

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.

The Department published a Notice of Proposed Rulemaking on May 5, 2003, at 68 FR 23627. No comments were received in response to that notice. This final rule adopts the proposed rule without change.

#### **The Rule**

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

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 will ensure that there is 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 will compensate set-aside carriers at that level if the amount that would be received is less than that computed under the set-aside formula.

Finally, the Department has noted that, in some unusual circumstances, the ASM-based formula established originally under the Stabilization Act would provide a greater level of compensation to a set-aside carrier than the 71 percent calculation based on the mean level of compensation for non set-aside carriers noted above. Because Congress afforded discretion to the Department in the Security Act to assist, not disadvantage, smaller carriers, we will provide compensation in this case based on the Stabilization Act formula, up to, but not to exceed, compensation for all air transportation-related losses.

#### **Regulatory Analyses and Notices**

##### *Regulatory Assessment*

This rulemaking is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and has not been reviewed by the Office of Management and Budget under that Order. This rule is also not significant under the regulatory policies and procedures of the Department of Transportation, 44 FR 11034.

This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

##### *Small Business Impact*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The Act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include approximately 50 small air carriers. The Department certifies that this rule does not have a significant economic impact on a substantial number of small entities because the rule will increase payouts to such a limited number of small air