

provision was necessary to ensure that carriers under the set-aside would not receive a higher percentage of compensation for losses, on average, than non set-aside carriers. Thus, we provided that compensation for set-aside carriers would not be more than an amount equivalent to the mean percentage of compensation for losses received by passenger and combination passenger-cargo air carriers that were not eligible for the set-aside funds. Finally, we provided that if a set-aside carrier would receive more compensation under the Stabilization Act formula than under the set-aside formula, it would receive compensation at the higher amount. 14 CFR 330.35(c).

Important to these calculations are, of course, the amounts that represented the mean losses per ASM for Class I and Class II carriers. In the Preamble to the April rule, the Department made clear that these amounts could be calculated only after all applications had been received from Class I and II carriers, and only after the amounts of actual losses could be verified. However, for purposes of illustration, the Department offered estimates of the basis upon which each Class would be compensated, relying upon the forecasted losses made by the air carriers that had already applied and would qualify for Class I and Class II. As an example, for Class I carriers, the Department estimated that the mean loss per ASM was \$0.82, based upon this preliminary data. Thus, for Class I carriers, the Department projected that a carrier with 100,000 ASMs might receive \$82,000 in total compensation if this formula were used. For Class II carriers, the average losses might be expected to be in the range of 25 to 50

cents per ASM, but to achieve consistency with the compensation rates for the Class I carriers this amount would need to be averaged over the first 310,000 ASMs and those between 310,000 and 10 million. The Department projected that if the \$0.82 per ASM rate were used for the initial 310,000 ASMs, the overall mean, based on these forecast data, would be reached by applying a rate of \$0.19 per ASM for those over the first 310,000 ASMs. As an example, we estimated that a carrier with 750,000 ASMs might receive approximately \$337,800 in total compensation under this formula. Again, we cautioned that these were estimates, and that, depending on the actual losses and ASMs that would be validated for set-aside applicants, the ASM rates for both Class I and Class II carriers could change. *See* 67 FR 18470.

The Department has now received and processed the carrier applications under the set-aside program. We have determined that the losses incurred by Class I carriers were significantly lower than our earlier estimates, averaging only \$0.42 per ASM. This was primarily due to carriers reporting actual losses lower than they had forecast earlier, although disallowance of some claimed losses also played a part. Losses for Class II carriers, on the other hand, were more consistent with earlier estimates, ranging generally from 25 to 32 cents per ASM. We also found that the smallest carriers in Class I, those reporting fewer than 75,000 ASMs, reported losses that were on average significantly higher per ASM than the larger carriers in Class I.

As a result, air carriers in Class I have been processed for payments in amounts that are often less than anticipated. Also, the smallest of the

carriers, because they have, on average, reported comparatively higher losses per ASM than other set-aside eligible carriers, still seem to have received disproportionately smaller amounts relative to those other carriers. On the other hand, because the verified loss amounts on a cumulative basis have been less than those we estimated, the Department has flexibility to modify the set-aside rule to provide more equitable treatment for the smaller set-aside carriers without disadvantaging the larger ones.

We are, therefore, considering changes to the definitions for the two classes of set-aside air carrier in 14 CFR 330.43. Class I would now consist of those carriers reporting 75,000 or fewer ASMs to the Department for the month of August 2001, while Class II would consist of those reporting between 75,001 and 10 million ASMs for that month. The set-aside formula for Class I carriers would be based on a mean ASM rate for that class of \$0.984 per ASM. The formula for Class II carriers would be based on the rate of \$0.984 for each of the first 75,000 ASMs, and \$0.24 for each ASM from 75,001 to 10 million. Use of these mean ASM rates would not reduce the payments any set-aside carrier has received. They would increase the maximum possible payment for set-aside carriers that reported 310,000 or fewer ASMs, but, primarily, would increase payments to the smallest carriers in that group.

To illustrate the effects of this change, the following table shows the approximate maximum payments that three fictional carriers would receive under both the preexisting and the proposed mean ASM rates and class definitions:

Carrier	ASMS in August 2001	Maximum compensation under April 16 rule	Maximum compensation under amended rule
ABC Airways .....	60,000	\$25,200	\$59,040
DEF Airways .....	250,000	105,000	115,800
GHI Airways .....	5,000,000	1,255,800	1,255,800

In addition to use of this formula for compensation, the Department may utilize several other alternatives as bases for compensation of set-aside carriers. These other alternatives are currently available under 14 CFR 330.45(c), and no change is being made to that subsection. Thus, the compensation paid to qualifying set-aside carriers will not be less than an amount equivalent to 25 percent of the direct and incremental transportation-related

losses that they demonstrate to the satisfaction of the Department were incurred as result of the terrorist attacks. This would ensure that there would be a "floor" of compensation at the 25 percent level available for extreme cases of loss.

In that same subsection, the Department had set a ceiling rate for compensation to ensure that set-aside carriers are not compensated at levels that would be excessive relative to other

carriers. Passenger and combination passenger-cargo air carriers that were not eligible for the set-aside have received compensation computed at a mean of 71 percent of their losses. Accordingly, the Department would compensate set-aside carriers at that level if the amount that would be received is less than that computed under the set-aside formula.