[4910-13]

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 158**

**[Docket No.: FAA-2002-13918; Amendment No. 158-2]**

**RIN 2120–AH43**

**Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the passenger facility charge (PFC) regulations by changing the amount of money that an air carrier may keep as compensation for collecting and handling PFC revenue for public agencies. Specifically, this action allows air carriers to keep $0.11 of each PFC they collect. This action is pursuant to a statutory requirement to establish a rate of compensation for air carriers that reflects the average necessary and reasonable expenses for collecting and handling PFCs.

**DATES:** Effective May 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Joseph Hebert, Passenger Facility Charge Branch, APP–530, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267-3845; facsimile (202) 267-5302.

**SUPPLEMENTARY INFORMATION:**

**Availability of Rulemaking Documents**

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic Docket

Management System (DMS) web page (http://dms.dot.gov/search);

(2) Visiting the Office of Rulemaking's web page at http://www.faa.gov/avr/arm/index.cfm; or

(3) Accessing the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue S.W., Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit http://dms.dot.gov.

**Small Business Regulatory Enforcement Fairness Act**

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact its local FAA official, or the person listed under FOR FURTHER INFORMATION CONTACT. You can find out more about SBREFA on the Internet at http://www.faa.gov/avr/arm/sbrefa.htm, or by e-mailing us at 9-AWA-SBREFA@faa.gov.

**Background**

The Aviation Safety and Capacity Expansion Act of 1990 (ASCE Act), codified under 49 USC 40117, set up the passenger facility charge (PFC) program. The ASCA Act allows public agencies to impose a PFC of $1, $2, or $3 for each enplaned passenger at a commercial service airport the public agency controls. Public agencies use the money from such PFC collections to finance FAA-approved, eligible airport-related projects. Section 158.53 of Title 14, Code of Federal Regulations prescribes the amount of money that air carriers may retain as compensation for collecting and handling PFCs. Initially, § 158.53 allowed air carriers to keep $0.12 of each PFC remitted to recover the costs of setting up $1, $2, or $3 charges under the PFC program. On June 28, 1994, FAA reduced the rate of compensation from $0.12 to $0.08 for each PFC collected because air carriers should have recovered the cost of program implementation by that time. Currently, air carriers may keep $0.08 of each PFC collected and remitted.

In April 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) changed the PFC program to allow public agencies to collect PFCs of $4 or $4.50. The issue of air carrier compensation rose again during the congressional proceedings leading up to the passage of AIR-21. In House Report 106-513, which accompanied AIR-21, Congress noted that several air carriers communicated to the conferees their views that compensation at $.08 is too low. Congress urged FAA to give the air carriers an opportunity to support their argument in a rulemaking action.

On April 27, 2000, the Department of Transportation Office of the Inspector General (OIG) issued a memorandum recommending to FAA procedures for conducting

rulemaking on PFC collection costs. Specifically, OIG suggested the type of data FAA should collect to ensure the agency receives the information necessary for evaluation. Further, OIG recommended accounting and audit procedures that ensure the costs are supportable.

To be responsive to Congress and OIG, FAA initiated contacts in April 2000 with the air carrier industry to learn about cost categories compatible with air carrier cost accounting capabilities that might meet the specifications of OIG. In addition, FAA consulted with independent accountants familiar with the accounting methods of the air carriers to learn the extent to which independent accountants would be able to determine if costs reported by air carriers are "supportable." Based on these contacts, FAA sent a letter to the air carriers suggesting cost categories and instructions for collecting incremental costs associated with PFC collection, handling, remittance, reporting, recordkeeping, and/or auditing to facilitate the collection of data to be evaluated. These categories consisted of the following:

a) Credit card fees;

b) Audit fees;

c) PFC disclosure;

d) Reservations;

e) Passenger service;

f) Revenue accounting, data entry, accounts payable, tax, and legal;

g) Corporate property department;

h) Training reservations, ticket agents, and other departments;

i) Carrier ongoing information systems;

j) Computer reservation systems on-going;

k) PFC absorption;

l) Airline Tariff Publishing Company (ATPCO);

m) Airline Reporting Corporation (ARC); and

n) Interest income.

