185610

Agenda Item 1002 | TESTIMONY | 3:00 PM TIME CERTAIN

STORMWATER MANAGEMENT SERVICES RATES FOR 3 DRAINAGE DISTRICTS

IF YOU WISH TO **SPEAK** TO CITY COUNCIL, **PRINT** YOUR **NAME, ADDRESS, AND EMAIL.**

NAME (print)	ADDRESS AND ZIP CODE	Email
✓ Anne Davidson	8900 NE Vancouver Way 97211	aemdavidson@aol.com
✓ Matthew Rotchford	2060 N Marine Dr. (Portland Expo Center) Portland, OR 97217	mpr@expocenter.org
✓ Mike Wells	1300 SW 5th #3000 Port OR 97201	mike.wells@cbre.com
✓ Maryhelen Kincaid	2030 NE Blue Heron Dr. PDX 97211	jamasu88@msn.com
✓ Cathy Humble	1036 NE Meadow Drive 97211	cathy.humble@gmail.com
✓ Val Humble	"	ValHumble@gmail.com
✓ DICK SHAFER	9324 NE LEVEE RD 97211	DICKSHAFER@AOL.COM
✓ Beth Cohen	7900 NE 33rd Drive 97211	bcohen@oregonfoodbank.org
✓ Justin Calloway	8850 NE Levee Rd 97211	justincalloway@gmail.com
✓ Barbara Kerr	1150 NE Faloma Rd 97211	kerrclifford@hotmail.com
✓ GARY CLIFFORD	1150 NE FALOMA ROAD 97211	

Date 9-5-12

Page 1 of 2

185610

Agenda Item 1002 TESTIMONY 3:00 PM TIME CERTAIN

STORMWATER MANAGEMENT SERVICES RATES FOR 3 DRAINAGE DISTRICTS

IF YOU WISH TO SPEAK TO CITY COUNCIL, **PRINT** YOUR NAME, ADDRESS, AND EMAIL.

NAME (print)	ADDRESS AND ZIP CODE	Email
✓ Corky Collier	6015 NE 80th 97218	corky@columbiacorridor.org
~~Robert Pike~~	805 SW Broadway, Portland OR, 97205	robert@tmtdevelopment.com
✓ Lise Glancy	PDX, 7200 NE Airport Way, PDX	lise.glancy@portofportland.com
✓ WALTER VALENTA	~~808~~ 173 NE BRIDGETON #6 97211	civicminded@waltervalenta.com

Date 9-5-12

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185610

Moore-Love, Karla

From: Cathy Humble [cathy.humble@gmail.com]
Sent: Thursday, September 06, 2012 3:28 PM
To: Moore-Love, Karla
Subject: text of 9/6/12 testimony

Attachments: Stormwater Council Meeting.doc

Stormwater
uncil Meeting.doc

For your records, attached is the text of my testimony at yesterday's Portland City Council hearing on drainage district stormwater charges.

Cathy Humble
1036 NE Meadow Drive
Portland OR 97211

503-289-9382

cathy.humble@gmail.com

Drainage District Stormwater Fees

My name is Cathy Humble. My husband and I have lived in the East Columbia neighborhood for 34 years. As part of our property tax, we now pay a $472 fee that supports our drainage district. The proposed Environmental Services off-site stormwater charge would eventually cost us about $186 per year in addition to that.

We have broader concerns than specific dates for starting up off-site charges. Many comments have been made about drainage district residents paying our "fair share." But fair share is a two-way concept. When you look at the big picture, the other Portland residents are not currently paying for all the stormwater protection they receive.

Yes, our drainage district uses our fee to handle stormwater via ditches and pumping stations But much of our drainage district fee covers protection of 35 miles of levee systems crucial to the safety of I-5 and I-205, Portland International Airport, and the well fields that back up the Bull Run water supply.

Currently, residents in other parts of Portland do not pay through their water bills or property taxes for this protection. And although the levees are so vital to the whole city's infrastructure, we're told that by a legal quirk, the cost of maintaining them cannot be considered in the water bill rate-setting process.

It's been proposed that the city pay the drainage districts for these crucial services. However, that amount has not been settled since the drainage districts are still analyzing the relevant costs. And there's simply no assurance that our drainage district would pass along any of that payment to residents like us as a reimbursement or reduced property tax amount. Nevertheless, the addition of direct off-site charges for drainage district residents is gung-ho to get under way.

In the interest of fairness and equity:

- We ask that Portland residents who do not live in the drainage districts share the real-world TOTAL cost—what the mayor calls the full freight—of managing stormwater and protecting the Columbia floodplain.

- We ask that any change in rates be tabled until the drainage district cost data is available and a cost-sharing agreement with the city is final.

- We ask that city officials give affected residents adequate notice on all parts of this process.

Thank you for your consideration.

