FAA POLICY AND PROCEDURES CONCERNING

THE USE OF AIRPORT REVENUE

NOTICE

RFP No. EO1741-07

ATTACHMENT K-1

federal register

Tuesday
February 16, 1999

Part II

Department of Transportation

Federal Aviation Administration

Policy and Procedures Concerning the Use of Airport Revenue; Notice

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 28472]

Policy and Procedures Concerning the Use of Airport Revenue

AGENCY: Federal Aviation Administration (FAA) DoT

ACTION: Policy statement.

SUMMARY: This document announces the final publication of the Federal Aviation Administration policy on the use of airport revenue and maintenance of a self-sustaining rate structure by Federally-assisted airports. This statement of policy ("Final Policy") was required by the Federal Aviation Administration Authorization Act of 1994, and incorporates provisions of the Federal Aviation Administration Reauthorization Act of 1996. The Final Policy is also based on consideration of comments received on two notices of proposed policy issued by the FAA in February 1996, and December 1996, which were published in the **Federal Register** for public comment. The Final Policy describes the scope of airport revenue that is subject to the Federal requirements on airport revenue use and lists those requirements. The Final Policy also describes prohibited and permitted uses of airport revenue and outlines the FAA's enforcement policies and procedures. The Final Policy includes an outline of applicable record-keeping and reporting requirements for the use of airport revenue. Finally, the Final Policy includes the FAA's interpretation of the obligation of an airport sponsor to maintain a self-sustaining rate structure to the extent possible under the circumstances existing at each airport.

DATES: This Final Policy is effective February 16, 1999.

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SUPPLEMENTARY INFORMATION:

Outline of Final Policy

The Final Policy implements the statutory requirements that pertain to the use of airport revenue and the maintenance of an airport rate structure that makes the airport as self-sustaining as possible. The Final Policy generally represents a continuation of basic FAA policy on airport revenue use that has been in effect since enactment of the Airport and Airway Improvement Act of 1982 (AAIA), currently codified at 49 U.S.C. § 47107(b). The FAA issued a comprehensive statement of this policy in the Notice of Proposed Policy dated February 26, 1996 (Proposed Policy), and addressed four particular issues in more detail in the Supplemental Notice of Proposed Policy dated December 18, 1996 (Supplemental Notice). The Final Policy includes provisions required by the Federal Aviation Administration Authorization Act of 1994, Public Law 103–305 (August 23, 1994) (FAA Authorization Act of 1994), and the Airport Revenue Protection Act of 1996, Title VIII of the Federal Aviation Administration Reauthorization Act of 1996, Public Law 104–264 (October 9, 1996), 110 Stat. 3269 (FAA Reauthorization Act of 1996). The Final Policy also includes changes adopted in response to comments on the Proposed Policy and Supplemental Notice.

The Final Policy contains nine sections. Section I is the Introduction, which explains the purpose for issuing the Final Policy and lists the statutory authorities under which the FAA is acting.

Section II, "Definitions," defines federal financial assistance, airport revenue and unlawful revenue diversion.

Section III, "Applicability of the Policy," describes the circumstances that make an airport owner or operator subject to this Final Policy.

Section IV, "Statutory Requirements for the Use of Airport Revenue," discusses the statutes that govern the use of airport revenue.

Section V, "Permitted Uses of Airport Revenue," describes categories and examples of uses of airport revenue that are considered to be permitted under 49 U.S.C. 47107(b). The discussion is not intended to be a complete list of all permitted uses but is intended to provide examples for practical guidance.

Section VI, "Prohibited Uses of Airport Revenue," describes categories and examples of uses of airport revenue not considered to be permitted under 49 U.S.C. 47107(b). The discussion is not intended to be a complete list of all prohibited uses but is intended to provide examples for practical guidance.

Section VII, "Policies Regarding Requirement for a Self-Sustaining Airport Rate Structure," describes policies regarding the requirement that an airport maintain a self-sustaining airport rate structure. This is a new section of the policy, which provides more complete guidance on the subject than appeared in either the Proposed Policy or Supplemental Notice.

Section VIII, "Reporting and Audit Requirements," addresses the requirement for the filing of annual airport financial reports and the requirement for a review and opinion on airport revenue use in a single audit conducted under the Single Audit Act, 31 U.S.C. §§ 7501–7505.

Section IX, "Monitoring and Compliance," describes the FAA's activities for monitoring airport sponsor compliance with the revenue-use requirements and the requirement for a self-sustaining airport rate structure and the range of actions that the FAA may take to assure compliance with those requirements. Section IX also describes the sanctions available to FAA when a sponsor has failed to take corrective action to cure a violation of the revenue-use requirement.

Background

Governing Statutes

Four statutes govern the use of airport revenue: the AAIA; the Airport and Airway Safety and Capacity Expansion Act of 1987; the FAA Authorization Act of 1994; and the FAA Reauthorization Act of 1996. These statutes are codified at 49 USC 47101, *et seq.*

Section 511(a)(12) of the AAIA, part of title V of the Tax Equity and Fiscal Responsibility Act, Public Law 97–248, (now codified at 49 USC 47107(b)) established the general requirement for use of airport revenue. As originally enacted, the revenue-use requirement directed public airport owners and operators to "use all revenues generated by the airport * * * for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property."

The original revenue-use requirement also contained an exception, or "grandfather" provision, permitting certain uses of airport revenue for non-airport purposes that predate the AAIA.

The Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100–223 (December 30, 1987), narrowed the permitted uses of airport revenues to nonairport facilities that are "substantially" as well as directly related to actual air transportation; required local taxes on aviation fuel enacted after December 30, 1987, to be

spent on the airport or, in the case of state taxes on aviation fuel, state aviation programs or noise mitigation on or off the airport; and slightly modified the grandfather provision.

