Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; EO 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9J, Airspace Designations and Reporting Points, dated August 31, 2001, and effective September 16, 2001, is amended as follows:

Paragraph 6005 Class E Airspace Areas extending upward from 700 feet or more above the surface of the earth.

AEA MD E5, Elkton, MD [NEW]

Cecil County Airport,
(Lat. 39°34′27″ N., long. 75°52′11″ W.)

That airspace extending upward from 700 feet above the surface within a 6 mile radius of the Cecil County Airport, Elkton, MD.

Issued in Jamaica, New York on March 26, 2002.

F.D. Hatfield,

Manager, Air Traffic Division, Eastern Region.

[FR Doc. 02–9124 Filed 4–15–02; 8:45 am]

BILLING CODE 4910–13–M

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; 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, directly resulting from the September 11 terrorist attacks on the United States. On October 29, 2001, and January 2, 2002, the Department published rules to carry out this Act. On the latter date, the Department also requested comments on whether and how to establish a set-aside for certain air carriers. This final rule provides forms and information for air carriers in making third round compensation applications, updates the existing rules, and establishes a set-aside for air taxi, commuter, and regional carriers that reported fewer than 10 million available seat miles for August 2001.

DATES: This rule is effective April 16, 2002. Comments should be submitted by April 30, 2002.

ADDRESSES: Interested persons should send comments to Docket Clerk, Docket OST–2001–10885, Department of Transportation, 400 7th Street, SW., Room PL–401, Washington, DC 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 9:00 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 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.''

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 regarding compensation under the Act. The rule covered such subjects as eligibility, deadlines for application, information and forms required of applicants, and audit requirements. On January 2, 2002 (67 FR 250), the Department published a ''second round'' final rule that responded to comments on the October 29 rule. On the same date (67 FR 263), the Department also requested comments concerning whether a set-aside of a portion of the funds authorized by the Act should be established to ensure adequate compensation for certain classes of air carriers.

This ''third round'' final rule addresses the set-aside issue, several issues raised during the Department's consideration of pending claims for compensation, and comments received on other aspects of the compensation program. It also provides forms and information for use by air carriers in applying for third round compensation under the Act.

Set-Aside

Background

As noted in the Department's January 2, 2002, request for comments, a number of carriers had expressed the concern that the Act's available seat mile (ASM)-based formula would not adequately compensate air ambulances and air tour operators, among others, for the losses they suffered as the result of the September 11 attacks. In response to these concerns, Congress, in the Aviation and Transportation Security Act (Public Law 107–71), 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 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. Consequently, in the January 2, 2002, notice, the Department requested comments on these matters.

Comments

The Association of Air Medical Services (AAMS) suggested that air ambulances should be a class of carriers eligible for a set-aside. AAMS recommended compensating air ambulances based on a formula derived from Medicare fee schedule rates. Under this formula, AAMS would compare each carrier's transports in the 30 days ending September 10, 2001, with the number of transports in the 30 days beginning September 11. The Department would provide compensation for each transport not made in the second period according to a base rate plus a mileage fee consistent with Medicare rates. For example, the compensation for each ''lost'' helicopter transport would be $4,256. Over 50 air ambulance carriers supported this proposal, and only one such carrier opposed it.

A number of air taxi and air tour companies generally supported the use of a set-aside, pointing to what they saw as inequities in the compensation for which they would be eligible under the general ASM-based formula. Some of these suggested that the most equitable means of distributing a set-aside would be to ensure that covered carriers received compensation amounting to the percentage of losses that other carriers had received.

One Las Vegas-based company suggested multiplying the number of reported ASMs by the percentage decrease in ASMs compared to an earlier, more normal, period. Another carrier suggested a separate set-aside for Las Vegas-based tour companies, which it said were badly hurt by a sharp reduction in foreign tourists. Compensation for these carriers would be based on their market share of ASMs flown by carriers in the class.

An environmental group, to the contrary, suggested that Las Vegas-based or other air tour companies that provide air tours in the area of the Grand Canyon not receive compensation at all. In this group's view, such operators were providing entertainment, rather than air transportation, and compensation to them would be inappropriate in view of the fact that they disturb the natural quiet of the Grand Canyon.

The National Air Transportation Association (NATA) advocated that we use an ASM-based formula limited to the pool of ASMs from Part 135 air charter carriers. NATA also suggested that participation in the set-aside not be limited to carriers who had applied previously, since some carriers may have been deterred from applying by the likelihood of receiving only very small amounts of compensation.

A New York-based helicopter company suggested multiplying its expected revenue for the September 11–December 31, 2001, period by the percentage of passengers that would have used facilities that were closed because of the terrorist attacks. Another carrier supported a formula involving the average number of seats in the operator's fleet, the speed of the aircraft, and the on-call time per day (normally 24 hours). The Department also received comments from a few fixed wing and helicopter carriers that are primarily or exclusively cargo carriers, requesting that a set-aside be made available to cargo carriers that would correct perceived inequities in the Act's RTM-based formula.

Two indirect air carriers that provide service to Cuba using foreign direct air carriers suggested that public charters be viewed as a class eligible for a set-aside, based on a formula comparing August and September passenger loads multiplied by airfare minus operating expenses. Another public charter indirect air carrier, which specializes in spring break trips for students, also asserted that it should be eligible for a set-aside, with a formula based on lost bookings. A Part 121 on-demand planeload charter passenger carrier said that carriers in its situation were also short-changed by the statutory ASM formula. They suggested substituting a formula based on the ratio of the losses of each carrier compared to the total losses of this class of carriers. A charter-tour operator who sells vacation packages through travel agents suggested a somewhat similar approach.

The Air Transport Association (ATA) generally supported the idea of a set-aside for air ambulances and air tour operators, agreeing that the original statutory formula did not adequately compensate them. ATA said, however, the amount set-aside should come out of the funds remaining after other air carriers had been paid 100 percent of the compensation for which they are eligible. This would avoid reducing compensation for other carriers, ATA noted.

DOT Response

The purpose of the amendment to the Act contained in Pub. L. 107–71 was to give the Department authority to find a way to ensure more adequate and equitable compensation for ''classes'' of air carriers for whom application of the normal ASM-based distribution formula would inadequately reflect their share of direct and incremental losses. It is clear from financial information submitted to the Department during the application process for compensation that there are some significant inequities among classes of carriers. However, for the air taxi, commuter, and regional air carriers with the smallest number of ASMs (no more than an average of 10,000 per day, or 310,000 for the reporting period of August 2001), the average percentage of recovery is about 6 percent of their claimed losses. For such carriers with between 310,000 and 10 million ASMs, the average percentage of recovery is about 14 percent. For remaining carriers, with more than 10 million ASMs, the average percentage of recovery is about 65 percent. For purposes of further defining the scope of the classes, the Department has added a

new definition of a regional air carriers, based on existing Departmental classifications used for other purposes.

The Department, consistent with the intent of Congress and the views of commenters, believes that it is appropriate to use its statutory set-aside authority to redress these inequities. Doing so would help to ensure a fair result to all classes of carriers. The most important questions for the Department to resolve are the identification of the classes of carriers eligible for compensation from the set-aside and the formula used to establish their compensation.