FAA noted in its letter that listing an item in the cost definitions did not necessarily represent a final FAA determination that the item represents a cost of collecting and remitting PFC revenue that is reimbursable from PFC revenue. Rather, some items were included because they had been proposed by at least one air carrier as collection or handling costs. From the responses to the letter, FAA found the average PFC handling fee reported by the air carriers was $0.0896 for each $3 PFC collected in 1999 and $0.0995 for each $3 PFC remitted in 1999. Had a $4.50 PFC been in place that year, the air carriers estimate the increase in their costs would have raised their overall cost to $0.1065 for each $4.50 PFC collected and $0.1184 for each $4.50 PFC remitted. On November 20, 2002, FAA issued Notice of Proposed Rulemaking (NPRM) No. 02-19, "Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers," (67 FR 70878, November 27, 2002). In that rulemaking action, FAA proposed to amend 14 CFR § 158.53 to allow air carriers to keep $0.10 of each PFC they collect in calendar years 2002 through 2004. From 2005 forward, the amount would increase to $0.11 for each PFC collected. FAA based its proposal on cost data received from Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Southwest Airlines Company, TransWorld Airlines, Inc., United Airlines, Inc, and US Airways, Inc. FAA initially reviewed the data submitted by

the air carriers to check for consistent data categories and formats, and then consolidated all the information into a single summary table. This table can be found in the preamble to the NPRM (67 FR 70880, November 27, 2002). FAA concluded the cost categories used to determine the amount of compensation for this rule represented the incremental costs directly associated with PFC collection, handling, remittance, reporting, recordkeeping and auditing.

**Discussion of Comments**

FAA received 11 comments in response to Notice No. 02-19. The commenters include airport operators, scheduled air carriers, and aviation industry trade associations. Most of the commenters support FAA's proposal to increase carrier compensation for handling PFCs. However, many commenters disagree with how FAA determined the proposed rate of compensation.

FAA received comments from the Allegheny County Airport Authority (ACAA); the Port Authority of New York and New Jersey (PANYNJ); the International Air Transport Association (IATA); the Maryland Aviation Administration (MAA); Southwest Airlines Company (Southwest); the Airports Council International – North America (ACI-NA) jointly with the American Association of Airport Executives (AAAE); American Airlines, Inc. (American); United Airlines, Inc. (United); the Air Transport Association (ATA); and Continental Airlines, Inc (Continental).

**Compensation based on Remitted PFCs vs. Collected PFCs**

**Comments**: Although ACAA, PANYNJ, and MAA support FAA's proposal to increase the rate of carrier compensation, they disagree with FAA's proposal to change the basis for compensation from PFCs remitted to PFCs collected. They assert that

changing the basis for calculating compensation might erode the money available to public agencies.

PANYNJ and MAA contend the difference between these compensation bases becomes apparent when passengers refund tickets. ACAA asserts that if carriers receive compensation for PFCs collected, then airports would be subsidizing the carriers for passengers who cancel their reservations and never travel through airports. In such instance, carriers would not remit PFCs to the airports. ACAA argues that FAA's proposal violates 49 U.S.C. 40117, which, according to ACAA, requires the Secretary to base compensation solely on money paid to the public agency. The commenters suggest that FAA reconsider the basis for compensation and clarify the issue of refunded tickets.

United supports the use of PFCs collected as the basis of carrier compensation. United claims that Congressional intent for air carrier compensation is based on PFCs collected and contends that FAA's past rulemaking supports this position. United also claims that when FAA promulgated the rules for carrier compensation, the agency only requested data based on collected PFCs, not remitted PFCs. Further, United contends that FAA's past rulemaking action appeared to use the terms "collected" and "remitted" interchangeably. Based on the above, United requests FAA to issue a statement that either (i) clarifies that carriers are (and have been) entitled to retain the designated amount of each PFC collected or (ii) recognizes explicitly that a dispute exists over the interpretation of the existing rule and states that FAA is expressing no view as to whether the old compensation fee was based on PFCs collected or PFCs remitted, or whether the term "remitted" was used interchangeable with (and deemed to have the same meaning as "collected" under the old rule).

**FAA Response**: FAA disagrees. The intent of FAA's proposal is to set a rate of carrier compensation on a basis that is clearly defined. FAA notes that 49 U.S.C. 40117 only requires the rate of compensation to be "...a uniform amount the Secretary determines reflects the average necessary and reasonable expenses...incurred in collecting and handling the fee." It does not require the Secretary to base the rate of compensation solely on money paid to the public agency.

The issue of compensation for handling refunded tickets has been a long-standing concern for both airports and air carriers. The preamble discussion in the NPRM addresses the issue of refunded tickets, where FAA notes that regardless of whether air carriers receive compensation based on PFCs collected or remitted, the aggregate amount of PFC revenue kept by the carriers for compensation is not significantly different.

Also, FAA notes that carriers incur expenses in collecting and handling PFCs even when they refund tickets. FAA chose not to adopt these comments, but to base carrier compensation on PFCs collected to account for widely varying refund rates between air carriers, while preserving PFC revenue for airports.

Finally, the request from United for one of two possible statements from the FAA regarding the existing rule is outside the scope of this rulemaking and FAA will take no action on this request.

