air carriers involved, should be regarded as generating RTMs, which the direct air carrier merely reports.

BAX asserted that it is the Department's obligation to find an appropriate ''other auditable measure'' for indirect air carrier operations for carriers that do not report RTMs, though BAX did not suggest what such measures might be. BAX did suggest, however, that the flexibility given to air taxis in the rule, for whom DOT could estimate RTMs based on other data, could be given to indirect air carriers as well.

BAX dismissed the Department's concern about ''duplicating'' ASMs or RTMs, saying that such overlap between direct and indirect air carriers is not ''inherently injurious.'' BAX appears to mean that a carrier will not be able to get ''double recovery,'' though it concedes that some carriers might have their compensation reduced as a result. Emery agreed that allowing indirect air carriers to claim RTMs will not require DOT to pay more than once for a specific loss. Emery added that the parties to a contract (i.e., a direct and indirect air carrier) should be able to provide DOT the information needed to make appropriate allocations of relief.

AAMS, representing air ambulance operators, also requested that the Department provide compensation to those air ambulance operators who are indirect air carriers.

DOT Response

Much of the discussion above concerning wet lease issues also pertains to the comments on indirect air carrier issues. In particular, the Department believes that double counting is impermissible. We find nothing in the text of the statute or its legislative history suggesting that Congress meant for carriers to be able to ''share'' RTMs. Further, none of these commenters have offered a way to calculate ''other auditable measures'' that may be applicable to them in a way that is free of the problem of duplicating the claims of other carriers. (BAX's analogy to air taxis is inapposite, since air taxis have been required to construct RTM data in a manner consistent with other carriers and no duplication of data is involved.)

Nor are we persuaded by the suggestions that indirect air carrier/freight forwarders have a superior claim to RTMs that are flown with their cargo aboard. As noted above, we believe that Congress implicitly adopted the reporting requirements of the Department in the Act, and we find no suggestion that it intended to displace, as eligible for compensation under the Act, the direct air carriers that report RTMs in accordance with our rules in favor of indirect air carriers that do not.

As to comments analogizing the role of freight forwarders to that of wet lessees, there are clearly differences between the two. While both assume economic risks, a wet lessee assumes economic control and responsibility for the flight, which the freight forwarder does not. As to claims that freight forwarder operations are economically equivalent to a wet lease, if an air carrier has in fact reported RTMs to the Department as a wet lessee, then its application can be processed on that basis. We believe that the manner in which carriers have actually defined their relationships and reported the data to DOT—without regard to the economic incentive created by the availability of compensation—should be given credibility.

That said, we are deleting the provision of the rule that made indirect air carriers ineligible to apply for compensation. In order to be consistent with the approach we have taken above for wet lessors, we will accept for processing applications from indirect air carriers if they (1) Otherwise qualify as an air carrier; (2) identify and document their status as an indirect air carrier, explaining thereby why they have not previously reported ASMs or RTMs on claimed operations; (3) identify the direct air carriers involved in their operations; (4) document that such direct air carriers are either ineligible for compensation or voluntarily have not and will not claim such compensation with respect to the operations in question; and (5) provide accurate and auditable records of ASMs or RTMs actually flown during the relevant time period for these operations.

We recognize that it is possible that some indirect air carriers may not have applied for compensation in the past because the rule said that they were ineligible. We are amending the application procedures of the rule to allow indirect air carriers who did not apply previously to so do within 14 days of the publication of this amendment.

As noted above, claims to confidentiality of information provided under this provision will be carefully scrutinized. In any situation in which the Department determines that both indirect and direct air carriers have claimed compensation for the same operations, the Department's general rule that direct air carriers report RTMs will be given effect and they will be given priority.

Air Ambulance Issues

AAMS expressed concern about the provisions of the Act and the rule that based calculations of compensation for which air carriers are eligible on available seat-miles (ASMs). AAMS said that ASMs are not a good measure of the capacity of air ambulance services, because air ambulances must be staffed and ready to go on a 24-hour basis, yet fly relatively few ASMs. Given the way the statutory formula works, this would result in very little compensation being made available to air ambulance services.