As noted above, there are two groups of carriers whose compensation under the original statutory ASM formula falls well below the compensation for carriers generally. Class I includes those air taxi, commuter, and regional carriers who reported an average of 10,000 ASMs or fewer per day, or 310,000 for the reporting period of August 2001. Class II includes air taxi, commuter, and regional air carriers reporting between 310,000 and 10 million ASMs. All-cargo carriers are not eligible to participate in the set-aside, which, under the statute, applies only to carriers who report ASMs and whose compensation comes from the $4.5 billion portion of the statutory authorization for passenger carriers.

Of the carriers who have applied for compensation to date, there are 143 carriers in the first class and 96 in the second. The Department believes that identifying classes of carriers eligible for a set-aside in these broad terms is more sensible, fair, and easy to administer than dividing carriers into smaller functional or local classes (*e.g.,* air ambulances, air tour operators generally or those based in a particular place, public charters, etc.), each with a separate compensation methodology that may address its own situation but not fit that of others. These broad classes include the vast majority of the carriers in these smaller groupings, including most of the carriers that submitted comments to the docket.

In addition to making the program more complicated to administer than a methodology covering broader classes of carriers, some of the specific methodologies suggested for narrower groups could be problematic. For example, the AAMS recommendation of a formula based on medicare reimbursement rates would make it difficult to distinguish between transportation costs and losses and other costs and losses attributable to non-transportation aspects of air ambulance services, such as the cost of waiting time for medical personnel. It would be difficult to achieve similarly equitable results for carriers in a single market, such as Las Vegas or New York, and carriers elsewhere using the approach suggested by Las Vegas- and New York-based tour operators.

With respect to the commenter that operates spring break charters for students, the Department does not believe that it can base a set-aside class on the experience of a single carrier with respect to loss claims that are subject to adjustment until Spring 2002, well after the September-December 2001 compensation period intended by Congress. Likewise, with respect to the commenter that operates on-demand planeload charters, it is difficult to identify a class of carriers eligible for a set-aside based solely on the situation of one carrier. This particular carrier, in any case, would be eligible for compensation as a Class II carrier under the set-aside in this rule.

The public charter carriers who operate as indirect air carriers and use direct foreign air carriers to provide service to Cuba may be eligible for compensation. As noted below, they should refer to the January 2, 2002 final rule, as amended by this rule, regarding use of the ASMs operated by their direct foreign air carrier partners to support a claim for compensation. The same may be true of the indirect air carrier commenter that operates as a charter-tour operator.

We considered the idea of simply compensating carriers so that each received compensation equivalent to about the same percentage of its losses as the average for all carriers. However, this approach has certain disadvantages. For example, it might not provide an accurate basis for compensation for carriers that are affiliated with larger carriers. It could unfairly reward carriers whose larger-than typical-losses may be attributable to less efficient operation or unfavorable market conditions unrelated to the terrorist attacks. It would result in slower payouts to all carriers eligible for the set-aside, since it would preclude the Department from establishing a standard process for carrier claims, which would make the process unduly laborious.

The approach that the Department has decided to take is conceptually similar to that suggested by some commenters, involving a formula that considers the market share of an individual carrier within a class of carriers. For carriers in Class I and Class II, the Department will calculate the average amount of documented losses per ASM reported. Using current applicants as an example, for Class I carriers, the average loss per ASM is approximately $.82. Thus, for Class I carriers, the Department would project the maximum compensation due by multiplying the number of ASMs for Class I carriers times $.82. Using this methodology, a carrier with 100,000 ASMs would receive no more than $82,000 in total compensation.

For Class II carriers, the method of calculation is somewhat more complex. To avoid disproportionately low compensation being paid to those carriers who fall just above the 310,000 ASM line of demarcation between Class I and Class II, the Department is taking a two-tiered approach. Again, using current applicants as an example, the Department would apply the projected $.82 loss per ASM rate to the first 310,000 ASMs of Class II carriers. For each ASM above 310,000, the carrier would receive an estimated $.19 per ASM, which represents the average loss per ASM for these incremental ASMs. For example, we project that a carrier with 750,000 ASMs would receive no more than $337,800 in total compensation. It should be noted that, depending on the actual losses and ASMs that are validated for set-aside applicants, the ASM rates for both Class I and Class II carriers could change.

The statute calls for a class-based compensation system under the set-aside. No class-based system can provide perfect equality for each individual carrier, and any such system could create some relative ''winners'' and ''losers.'' To preclude inequitably high or low compensation results for specific carriers, the Department has decided to add a minimum and maximum percentage recovery limit for carriers receiving additional compensation under the set-aside program. No Class I or Class II carrier will receive more in compensation than the average percentage of recovery for carriers with more than 10 million ASMs, which, based on current data, is approximately 65 percent of its losses, unless the carrier would have recovered more than 65 percent of its losses under the original ASM formula in which case it will be compensated using that rate. The Department will use its most current data in establishing a final ''cap,'' meaning that the cap percentage may need to be adjusted. Further, no Class I or Class II carrier will receive less than 25 percent of its verified eligible transportation-related losses. The 25 percent ''floor'' will ensure, in the interest of fairness, that all classes of carriers will be in the position of receiving at least that amount of compensation, in accordance with the statutory direction to provide compensation that adequately reflects their share of direct and incremental

losses. In these latter cases, the carrier will be required to satisfy the Department that its claimed losses are valid, eligible, and transportation-related.

Application of this system will ensure the result intended by Congress: the projected median recovery for Class I, Class II, and other carriers as a class will all be about the same percentage of losses. We project that current applicants would receive $27.5 million under this approach, as opposed to the $6.4 million they are projected to receive under the original statutory formula. In addition to this $27.5 million, the Department is setting aside an additional $7.5 million to cover potential payments to new applicants. As suggested by commenters, the final rule will permit carriers in Class I and Class II who have not previously applied to do so. We believe that this is fair because the low amounts of compensation under the original statutory formula may well have discouraged some carriers from applying in the past. Therefore, the total set-aside will be up to $35 million. As the Air Transport Association (ATA) requested, the Department expects that this amount will not diminish the recovery of other carriers.

To begin disbursement of compensation promptly, the Department plans to use a two-phase compensation process for eligible air carriers under the set-aside program. In the first phase, commencing upon publication of this rule, the Department will review those applications that already have been filed by such eligible air carriers, and, assuming no disqualifying issues arise, provide initial payment of a partial amount. In order to protect against potential overpayments, for Class I carriers this partial payment will be the lesser of (A) no more than 30 percent of validated losses, or (B) $0.35 per ASM. Similarly, for Class II carriers, the partial payment will be the lesser of (A) no more than 30 percent of validated losses, or (B) $0.35 per ASM for the first 310,000 ASMs and $0.08 per ASM for each ASM above 310,000. For both Class I and Class II carriers, the partial payment will be reduced by any amounts that have previously been paid in compensation.