**Disproportional Cost for International Carriers**

**Comments:** IATA supports FAA's proposed increase in the rate of air carrier compensation. However, IATA claims there is a disproportional cost for international carriers to collect and remit PFCs to airports they do not serve. With the development of airline alliances, IATA asserts that international air carriers often sell tickets and collect

PFCs for airports they do not serve. IATA notes that for smaller airports, international carriers may collect only one or two PFCs each month. Therefore, IATA requests that FAA consider adopting quarterly remittance and reporting for international carriers when the total monthly collection for an individual public agency does not exceed $300.

**FAA Response:** FAA disagrees. IATA's proposed changes to the collection and reporting requirements are beyond the scope of this rulemaking action. Therefore, FAA has not made any changes to the rule in response to IATA's comments.

**Disclosure Costs**

**Comments:** ATA, Southwest, and United oppose FAA's proposal to use reduced disclosure costs for Southwest in calculating the rate of compensation. Disclosure costs are those costs associated with disclosing, in applicable advertising, the existence of PFCs to the general public. The commenters claim that FAA's failure to use the full amount of Southwest's disclosure costs in calculating the increased rate of carrier compensation will result in under-compensation of air carriers. In response to NPRM, Southwest sent more data supporting its disclosure costs (Docket No.: FAA-2003-13918).

**FAA Response:** FAA agrees. FAA has considered the commenters' arguments and has analyzed Southwest's data. Tables A-1, A-2 and B show FAA's analysis. FAA has determined that Southwest's data conforms to the agreed-upon audit procedures that OIG recommended as a valid means of measuring the incremental disclosure costs associated with PFC collections. Therefore, FAA has included these costs in calculating the new rate of carrier compensation. Including the full amount of Southwest's disclosure costs has the effect of raising the rate of compensation by one cent during the time frame before January 1, 2005. Therefore, the FAA has set the new PFC rate of air

carrier compensation at $0.11 for PFCs collected, effective 30 days from the date of publication of this final rule.

**Table A-1**

| ALL AIRLINES | 1999 Actual Costs [1] | | 1999 Pro-Forma [2] | | Implementation Costs [3] | |
|---|---|---|---|---|---|---|
| | Total Cost ($) | % Total Bef. Int. | Total Cost ($) | % Total Bef. Int. | Total Cost ($) | % Total Bef. Int. |
| Credit Card Fees/Bad Debt Expenses | 24,311,612 | 43.7% | 33,390,598 | 52.8% | - | |
| Audit Fees (External) | 423,502 | 0.8% | 296,166 | 0.5% | 85,182 | 2.5% |
| Disclosure Costs | 6,218,343 | 11.2% | 6,218,343 | 9.8% | - | |
| Reservations | 9,751,032 | 17.5% | 9,317,814 | 14.7% | - | |
| Passenger Services | 5,226,254 | 9.4% | 5,092,650 | 8.1% | - | |
| Data Entry: | | | | | | |
| Internal | 43,609 | 0.1% | 29,605 | 0.0% | - | |
| Other | - | 0.0% | - | 0.0% | - | |
| Revenue Accounting | 857,925 | 1.5% | 728,507 | 1.2% | 6,875 | 0.2% |
| Accounts Payable | 109,905 | 0.2% | 71,390 | 0.1% | - | |
| Tax & Legal | 77,359 | 0.1% | 75,859 | 0.1% | - | |
| Corporate Property Department | 323,570 | 0.6% | 282,195 | 0.4% | - | |
| Training: | | | | | | |
| Reservations | 99,154 | 0.2% | 99,158 | 0.2% | 49,675 | 1.4% |
| Other | 413 | 0.0% | 413 | 0.0% | - | |
| Ticket Agents | 782,336 | 1.4% | 445,625 | 0.7% | 55,424 | 1.6% |
| Internal On-Going IT | 552,695 | 1.0% | 488,602 | 0.8% | - | |
| CRS On-Going fees | 5,823,761 | 10.5% | 5,732,145 | 9.1% | - | |
| ATPCO | 5,407 | 0.0% | 4,643 | 0.0% | 135 | 0.0% |
| ARC + BSP | 988,694 | 1.8% | 946,262 | 1.5% | 77,712 | 2.2% |
| Internal One-Time IT update | - | 0.0% | - | 0.0% | 3,020,947 | 87.2% |
| CRS One-Time update | - | 0.0% | - | 0.0% | 168,870 | 4.9% |
| Interest Revenue on Float | (7,070,099) | n/a | (9,969,952) | n/a | - | |
| TOTAL COSTS | 55,595,572 | 100.0% | 63,219,975 | 100.0% | 3,464,820 | 100.0% |
| TOTAL COSTS LESS INTEREST | 48,525,473 | n/a | 53,250,024 | n/a | 3,464,820 | n/a |
| **Number of PFCs Remitted** | 436,659,521 | | 406,526,509 | | 448,929,355 | |
| **Number of PFCs Collected** | 485,238,737 | | 452,173,384 | | 505,223,269 | |
| Percentage of PFCs Refunded | 10.0% | | 10.1% | | 11.1% | |
| **Cost Less Interest / PFC Remitted** | **$0.1111** | | **$0.1310** | | **$0.0077** | |
| YOY Change | | | | | | |
| **Cost Less Interest / PFC Collected** | **$0.1000** | | **$0.1178** | | **$0.0069** | |
| YOY Change | | | | | | |
| PFC Absorption | $30,495,212 | | $123,040 | | $0 | |
| **Cost Less Interest / PFC Remitted** | **$0.0698** | | **$0.0003** | | **$0.0000** | |
| **Cost Less Interest / PFC Collected** | **$0.0628** | | **$0.0003** | | **$0.0000** | |
| Airline, Inc. Specific Issue | $0 | | $0 | | $0 | |
| **Cost Less Interest / PFC Remitted** | **$0.0000** | | **$0.0000** | | **$0.0000** | |
| **Cost Less Interest / PFC Collected** | **$0.0000** | | **$0.0000** | | **$0.0000** | |