In place of the ASM calculations that are used for other kinds of air carriers, AAMS recommended that the Department calculate lost volume by comparing the flight volume of August and September 2001, multiplying the difference by the average revenue per flight, and extrapolating the result to the industry as a whole. AAMS suggested that the functional equivalent of ASMs (i.e., as a measurement of capacity) could be calculated by multiplying the average number of seats in air ambulances aircraft (six) times the average speed of the aircraft (150 m.p.h.) times the hours per day it is staffed and ready (24). This, AAMS suggested, would create a reasonable approximation of the capacity of an air ambulance aircraft per day.

In the Aviation and Transportation Security Act (Pub. L. 107–71), Congress also addressed the situations of air ambulances. Section 124(d) of this statute amended section 103 of the Air Transportation Safety and System Stabilization Act. The purpose of this amendment, according to the Conference Report (House Report 107–296 at p. 79), is to ''to allow for a modified system of providing compensation to air tour operators and air ambulances to better address their needs after industry wide losses.'' The following is the text of this amendment:

(d) Compensation for Certain Air Carriers.—

(1) Set-Aside.—The President may set aside a portion of the amount of

compensation payable to air carriers under section 101(a)(2) to provide compensation to classes of air carriers, such as air tour operators and air ambulances (including hospitals operating air ambulances) for whom application of a distribution formula containing available seat miles as a factor would inadequately reflect their share of direct and incremental losses. The President shall reduce the $4,500,00,000 specified in section (b)(2)(A)(i) by the amount set aside under this subsection.

(2) Distribution of Amounts.—The President shall distribute the amount set aside under this subsection proportionally among such air carriers based on an appropriate auditable measure, as determined by the President.

Under the statutory language, use of this set-aside authority is discretionary (''The President may set aside * * *''). Neither the statute nor the Conference Report provides any guidance concerning the appropriate size of such a set-aside or the identity of any other ''classes'' of air carriers that could be included in it, if the President chooses to use the authority.

DOT Response

The Department will consider using the discretion provided by section 124(d) of the Transportation Security Act to set aside a portion of the $4.5 billion compensation available for passenger carriers for air ambulances and other classes of air carriers for whom application of an ASM-based compensation formula would inadequately reflect their share of direct and incremental losses. The Department is issuing a separate document in today's **Federal Register** requesting comment on the issue of whether we should establish a set-aside, which classes of carriers a set-aside should cover, and what method or methods should be used to allocate funds from a set-aside.

Charter Carrier Issues

NACA, representing charter air carriers, asked for changes in the data the Department collects. NACA said that Parts 2 and 4 of Form 330–A request a variety of types of information (e.g., forecast ASMs and RTMs; volume, revenue and cost information related to individual passengers; break even load factor, average length of passenger haul, departures planned, average passenger fares, and passenger yield per RPM) that are not relevant to charter air carriers' operation. Charter air carriers, NACA said, typically sell full planeload charter flights to tour operators, who in turn pay for the whole airplane by ''block hour.'' Charter revenue forecasts are based on aircraft utilization, which is the predicted monthly number of block hours the carrier expects to operate. The forecast units then become revenue and cost per block hour, rather than ASMs and RTMs.

DOT Response

The Department understands that some charter carriers may not have some of the data elements in the form the Department has asked for them. The Department has received applications from a number of such carriers, and we are working with the carriers in question to clarify information necessary to permit determinations on compensation to be made. Consequently, the Department does not believe that it is necessary to make any changes in the current rule or forms to accommodate NACA's concern. However, we will consider whether, in connection with the third increment of compensation we intend to distribute in 2002, we should change any of the data elements for charter carriers.

Accounting Issues

The American Institute of Certified Public Accountants (AICPA) recommended a number of changes in the way that the rule describes the independent audit requirements of the final rule. Rather than requiring a ''review'' of a carrier's ''forecasts,'' or an ''audited financial statement,'' AICPA suggested that DOT require carriers to perform an ''agreed-upon procedures engagement.'' This change would make the rule more consistent with accounting terms of art, AICPA said. AICPA provided a suggested draft of such agreed-upon procedures as well as technical amendments to the rule's language that would accommodate the group's concerns.

AICPA also commented concerning the rule's requirement that carriers report and support reports of losses for the period beginning September 11, 2001. Generally, AICPA said, carriers prepare financial data on a monthly, rather than a daily basis, so it would make more sense to report losses beginning September 1 rather than September 11. Also, carriers and the DOT should have access to the independent auditors' working papers on request, but the carrier should not routinely obtain and retain them. Doing the latter would be inconsistent with AICPA auditing standards, the organization asserted.