The second phase of set-aside payments will be processed as part of the final round of payments for all carriers. At that time, payments will be made to set-aside air carriers who had received first-phase partial compensation for the balance that the Department determines is outstanding. Set-aside applicants that file new applications will also have their applications processed by the final round of the compensation process.

The Federal Aviation Administration (FAA) recently completed a lengthy and complex rulemaking to determine the appropriate routes and volume of air tour flights over the Grand Canyon. This rulemaking involved extensive consultation with air tour operators, environmental groups, Indian tribes, and other concerned government agencies. In the Department's view, air tour operations over the Grand Canyon that comply with the FAA rule are no less eligible for compensation than any other air carrier operations subject to the Stabilization Act. While we recognize that there may be continuing argument about the merits of such flights, this compensation rule is not the place to resolve them.

Impairments and Other Extraordinary or Nonrecurring Items

The Airline Stabilization Act provides compensation for direct losses incurred by carriers beginning on September 11 as the result of Federal ground stop orders, and for ''incremental losses incurred beginning September 11, 2001, and ending December 31, 2001'' as a direct result of the terrorist attacks.

By this language, Congress required that compensable losses be limited to the September 11–December 31 period, meaning that compensable losses must actually be incurred in the September 11–December 31 period. Losses experienced before September 11 or after December 31 are not eligible for compensation. A number of applications included as claimed losses items that, while they may have been reported for purposes of generally accepted accounting principles (GAAP) as being ''incurred'' within the September 11 to December 31 period, nevertheless would actually be experienced over a much longer period. One example of such an item is the devaluation of aircraft (impairment) or other assets, based on an expectation of their diminished value due, in many cases, to a perceived decrease in the asset's ability to generate revenue after the terrorist attacks. Because the Department considered that such charges should be excluded from compensable losses, we required carriers (through a December 4, 2001, letter and a supplemental certification form) to clarify whether their applications included any extraordinary, non-recurring, or unusual adjustments that were not included in their pre-September 11 forecasts, and to specify the amounts involved. In processing applications for second round payments, we generally excluded these amounts as ineligible for compensation.

Thereafter, the Department received a number of comments objecting to these exclusions. In some cases, carriers returned the Supplemental Certification Form with a statement that such charges should be compensable and that they were not waiving their right to claim them. In a letter dated December 10, 2001, to the Department, the Air Transport Association and Regional Airline Association asserted that impairment charges had ''real-world'' impacts on air carrier finances, because credit is based on independently appraised asset values. Thus, as assets dropped in value, many carriers claimed to have lost valuable sources of liquidity. The associations stated their belief that Congress intended such losses to be compensated. Moreover, they argued that impairment charges, and similar writedowns, including lease buyouts, are recognized as losses under GAAP, and the Financial Standards Accounting Board (FASB) has recognized that impairment losses can result from the September 11 events. Thereafter, in comments addressed to Docket OST–2001–10885, the Air Transport Association reiterated the view that the inclusion of these losses is consistent with the Stabilization Act, GAAP, and the standards for financial statements set by the Securities and Exchange Commission (SEC). It further argued that impairment charges, like severance expenses and other non-recurring charges that DOT has disallowed, result in ''real'' accounting and economic losses, and ''real'' foregone liquidity.

DOT Response

The Department does not disagree that impairment and similar charges may be proper for purposes of GAAP. Nor do we take issue with arguments that the reporting of such losses may be consistent with FASB or SEC procedures. However, because they may be proper under or consistent with such procedures does not mean that they are necessarily within the scope of losses that Congress intended to be eligible for compensation under the Act.

We note that including asset devaluation charges within the September 11 to December 31 period would potentially allow a carrier to receive full compensation for what is typically a very large expense item, even though most of the associated cost to that carrier would be experienced over time. In effect, this would be similar to a front-end loading of depreciation or lease expenses, shifting costs that will occur in the future into the period for

which compensation is to be provided. That result, we continue to believe, is inconsistent with the direction to compensate carriers only for losses actually incurred through December 31. Further, where impairment charges or other writedowns reflect a temporary grounding of aircraft or suspension of use of other assets, we do not have the practical ability to monitor the accounting for those assets in the future to ensure that they recapture excess compensation if they are returned to service earlier than expected.

Moreover, the theoretical basis for an impairment charge is an expected decline in asset value that reflects an expected permanently reduced demand and reduced ability to generate revenue. However, since we are already compensating carriers for the actual decline in revenue they are experiencing through the end of the year, there is an inherent duplication in also compensating them for the associated asset devaluation costs. As to the carriers' concern regarding loss in liquidity due to asset writedowns, the compensation payments provide a direct source of funds to replace lost liquidity.

This is not to suggest that the Department considers that all extraordinary or non-recurring losses must be disallowed. Where an applicant can show, apart from conformity to GAAP requirements, that the actual costs of a loss were the direct result of the terrorist attacks of September 11 (and not, for example, the result of a general economic slowdown), were fully borne within the September 11 to December 31 period and are permanent, and that compensation for those costs would not be duplicative, the Department will consider such claims on a case-by-case basis. The forms for the third round application process include a section addressing the treatment of extraordinary or non-recurring losses, and section 330.39 of the rule has been amended to require information about such losses.

Adjustment for Losses Not the Direct Result of the Events of September 11

Section 101(a)(2) of the Act provides that the President shall compensate air carriers for direct losses incurred beginning on September 11 as the result of any Federal ground stop orders, and their incremental losses incurred beginning September 11, 2001 and ending December 31 ''as a direct result of'' the terrorist attacks. Section 107(3) of the Act further specifies that the term ''incremental loss'' does not include any loss that the President determines would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001 had not occurred. The application forms for third round compensation payments have been revised to include a section addressing certain types of revenues and expenses, in order to further implement this ''direct result'' requirement and incremental loss definition.

In the previously-issued rules and guidance concerning payment of compensation in the first and second rounds, the Department required carriers to supply pre-September 11 forecast financial data including revenue, expenses, operating income, nonoperating expenses, and net income. Updated forecasts after September 11 for the period October 1 through December 31, 2001, and later, actual results, were also to be supplied. Carriers were required to certify such data as true and accurate under penalty of law.

The Department used, as a starting point for its compensation determinations, the difference between pre-September 11 forecasts and the updated forecasts or actual results. During their reviews, Department staff scrutinized applications for actual and forecasted revenues and expenses that did not appear to be directly impacted by the terrorist attacks, and incremental losses that might have been incurred even if the attacks had not taken place. Revenues and expenses of this sort were questioned, and where appropriate, disallowed.

For example, we disallowed as expenses certain supplemental employee compensation payments that were not related to the events of September 11. Also, we disallowed certain maintenance expenses that were accelerated into the September 11 to December 31 period, but would have been incurred normally after January 1, 2002. With the experience gained from these case-by-case determinations, the Department believes that it may be helpful to clearly state the standards and procedures that govern in these areas, consistent with the requirements of the Act. These standards and procedures have been incorporated in the third round application Forms, as well as into the core requirements for the agreed-upon procedures for review of the carriers' financial data. This will permit both applicants and reviewers to focus on revenue and expense items that may be subject to exclusion as not related to September 11, and prevent any misunderstanding of how such items will be treated. It will also facilitate the administrative review process, as applicants will be presenting their financial information in a manner that permits more expeditious review, expediting also their third round and final payments. Applicants are to be guided by the following principles in applying for the third round of direct compensation:

1. Use Form 330 (Final) to show forecasted and actual net income/losses for the period September 11, 2001 to December 31, 2001. These must be updated from previous Forms to reflect actual results through December 31, 2001, using the most current information available showing final financial results.