*All Notes Located After Table A-2

## Table A-2

| ALL AIRLINES | Full Year Costs 2000 (X Act.+ Y Fore.) [4, 5] | | Forecast 2001 [5, 6] | | Forecast 2002 [5, 7] | |
|---|---|---|---|---|---|---|
| | Total Cost ($) | % Total Bef. Int. | Total Cost ($) | % Total Bef. Int. | Total Cost ($) | % Total Bef. Int. |
| Credit Card Fees/Bad Debt Expenses | 25,764,355 | 44.8% | 30,439,131 | 48.7% | 40,171,934 | 54.6% |
| Audit Fees (External) | 346,218 | 0.6% | 254,874 | 0.4% | 258,866 | 0.4% |
| Disclosure Costs | 6,620,836 | 11.5% | 7,299,357 | 11.7% | 7,653,674 | 10.4% |
| Reservations | 10,171,552 | 17.7% | 9,976,331 | 16.0% | 10,305,004 | 14.0% |
| Passenger Services | 4,961,096 | 8.6% | 5,118,586 | 8.2% | 5,333,362 | 7.3% |
| Data Entry: | | | | | | |
| Internal | 27,348 | 0.0% | 14,251 | 0.0% | 11,961 | 0.0% |
| Other | - | 0.0% | - | 0.0% | - | 0.0% |
| Revenue Accounting | 797,781 | 1.4% | 677,840 | 1.1% | 728,875 | 1.0% |
| Accounts Payable | 65,580 | 0.1% | 22,247 | 0.0% | 22,662 | 0.0% |
| Tax & Legal | 79,397 | 0.1% | 82,375 | 0.1% | 85,226 | 0.1% |
| Corporate Property Department | 330,789 | 0.6% | 285,300 | 0.5% | 291,418 | 0.4% |
| Training: | | | | | | |
| Reservations | 46,063 | 0.1% | 64,529 | 0.1% | 67,572 | 0.1% |
| Other | 413 | 0.0% | 424 | 0.0% | 435 | 0.0% |
| Ticket Agents | 808,604 | 1.4% | 506,472 | 0.8% | 521,076 | 0.7% |
| Internal On-Going IT | 461,317 | 0.8% | 411,713 | 0.7% | 427,077 | 0.6% |
| CRS On-Going fees | 6,041,255 | 10.5% | 6,289,935 | 10.1% | 6,622,008 | 9.0% |
| ATPCO | 5,459 | 0.0% | 4,747 | 0.0% | 4,800 | 0.0% |
| ARC + BSP | 1,019,882 | 1.8% | 1,005,256 | 1.6% | 1,021,747 | 1.4% |
| Internal One-Time IT update | - | 0.0% | - | 0.0% | - | 0.0% |
| CRS One-Time update | - | 0.0% | - | 0.0% | - | 0.0% |
| Interest Revenue on Float | (8,084,805) | n/a | (8,994,969) | n/a | (11,842,645) | n/a |
| TOTAL COSTS | 57,547,945 | 100.0% | 62,453,367 | 100% | 73,527,696 | 100% |
| TOTAL COSTS LESS INTEREST | 49,463,140 | n/a | 53,458,398 | n/a | 61,685,052 | n/a |
| **Number of PFCs Remitted** | 444,824,234 | | 461,578,154 | | 478,388,038 | |
| **Number of PFCs Collected** | 501,515,992 | | 520,524,261 | | 539,660,248 | |
| Percentage of PFCs Refunded | 11.3% | | 11.3% | | 11.4% | |
| **Cost Less Interest / PFC Remitted** | **$0.1112** | | **$0.1158** | | **$0.1289** | |
| YOY Change | | | 4.2% | | 11.3% | |
| **Cost Less Interest / PFC Collected** | **$0.0986** | | **$0.1027** | | **$0.1143** | |
| YOY Change | | | 4.1% | | 11.3% | |
| PFC Absorption | $11,706,485 | | $11,967,101 | | $12,233,538 | |
| **Cost Less Interest / PFC Remitted** | **$0.0263** | | **$0.0259** | | **$0.0256** | |
| **Cost Less Interest / PFC Collected** | **$0.0233** | | **$0.0230** | | **$0.0227** | |
| Airline, Inc. Specific Issue | $0 | | $0 | | $0 | |
| **Cost Less Interest / PFC Remitted** | **$0.0000** | | **$0.0000** | | **$0.0000** | |
| **Cost Less Interest / PFC Collected** | **$0.0000** | | **$0.0000** | | **$0.0000** | |
| ASM growth rate | 0.0% | | 10.0% | | 5.0% | |
| "CPI - Urban" from WEFA [8] | 3.3% | | 2.4% | | 2.4% | |