The FAA Authorization Act of 1994 Act included three sections regarding airport revenue.

Section 110 added a policy statement to Title 49, Chapter 471, "Airport Development," concerning the preexisting requirement that airports be as self-sustaining as possible, 49 USC § 47101(a)(13).

Section 111 added a new sponsor assurance requiring airport owners or operators to submit to the Secretary and to make available to the public an annual report listing all amounts paid by the airport to other units of government, and the purposes for the payments, and a listing of all services and property provided to other units of government and the amount of compensation received. Section 111 also requires an annual report to the Secretary containing information on airport finances, including the amount of any revenue surplus and the amount of concession-generated revenue.

Section 112(a) requires the Secretary to establish policies and procedures that will assure the prompt and effective enforcement of the revenue-use requirement and the requirement that airports be as self-sustaining as possible.

Section 112(b) amends 49 USC § 47111, "Payments under project grant agreements," to provide the Secretary, with certain limitations, to withhold approval of a grant application or a new application to impose a Passenger Facility Charge (PFC) for violation of the revenue-use requirement. Section 112(c) authorizes the Secretary to impose civil penalties up to a maximum of $50,000 on airport sponsors for violations of the revenue retention requirement. Section 112(d) requires the Secretary, in administering the 1994 Authorization Act's revenue diversion provisions and the AIP discretionary grants, to consider the amount being lawfully diverted pursuant to the grandfathering provision by the sponsor compared to the amount being sought in discretionary grants in reviewing the grant application. Consequently, in addition to the prohibition against awarding grants to airport sponsors that have illegally diverted revenue, the FAA considers the lawful diversion of airport revenues by airport sponsors under the grandfather provision as a factor militating against the distribution of discretionary grants to the airport, if the amounts being lawfully diverted exceed the amounts so lawfully diverted in the airport's first year after August 23, 1994.

Section 112(e), which amended the Anti-Head Tax Act, 49 USC § 40116(d)(2)(A), prohibits a State, political subdivision, or an authority acting for a State or political subdivision from collecting a new tax, fee, or charge which is imposed exclusively upon any business located at a commercial service airport or operating as a permittee of the airport, other than a tax, fee, or charge utilized for airport or aeronautical purposes.

Title VIII of the FAA Reauthorization Act of 1996 included new provisions on the use of airport revenue. Among other things, section 804 codifies the preexisting grant-assurance based revenue-use requirement as 49 U.S.C. § 47133. Section 804 also expands the application of the revenue-use restriction to any airport that is the subject of Federal assistance.

Section 805, codified as 49 U.S.C. § 47107(m) *et seq.*, requires recipients of Federal assistance for airports who are subject to the Single Audit Act to include a review and opinion on airport revenue use in single audit reports.

Under section 47107(n), the Secretary, acting through the Administrator of the FAA, will perform fact finding and conduct hearings in certain cases; may withhold funds that would have otherwise been made available under Title 49 of the U.S. Code to a sponsor including another public entity of which the sponsor is a member entity, and may initiate a civil action under which the sponsor shall be liable for a civil penalty, if the Secretary receives a report disclosing unlawful use of airport revenue. Section 47107(n) also includes a statute of limitations that prevents the recovery of funds illegally diverted more than six years after the illegal diversion occurs. The Secretary is also authorized to recover civil penalties in the amount of three times the unlawfully diverted airport revenue under 49 U.S.C. § 46301(n)(5).

Section 47107(o) requires the Secretary to charge a minimum annual rate of interest on the amount of any illegal diversion of revenues. Interest is due from the date of the illegal diversion.

Section 47107(l)(5) imposes a statute of limitation of six years after the date on which the expense is incurred for repayment of sponsor claims for reimbursement of past expenditures and contributions on behalf of the airport. A sponsor may claim interest on the amount due for reimbursement, but only from the date the Secretary determines that the airport owes a sponsor.

Procedural History

In response to provisions in the 1994 Authorization Act, the FAA issued the Proposed Policy. (61 FR 7134, February 26, 1996) After reviewing all comments received in response to the notice, the FAA issued the Supplemental Notice on December 11, 1996, and requested further public comment. (61 FR 66735, December 18, 1996) Although the FAA published both documents as proposed policies, both notices stated that the FAA would apply the policies in reviewing revenue-use issues pending publication of a final policy.

The Department received 32 comments on the Proposed Policy and received 50 comments on the Supplemental Notice. Comments were received from airport owners and operators, airline organizations, transit authorities, and affected businesses and organizations. Most of the commenters were airport owners and operators. The Airport Council International-North America and the American Association of Airport Executives also provided comments supporting the sponsor/operator positions. Two major groups commented on behalf of the airlines—the Air Transport Association of America and the International Air Transport Association.

The Aircraft Owners and Pilots Association and the National Air Transportation Association commented on behalf of the general aviation and private aircraft owners. AOPA was primarily concerned with sponsor/airport accountability and the prompt and effective enforcement of the revenue diversion prohibitions.

Several port authorities, transit authorities, environmental groups, other public interest groups, trade associations, private businesses and individuals commented on a variety of specific issues.

The following discussion of comments is organized by issue rather than by commenter. Issues are discussed in the order they arise in the Final Policy. Airport proprietors and their representatives who took similar positions on an issue are collectively referred to as "airport operators." Airlines and airline trade associations are referred to as "air carriers" when the organizations took common positions. The summary of comments is intended to represent the general divergence or correspondence in commenters' views on various issues. It is not intended to be an exhaustive restatement of the comments received.