2. To be compensable under the Stabilization Act, incremental losses must have been actually incurred ''as a direct result'' of the terrorist acts of September 11, 2001. Also, any loss that would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001, had not occurred is not eligible for compensation under the statute.

3. Based on its experience in reviewing claims received to date, the Department believes that, in most instances, it is extremely difficult if not impossible to distinguish, on a line line item by line item basis, individual revenue and expense items that were affected directly by the terrorist attacks from those that were affected indirectly, or those that were partially affected, or not affected at all. That conclusion is confirmed by findings of the Emerging Issues Task Force of the Financial Accounting Standards Board, in its Discussion of Agenda Technical Issues, Issue No. 01–10, addressing Accounting for the Impacts of the Terrorist Attacks of September 11, 2001:

> The Task Force noted that it would be impossible to isolate and therefore distinguish (in a consistent way) the effects of the September 11 events in any single line item on companies' financial statements because of the inability to separate losses that are directly attributable to the September 11 events from those that are not. For example, impairment of long-lived assets as a result of the September 11 events would in many cases be impossible to measure separately from impairment due to the general economic slowdown that was generally acknowledged to be under way. (The September 11 events probably contributed to the speed and depth of that economic slowdown, but determining the portion of the slowdown directly attributable to the September 11 events would be extremely subjective and difficult, if not impossible.)

The Department believes that, in most cases, the comparison between pre-September 11, 2001 forecasts and actual results provides an approximation of the incremental losses that are a direct result of the attacks, and that approximation, without more, gives effect to the language of the statute.

However, to give further effect to the statutory language, the Department is providing rules and guidance for the third round and final payments. To avoid burdening applicants, reviewers and auditors with a potentially subjective and inherently imprecise line item by line item analysis, we are employing various measures designed to highlight items that may not be within the scope of compensable losses, while establishing a presumption that other items were impacted by the attacks so as to warrant inclusion within the formula. Notwithstanding these presumptions, to ensure fairness, applicants may bring specific matters to our attention as described below.

4. The Department expects that some items, potentially of significant relative financial impact, that would not be identified through the forecast/actual analysis but yet were not directly the result of the terrorist attacks would be ones that were extraordinary or non-recurring. For example, suppose that a claim for incremental losses includes a post-September 11 unfavorable judgment of $1 million in a lawsuit, the operative facts of which all occurred prior to September 11. That $1 million liability is not a loss incurred as a direct result of the terrorist attacks, and would have been incurred had the attacks not taken place. Accordingly, it must be excluded from net losses.

To permit the Department to take them properly into account, applicants must separately identify all extraordinary and non-recurring revenue and expense items on pages 2 and 3 of Form 330 (Final). For these purposes, ''extraordinary items'' are events and transactions that are unusual in nature and infrequent in occurrence. ''Non-recurring items'' are either unusual or infrequent, but not both. Applicants shall describe and explain such items, and address, with supporting documents, whether each such item is attributable to the terrorist attacks or not.

5. On pages 2 and 3 of Form 330 (Final), applicants must also report any revenue or expense items that would normally have been reported in a time period other than September 11 through December 31, 2001, but were reported in and claimed for the September 11 through December 31, 2001 period. For example, an applicant has reported an amount in a Provision for Bad Debts in the October 1 through December 31 period that normally would have been reported in the first calendar quarter of 2002. This must be identified in Form 330 (Final) so as to allow the amount of net income to be adjusted. To the extent a loss claim included such an expense item, it would represent a loss that would have been incurred had the terrorist attacks not taken place. Applicants are advised that the reviewing staff will give careful attention to any prepaid or accelerated expense items in this regard.

6. Applicants should carefully scrutinize their applications for other situations, not addressed specifically above, in which losses have been or could be reported that were not directly the result of the terrorist acts, or that would have been incurred in any event, including items that, while not literally extraordinary or non-recurring, were nonetheless identifiable as falling into the above categories. Applicants may wish to utilize monthly profit and loss statements, which section 330.21(g) of the revised regulation requires be submitted with each application, to identify prospective items of such character. Applicants shall report such items on Form 330 (Final), as appropriate.

7. The Department expects that many applicants have experienced, by their own initiatives, a reduction in actual versus forecast expenses, giving rise to a question as to whether any such reductions may be excluded from the calculations of losses on the ground that they are unrelated to the terrorist attacks. As a general rule, for the reasons stated below, the Department will treat such variances for all categories of expenses as being attributable to the terrorist attacks. First, we would expect that cost reduction plans not related to the terrorist attacks would have been reflected in an applicant's pre-September 11 forecasted financials. Second, we believe it highly likely that expense reduction efforts undertaken after September 11 were attributable, implicitly if not explicitly, to changed expectations regarding revenues after the attacks. Third, we note that Congress provided that we compensate air carriers for ''losses incurred.'' Cost savings that are achieved in fact reduce an air carrier's losses, and the calculations required under our regulations may not be manipulated to exclude actual reductions in expenses, thereby generating a basis for increased compensation. Moreover, we interpret Congress' language here as indicating an intent that carriers not receive increased compensation for achieving savings in costs, which they have an independent obligation to their managements and shareholders to achieve, and which it is reasonable to expect them to undertake to mitigate the need for compensation under the Act. If there are specific instances of cost savings that an applicant believes are unrelated to the events of September 11 and believes should be excluded with the effect of increasing compensation, and the applicant can provide pre-existing documentary support for its position, the Department will consider the request. Otherwise, such items are not allowable and should not be claimed.

8. Section 103(a) of the Stabilization Act is clear that the amount of compensation payable may not exceed the amount of losses that the air carrier *demonstrates to the satisfaction* of the President, using sworn financial statements or other appropriate data, that the air carrier *incurred.* The Department expects that application of the foregoing requirements will result in many compensation claims effectively being reduced. Where claimed losses are increased, the Department can be expected to give careful attention to the justifications offered in support of such increases. Applicants are advised that, under the Stabilization Act, the burden remains on them to demonstrate to the Department's satisfaction that all claimed losses have been incurred and are otherwise eligible for compensation.

Other Issues

Overcompensation Issues. As the Department processes applications and receives updated data from carriers, and the Inspector General's office or the General Accounting Office reviews them, there may be instances in which we determine that we have remitted more in compensation than current financial or operating data support. In this event, as provided in revised § 330.9(b), the carrier will be notified of the situation and is required to return the difference to the Department immediately. The revision makes clear that the Department need not wait until a third round or final payment has been made, or an audit has been conducted, before requiring the return of funds that it believes represents an overpayment.

