

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: Request for 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 a final rule being published in today’s Federal Register, the Department is amending its application procedures for this compensation program. This document requests further comments on the issue of whether the Department should establish a set-aside of compensation funds for classes of air carriers, such as air ambulances

and air tour operators, for whom the final rule's compensation formula may not adequately reflect their share of direct and incremental losses.

DATES: Comments should be received by January 16, 2002; late-filed comments will be considered to the extent practicable.

ADDRESSES: Interested persons should send comments to Docket Clerk, Docket OST-2001-10885, Department of Transportation, 400 7th Street, SW, Room PL-401, Washington, D.C. 20590. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The Docket Clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10:00 a.m. to 5:00 p.m., Monday through Friday. Comments also may be sent electronically to the Dockets Management System (DMS) at the following Internet address: <http://dms.dot.gov/>. Commenters who wish to file comments electronically should follow the instructions on the DMS web site. Interested persons can also review comments through this same web site.

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 noted in the preamble to the final rule on airline compensation procedures that the Department is publishing in today's Federal Register, commenters expressed a concern about the provisions of the Act that based calculations of compensation for which air carriers are eligible on available seat-miles (ASMs). The concern was basically that this ASM-based formula would not adequately compensate air ambulances and air tour operators for the losses they suffered as the result of the September 11 attacks.

In the Aviation and Transportation Security Act (Pubic. L. 107-71), Congress addressed the situations of air ambulances, air tour operators and other similarly situated classes of air carriers. 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 subsection (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, the methodology for proportionally allocating any funds 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.

The Department is considering 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 tour operators, 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 does not have sufficient information to determine whether to create such a set-aside at this time, which classes of carriers a set-aside would cover, what the appropriate size of such a set-aside would be, or how any funds set aside should be allocated. While we have some information about the situation of air ambulances, we have little information about the situation of other classes of air carriers to which such a set-aside could apply.

Both because of this lack of information and our desire to avoid delays in distributing the second increment of compensation funds to carriers, the Department did not make a determination, for purposes of today’s final rule,

about whether to create a set-aside. After this second increment of funds is distributed, approximately 15 percent of the authorized \$4.5 billion will remain. This should be more than enough to use for the purpose of compensating carriers who would be subject to such a set-aside. If the Department decides to implement a set-aside, we would do so in connection with the third increment of compensation funds. To help the Department decide whether to implement a set-aside, the Department requests information concerning whether there are classes of air carriers for whom application of an ASM-based compensation formula would inadequately reflect their share of direct and incremental losses for which use of this set-aside authority would be appropriate. This information should pertain to *classes* of carriers, not just to individual carriers, and concern such subjects as the type of operations conducted by a class of carriers and the reasons why use of the statute's general approach to compensation is inadequate for the class. Commenters should note that the statute's general approach does not assure that all losses attributable to the terrorist events will be compensated; because of the statute's default provision to the ASM formula, the vast majority of passenger carriers are scheduled to receive compensation well below their claimed losses.

If the Department were to establish a set-aside, there are a number of possible ways that funds from the set-aside could be allocated. In its comment, the Association of Air Medical Services (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 ambulance 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. This suggestion, a variation of it, or some other surrogate for ASMs could be one possible approach to distribution of compensation under a set-aside.

Subsequent to the enactment of the Transportation and Aviation Security Act, AAMS and the air carrier MEDjet approached the Department separately with alternative approaches for compensating air ambulances, that do not rely on ASM's as a factor. These proposed alternative approaches are derived from the Medicare Fee Schedule, which both AAMS and MEDjet propose could be used as a benchmark for determining lost revenue based on lost volume. Both AAMS and MEDjet propose that the lost revenues for an air ambulance could be determined by taking a base rate for each lost trip and adding that amount to the product of the lost miles for that trip and a fixed mileage rate. The base rate and the mileage rate would be derived from the Medicare Fee Schedule. Both AAMS and MEDjet proposed a different, limited period of time to be used for calculating lost trips as well as different base rate and mileage rate figures. One

disadvantage to these approaches is that they may not be readily adaptable to use for air tour operators or other classes of carriers.

Another approach could be to calculate the average percentage of documented direct and incremental losses that applicant carriers have received in compensation. We could then apply that percentage to the direct and incremental losses that carriers in the class or classes subject to the set-aside could document. For example, if on average all carriers were eligible, under the statutory formula, for compensation equivalent to 60 percent of their documented losses, the Department could compensate carriers participating in the set-aside for 60 percent of their documented losses.

The Department seeks comments on these or other approaches that the Department could use to allocate funds from a set-aside, as well as on the underlying question of whether the Department should use its discretionary authority to establish a set-aside in the first place.

The Department will keep the docket open for 14 days to receive comments on this set of issues. If the Department decides to establish a set-aside, we would amend Part 330 in the future to provide application instructions for carriers who sought compensation under the set-aside.

REGULATORY ANALYSES AND NOTICES

This request for comments pertains to an underlying rule (49 CFR Part 330) that is significant for purposes of Executive Order 12886 and the

Department of Transportation's rulemaking policies and procedures. If the Department decides to undertake further rulemaking after reviewing comments, the Department will follow applicable provisions of these requirements.

If the Department proceeds with further rulemaking on the subject of this notice, the rulemaking may have a significant economic effect on a substantial number of small entities. Among the entities in question are air ambulances and other classes of air carriers that include small entities. In analyzing small entity impact for purposes of the Regulatory Flexibility Act, we believe that, to the extent that the use of the Department's set-aside authority impacts small air carriers, the impact will be a favorable one, since it will consist of receiving additional compensation. The Department has also concluded that this rule does not have sufficient Federalism implications to warrant the consultation requirements of Executive Order 13132.

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