In addition, many comments on the original notice of proposed policy were addressed in the supplemental notice.

Those comments are not addressed again in this discussion.

The FAA considered all comments received, even if they are not specifically identified in this summary.

Discussion of Comments by Issue

1. Applicability

a. Applicability of Policy to Privately Owned Airports

In accordance with the statutes in effect at the time it was published, the Proposed Policy applied only to public agencies that had received AIP grants for airport development. The Proposed Policy included a specific statement that it did not apply to privately owned airports that had taken AIP grants while under private ownership. The Supplemental Notice did not modify these provisions.

The Comments: A public interest group concerned about reducing airport noise and mitigating its impacts recommended that the policy should apply to operators of privately owned airports.

Final Policy: The new statutory provision added by the Reauthorization Act of 1996, governing the restriction on the use airport revenue, 49 U.S.C. § 47133, does not differentiate between publicly or privately owned airports. The statute applies to all airports that have received Federal assistance. Under the AAIA certain privately-owned airports that are available for public use are eligible to receive airport development grants. As a result, any privately owned airport that receives an AIP grant after October 1, 1996, (the effective date of the FAA Reauthorization Act of 1996), is subject to the revenue use requirements. The applicability section of the Final Policy, Section III, is modified to reflect the expansion of the revenue-use requirement to include privately-owned airports.

b. Applicability of Policy to Publicly and Privately Owned Airports Subject to Federal Assistance

As a result of the same change in the law, recipients of Federal assistance provided after October 1, 1996, other than AIP grants, are also subject to the revenue-use restrictions. However, the Reauthorization Act of 1996 did not define Federal assistance, and the legislative history does not provide guidance on the meaning of this term. In addition, it did not explicitly address the status of airports that received Federal assistance other than AIP airport development grants before October 1, 1996, and therefore were not already bound by the revenue use restrictions. These issues are addressed in the Final Policy, based on the FAA's review of the statute, its legislative history and relevant judicial decisions.

Applicability of the revenue-use requirement under § 47133 depends on the definition of the term "Federal assistance." In the absence of guidance in the statute and legislative history, the FAA has relied on the interpretation given to the similar term "Federal financial assistance" in Federal regulations and court decisions. 28 CFR part 41, "Implementation of Executive Order 12250, Non-discrimination on the Basis of Handicap in Federally Assisted Programs," section 41.4(e) establishes the definition of "Federal financial assistance" for all Federal agencies implementing § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. That definition is in turn subject to the limitation of the Department of Transportation v. Paralyzed Veterans, 477 U.S. 597 (1986) (Paralyzed Veterans), which specifically addressed the issue of whether certain facilities and services provided by the FAA in managing the national airspace system constituted federal assistance. That decision held that the provision of air navigation services and facilities to airlines by the FAA did not make the commercial airline passenger service a Federally assisted program within the meaning of § 504.

The FAA's interpretation of the term "Federal assistance" is included in Section II of the Final Policy, Definitions. The Final Policy's definition of "Federal assistance" adapts the generalized language of 28 CFR § 41.4(e) to the specific circumstances of airports receiving Federal support and reflects the holding of the Paralyzed Veterans decision. The definition lists as Federal Assistance the following:

(1) Airport development and noise mitigation grants;

(2) Transfers, under various statutory provisions, of Federal property at no cost to the airport sponsors; and

(3) Planning grants related to a specific airport.

Under this definition, FAA installation and operation of navigational aids and FAA operation of control towers are not considered Federal assistance, based on the Supreme Court decision in Paralyzed Veterans. Similarly, the FAA does not consider passenger facility charges (PFCs) to be Federal assistance even though PFCs may be collected only with approval of the FAA.

Airport development and noise mitigation grants are considered Federal assistance because they apply to a specific airport, and that airport is, therefore, "subject to Federal assistance" under the statute. Transfers of Federal property to an airport are considered Federal assistance because they also apply to a specific airport. Planning grants may apply to a specific airport or may be more general in nature. Under § 47133, the FAA considers only planning grants related to a specific airport to be Federal assistance.

However, not all airports that are the subject of Federal assistance are necessarily bound to the revenue-use assurance simply by the passage of § 47133. Established Federal grant law prevents a statute from being construed to modify unilaterally the terms of preexisting grant agreements absent a clear showing of legislative intent to do so. *Bennett* v. *New Jersey* 470 U.S. 632 (1985), 84 L.Ed 2d 572, 105 S.Ct. 1555. Neither the statutory language nor its legislative history indicates an intent by Congress to apply § 47133 to impose the revenue-use requirement on airports that were not already subject to it. By contrast, a recent example of Congressional intent to modify preexisting grant agreements exists in § 511(a)(14) of the Airport and Airway Improvement Act of 1982, 49 USC App. 2210(a)(14), which was recodified at 49 USC 47107(c)(2)(B). That subsection, which was added to the AAIA in 1987, established requirements for the disposal of land acquired with Federal grants that is no longer needed for airport purposes. The statute by its terms applied to an "airport owner or operator [who] receives a grant before on or after December 31, 1987" for the purchase of land for airport development purposes. This language demonstrated a clear Congressional intent to modify preexisting grant agreements. The language of § 47133 and its legislative history lacks any such express direction.

Therefore, the FAA does not interpret § 47133 to impose the revenue-use requirements on an airport that was not already subject to the revenue-use assurance on October 1, 1996. An airport that had accepted Surplus Property from the Federal government, but did not have an AIP grant in place on October 1, 1996, would not be subject to the revenue-use requirement by operation of § 47133. If that airport accepted additional Federal property or accepted an AIP grant on or after October 1, 1996, the airport would be subject to the revenue-use requirement. As discussed below, by operation of § 47133, the revenue-use requirement would remain in effect as long as the airport functioned as an airport.

