

DATES: This rule is effective July 29, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

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.

Under section 101(a)(2)(A)–(B) of the Stabilization 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.”

Section 103 of the Stabilization Act established the basis for determining the amount of compensation payable to each carrier. Under section 103(b), that amount, for each passenger and combination passenger-cargo carrier, was the lesser of (1) the amount of its direct and incremental losses, or (2) the product of \$ 4.5 billion and the ratio of the number of available seat miles reported for the month of August 2001 by the particular carrier to the number of available seat miles of all such air carriers reported for that month.

Thereafter, a number of carriers expressed concern that the Stabilization Act’s use of approximate market share ratios as one of the alternate tests for compensation—*i.e.*, measuring each carrier’s available seat miles (ASMs) against the total number of industry ASMs—would not adequately compensate some classes of carriers for their losses. Since ASMs are the product of the number of seats available for revenue use and the miles they are flown, 14 CFR 330.3, these carriers pointed out that those who operate aircraft having relatively few seats and/or fly for relatively short distances, such as air ambulances and air tour operators, do not accumulate ASMs as quickly as

carriers operating large aircraft and flying longer distances. They argued that an ASM ratio formula, if used as a ceiling for compensation, would place such carriers at a disadvantage to larger carriers and result in compensation payments that were well below the losses these carriers had sustained from the attacks.

Subsequently, Congress enacted Section 124(d) of the Aviation and Transportation Security Act (Pub. L. 107–71, Nov. 19, 2001), which amended section 103 of the Stabilization Act. The purpose of this amendment, according to the Conference Report (H.R. REP. No. 107–296 at 79), was “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 \$4,500,000,000 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.

On January 2, 2002 (67 FR 263), the Department requested comments concerning whether it should utilize this discretionary authority to set-aside a portion of funds, and if so, in what manner and to what classes of air carriers. Following receipt and consideration of written comments, the Department determined that the statutory formula in the Stabilization Act did result in disproportionately smaller recoveries for smaller passenger carriers, and that it would be appropriate to use the set-aside authority to address that situation. In analyzing the financial information submitted to that point by smaller carriers, the Department found that air taxi, commuter, and regional carriers reporting fewer than 10 million ASMs would receive disproportionately less relative to their losses under the

Stabilization Act formula than carriers that had higher ASM levels. Moreover, the smallest of these—those who reported an average of 10,000 or fewer per day, or 310,000 for the reporting period of August 2001—seemed to fall even further behind in compensation levels relative to their expected losses.

Therefore, in its final rule on the subject (67 FR 18468–78, April 16, 2002) the Department established a set-aside program and created two classes of small carrier for purposes of prospective compensation under that program. A Class I air carrier was defined as an air taxi, regional, or commuter air carrier that reported 310,000 or fewer available seat miles to the Department for the month of August 2001. A Class II air carrier was defined as an air taxi, regional, or commuter air carrier that reported between 310,001 and 10 million available seat miles to the Department for that month. 67 FR 18477, codified at 14 CFR 330.43.

(Indirect carriers reporting 310,000 or fewer, and from 310,001 to 10 million ASMs, were added to these two classes in a final rule published on August 20, 2002, 67 FR 54058–83.) The rule further stated that compensation for Class I carriers would be calculated using a fixed ASM rate equivalent to the mean losses per ASM for all Class I carriers applying for compensation. Compensation for Class II carriers would 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. 67 FR 18478, codified at 14 CFR 330.45(b).

Another subsection of the regulation set a “floor” for payment to qualifying set-aside carriers, equivalent to 25% of their direct and incremental transportation-related losses, to ensure that even air carriers with very high loss/ASM ratios would receive compensation at a rate more consistent with those being paid to larger carriers having high loss/ASM ratios. A further 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