*Notes for Tables A-1 and A-2*

1. Actual costs incurred. Agreed upon procedures have been applied by the independent account to actual 1999 costs.
2. Assumes the same volume as 1999, but with 100% of PFCs Collected at $4.50 per PFC – this **only** impacts Credit Card Fees and Interest Revenue. **Does not include Continental.**
3. For any costs associated with the implementation of the new maximum $4.50 PFC rate. This column is not year specific.
4. 2000 estimate total based on 1999 actual performance. **Does not include TWA results.**
5. Does not include any one time IT Costs (Implementation Costs).
6. Assumes 3 months with 100% of PFCs Collected at $3. Assumes 9 months with 50% at $3 and 50% at $4.50.
7. Assumes 12 months with 100% of PFCs at $4.50.
8. WEFA US Economic Outlook 2000-05 – US Cycle Monitor, September 2000, page 201. All Items – Urban Wage Earners.
9. Labor contracts require union members to receive annual raises which are an average of United, American, Delta and Northwest's union contracts plus an additional 1%.

## Table B

| Table 6: Proposed Compensation Fee Phase-In | | | | |
|---|---|---|---|---|
| | | | | |
| | Year 2002 | Year 2003 | Year 2004 | Year 2005 |
| | (Assumes 50% | (Assumes 40% | (Assumes 30% | (Assumes 20% |
| | PFC's at $3 | PFC's at $3 | PFC's at $3 | PFC's at $3 |
| | and 50% at | and 60% at | and 70% at | and 80% at |
| | $4.50) | $4.50) | $4.50) | $4.50) |
| **Compensation Per Collected PFC** | | | | |
| | | | | |
| Cost Per $3 PFC Collected (Actual) | $0.1000 | $0.1000 | $0.1000 | $0.1000 |
| Cost Per $4.50 PFC Collected (Pro-Forma) | $0.1177 | $0.1177 | $0.1177 | $0.1177 |
| Weighted Cost Per PFC Collected (Actual) | $0.1089 | $0.1106 | $0.1124 | $0.1142 |
| **Proposed Fee Per PFC Collected** | **$0.1100** | **$0.1100** | **$0.1100** | **$0.1100** |
| Over/Under Compensation at Proposed Fee | $0.0012 | ($0.0006) | ($0.0024) | ($0.0042) |

## Rate of Adoption of the $4.50 PFC Level

**Comment:** American, ATA, and Southwest urged FAA to reconsider its estimated mix of airports adopting the $4.50 PFC level. American contends more airports have adopted the $4.50 PFC than FAA estimated in its proposal. American, therefore, asserts that air carriers should receive a higher rate of compensation (by one cent) for PFC collections. Southwest agreed with American's claim.

**FAA Response:** FAA disagrees. FAA found that by January 1, 2003, 53 percent of airports collecting PFCs had adopted the $4.50 PFC level. This adoption rate is slightly higher than FAA's projected rate in the NPRM that 50 percent of all PFCs collected in 2002 would be at $4.50. However, the 53 percent adoption rate is a year-end rate and does not represent the average adoption rate for 2002. Based on this, FAA believes the 50 percent projected adoption rate is consistent with the actual average adoption rate for 2002.

**Retroactivity of Increased Compensation Level**

**Comments:** Many of the commenters urge FAA to make the proposed change to the air carrier compensation rule retroactive to January 1, 2002. The commenters claim the data in FAA's proposal clearly indicates that carriers have been under-compensated since 1999. The commenters state that air carriers should not have to "absorb" the cost of handling PFCs in the years they were under-compensated.

Also, ATA requests that FAA establish a "start up" rate of compensation that would give air carriers credits against landing fees and other airport charges. ATA request that FAA at least provide a temporary adjustment to allow air carriers to "catch up" on the shortfall. Specifically, Continental recommends that FAA adopt a $0.12 level for a period of time to allow carriers to recover money lost during the time that air carriers were under-compensated. Also, Continental requests that FAA make the increased rate of compensation effective the date that FAA issued the proposed rulemaking.