For airports that were already subject to the revenue-use requirement on October 1, 1996, and those that become subject to the requirement after that date, the effect of § 47133 is to extend the duration of the requirement indefinitely. This application is not explicit in the statute and reference to the legislative history of the statute is necessary to determine congressional intent and the specific meaning and application of the statutory language. The legislative history of § 47133 makes it clear that Congress enacted § 47133 to extend the duration of the revenue-use requirement for airports that are already subject to it. In describing an earlier version of § 47133, the Committee on Transportation and Infrastructure of the House of Representatives stated that the reason for the change was because "revenue diversion burdens interstate commerce even if the airport is no longer receiving grants. In recognition of this fact, the bill applies the exact same revenue diversion prohibition to airports that have a FAA certificate [modified to airports that are subject to Federal assistance in conference] as now applied to airports that receive AIP grants. For the most part, these will be the same airports." H.R. Rep. 104–714 (July 26, 1996) at 38, reprinted at 1996 US Code, Congressional and Administrative News at 3675. The report further stated that broadening the prohibition would "make it clear that an airport cannot escape this prohibition [on revenue diversion] by refusing to accept AIP grants[;]" remove "this perverse incentive to refuse AIP grants * * *[;]." and "once again [encourage] all airports to use available Federal money to increase safety, capacity, and reduce noise." *Id.*

Any airport that had an outstanding AIP grant agreement in effect on October 1, 1996, was already bound to the same revenue use assurance that is contained in § 47133. Because § 47133 is extending the duration of an existing obligation, there is no conflict with the principle of Federal grant law outlined above.

c. Relationship of Final Policy to Airport Privatization

In the applicability and definition section of the Proposed Policy, the FAA stated that proceeds from the sale of the entire airport as well as from individual parcels of land would be considered as airport revenue. The FAA also stated that it did not intend "to effectively bar airport privatization initiatives," and that the FAA would take into account "the special conditions and constraints imposed by the fact of a change in ownership of the airport." 61 Fed. Reg. at 7140. The FAA proposed to remain "open and flexible in specifying conditions on the use of revenue that will protect the public interest and fulfill the requirements and objectives of § 47107(b) without unnecessarily interfering with the appropriate privatization of airport infrastructure." *Id.*

Airport operators: A number of airport operators expressed concern that the guidance in the Proposed Policy was too ambiguous to encourage privatization and might discourage privatization initiatives. One operator suggested that the FAA should take a flexible approach to the proceeds of a privatization transaction when an airport's concession revenues are sufficient to allow a public owner to use some sales proceeds for nonairport purposes without increasing fees charged to aeronautical users and without continuing a need for Federal subsidy. Another airport operator suggested that the financial terms of a transaction would reflect the local circumstances in which the transaction was negotiated and recommended that the FAA account for this fact in reviewing revenue diversion claims.

Air carriers: ATA adamantly opposed the sale or transfer of a public use airport in a situation when such an action would cause airport revenue to be taken off the airport. ATA believes that the FAA does not have the flexibility or the statutory authority to require anything less than 100% compliance under 49 USC § 47107(b).

General aviation: The AOPA is concerned that the policy gives the impression that airport privatization is a fully resolved issue. The AOPA believes that the policy must avoid any implication that the issue is resolved or that the FAA endorses privatization.

Other commenters: Three public interest organizations addressed the issue of privatization from different perspectives. A group concerned with preventing and mitigating airport noise suggests that the FAA must ensure that adequate funds remain available to meet current and future airport noise mitigation needs. This group recommended that, before approving a transfer, the FAA should conduct a thorough audit of the airport's compliance with noise compatibility requirements, plans, and promises, and that the FAA should assess the adequacy of resources to address noise compatibility problems. The FAA should also require enforcement mechanisms to ensure implementation of noise compatibility and mitigation measures as a condition of the sale or transfer.

Two other groups supported a policy that does not discourage airport privatization. One of these suggested that the FAA consider defederalization of airports. The comments regarding defederalization are beyond the scope of this proceeding, because they would require statutory changes.

Final Policy: The Final Policy adopts the basic approach of the Proposed Policy toward privatization, with some language changes for clarity and readability. In addition, the Final Policy explicitly acknowledges the Airport Privatization Pilot Program.

Guidance on the process for obtaining FAA approval of the sale or lease of an airport is contained in FAA Order 5190.6a, Airport Compliance Requirements. The Final Policy is not intended to modify the process in any way. FAA approval is required for any transfer, including those between government entities. The Final Policy makes clear, however, that in processing an application for approval the FAA will: (a) treat proceeds from the sale or lease as airport revenue; and (b) apply the revenue-use requirement flexibly, taking into consideration the special conditions and constraints imposed by a change in ownership of the airport. For example, as is noted in the Final Policy, if the owner of a single airport is selling the airport, it may be inappropriate to require the seller to simply return the proceeds to the private buyer to use for operation of the airport.

The FAA requires the transfer document to bind the new operator to all the terms and grant assurances in the sponsor's grant agreement. The FAA retains sufficient authority and power through its grant assurances to ensure compliance by the new owner with all of its obligations, including any grant-based obligations relating to mitigation of environmental impacts of the airport; to conduct sponsor audits and to take other appropriate action to ensure that the airport is self-sustaining.