Timing of Compensation. In the interest of the prudent administration of funds under this program, the Department has determined that it will distribute up to 95 percent of the compensation for which an air carrier is eligible as part of this third round. Temporarily retaining the remaining five percent will permit the Department to determine with greater certainty the total amount of compensation for which all carriers are eligible, since we will have had the chance to review everyone's Form 330 (Final) and AUP or simplified procedures reports. This approach will also help us to avoid any possibility of exceeding authorized amounts, as well as enabling the

Department to finalize the compensation amounts based on receipt of all claims.. The Department will pay remaining compensation to carriers subsequently. We do not anticipate that carriers will have to make any additional claim submissions to receive the remaining compensation.

Offsetting Losses Against Profits or Gains. A question has arisen as to whether an air carrier is entitled to be compensated for its direct losses as a result of the Federal ground stop order regardless of its profits or gains during the period of September 11 to December 31, 2001. After reviewing the matter, the Department has concluded that air carriers seeking compensation under Section 101(a)(2) of the Act cannot isolate their direct losses incurred during the period of the Federal ground stop order from their actual results for the overall period of September 11 to December 31, 2001. Where, for example, a carrier experienced better-than-forecasted total results for that period, the actual results for the period after the Federal ground stop order was lifted, September 14, 2001 to December 31, 2001, must be offset against direct losses incurred during the period of the Federal ground stop order. Such an offset is necessary to implement the requirement of the Act that air carriers only receive compensation for losses actually incurred. A loss has been incurred only if that loss has not been fully offset by better-than-forecasted results. This result is consistent with the structure and language of the Act regarding direct and incremental losses. We believe such an offset is consistent with the overall congressional intent of the Act, to stabilize the air carrier industry by compensating for actual losses rather than enhancing profits during the September 11 to December 31, 2001, period.

Wet Lease Arrangements and Indirect Air Carriers. In further response to comments concerning the methodology for determining compensation in situations in which a direct and an indirect air carrier, or a wet lessor and a wet lessee, are both involved in an operation, the Department has decided to delete two provisions of its January 2, 2002 final rule: §§ 330.31(d)(1)(iv) and 330.31(d)(2)(iv). These provisions required wet lessor and indirect air carrier applicants to document that lessees or direct air carriers are either ineligible for compensation or voluntarily will not or have not claimed compensation with respect to the operations in question.

The Department believes that removing these provisions will permit more equitable treatment for wet lessors and indirect air carriers without impinging on the interests of wet lessees and direct air carriers. Doing so will make it more likely that affected carriers will receive adequate compensation for the effects of the September 11, 2001 attacks than would otherwise be the case. By removing administrative barriers, the Department's approach will create a level playing field on which different types of carriers can apply for compensation eligibility. Wet lessors and indirect air carriers therefore may apply for compensation, as long as they meet other requirements of the rule (e.g., the remaining four requirements of § 330.31(d)(1) and (2)).

This approach will also help to alleviate the concern that the deleted provisions might create an incentive for manipulation of the compensation system (e.g., transfers of ASMs or RTMs to other parties in ways that would artificially inflate the overall amount of compensation paid). We anticipate that the Department can implement this approach without reducing the compensation available to other eligible carriers, since some carriers are being paid on the basis of losses, which in these cases are less than the full formula amount.

Accordingly, the rule provides that wet lessors and indirect air carriers who have not already applied to the Department for compensation because of their inability to meet the requirements of former § 330.31(d)(1)(iv) and (d)(2)(iv) are permitted to submit applications in the third round. Applications must be received within 30 days.

With respect to the issue of wet lease arrangements and indirect air carriers, ATA requested that compensation be limited to U.S. citizens. In particular, ATA asked the Department to require that, in the case of indirect carriers and wet leases, both the applicant and the operator must be U.S. citizens. In ATA's view, a U.S. indirect air carrier should not be compensated for RTMs operated on its behalf by a non-U.S. direct air carrier. On the other hand, two indirect air carriers that operate charter flights via foreign direct air carriers took the opposite view.

Under the statute and the rule, only U.S. carriers can receive compensation. No foreign carrier can receive funds under the Act. We do not see a compelling reason to treat the U.S. indirect air carrier's eligibility for compensation differently depending on the nationality of the direct air carrier involved. Indeed, some commenters whose views were reflected in the Department's decisions set forth in the January 2 rule are indirect carriers who made extensive use of foreign direct air carriers.

We do not believe that these provisions of the rule will cause significant delays in processing claims for compensation. Consequently, consistent with the January 2 final rule, we will continue to regard U.S. indirect air carriers as eligible for compensation based on ASMs or RTMs flown for them by foreign direct air carriers.

Independent Public Accountant's Review. Under 49 CFR 330.37, to be eligible to receive payment from the third round or final installment of compensation under the Air Transportation Safety and System Stabilization Act (the Act), the applicant must submit an independent public accountant's (IPA) report based on the performance of agreed-upon procedures (AUP) satisfactory to the Department with respect to the carrier's forecasts and actual results. The IPA's engagement must be performed in accordance with generally accepted professional standards applicable to AUP engagements. The applicant must submit the results of the AUP engagement to the Department with its application for payment of the third round or final installment. Section 330.37 has been expanded to specify the core requirements to be covered by these procedures.

In order to reduce the application burden on smaller air carriers, the Department has approved simplified procedures for (1) passenger-only and passenger/cargo carriers with fewer than 10 million available seat miles (ASM) in August 2001 and (2) cargo-only air carriers with fewer than two million revenue ton miles (RTM) for the quarter ending June 30, 2001.

Model agreed-upon procedures (AUPs) were submitted to the Department by the American Institute of Certified Public Accountants (AICPA) and the Air Transport Association (ATA), and we have modified those procedures in certain respects to be more consistent with our needs. Model AUPs will be made available on the Department's web site, www.dot.gov, along with the simplified procedures, or can be obtained from the DOT contact noted above under **FOR FURTHER INFORMATION CONTACT.** These model AUPs are provided solely as an aid to applicants in meeting the requirements of the Act and these rules, and the use of the model AUPs, or any other procedures, does not diminish or affect in any way the Department's right to examine fully and audit all aspects of all claims for compensation.

Regulatory Analyses and Notices

Executive Order 12866

These amendments do not constitute an economically significant rule under Executive Order 12866, but they are significant under the Executive Order and the Department's Regulatory Policies and Procedures, because they affect important sectors of the air transportation industry and are of general policy interest.

The Department has determined that these amendments are being issued in an emergency situation, within the meaning of Section 6(a)(3)(D) of Executive Order 12866. However, their 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 particular, the impact will be favorable on the carriers eligible for the set-aside, since they otherwise would have received, individually and as a class, considerably less compensation. In accordance with Section 6(a)(3)(D), this rule was submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

While we did request comment on the set-aside issue, there was no notice of proposed rulemaking. Consequently, 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. In analyzing small entity impact of the amendments, 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 more compensation under the set-aside than these carriers would have received otherwise. The Department has also concluded that this rule does not have sufficient federalism implications to warrant the consultation requirements of Executive Order 13132.