**FAA Response:** FAA disagrees. Nothing in the PFC statute authorizes retroactive compensation. Therefore, FAA does not have the authority to retroactively

authorize compensation for PFCs. Accordingly, FAA has not adjusted the rate of compensation to provide a retroactive increase.

**Periodic Review of Air Carrier Compensation**

**Comments:** ATA recommends that FAA consider setting up a mechanism for formal review of air carrier compensation on a periodic basis, such as every two years. ATA noted that such a review process would be less costly and burdensome on air carriers, airports, and FAA than engaging the rulemaking process.

**FAA Response:** FAA agrees with the commenter and will establish a process to periodically review air carrier compensation for handing PFCs.

**Cost Categories**

**Comments:** In a joint comment, ACI-NA and AAAE note that OIG suggested that FAA limit cost data to air carrier incremental costs associated directly with PFC collection, handling, and remittance. The commenters assert they do not believe that ATA and the air carriers have made sufficient argument for increasing carrier compensation on PFCs collected. Specifically, the commenters state that much of the data that air carriers submitted to FAA for analysis does not meet OIG's "intent and legitimacy test."

The commenters agree with FAA's proposal to exclude PFC absorption as a legitimate cost. Also, the commenters agree with FAA's proposal to include credit card fees for remitted PFCs. However, the commenters disagree with the inclusion of credit card fees for refunded tickets. In addition, the commenters oppose three of the cost categories FAA used in calculating the proposed rate of compensation. Specifically, the commenters oppose accepting reservation services, disclosure costs, and passenger

service expenses as categories associated directly with PFC collection and remittance. The commenters contend these categories, although included in the agreed-upon procedures, provide flexibility for interpretation that allows arbitrariness, miscalculation, and error. The commenters claim these costs are not associated directly with PFC collection and remittance. The commenters note that if FAA removes these costs from the calculations, the actual rate of compensation decreases by $0.04. The commenters also contend that PFC conversion from a remitted PFC to a collected PFC would cause carriers to incur high changeover costs. Finally, some commenters object to FAA basing the compensation rate on average costs. They assert that such action rewards high cost carriers for their inefficiency in processing PFCs.

**FAA Response:** FAA disagrees. FAA has found that air carriers do incur credit card costs on refunded transactions and has found that carriers incur a service fee with such transactions. FAA also confirmed these refund costs were included in the carrier cost data. Accordingly, these costs are retained for the purposes of determining compensation.

FAA also disagrees with the commenters with regard to the potential for high changeover costs for a new charge level. FAA notes that PFC revenue remitted by the air carriers is already net of compensation. Therefore, the carriers would only have to restructure their accounting systems for the change in rate and basis. No carrier filing comments to FAA's proposal objected to costs associated with the changeover. Some air carriers have always used collected PFCs, such as United, and their accounting systems operate that way today.

FAA has reexamined OIG's recommended procedures and the air carrier cost categories and data. FAA has determined the categories used to determine the rate of compensation are those that most accurately reflect the costs to the carriers for collecting, handling, and remitting PFC revenue to collecting airports. FAA agrees these categories may not capture purely "incremental" costs. However, as the commenters noted, it is difficult to fully isolate these incremental costs. FAA is not convinced that isolating these costs would add significant value and added accuracy in calculating the costs associated with collecting and handling PFCs. FAA notes, however, these considerations do not diminish the validity of using these categories to arrive at a PFC rate of compensation.

Finally, FAA notes the governing statute mandates that FAA establish a uniform amount reflecting the "average reasonable and necessary expenses" of collecting and handling the PFC. Therefore, in order to determine the "average" of any cost category which meets OIG's "intent and legitimacy test," FAA must consider the costs of both high cost carriers and low cost carriers.

**Revisions to PFC Audit Requirements**

**Comments:** In a joint comment, ACI-NA and AAAE request that FAA revise its audit requirements to include financial information gathered from the two air carrier ticket clearing houses.

**FAA Response:** The request to revise audit requirements is outside the scope of this rulemaking and FAA will take no action on this request.

**Interest Rate on Float**

**Comments:** In a joint comment, ACI-NA and AAAE agree with FAA's decision to include a "float" interest in calculating carrier compensation. However, the commenters recommend using a ten-year average interest rate in place of the shorter-term rate in FAA's proposal to mitigate extraneous benefits to the carriers by using a rate at a historically low level.

**FAA Response:** FAA disagrees with the commenter's recommendation. The data that each air carrier provided to FAA, in accordance with the agreed-upon procedures, reflects the carrier's audited interest earnings during the base year. FAA's approach is to calculate the compensation rate using actual carrier earned interest. OIG concurs with this approach. Using this calculation for the base year as an offset to costs is the most consistent methodology. Moreover, the PFC statute specified that carrier compensation be set after offsetting the interest earned by the carriers, not after applying an interest index.