The Air Transport Association noted in its comments that it supported the AICPA's views.

DOT Response

In the interest of facilitating auditing of carriers' records, the Department will make the regulatory text changes suggested by AICPA, with minor edits. These changes in the Department's rule include adoption of the ''agreed-upon procedures engagement'' approach that AICPA suggested. However, the Department does not adopt or otherwise approve the specific agreed-upon procedures document enclosed with AICPA's comment.

In implementing the agreed-upon procedures approach, DOT will require that airlines and their accountants use procedures that are acceptable to applicants and the Department. The Department intends to issue, in the near future, guidance that will provide the essential elements of procedures that the Department will accept. As part of this process, the Department is considering guidance relating to abbreviated procedures for smaller air carriers.

Before- and After-Tax Reporting

TEM Enterprises noted that the rule requires that carriers report both ''net losses, before taxes'' and ''total net income after taxes, based on application of standard corporate income tax rates.'' TEM recommended that the Department use before-tax information in determining compensation, particularly where a carrier projected losses even before the September 11 attacks, since no tax would have been paid in that case. It would not make sense to use after-tax data except, perhaps, in the case of carriers who project having taxable income at the end of their tax years. TEM also objected to the possibility that the reference to ''standard corporate tax rates'' would mean that the Department would uniformly apply a 34 percent tax rate against a carrier's projected net income.

AICPA also asked for clarification on whether compensation will be based on pre-tax or net income after taxes, and on what is meant by the rule's reference to ''standard corporate income tax rates.''

DOT Response

The Department has determined, as the result of reviewing both compensation applications and comments to the docket for this rule, that the Department will rely on pre-tax data for purposes of determining carriers' losses. Consequently, issues concerning use of after-tax data, including the appropriate corporate tax rate to apply, are moot. We have deleted the after-tax income lines from the reporting forms in Appendices A–C of the regulation.

Documentation of pre-September 11 Forecasts

TEM Enterprises and Custom Air Transport made similar comments concerning the rule's requirement that carriers submit documentation that pre-September 11 forecasts were, in fact, completed before September 11. The problem, they said, was that carriers such as themselves do not routinely prepare forecasts of the kind contemplated by the rule. They could produce, for purposes of their applications, they said, detailed forecasts based on information existing before September 11, but these forecasts were prepared after September 11. It would be unreasonable, they said, to exclude carriers from compensation because their normal business practices before September 11 did not involve preparing detailed forecasts. Like air taxis, some other air carriers should be given flexibility to make a good faith effort to categorize their revenues and expenses according to the rule's forms.

DOT Response

The Department believes that it is fair to accommodate the situation of carriers that did not prepare actual forecasts before September 11. In reviewing applications that have been submitted, the Department has accepted some carriers' estimates of pre-September 11 expectations for their performance, based on historical data, in lieu of a forecast actually made before that date. As a matter of interpretation, the Department will continue this practice. While the Department will scrutinize the carrier's data to make sure the estimates of expectations are reasonable, the Department will not exclude carriers in this category from eligibility for compensation.

Other Issues

Worldwide Flight Services, an aviation services firm that provides ramp, passenger, cargo, maintenance, container leasing, and fueling services, commented that it has suffered significant losses as the result of the September 11 attacks. The company is not receiving its expected revenue because carrier customers operating fewer flights are using their services less. Worldwide asserted it is not an indirect air carrier and that its unique position and the services it provides to carriers should result in its becoming eligible for compensation. Generally, Worldwide believes its services are vital to the flights of aircraft.

If its operations stopped tomorrow, Worldwide said, many flights could not operate because essential services would not be provided, especially in smaller communities. According to Worldwide, in view of the Act's mandate that the Secretary take appropriate action to ensure the continuation of scheduled air service to small communities, the Department should compensate the company. In addition, acccording to worldwide, if Worldwide stopped providing its service, there would be interruptions of mail deliveries.

ATA expressed concern about the provision that carriers must provide all requested information with their applications or face rejections of their applications by the Department. This requirement is too stringent, in ATA's view, particularly since carriers may be unable to meet precisely some of the rule's information requirements. For example, carriers may well be unable to provide an auditable forecast and actual losses for the September 11–30 period, since they do not keep records in a daily or weekly, as opposed to monthly, fashion. Like AICPA, ATA recommended that the rule's information collection requirements relate to the entire month of September.