Paperwork Reduction Act

This rule contains information collection requirements subject to the Paperwork Reduction Act (PRA), specifically the application documents that air carriers must submit to the Department to obtain compensation and information collections concerning the review of carriers' financial and operational information. The title, description, and respondent description of the information collections are shown below as well as an estimate of the reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Procedures and Forms for Compensation of Air Carriers

Need for Information: The information is required to administer the requirements of the Act.

Use of Information: The Department of Transportation would use the data submitted by the air carriers to determine each carrier's compensation 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, 2001, terrorist attacks on the United States as defined in the Act.

Frequency: For this final rule, the Department will collect the information once, with air carriers reporting on Form 330 (Final). In addition, some air carriers must report to the Department concerning agreed-upon procedures engagements with independent public accountants. Other carriers will have to report on the basis of simplified procedures. These are also one-time submissions.

Respondents: All applicants will have to submit a Form 330 (Final). This includes 435 existing applicants and an estimated 150 new applicants, for a total of 585 carriers. We estimate that it will take carriers 6 hours for this task, for a total of 3510 hours.

In addition, about 97 of these carriers will have to report on the basis of an agreed-upon procedures (AUP) engagement with an independent public accountant (IPA). These carriers are those who report more than 10 million ASMs or two million RTMs. We estimate that filling out the schedules associated with the AUP process will take 20 hours, with another 360 hours representing the time of IPA and carrier staff working on the AUP process. Consequently, we estimate 36,860 hours for the AUP requirement.

Smaller carriers will report on the basis of simplified procedures. There are two tiers of these carriers; the first tier consists of carriers with 310,000—10 million ASMs or 200,000—two million RTMs, and the second tier consists of carriers with less than 310,000 ASMs or 200,000 RTMs. We estimate that 190 carriers will be in the first tier and 298 in the second. We believe that the first tier procedures will take 10 hours and that the second tier (even more simplified) procedures will take three hours. Consequently, the two tiers' estimated burden hour totals would be 1900 hours and 894 hours, respectively, for a total of 2794 hours.

Burden Estimate: Based on the above assumptions, we project a total of 43,164 hours. In dollar terms, we estimate the cost for these tasks to be $1,184,420, based on an average cost per hour of $27.44.

Form(s): The data would be collected on Form 330 (Final), found in the Appendix to this rule.

Average Burden Hours per Respondent: For larger carriers, 386 hours; for smaller carriers, 16 hours for first tier and 9 hours for second tier carriers; for new applicants, 12.5 hours.

The Office of Management and Budget has approved this information collection on an emergency basis, with Control Number 2105–0548.

Administrative Procedure Act Findings

We are making this rule effective immediately, without additional 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. While the Department will begin implementing this rule immediately, we will respond subsequently to comments we receive.

List of Subjects in 14 CFR Part 330

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

Issued This 11th Day of April, 2002, 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 continues 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, 155 Stat. 631 (49 U.S.C. 40101 note).

2. Amend § 330.3 by adding a new definition of ''Regional air carrier'' in alphabetical order to read as follows:

§ 330.3 What do the terms used in this part mean?

* * * * *

Regional air carrier means an air carrier that operates at least one large aircraft and has annual operating revenues of less than $100 million.

* * * * *

3. Revise § 330.5 to read as follows:

§ 330.5 What funds will the Department distribute under this part?

Under subpart C of this part, the Department will distribute up to the amount of the set-aside provided for in subpart C of this part to air carriers eligible for it. Under subparts A and B of this part, the Department will distribute compensation to other eligible air carriers up to 95 percent of the total remaining funds available, cumulatively with funds distributed previously.

4. Revise § 330.7 to read as follows:

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

(a) If you are an eligible air carrier that has not previously received compensation under the Act, you will receive compensation not to exceed 95 percent of the compensation for which you demonstrate to the satisfaction of the Department that you are eligible under the Act.

(b) If you are an air carrier that has previously received compensation under the Act, you will receive compensation not to exceed 95 percent of the compensation for which you demonstrate to the satisfaction of the Department that you are eligible under the Act, less the amount of compensation that you previously received. For example, suppose that you previously received 85 percent of the compensation for which the Department ultimately determines you are eligible. You would then receive up to an additional 10 percent of the compensation for which you are eligible under the Act.

(c) The provisions of paragraphs (a) and (b) of this section apply in the same way to air carriers eligible for the set-aside provisions of subpart C of this part as they do for other air carriers. When the Department determines the amount of compensation for which an air carrier is eligible under the set-aside provisions of Subpart C of this part, the Department will distribute to the air carrier either up to 95 percent of the compensation for which it is eligible (if it has not previously received any compensation) or up to 95 percent of the compensation for which it is eligible less the amount of compensation it has already received. The Department may distribute these funds in one or more increments.

(d) The Department will pay the remaining amount of compensation to the carrier (i.e., up to 100 percent of the compensation for which a carrier is eligible) after the Department completes a review of third round adjustments under this part, without further application by the carrier. However, the Department may require additional information to support payments to individual carriers in connection with this final payment.

5. Amend § 330.9 by revising paragraph (b) to read as follows:

§ 330.9 What are the limits on compensation to air carriers?

* * * * *

(b) If at any time we determine that a past payment is greater than the amount justified by the provisions of this part and the documentation you submit, you must repay immediately the excess amount to the Department. This requirement applies to you with respect to all stages of the compensation process. For example, if the Department determines that a carrier's estimated losses for the September 11—December 31, 2001 period, which were used in determining the first and second round payments, are higher than actual losses once actual results have become available in 2002, the Department will require that you repay the compensation overage immediately, without prejudice to the determination of the amount of the third round or final payment. In this event, you must repay the overage to the Department at the time we request it, without waiting for a final payment or completion of an audit of the total amount of compensation to which you are entitled.

6. Amend § 330.21 by adding new paragraphs (f) through (h), to read as follows:

§ 330.21 When must air carriers apply for compensation?

* * * * *

(f) Notwithstanding any other provision of this section, if you are a carrier eligible for funds under the set-aside provided under Subpart C of this part, and you did not previously submit an application or wish to amend your application, you may do so by May 16, 2002. The Department may extend this deadline for a reasonable time, if the applicant demonstrates to the satisfaction of the Department that there is good cause for an extension.

(g)(1) Notwithstanding any other provision of this section, if you are a carrier that did not previously submit an application for compensation because of the provisions of § 330.31(d)(1)(iv) or (d)(2)(iv) in effect prior to April 16, 2002. (*See* 14 CFR 330.31 as revised in the **Federal Register** of January 2, 2002), or you wish to amend your application because of the removal of these provisions, you must submit or amend your application by May 16, 2002. The Department may extend this deadline for a reasonable time, if the applicant demonstrates to the satisfaction of the Department that there is good cause for an extension.

(2) To be eligible for compensation, such an application must demonstrate, to the satisfaction of the Department, that you meet all applicable requirements of this part.