**Bankruptcy Protection**

**Comments:** In a joint comment, ACI-NA and AAAE contend that if FAA increases the rate of carrier compensation for PFCs, airports will need improved protection in carrier bankruptcy proceedings. Specifically, the commenters suggest that FAA prohibit air carriers from commingling PFCs with other air carrier funds. The commenters want to ensure that air carriers will have easy access to PFC funds even when they have entered bankruptcy. Also, PANYNJ requests that FAA include language that clarifies the status of PFC funds when carriers enter bankruptcy.

**FAA Response:** The issues the commenters raise are outside the scope of this rulemaking. In addition, FAA notes that some of these proposals may require changes to bankruptcy statutes or regulations that are beyond the authority of the FAA.

**Summary and Conclusion**

FAA has considered the commenters' arguments and has determined that a compensation rate of $0.11 per PFC collected reflects the average necessary and reasonable expenses incurred by the air carriers in collecting and handling the PFC for airports. Accordingly, the compensation rate of $0.11 per PFC collected will be effective 30 days after the publication of this rule.

**Paperwork Reduction Act**

Information collection requirements in the amendment to part 158 previously have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and have been assigned OMB Control Number 2120–0557. Nine air carriers voluntarily submitted most of the data FAA used in this rulemaking action.

**International Compatibility**

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. FAA determined there are no ICAO Standards and Recommended Practices that correspond to this compensation adjustment.

**Economic Assessment, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531-2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

In conducting these analyses, FAA has determined this rule (1) has benefits that justify its costs, is a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 and is "significant" as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant economic impact on a substantial number of small entities; (3) will not reduce barriers to international trade; and (4) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector. These analyses, available in the docket, are summarized below.

**Economic Assessment**

Analysis of Costs

This change in compensation to air carriers is limited to what is allowed by statute. Once FAA has determined air carriers' average, necessary and reasonable expenses incurred in collecting and handling PFCs, the compensation rate is not subject to FAA discretion.

Costs to Airports

For airports, the principal effect of the higher rate of compensation is the marginal erosion of the airports' PFC revenue stream. FAA is changing the basis of compensation from a PFC remitted basis to a PFC collected basis. A rate of compensation of $0.11 for each PFC collected equals about $0.12 for each PFC remitted. Average air carrier ticket refund rates, which account for the difference between PFCs collected and remitted, are about 9 percent.

The increase in compensation will lead to redistribution of $21 million each year in PFC collections to air carriers from airports based on 1999 enplanements. The sum amounts to a loss of slightly more than one percent of the projected annual PFC stream. However, the increase in compensation will not erode approved collection authority for airports. Rather, the higher compensation will result in a small extension of the time period required to collect an authorized amount of PFC revenue. For example, an authorized PFC collection amount, such as $1 million, would currently take a public agency one year to collect at a $4.50 PFC level. This assumes the air carrier retains $0.08 for each remitted PFC. Under the new compensation rate of $0.11, it would take one year plus 3.3 days to collect $1 million at a $4.50 level.

It is possible that some airports may be impacted negatively by the slight increase in the time it would take, because of the increase in the compensation level, to raise authorized PFC amounts for projects. However, most airports with PFC-funded projects already in place originally planned to finance these projects based on a $3 PFC level. Now, under AIR-21, they can implement a $4 or $4.50 PFC level to supplement funding. New projects based on the $4.50 PFC level can be planned around the higher rate of compensation, if necessary.

The group of airports that will be impacted the most by the increase would be those airports that do not increase their PFC to a $4 or $4.50 PFC level. FAA assumes that 80 percent of all airports will move to a $4.50 PFC by 2005. This assumption reflects the almost uniform adoption of the $3 PFC level by airports before AIR-21, even though they had the option of either a $1, $2, or $3 PFC level. To date, some airports have decided to remain at the $3 level because of market or other local conditions. Similarly, some large or medium hub airports may not be able to develop a sufficient volume of projects to qualify at the $4.50 level. In the case of any airport remaining at a $3 level, the airport's annual PFC revenue erosion would increase to 1.3 percent. For example, it would take a public agency one year to collect an authorized amount, such as $1 million, at a $3.00 PFC level. This assumes the air carrier retains $0.08 for each remitted PFC. Under the new rate of compensation, it would take the public agency one year plus 5.1 days to collect $1 million at a $3.00 level. This higher percentage loss of revenue for the limited number of airports that remain at the $3 level will not severely affect their infrastructure improvement plans.