The Final Policy's approach to privatization does not represent, as ATA suggests, less than 100 percent compliance with the revenue-use requirement. The FAA agrees with the ATA that we cannot waive that requirement. Rather, the FAA has committed to exercise its authority to interpret the requirement in a flexible way to account for the unique circumstances presented by a change of ownership.

The Final Policy is not an endorsement of privatization and it does not resolve the policy debate about privatization. FAA will continue to review the sale or lease of an airport on

a case-by-case basis, including transfers proposed under the Airport Privatization Pilot Program, 49 U.S.C. 47134, created by § 149 of the FAA Reauthorization Act of 1996. The demonstration program authorizes the FAA to exempt five airports from Federal statutory and regulatory requirements governing the use of airport revenue. Under the program, the FAA can exempt an airport sponsor from its obligations to repay Federal grants, to return property acquired with Federal assistance, and to use the proceeds of the sale or lease exclusively for airport purposes. The latter exemption is also subject to approval by the air carriers serving the airport.

The FAA notes the concerns that the revenue-use requirement may discourage privatization. Congress addressed this prospect by enacting the Privatization Pilot Program, which authorizes the FAA to grant exemptions from sections 47107(b) and 47133 to permit the sponsor to use sales or lease proceeds for nonairport purposes, on certain conditions. That exemption would not be required unless sales or lease proceeds were airport revenue. In addition, the FAA will consider the unique circumstances—financial and otherwise—of individual transactions in determining compliance with section 47107(b), and this should address to some degree the commenters' concerns about privatization.

d. Effect of § 47133 on Return on Investment for Private Airport Owners or Operators That Accept Federal Assistance

By extending the revenue-use requirement to privately-owned airports, § 47133 requires the FAA to consider a new issue—the extent to which a private owner that assumes the revenue-use obligation may be compensated from airport revenue for the ownership of the airport. Section 47133 prohibits all such private airport owners or operators from using airport revenue for any purpose other than the capital and operating costs of the airport. However, the FAA does not consider section 47133 to preclude private owners or operators from being paid or reimbursed reasonable compensation for providing airport management services. Private operators, presently, provide airport management services at a number of airports. In many cases, these airports are publicly owned and subject to the revenue-use requirement. The private operator is providing these services under some form of contract with the public owner. These services are considered part of the operating cost of the airport owner, and the fees can be paid from airport revenue.

It is reasonable to equate private operators managing publicly owned airports with private owner/operators managing privately owned or leased airports. To avoid any confusion of the issue, reasonable compensation for management services provided by the owner of a privately-owned airport is identified as a permitted use of airport revenue in the Final Policy.

Private airport owners may typically expect a return on their capital investment. Such investment could be considered a capital cost of the airport. In the case of private owners or operators of airports who have assumed the revenue-use obligation, that obligation would limit the ability to use the return on capital invested in the airport for nonairport purposes. In particular, the FAA expects private owners to be subject to the same requirements governing a self-sustaining airport rate structure and the recovery of unreimbursed capital contributions and operating expenses from airport revenue as public sponsors. Under section 47107(l)(5), private sponsors—like public sponsors—may recover their original investment within the six-year statute of limitation. In addition, they are entitled to claim interest from the date the FAA determines that the sponsor is entitled to reimbursement under section 47107(p). Any other profits generated by a privately-owned airport subject to section 47133 (after compensating the owner for reasonable costs of providing management services) must be applied to the capital and operating costs of the airport.

This interpretation is required by provisions of 49 U.S.C. 47134, the airport privatization pilot program. Section 47134 authorizes the FAA to grant exemptions from the revenue-use requirement to permit the private operator to "earn compensation from the operations of the airport." This exemption would not be necessary if section 47133 did not restrict the freedom of the private owner of a Federally-assisted airport to use the profits from the investment in the airport for nonairport purposes. This interpretation does not unreasonably burden private owners, because they receive a benefit (in the form of either Federal property added to the airport or Federal grant funds) in exchange for assuming the restrictions on the use of their profit.

e. Grandfather Provisions

The Proposed Policy included a discussion of the grandfather provisions of section 47107(b) in the section on permitted uses of airport revenue. That discussion included a list of examples of financing obligations and statutory provisions that had been previously found by the Department of Transportation to confer grandfather status.

The Comments: Two airport operators commented on this issue. One is an airport operator whose status under the grandfather provisions was under consideration by the FAA when the Proposed Policy was published. Its concerns were addressed by the FAA's consideration of its individual situation.

The second commenter is airport operator already established as a grandfathered airport operator. This commenter recommends that the Final Policy continue to recognize the rights of grandfathered airports.

Final Policy: The Final Policy continues to recognize the rights of grandfathered airport owners set forth at title 49 U.S.C. 47107(b)(2) and 47133. To qualify an airport for grandfathered status, the statute requires that local covenants, assurances or governing laws pre-dating September 2, 1982, must specifically pledge the use of airport generated revenues to support not only the airport but also the general debt obligations or other facilities of the owner or operator. However, the Final Policy is modified to reflect the requirement in the 1996 FAA Reauthorization Act that the FAA consider the increase in grandfathered payments of airport revenue as a factor militating against the award of discretionary grants.

f. Applicability to Non-municipal Airport Authorities

Lehigh-Northampton Airport Authority (LNAA): LNAA asserted that the airport revenue-use requirement does not allow FAA to regulate airport transactions with non-governmental parties and does not empower FAA to override state and local laws governing the use of airport revenue for airport marketing and promotional activities. The commenter advanced a number of arguments as to why FAA does not have authority to restrict such transactions. First, Congress has shaped the revenue diversion statute to identify financial irregularities in dealings between an airport enterprise account and another unit of government. The statute does not contemplate FAA regulation of airport financial relationships with non-government parties. Second, Congress did not intend the "capital or operating costs" language in the revenue diversion statute to authorize a new Federal regulatory scheme to narrow the types or levels of airport expenditures beyond

what is legal under applicable state and local law. Third, there is not a statutory requirement for FAA to regulate airport expenditures for community events or charitable contributions in the absence of facts suggesting that such expenditures are the result of undue influence by a governmental unit.