(h) If you are an air carrier that has received compensation under the Act or submitted a claim for compensation prior to April 16, 2002, you must submit a ''third round'' application, including the report of the agreed-upon procedures engagement required by § 330.37(c) or the simplified procedures report required by § 330.37(d), as applicable. You must also submit copies of monthly profit and loss statements for the months July 2001 through January 2002, each of which must include the imputed price per gallon average of the fuel used for all aircraft during that month. These statements must be certified to be true and accurate (see § 330.33). You must submit this application and all required supporting materials by May 16, 2002. The Department may extend this deadline for a reasonable time, if the applicant demonstrates to the satisfaction of the Department that there is good cause for an extension.

§ 330.31 [Amended]

7. Amend § 330.31 as follows:

a. Add the word ''and'' following the semicolon in paragraph (d)(1)(iii); remove paragraph (d)(1)(iv); and redesignate paragraph (d)(1)(v) as paragraph (d)(1)(iv).

b. Add the word ''and'' following the semicolon in paragraph (d)(2)(iii); remove paragraph (d)(2)(iv); and redesignate paragraph (d)(2)(v) as paragraph (d)(2)(iv).

8. Amend § 330.37 as follows:

a. In paragraph (b), remove the word ''Before'' at the beginning of the first sentence and add the words ''Except as provided in paragraph (c) of this section, before'' in its place.

b. Add new paragraphs (c) and (d), to read as follows:

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

* * * * *

(c) The following are the core requirements for the independent public accountant's review:

(1) Determine that the earnings forecast presented to the Department was inclusive of the entity's full operations as an air carrier and was the most current forecast prepared prior to September 11, 2001;

(2) Determine that, if forecasts presented to the Department for prior periods had material variances from actual results, the carrier provided explanations to account for such variances;

(3) Determine that the methodology for allocating revenue and expenses to the periods September 1–10 and September 11–30, from the forecasted and actual September results, was in accordance with air carrier records and analyses;

(4) Determine that the actual expenses and revenues presented to the Department are in accordance with the official accounting records of the carrier or the financial statements included in the carrier's Securities and Exchange Commission Form 10-Q, and consistent with Generally Accepted Accounting Principles (GAAP), except to the extent that GAAP would require or allow treatment that would be inconsistent with the Act or this part;

(5) Verify that the carrier provided explanations supporting the allocation methodology used if the forecasted and/or actual results for the September 11—30 period was different from allocating 66.7 percent of the total amounts for September;

(6) Determine that the carrier provided full explanations for all material differences between forecast and actual results for the September 11—30, 2001 period and the October 1—December 31, 2001 period;

(7) Determine that the amounts included in management's explanations for such material differences were in accordance with the carrier's analysis of such fluctuations, and the amounts and explanations were traceable to supporting general ledger accounting records or analyses prepared by the carrier;

(8) Determine that the amounts presented to the Department in Form 330 (Final), pages 2–3, in appendix A of this part that the carrier identified as adjustments to the difference between the pre-September 11 forecast and actual results for the period September 11 through December 31, 2001, were in accordance with the official accounting records of the carrier or the financial statements included in the carrier's Securities and Exchange Commission Form 10–Q, and consistent with GAAP, except to the extent that GAAP would require or allow treatment that would be inconsistent with the Act or this part;

(9) Determine that the insurance recoveries and government payments reported by the air carrier and offsetting income were in accordance with the air carrier's general ledger accounting records;

(10) Determine that the information presented in the air carrier's Supplemental Certification were in accordance with the air carrier's general ledger accounting records;

(11) Include in the auditor's report full documentation for each exception taken by the auditor; and

(12) Identify air carrier reports and records utilized in performing the procedures in paragraphs (c)(1) through (11) of this section.

(d) If you are a carrier that reported fewer than 10 million ASMs for the month of August 2001 or fewer than two million RTMs for the quarter ending June 30, 2001, you are not required to report to the Department on the basis of an agreed-upon procedures engagement by an independent public accountant. Instead, you may report on the basis of simplified procedures approved by the Department.

9. Add a new § 330.39 to subpart B, to read as follows:

§ 330.39 What are examples of types of losses that the Department does not allow?

(a)(1) The Department generally does not allow air carriers to include in their calculations aircraft impairment charges, charges or expenses attributable to lease buyouts, or other losses that are not actually and fully realized in the period between September 11, 2001 and December 31, 2001.

(2) The Department will consider requests to accept adjustments for extraordinary or non-recurring expenses or revenues on a case-by-case basis. If, as a carrier, you make such a request, you must demonstrate the following to the satisfaction of the Department:

(i) That the expense or revenue was (or was not, as appropriate) the direct result of the terrorist attacks of September 11, 2001;

(ii) That the revenue or expense was reported in accordance with Generally Accepted Accounting Principles (GAAP), except to the extent that that the GAAP would require or allow treatment that would be inconsistent with the Act or this part;

(iii) That an expense was fully borne within the September 11—December 31, 2001, period and is permanent; and

(iv) That the resulting additional compensation would not be duplicative of other allowances for compensation.

(b) The Department generally does not accept claims by air carriers that cost savings should be excluded from the calculation of incurred losses. Consequently, the Department will not allow such claims to be used in a way that has the effect of increasing the compensation for which an air carrier is eligible.

10. Add a new Subpart C, to read as follows:

Subpart C—Set-Aside for Certain Carriers

Sec.

Subpart C—Set-Aside for Certain Carriers

§ 330.41 What funds is the Department setting aside for eligible classes of air carriers?

The Department is setting aside a sum of up to $35 million to compensate eligible classes of air carriers, for which application of a distribution formula containing ASMs as a factor, as set forth in section 103(b)(2) of the Act, would inadequately reflect their share of direct and incremental losses.

§ 330.43 What classes of air carriers are eligible under the set-aside?

There are two classes of eligible air carriers:

(a) You are a Class I air carrier if you are an air taxi, regional, or commuter air carrier and you reported 310,000 or fewer ASMs to the Department for the month of August 2001 (10,000 ASMs per day).

(b) You are a Class II air carrier if you are an air taxi, regional, or commuter air carrier and you reported between 310,001 and 10 million ASMs to the Department for the month of August 2001.

§ 330.45 What is the basis on which air carriers will be compensated under the set-aside?

(a) Except as provided in paragraph (c) of this section, as an air carrier eligible for compensation through the set-aside, you will be compensated for an amount calculated as provided in paragraph (b) of this section.

(b)(1) As a Class I carrier, your compensation will be calculated using a

fixed ASM rate equivalent to the mean losses per ASM for all Class I carriers applying for compensation.

(2) As a Class II carrier, your compensation will be calculated using a graduated ASM rate equivalent to—

(i) The mean loss per ASM for all Class I carriers applying for compensation, for each of the first 310,000 ASMs reported; and

(ii) The mean loss per ASM for all Class II carriers applying for compensation for each ASM in excess of 310,000.

(3) For purposes of this paragraph (b), ASMs are those verified by the Department for August 2001.

(4) Any compensation payments previously made to air carriers eligible for the set-aside will be deducted from the amount calculated as the carrier's total compensation under the set-aside formula.