Costs to Air Carriers

Air carriers will incur only slight costs in adjusting their accounting and ticketing programs to accommodate the increased compensation amount of $0.11 for each PFC collected. Before June 28, 1994, air carrier accounting and ticketing programs allowed a compensation rate of $0.12 for each remitted PFC. Therefore, air carriers should be able to adjust such programs to accommodate the $0.11 rate of compensation. The primary cost of the amendment is associated with the change in the compensation basis from remitted PFCs to collected PFCs. This new basis of compensation may require some new programming. However, FAA believes the reprogramming costs, if any, to allow this change will be minor.

Impact on Air Passengers

The adjustment to PFC collection compensation will not affect the PFC amount or the ticket prices paid by airline passengers for any given flight. The amendment will only affect amounts of the PFC retained by the air carrier. Instead of retaining $.08 for each PFC remitted to a public agency, air carriers will retain $0.11 for each PFC they collect. The only potential impact on air passengers would arise from the effects of the slightly reduced annual PFC remittances to airports. Since it would take an airport slightly longer to collect a specific amount of PFC revenues to fund a project, the period of time during which a PFC would be collected would be longer. In some cases, the longer collection period could slightly delay PFC-funded projects intended to benefit air passengers. The effect of such delays, however, would be minor.

Analysis of Compensation Effects

Compensating air carriers based on PFCs collected rather than PFC remitted is subject to FAA discretion. In the case of refunded tickets, FAA reasoned the additional

handling cost of collecting and refunding a PFC to a passenger would add to the overall expense of collecting and handling PFCs. Such costs would be embedded in the overall collection and handling cost data provided by the air carriers. If all air carriers had identical refund rates, use of an average compensation amount for each PFC collected or for each PFC remitted would be equally fair to individual carriers. For example, assume that total industry collection and handling costs were $12 million for 120 million PFCs collected. If 20 million PFCs were refunded and 100 million remitted to the airports, then a compensation rate of $0.10 for each PFC collected or $0.12 for each PFC remitted PFC would generate the same total compensation to the industry. Moreover, if all air carriers had equivalent refund rates, all airports would be reimbursed equally for these refund expenses. However, refund rates among individual air carriers in 1999 varied from 5 percent of total collected PFCs refunded to as high as 20 percent. By selecting compensation method based on PFCs collected, individual carriers would be reimbursed in a manner that more closely corresponds to actual handling levels. This approach, while not affecting the overall amount of compensation received, provides a closer match between each individual carrier's actual handling costs and its PFC handling compensation.

Summary of Costs and Compensation Effects

FAA concludes this final rule is a cost-effective means of meeting the statutory requirement. It provides a uniform rate of compensation that fully covers the reasonable and necessary costs of air carriers for collecting and handling PFCs for airports. FAA estimates that a compensation rate of $0.11 for each PFC collected will allow air carriers to recover fully their collection and handling expenses over a ten-year period.

**Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

FAA has determined the rule will have only a negligible impact on small commercial service airports. All costs are recoverable fully through the PFC by making small adjustments to the period of PFC collection. Any adverse impact on small air carriers that collect and handle PFCs will be minor and the result of statutory law. Also, FAA expects the final rule to result in higher compensation for air carriers even after

incurring minor up-front administrative costs to convert ticketing systems to accommodate the new rate of compensation.

FAA conducted the required review of this final rule and determined that it would not have a significant economic impact. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Federal Aviation Administration certifies this rule will not have a significant impact on a substantial number of small entities.

**International Trade Impact Assessment**

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards

In accordance with the above statute, FAA has assessed the potential affect of this final rule and has determined that, to the extent it imposes any costs affecting international entities, it will impose the same costs on domestic entities for comparable services and thus has a neutral trade impact. The additional compensation to air carriers for handling PFCs will not affect the cost of international travel. The existing rule imposes the same requirements to collect the PFC on tickets issued in the United States on domestic air carriers and on foreign air carriers. All international air carriers will receive higher compensation levels to reimburse their reasonable costs of collecting and handling PFCs.

**Unfunded Mandates Assessment**

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other

things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This final rule does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

**Executive Order 13132, Federalism**

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

**Environmental Analysis**

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

**Energy Impact**

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94-163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. We have determined that the final rule is not a major regulatory

action under the provisions of the EPCA.

**List of Subjects in 14 CFR Part 158**

Air carriers, Airports, Passenger facility charge, Public agencies, Collection compensation.

**The Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends part 158 of Title 14 of the Code of Federal Regulations as follows:

**PART 158-PASSENGER FACILITY CHARGES (PFC'S)**

1. The authority citation for part 158 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40116-40117, 47106, 47111, 47114-47116, 47524, 47526.

2. Amend § 158.53 by revising paragraph (a) to read as follows:

**§ 158.53 Collection Compensation.**

As compensation for collecting, handling, and remitting the PFC revenue, the collecting air carrier is entitled to:

(a) Retain $0.11 of each PFC collected;

* * * * *

Issued in Washington, DC, March 11, 2004 .

Marion C. Blakey

Marion C. Blakey

Administrator

Certified to be a True Copy