The LNAA currently has a case pending before the FAA under FAR Part 13, in which certain expenditures that LNAA characterizes as marketing and promotional expenses are being examined for consistency with the revenue-use requirement. LNAA's assertions with respect to its own promotional activities will be addressed by the FAA in that proceeding. To the extent that LNAA's practices were inconsistent with this Final Policy, LNAA will have an opportunity to argue that the Final Policy should not be applied to its situation.

The general issues of the use of airport revenue for marketing and promotional expenses and charitable donations are discussed separately below.

The FAA is not modifying the applicability of the Final Policy based on LNAA's other concerns. The language of section 47107(b) explicitly states that revenue generated by the airport may only be expended for the capital or operating costs of the airport or local airport system; it contains no limiting language concerning "financial irregularities." The statute further defines expenditures for general economic development and promotion as unlawful use of airport revenue, providing specific authority over transactions that do not involve transfers of airport revenue to other governmental entities. See 49 U.S.C. 47107(l)(2). This provision grants authority for regulation of expenditures for charitable and community-use purposes.

In addition, the Congressional mandate to establish policies and procedures to "assure the prompt and effective enforcement" of the revenue use and self-sustainability requirements (49 U.S.C. 47107(l)(1)) provides statutory authority to adopt more detailed guidance on permitted and prohibited uses of airport revenue. Many airport operators have expressed concern over the difficulty of responding to OIG findings of unlawful revenue use without clear and specific FAA guidance on permitted and prohibited practices.

Finally, the grandfathering provision establishes Congressional intent to prohibit certain airport revenue practices authorized by state or local law that do not satisfy the specific requirements of the grandfather provisions of the AAIA.

2. Definition of Airport Revenue

a. Proceeds From Sale of Airport Property

The Proposed Policy included proceeds from the sale of airport property in the proposed definition of airport revenue. No distinction was made between property acquired with airport revenue and property acquired with other funds provided by the sponsor. In the explanatory statement, the FAA discussed alternatives it had considered, including limiting the definition to property acquired with airport revenue. (61 FR 7138) The FAA also stated that a sponsor would be able to recoup any funds it contributed to finance the acquisition of airport property as an unreimbursed capital contribution.

Airport operators: Airport operators objected to defining proceeds from the sale of airport property as airport revenue. ACI/AAAE argued that the definition would reduce incentives for airport sponsors to pursue legitimate airport endeavors. One airport operator argued that the definition constitutes a transfer of wealth from the taxpayers to the airport users, and that cities would be less willing to contribute to future airport projects. Another individual operator argued that the policy should not apply to property acquired with the sponsor's own funds and to property acquired with airport revenue before 1982. This airport operator further argues that application of the policy to property acquired before 1982 amounts to a taking of airport property without just compensation and without Congressional authorization. Finally, this operator argued that the proposed definition appears to contradict a portion of the FAA Compliance Handbook, Order 5190.6A (October 2, 1989), Paragraph 7–18, that states there is no required disposition of net revenues from sale or disposal of land not acquired with Federal assistance.

Air carriers: The ATA commented that the use of airport revenue for repayment of contributions from prior years should be limited. According to ATA, reimbursements should be permitted only when the sponsor and airport enter into a written agreement concerning the terms of reimbursement before the service or expenditure is provided.

Other commenters: A public interest organization opposed the treatment of proceeds from the sale of airport property as airport revenue. This commenter argued that the sponsor, as the principal provider of airport's land and capital, has a legitimate claim to cash-out the value of its investments and to use the proceeds for other purposes.

The Final Policy: The Final Policy does not modify the treatment of proceeds from the sale, lease or other disposal of airport property. Proceeds from the sale lease or other disposal of all airport property are considered airport revenue subject to the revenue-use requirement and this policy, unless the property was acquired with Federal funds or donated by the Federal government. While proceeds from disposal of Federally-funded and Federally-donated property are also airport revenue, these proceeds are subject to separate legal requirements that are even more restrictive than the revenue-use requirement.

As discussed in the Proposed Policy, this definition is consistent with the language of the original version of section 47107(b), which applies to "all revenues generated by the airport."

In addition, the Airport Privatization Pilot Program, 49 U.S.C. 47134, permits the FAA to grant exemptions from the revenue-use requirements to permit a sponsor to keep the proceeds from a sale or lease transaction, but only to the extent approved by 65 percent of the air carriers. An exemption would not be required unless the proceeds from the sale or lease of the entire airport were airport revenue within the meaning of section 47107(b) and 47133. Since the proceeds from the sale of an entire airport are airport revenue, it follows that the proceeds from the sale of individual pieces of airport property are also airport revenue.

Further, section 47107(l)(5)(A) establishes a six-year period during which sponsors may claim reimbursement for their capital and operating contributions. This limitation on seeking reimbursement could be avoided through the process of disposing of airport property, if the proceeds of sales were not themselves considered airport revenue. Through section 47107(l)(5)(A) Congress has defined the rights of airport owners and operators to recover their investments in airport property for use for nonairport purposes. Subject to the six-year statute of limitations, the sponsor is entitled to use airport revenues for reimbursement of such contributions. Section 47107(p) provides that a sponsor may also claim interest if the FAA determines that a sponsor is entitled to reimbursement, but interest runs only from the date on which the FAA makes the determination. As discussed below, the Final Policy provides flexibility to

structure future contributions to permit reimbursement over a longer period of time in order to promote the financial stability of the airport. The six-year limitation, which is incorporated in the Final Policy, also addresses ATA's request for a time limit on the airport owner or operator's ability to claim recoupment for past unreimbursed requests.