Finally, ATA disagreed with the rule's requirement that independent auditors review carriers' forecasts for accuracy. This, ATA said, would be difficult given the variation among carriers' forecasting methods. Instead, the auditors should certify that the forecast submitted to DOT was the carrier's most recently available forecast prior to September 11.

DOT Response

The events of September 11 had serious economic effects on a wide variety of businesses. For example, airport concessionaires, hotels and resorts, and other tourism-related businesses appear to have lost substantial amounts of money. We do not doubt that an aviation services company like Worldwide may have suffered significant financial losses as the result of the September 11 attacks, and we recognize that firms like Worldwide can play an important role in the aviation industry.

Nevertheless, Congress provided compensation in the Act only to air carriers. Worldwide is not only not an indirect air carrier; it is not an air carrier at all, as defined in the Act. We do not have the legal discretion to provide compensation to parties that are not air carriers, even though doing so could help to achieve other purposes of the Act, such as maintaining service to small communities.

The Act requires losses to be calculated from September 11, not September 1. The Department cannot assume that a forecast pertaining to all of September will permit an accurate calculation of losses pertaining to September 11–30. Certainly, merely pro-rating data for the entire month as a means of estimating losses for September 11–30 would not be an accurate method for doing so. It is appropriate and possible, in the Department's view, for carriers—even those who did not originally structure their forecasts in this fashion—to break out data pertaining to September 1–10 and September 11–30, respectively.

As noted in the response to the AICPA comment, DOT is modifying audit requirements and will rely on ''agreed-upon procedures'' as distinct from a formal ''review'' or ''audit'' of carrier information. This change adequately responds to ATA's comments on this point. We do not believe it would be adequate to have an auditor merely attest to the recency of a carrier's documents. To ensure that the Department distributes funds in accordance with Congress' direction, auditors need to consider the accuracy of the substance of this information.

Regulatory Analyses and Notices

This rule is an economically significant rule under Executive Order 12886, since it will facilitate the distribution of more than a billion dollars into the economy during the 12-month period following its issuance. Because of the need to move quickly to provide compensation to air carriers for the purpose of maintaining a safe, efficient, and viable commercial aviation system in the wake of the events of September 11, 2001, we are not required to provide an assessment of the potential cost and benefits of this regulatory action. The Department has determined that this rule is being issued in an emergency situation, within the meaning of Section 6(a)(3)(D) of Executive Order 12866. However, this impact is expected to be a favorable one: making these funds available to air carriers to compensate them for losses resulting from the terrorist attacks of September 11. In accordance with Section 6(a)(3)(D), this rule was submitted to the Office of Management and Budget for a brief review.

Because a notice of proposed rulemaking is not required for this rulemaking under 5 U.S.C. 553, we are not required to prepare a regulatory flexibility analysis under 5 U.S.C. 604. However, we do note that this rule may have a significant economic effect on a substantial number of small entities. Among the entities in question are air taxis, as well as some commuters and small certificated air carriers. In

analyzing small entity impact for purposes of the Regulatory Flexibility Act, we believe that, to the extent that the rule impacts small air carriers, the impact will be a favorable one, since it will consist of receiving compensation. We have facilitated the participation of small entities in the program by allowing a longer application period for air taxis, which are generally the smallest carriers covered by this rule and which do not otherwise report traffic or financial data to the Department. The Department has also concluded that this rule does not have sufficient Federalism implications to warrant the consultation requirements of Executive Order 13132.

We are making this rule effective immediately, without prior opportunity for public notice and comment. Because of the need to move quickly to provide compensation to air carriers for the purpose of maintaining a safe, efficient, and viable commercial aviation system in the wake of the events of September 11, 2001, prior notice and comment would be impractical, unnecessary, and contrary to the public interest. Consequently, prior notice and comment under 5 U.S.C. 553 and delay of the effective date under 5 U.S.C. 801, *et seq.*, are not being provided. On the same basis, we have determined that there is good cause to make the rule effective immediately, rather than in 30 days. We are providing for a 14-day comment period following publication of the rule, however. The Department will subsequently respond to comments we receive.

The Office of Management and Budget has approved the information collection requirements of this rule, with Control Number 2105–0546.