(c) If you are an air carrier whose compensation is calculated using an ASM rate as provided in paragraph (b) of this section, your compensation will not be less than an amount equivalent to 25 percent of the direct and incremental transportation-related losses you have demonstrated to the satisfaction of the Department were incurred as a direct result of the terrorist attacks of September 11, 2001. Your compensation will not be more than an amount equivalent to the mean percentage of compensation for losses received by passenger and combination air carriers that are not eligible for the set-aside funds, unless you would have been compensated for more than that percentage of losses under the formula set forth in section 103(b)(2) of the Act, in which case you will be compensated under that formula.

11. Revise Appendix A to Part 330, to read as follows:

BILLING CODE 4910–62–P

Appendix A to Part 330—Forms for New and Third Round Applications

FORM 330 (Final)
Page 1 of 6
(for completion by all carriers)

AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT APPLICATION FOR COMPENSATION

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	

Forecasted and Actual Losses for the Period September 11, 2001 to December 31, 2001

	Column A	Column B	Column C
Passenger Carrier Financial Data	Pre 9/11/01 Forecast for the Period 9/11/01 thru 12/31/01	Actual Results for the Period 9/11/01 thru 12/31/01	Difference Between the Pre 9/11/01 Forecast & Actual Results for 9/11/01 thru 12/31/01 (A-B)
1. Total Operating Revenue			
2. Total Operating Expenses			
3. Total Operating Income (1-2)			
4. Non-Operating Revenue			
5. Non-Operating Expenses			
6. Income Before Taxes (3 + 4 –5)			

Fuel Price Used in Forecast: Average price per gallon of aircraft fuel used in the pre-September 11 forecast for the period from September 11, 2001 through December 31, 2001: _____.

Monthly Profit and Loss Statements: Per section 330.21(h), you must also submit copies of monthly profit and loss statements for the months July 2001 through January 2002, each of which must include the imputed price per gallon average of the fuel used for all aircraft during that month.

FORM 330 (Final)
Page 2 of 6
(for completion by all carriers)

NAME OF AIR CARRIER	

Identification and Explanation of Out-of-Period, Extraordinary or Non-Recurring Revenues and Expenses, and Adjustments to Revenues and Expenses Stemming from Changes Not Directly Related to the Terrorist Events of September 11, 2001

(Note: For definitions and background information in completing this Form, see the sections on "Impairments and Other Extraordinary or Nonrecurring Items" and "Adjustment for Losses Not the Direct Result of the Events of September 11" in the preamble section. See especially the discussion of impairment of assets, lease buyouts, and limitations on treatment of cost reductions below forecast. The three blank lines in each table indicate the format, rather than the expected number of entries.)

In Table 1 below, separately identify and explain any and all out-of-period revenues, extraordinary or non-recurring revenues, and adjustments to actual revenues not directly related to the terrorist events of September 11, 2001 that were **included** in Column B (Boxes B-1 and B-4 on page 1 of this form) but not in Column A, the forecasted revenues. You should use a separate sheet to provide a complete explanation.

Table 1. Adjustments in Included Revenues

Included Revenue Items	Dollar Amount	Explanation (on separate sheet)

In Table 2 below, separately identify and explain any and all out-of-period revenues, extraordinary or non-recurring revenues, and adjustments to actual revenues not directly related to the terrorist events of September 11, 2001 that were **excluded from** Column B (Boxes B-1 and B-4 on page 1 of this form) but not from Column A, the forecasted revenues. You should use a separate sheet if necessary to provide a complete explanation.

Table 2. Adjustments in Excluded Revenues

Excluded Revenue Items	Dollar Amount	Explanation (on separate sheet)

In Table 3 below, separately identify and explain any and all out-of-period expenses, extraordinary or non-recurring expenses, and adjustments to actual expenses not directly related to the terrorist events of September 11, 2001 that were **included** in Column B (Boxes B-2 and B-5 on page 1 of this form) but not in Column A, the forecasted expenses. You should use a separate sheet to provide a complete explanation.

Table 3. Adjustments in Included Expenses

Included Expense Item	Dollar Amount	Explanation (on separate sheet)

In Table 4 below, separately identify and explain any and all out-of-period expenses, extraordinary or non-recurring expenses, and adjustments to actual expenses not directly related to the terrorist events of September 11, 2001 that were **excluded from** Column B (Boxes B-2 and B-5 on page 1 of this form) but not from Column A, the forecasted expenses. You should use a separate sheet to provide a complete explanation.

Table 4. Adjustments in Excluded Expenses

Excluded Expense Item	Dollar Amount	Explanation

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(to be completed by all-cargo carriers)

NAME OF AIR CARRIER	

ALL-CARGO OPERATIONAL DATA

Cargo Carrier Operating Data	Pre 9-11-01 Forecast for the Period 9-11-01 through 12-31-01	Actual Data for the Period 9-11-01 through 12-31-01	Difference Between the Pre 9-11-01 Forecast and Actual Loss for the Period 9-11-01 thru 12-31-01
Revenue Tons Enplaned			
Revenue Ton Miles (RTMs)			
Available Ton Miles (ATMs)			
Load Factor (%)			
Departures Performed			
Cargo Revenue Yield per RTM			

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Page 5 of 6
(to be completed by passenger and combination carriers)

NAME OF AIR CARRIER	

PASSENGER AND COMBINATION CARRIER OPERATIONAL DATA

Passenger Carrier Operating Data	Pre 9-11-01 Forecast for the Period 9-11-01 thru 12-31-01	Actual Data for the Period 9-11-01 thru 12-31-01	Difference Between the Pre 9-11-01 Forecast and Actual Loss for the Period 9-11-01 thru 12-31-01
Revenue Passengers Carried			
Revenue Passenger Miles (RPMs)			
Available Seat Miles (ASMs)			
Load Factor (%)			
Breakeven Load Factor (%)			
Average Length of Passenger Haul			
Departures Performed			
Average Passenger Fare ($)			
Passenger Revenue Yield per RPM (cents)			
Operating Revenue per ASM (cents)			
Operating Expense per ASM (cents)			

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NAME, ADDRESS AND TELEPHONE NUMBER OF AIR CARRIER	

Compensation payments will be made via Electronic Funds Transfer. The Department of Transportation can process this type of payment only if air carrier applicants submit the following banking information with their request:

Air Carrier Bank Routing Number	_ _ _ _ _ _ _ _ _ (9 positions)
Air Carrier Bank Account Number	
Name on Account	
Type of Account (*e.g.*, checking, savings)	
Taxpayer ID Number	

I CERTIFY THAT THE INFORMATION ON FORM 330 (FINAL) AND THE MONTHLY PROFIT AND LOSS STATEMENTS SUBMITED AS PART OF THE APPLICATION ARE TRUE AND ACCURATE UNDER PENALTY OF LAW. FALSIFICATION OF A CLAIM FOR COMPENSATION/PAYMENTS UNDER PUB. L. 107-42 MAY RESULT IN CRIMINAL PROSECUTION RESULTING IN FINE AND/OR IMPRISONMENT.

_____ _____

CERTIFYING OFFICER (CEO, CFO or COO) **DATE**

Print Name_____ Telephone Number _____

Title: _____

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