The FAA does not accept the suggestion that the definition is an unauthorized taking of sponsor property without just compensation. First, as noted, the definition is supported by the 1996 FAA Reauthorization Act, which included an express provision for an exemption from the revenue use restriction for sale and lease proceeds. Second, all airport sponsors, including the airport commenters, voluntarily agreed to their restrictions on the use of airport revenue when they accepted grants-in-aid under the AIP program. Finally, the definition does not deprive the commenter of its property. The proceeds from the disposal will still flow to the commenter sponsor to be used for a legitimate local public purpose—operation and development of the commenter's airport.

The FAA acknowledged in the Proposed Policy that existing FAA internal orders contain provisions on the status of proceeds from the disposal of airport property that are inconsistent with this Final Policy. As stated in the Proposed Policy, this inconsistency does not preclude the FAA from defining proceeds from the disposal of airport property as airport revenue in this Final Policy. Rather, "the Policy takes precedence, and the orders will be revised to reflect the policies in this statement." 61 FR 7138. In addition, the provisions in the FAA internal orders are in conflict with the 1996 FAA Reauthorization Act. Because of this statutory conflict, the FAA cannot continue to apply them.

b. Revenue Generated by Off-airport Property

The Proposed Policy defined as airport revenue the revenue received for the use of property owned and controlled by a sponsor and used for airport-related purposes, but not located on the airport.

Airport operators: The ACI–NA/AAAE and two individual airport operators objected to this definition of airport revenue. The ACI–NA/AAAE stated that revenues received from off-airport activities should ordinarily not be counted as airport revenue. One airport operator argued that this definition is inconsistent with the statutory definition of airport in the AAIA. The other airport operator (the State of Hawaii) is especially concerned about revenue generated by off-airport duty fee shops.

No other comments were received.

Final Policy: The Final Policy does not modify the definition of airport revenue as it pertains to off-airport revenue. This definition is consistent with FAA's prior interpretation, which has defined as airport revenue the revenues received by the airport owner or operator from remote airport parking lots, downtown airport terminals, and off-airport duty free shops.

After enactment of the original revenue-use requirement, the FAA initiated an administrative action to require the State of Hawaii to use its revenue from off-airport duty free sales in a manner consistent with section 47107(b). In response, Congress amended the revenue-use requirement to provide a specific and limited exemption to the State of Hawaii to permit up to $250 million in off-airport duty-free sales revenue to be used for construction of highways that are part of the Federal-Aid highway system and that are located in the vicinity of an airport. See, 49 U.S.C. § 47107(j). The statutory exemption would only be necessary if the revenue from off-airport duty free shops is airport revenue within the meaning of the statute.

c. Royalties From Mineral Extraction

The Proposed Policy included royalties from mineral extraction on airport property earned by a sponsor as airport revenue.

Airport operators: One airport operator objected to including revenue from the sale of sponsor-owned mineral, natural, or agricultural products or water to be taken from the airport in the definition of airport revenue. The operator stated that the retention of mineral rights as airport property would represent a windfall to the airport at the sponsor's expense; that the Proposed Policy is contrary to congressional intent and that it would take, without compensation, valuable property rights from the sponsor. The operator also cited a prior decision where FAA concluded the production of natural gas at Erie, Pennsylvania, does not serve either the airport or any air transportation purpose. The royalties generated by such production were determined to be outside the scope of the revenue-use requirement.

Final Policy: The Final Policy retains the proposed definition of airport revenue to include the sale of sponsor-owned mineral, natural, agricultural products or water to be taken from the airport. On further review of the Erie interpretation in this proceeding, the FAA no longer considers the analogy drawn in that interpretation—between mineral extraction and operation of a convention center or water treatment plant—to be appropriate. Rather, mineral and water rights represent a part of the airport property and its value. Just as proceeds from the sale or lease of airport property constitute airport revenue, proceeds from the sale or lease of a partial interest in the property—i.e. water or mineral rights—should also be considered airport revenue. The FAA will not require an airport owner or operator to reimburse the airport for past mineral royalty payments used for nonairport purposes based on the Erie interpretation. However, all airport owners and operators will be required to treat these payments as airport revenue prospectively, starting on the publication date of the Final Policy.

With respect to agricultural products, the FAA has always treated lease revenue from agricultural use of airport property as airport revenue, even if that revenue is calculated as a portion of the revenue generated by the crops grown on the airport property. The definition in the Final Policy will assure that the airport gets the full benefit of agricultural leases of airport property, regardless of the form of compensation it receives for agricultural use of airport property.

The FAA does not consider this interpretation to create a taking of airport owner or operator property. As discussed in other contexts, the limitation on the use of airport revenue was voluntarily undertaken by the airport operator upon receiving AIP grants. In addition, the revenues generated by these activities will still flow to the sponsor for its use for a legitimate local governmental activity, the operation and development of its airport.

d. Other Issues

The Final Policy includes a discussion of the requirement of 49 U.S.C. § 40116(d)(2)(A). This provision requires that taxes, fees or charges first taking effect after August 23, 1994, assessed by a governmental body exclusively upon businesses at a commercial service airport or upon businesses operating as a permittee of the airport be used for aeronautical, as well as airport purposes. This addition is included, at the suggestion of a commenter, to comply with the statutory provision, which was enacted as section 112(d) of the 1994 FAA Authorization Act.