List of Subjects in 14 CFR Part 330

Air carriers, Grant programs—transportation, Reporting and recordkeeping requirements.

Issued this 26th day of December, 2001, at Washington, DC.

Read C. Van de Water,

Assistant Secretary for Aviation and International Affairs.

■ For the reasons set forth in the preamble, the Department amends 14 CFR Part 330 as follows:

PART 330—PROCEDURES FOR COMPENSATION OF AIR CARRIERS

■ 1. The authority citation for Part 330 is revised to read as follows:

Authority: Pub. L. 107–42, 115 Stat. 230 (49 U.S.C. 40101 note); sec. 124(d), Pub. L. 107–71, 115 Stat. 631 (49 U.S.C. 40101 note).

■ 2. Amend § 330.7 by revising paragraph (c) to read as follows:

§ 330.7 How much of an eligible air carrier's estimated compensation will be distributed under this part?

* * * * *

(c) If, as an air carrier, you are able to submit data, subsequent to your application under this part but before December 31, 2001, demonstrating and documenting conclusively that you have incurred actual losses as defined in section 101(a)(2) of the Act that exceed the amount of compensation for which you demonstrate you are eligible under the formula of section 103(b)(2) of the Act, the Department may disburse to you, without waiting for a submission in Calendar Year (CY) 2002, the remainder of the formula amount of compensation for which you are eligible.

(1) A carrier that requests a final installment before December 31, 2001 must submit its claim of actual losses for the period of the claim, a forecast for the same period that was prepared before September 11, 2001, and an independent public accountant's report based on the performance of agreed-upon procedures approved by the Department of Transportation with respect to the carrier's forecasts and actual results. The independent public accountant's engagement must be performed in accordance with generally accepted professional standards applicable to agreed-upon procedures engagements.

(2) The consideration of requests for final payment before December 31, 2001 is contingent upon the establishment by the Department of a fixed comprehensive universe of ASMs and RTMs for all eligible air carriers to be used as the basis of the final compensation formula for all eligible air carriers as established in the Act.

§ 330.11 [Amended]

■ 3. Amend § 330.11 by removing and reserving paragraph (b).

■ 4. Amend § 330.21 by adding new paragraphs (d) and (e), to read as follows:

§ 330.21 When must air carriers apply for compensation?

* * * * *

(d) Notwithstanding any other provision of this section, if you are an eligible air carrier that did not submit an application or wishes to amend its application, you may do so by January 16, 2002 if you are one of the following:

(1) An indirect air carrier which did not file an application because indirect air carriers were formerly ineligible to apply for compensation; or

(2) A wet lessor that either did not file an application, or submitted fewer ASMs or RTMs with its application than it now believes can be counted for compensation purposes, because this rule formerly limited the ASMs or RTMs that you could submit.

(e) If you are submitting a new or amended application under paragraph (d) of this section, you must include a signed statement, under penalty of perjury, that you are submitting the new or amended application for the reason stated in paragraph (d)(1) or (d)(2) of this section.

■ 5. Revise § 330.31 to read as follows:

§ 330.31 What data must air carriers submit concerning ASMs or RTMs?

(a) Except as provided in paragraph (d) of this section, if you are applying for compensation as a passenger or combination passenger/cargo carrier, you must have submitted your August 2001 total completed ASM report to the Department for your system-wide air service (e.g., scheduled, non-scheduled, foreign, and domestic).

(b) Except as provided in paragraph (d) of this section, if you are applying for compensation as an all-cargo carrier, you must have submitted your RTM reports to the Department for the second calendar quarter of 2001.

(c) In calculating and submitting ASMs and RTMs under paragraphs (a) and (b) of this section, there are certain things you must not do:

(1) Except at the direction of the Department, or to correct an error that you document to the Department, you must not alter the ASM or RTM reports you earlier submitted to the Department. Your ASMs or RTMs for purposes of this part are as you have reported them to the Department according to existing standards, requirements, and methodologies established by the Office of Airline Information (Bureau of Transportation Statistics).

(2) You must not include ASMs or RTMs resulting from operations by your code-sharing or alliance partners.

(3) You must not include ASMs or RTMs that are reported by or attributable to flights by another carrier.

(d) If you have not previously reported ASMs or RTMs as provided in paragraphs (a) and (b) of this section for a given operation or operations, you may submit your calculation of ASMs or RTMs to the Department with your application. You must certify the accuracy of this calculation and submit with your application the data and assumptions on which the calculation is based. After reviewing your submission, the Department may modify or reject your calculation.

(1) If you are a direct air carrier that has operated your aircraft for a lessee (i.e., a wet lease, or aircraft, crew, maintenance, and insurance (ACMI)

operation), you may submit your calculation of ASMs or RTMs for these flights. Your submission must include the following elements:

(i) Documentation that you otherwise qualify as an air carrier;

(ii) Documentation that you are a wet lessor, and an explanation of why you did not previously report ASMs or RTMs for the operations in question;

(iii) Documentation of the identify of the wet lessees involved in these operations;

(iv) Documentation that such lessees are either ineligible for compensation or voluntarily have not and will not claim such compensation with respect to the operations in question; and

(v) Accurate and auditable records of ASMs or RTMs actually flown during the relevant time period for these operations.

(2) If you are an indirect air carrier, you may submit your calculation of ASMs or RTMs for flights that direct air carriers have operated for you under contract or other arrangement. Your submission must include the following elements:

(i) Documentation that you otherwise qualify as an air carrier;

(ii) Documentation that you are an indirect air carrier, and an explanation of why you did not previously report ASMs or RTMs for the operations in question;

(iii) Documentation of the identify of the direct air carriers involved in these operations;

(iv) Documentation that such direct air carriers are either ineligible for compensation or voluntarily have not and will not claim such compensation with respect to the operations in question; and

(v) Accurate and auditable records of ASMs or RTMs actually flown during the relevant time period for these operations.

■ 6. Amend § 330.35 by revising paragraph (a)(4) to read as follows:

§ 330.35 What records must carriers retain?

* * * * *

(a) * * *

(4) You must agree to have your independent public accountant retain all reports, working papers, and supporting documentation pertaining to the agreed-upon procedures engagement conducted by your independent public accountant under the requirements of this part for a period of five years. The accountant must make this information available for audit and examination by representatives of the Department of Transportation (including the Office of the Inspector General), the Comptroller General of the United States, or other Federal agencies.

* * * * *

■ 7. Amend § 330.37 by revising paragraph (b) to read as follows:

§ 330.37 Are carriers which participate in this program subject to audit?

* * * * *

(b) Before you are eligible to receive payment from the final installment of compensation under the Act, there must be an independent public accountant's report based on the performance of procedures agreed upon by the Department of Transportation with respect to the carrier's forecasts and actual results. The independent public accountant's engagement must be performed in accordance with generally accepted professional standards applicable to agreed-upon procedures engagements. You must submit the results of the agreed-upon procedures engagement to the Department with your application for payment of the final installment.

■ 8. Amend Appendix A to Part 330 by revising Page 1 of 5 and Page 3 of 5 of Form 330–A to read as follows:

Appendix A to Part 330—Forms for Certificated and Commuter Air Carriers

BILLING CODE 4910–62–P

FORM 330-A
Page 1 of 5

AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT

APPLICATION FOR COMPENSATION FOR CERTIFICATED AND COMMUTER AIR CARRIERS (PROVIDING PASSENGER AND COMBINATION PASSENGER/CARGO SERVICE)

NAME, ADDRESS AND TELEPHONE NUMBER OF AIR CARRIER	
TYPE OF DOT ECONOMIC AUTHORITY HELD	
COMPENSATION AMOUNT RECEIVED TO DATE UNDER SECTION 101(A)(2) OF THE ACT	

PART 1: FORECASTED & ACTUAL LOSSES FOR THE PERIOD

SEPTEMBER 11, 2001 TO SEPTEMBER 30, 2001

FINANCIAL DATA
(in whole dollars)

Passenger Carrier Financial Data	Pre 9-11-01 Forecast for the Period 9-11-01 through 9-30-01	Actual Results for the Period 9-11-01 through 9-30-01	Difference Between the Pre 9-11-01 Forecast and Actual Results for 9-11-01 through 9-30-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

FORM 330-A
Page 3 of 5

NAME OF AIR CARRIER	

PART 3: ESTIMATE OF LOSS FOR THE PERIOD

OCTOBER 1, 2001 TO DECEMBER 31, 2001

FINANCIAL DATA
(in whole dollars)