3. Permitted Uses of Airport Revenue

a. Promotion/marketing of the Airport

Congress, in the FAA Authorization Act of 1994, permitted the use of airport revenues for promotion of the airport by expressly prohibiting "use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems." The Supplemental Proposed Policy cited this law and recognized that many airport sponsors engage in some form of promotional effort, to encourage use of the airport and increase the level of service. Accordingly, the Supplemental Notice provided that "[a]irport revenue may be used for * * * [c]osts of activities directed toward promoting public and industry awareness of airport facilities and services, and salary and expenses of employees engaged in efforts to promote air service at the airport." 61 FR 66470.

However, the preamble to the Supplemental Notice stated that promotional/marketing expenditures directed toward regional economic development, rather than specifically toward promotion of the airport, would not be considered a permitted use of airport revenue. In addition, the FAA proposed to prohibit the use of airport revenue for a direct purchase of air service or subsidy payment to air carriers because the FAA does not consider these payments to be capital or operating costs of the airport.

Airport operators: In their comments to the original proposed policy, ACI–NA/AAAE requested that FAA establish a "safe harbor," or a maximum dollar amount (perhaps based on a percentage of airport costs), under which an airport could spend airport revenue on certain promotional and marketing activities. Greater percentage amounts would be allowed for the costs of airport-specific activities, while lower amounts would be allowed for joint efforts for campaigns and organizations that have broader, regional marketing missions.

Several airport operators supported this "safe harbor" concept in their comments to the docket for the original Proposed Policy. One such commenter, without reference to ACI/AAAE's remarks, suggested a cap of 5% of an airport's budget as a "safe harbor" for marketing expenses that are not directly related to the airport or airport system. Furthermore, this commenter would limit the use of airport revenue to a maximum share of 20 percent of the overall cost of any joint-project budget.

ACI/AAAE did not pursue the concept of "safe harbor" in their comments to the docket for the Supplemental Policy, focusing instead on the discretion of the airport operator to use reasonable business judgment to determine potential benefits to the airport. Several airports concurred with the ACI–NA/AAAE position, and one airport operator added that joint-marketing expenses, if reasonable and clearly related to aviation, should be considered an operating cost of the airport.

The ACI/AAAE and several individual airport operators commented that an airport cannot be distinguished from the region served by the airport. ACI/AAAE commented that the policy should permit reasonable spending for marketing of communities and regions because airports are not ultimate destinations of passengers. Therefore, airport operators must be free to make a reasonable attempt to increase revenues by investing in the promotion of their community as a destination.

Some airports specifically opposed the ATA's suggestion of a cap, described below.

Air carriers: In its comments to the Supplemental Notice, the ATA mentioned the concept of a maximum or "cap" under which expenditures would be considered reasonable, but would apply it to efforts to promote the services of the airport itself. The ATA would have the policy prohibit entirely the use of airport revenue for the promotion of regional development, because "expenditures by an airport to promote local or regional economic development—as opposed to the services and functionality of an airport—should not be considered legitimate airport costs." In regard to cooperative or joint-marketing expenses, the ATA focused on airport participation in joint-marketing of new airline services, suggesting that these activities be limited to a 60-day promotional period. ATA also warned against abuses of cooperative marketing, in particular programs that result in promotion of a particular airline.

The ATA rejected the airport position that use of airport revenue to fund regional promotional activities is acceptable, because airports themselves are not destinations. They stated, "[l]ocal governments that are also airport sponsors should not be permitted to pass off local and regional promotional activities in order to charge such costs to an airport. Indeed, many civic organizations and chambers of commerce undertake such activities directly, since continued economic development directly benefits the local businesses that constitute such organizations."

The Final Policy: The FAA has modified the provisions on permitted uses of airport revenue in regard to promotion and marketing in the Final Policy. The FAA has applied the sections 47107(b) and 47107(l) to determine to what extent various kinds and amounts of promotional and marketing activities can be considered legitimate operating costs of the airport. The permitted uses of airport revenue for marketing and promotion are split into two paragraphs, V.A.2 and V.A.3., in the Final Policy—one addressing costs that may be fully paid with airport revenue, and one addressing costs that may be shared. The issues of general economic development, direct subsidies of air carriers, the waiving of fees to airport users and airport participation in airline marketing and promotion is further addressed in Section VI.

The Final Policy provides, under V.A.2, that expenditures for the promotion of an airport, promotion of new air service and competition at the airport, and marketing of airport services are legitimate costs of an airport's operation. These expenditures may be financed entirely with airport revenue, and the expenditures may include the costs of employees engaged in the promotion of airport services. In addition, cooperative airport-airline advertising of air service at the airport may be financed with airport revenue, with or without matching funds. The FAA is prepared to rely on airport management to assure that the level of expenditures for such purposes would be reasonable in relation to the airport's specific financial situation. In addition, cooperative airport-airline advertising of air service must be conducted in compliance with applicable grant assurances prohibiting unjust discrimination in providing access to the airport.

For other advertising and promotional activities, such as regional or destination marketing, airport revenue may be used to pay a share of the costs only if the advertising or promotional material includes a specific reference to the airport. The share must be reasonable, based on the benefits to the airport of participation in the activity. The FAA construes the prohibition on "use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems' to preclude the reliance on airport management judgment to support the use of airport revenue for general destination advertising containing no references to the airport. Likewise, the prohibition precludes adoption of a safe-harbor