Passenger Carrier Financial Data	Pre 9-11-01 Forecast for the Period 10-01-01 through 12-31-01	Current Forecast for the Period 10-01-01 through 12-31-01	Difference Between the Pre 9-11-01 Forecast and the Current Forecast for 10-01-01 through 12-31-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

■ 9. Amend Appendix B to Part 330 by revising Page 1 of 5 and Page 3 of 5 of Form 330–B to read as follows:

Appendix B to Part 330—Forms for Certificated Cargo Carriers

FORM 330-B
Page 1 of 5

AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT

APPLICATION FOR COMPENSATION
FOR CERTIFICATED CARRIERS
THAT PROVIDE ALL CARGO OPERATIONS ONLY

NAME, ADDRESS AND TELEPHONE NUMBER OF AIR CARRIER	
TYPE OF DOT ECONOMIC AUTHORITY HELD	
COMPENSATION AMOUNT RECEIVED TO DATE UNDER SECTION 101(A)(2) OF THE ACT	

PART 1: FORECASTED & ACTUAL LOSSES FOR THE PERIOD

SEPTEMBER 11, 2001 TO SEPTEMBER 30, 2001

FINANCIAL DATA
(in whole dollars)

Cargo Carrier Financial Data	Pre 9-11-01 Forecast for the Period 9-11-01 through 9-30-01	Actual Results for the Period 9-11-01 through 9-30-01	Difference Between the Pre 09-11-01 Forecast and Actual Results for 9-11-01 through 9-30-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

FORM 330-B
Page 3 of 5

NAME OF AIR CARRIER	

Part 3: ESTIMATE OF LOSS FOR THE PERIOD

OCTOBER 1, 2001 TO DECEMBER 31, 2001

FINANCIAL DATA
(in whole dollars)

Cargo Carrier Financial Data	Pre 9-11-01 Forecast for the Period 10-01-01 through 12-31-01	Current Forecast for the Period 10-01-01 through 12-31-01	Difference Between the Pre 9-11-01 Forecast and the Current Forecast for 10-01-01 through 12-31-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

■ 10. Amend Appendix C to Part 330 by revising Page 1 of 7 and Page 3 of 7 of Form 330–C to read as follows:

Appendix C to Part 330—Forms for Air Taxi Operators

FORM 330-C
Page 1 of 7

AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT APPLICATION FOR COMPENSATION FOR AIR TAXI OPERATORS

NAME, ADDRESS AND TELEPHONE NUMBER OF AIR TAXI OPERATOR	
DATE OF MOST RECENT PART 298 REGISTRATION OR AMENDMENT	
FAA PART 135 OR 121 CERTIFICATE NUMBER	

PART 1: FORECASTED & ACTUAL LOSSES FOR THE PERIOD SEPTEMBER 11, 2001 TO SEPTEMBER 30, 2001
(in whole dollars)

Air Taxi Financial Data	Contracted/Planned Operations for the Period 9-11-01 through 9-30-01	Actual Results for the Period 9-11-01 through 9-30-01	Difference Between the Pre 09-11-01 Forecast and Actual Results for 9-11-01 through 9-30-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

The operations for hire for which losses are claimed in this chart must have been cancelled entirely, resulting in a complete loss of revenue for those operations. Revenue for these operations must not have been re-captured through subsequent re-accommodation of the same trips. Such non-recovered losses in revenues had associated countervailing reductions in operating expenses that have also been incorporated in the data and calculations in this chart.

FORM 330-C
Page 3 of 7

NAME OF AIR CARRIER	

PART 3: ESTIMATE OF LOSS FOR THE PERIOD OCTOBER 1, 2001 TO DECEMBER 31, 2001 (in whole dollars)

Air Taxi Financial Data	Pre 09-11-01 Forecast* for the Period 10-01-01 through 12-31-01	Current Forecast for the Period 10-01-01 through 12-31-01	Difference Between the Pre 09-11-01 Forecast and the Current Forecast for the period 10-01-01 through 12-31-01
Total Operating Revenue			
Total Operating Expenses			
Total Operating Income			
Non-Operating Income			
Non-Operating Expenses			
Income Before Taxes			

* For those air taxi operators that do not typically prepare forecasts, use contracted/scheduled services that were scheduled before September 11, 2001 and can be documented.

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