185610

Oregon FOOD BANK SM

www.oregonfoodbank.org

A member of FEEDING AMERICA

Testimony of Beth Cohen before Portland City Council
Re: proposed rates for stormwater management services
September 5th, 2012

Good afternoon Mayor Adams and City Council. My name is Beth Cohen and I am a Public Policy Advocate with Oregon Food Bank (OFB).

I want to thank you for this opportunity to testify today on the proposed rates for stormwater management services in the areas of the city served by Multnomah County Drainage District No. 1, Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2.

Oregon Food Bank is in favor of a four-year phased implementation for the proposed rates for stormwater management services in the Columbia Corridor beginning in July of 2013.

Oregon Food Bank headquarters at 7900 NE 33rd Drive is served by Multnomah County Drainage District and will be impacted by the proposed changes to the stormwater rates. The proposed changes to stormwater management fees will have a large impact on Oregon Food Bank and our ability to provide food to families and individuals in need. Oregon Food Bank has paid roughly $4,000 annually for the past ten years in stormwater fees. Based on the original proposal, the changes to stormwater management rates will add an additional $18,000 in fees to our bill, representing a substantial increase for Oregon Food Bank and the families we serve.

Oregon Food Bank wants the rates to be fair and we are happy to pay a rate that is deemed fair by the city of Portland. But we are concerned about the timing of the fee implementation, which is in the middle of our fiscal year, from July 2012 through June 2013. It is helpful for OFB to have predictable operating costs and for increases in costs to be gradual. We found out about the proposed stormwater rate increase in June of this year, which didn't allow time to include the increase into our budget planning for the current fiscal year that began in July.

An unbudgeted increase would strain our already tight budget for this year and cause us to divert funds from our ability to distribute food to our community partners across the state and here in Portland. We estimate that it costs about fifty cents for us to acquire and distribute one pound of bulk food, such as rice and beans and

... because no one should be HUNGRY

OFB Headquarters
P.O.Box 55370
Portland, OR 97238-5370
503-282-0555
fax: 503-282-0922

OFB West
P.O.Box 5817
Beaverton, OR 97006-0817
503-439-6510
fax: 503-439-6621

OFB Southeast Oregon Services
P.O.Box 716
Ontario, OR 97914-3914
541-889-9206
fax: 541-889-4716

OFB Tillamook County Services
P.O.Box 1344
Tillamook, OR 97141-1344
503-842-3154
fax: 503-842-1900

185610

Oregon FOOD BANK SM

www.oregonfoodbank.org

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frozen vegetables. At this rate, the fee increase of $18,000 translates into roughly 36,000 pounds of food or 27,000 meals each year that the organization will no longer be able to provide.

This is especially concerning as families and households in the Portland area continue to struggle with food insecurity and lack of access to healthy food. Demand for emergency food has increased drastically since the beginning of the recession. But even as the economy has slightly improved in the last year, we have seen demand continue to increase. Since the beginning of 2012, demand for emergency food in the Portland area has increased by about 12 percent. Food supply is not increasing at the same rate. We have been working to keep up with this growing demand and in fact, we project that we will be able to distribute less food this year than last. Anything that takes away from our ability keep up with the growing demand for emergency food impacts of our mission and the families we serve.

In sum, we urge you to amend this proposal to include a four-year phase in of fee increases beginning in July 2013. A gradual and expected fee increase over the next four years would allow us to plan and account for the new rates in our budget and as a result, would have minimal impact on our mission to eliminate hunger.

We believe that addressing hunger requires partnerships between the public and private sectors and the city of Portland has been an incredibly supportive partner and collaborator in the fight to eliminate hunger. We appreciate the support that the city of Portland has provided to Oregon Food Bank over the years and want to thank you for your consideration today.

Thank you and I'm happy to respond to questions.

Beth Cohen
Public Policy Advocate
Oregon Food Bank
7900 NE 33rd Drive
Portland, OR 97211
bcohen@oregonfoodbank.org
(971)223-3383)

... because no one should be **HUNGRY**

Testimony on Stormwater Fee proposal for Drainage Districts   September 5, 2012

Mayor and Council,

The East Columbia and Bridgeton neighborhoods have held several meetings regarding the City's proposal to direct bill drainage district landowners for stormwater fees. Many questions and issues were raised and noted by BES staff. This is our summary of the important facts and considerations we believe you, our City Council should consider. Careful consideration of all the facts should be made since this proposal results in an extraordinarily large increase in charges for drainage district residents and businesses.
Rates will increase significantly. Single family residents currently pay approximately $107/year to MCDD via property taxes. Amounts vary due to a complicated county tax assessment equation. BES proposes to add an additional $200/year for offsite stormwater management. Businesses face even larger increases. In this economy these increases could cause businesses to close and inflict great hardship on homeowners.

Recommendations:

- **Equitably charge *all* ratepayers for *all* fees associated with stormwater runoff in the City. Include all service costs in the rate structure, including costs to maintain and manage the levee as well as certification of the levee. Base this determination on actual costs as determined by the yet to be completed study undertaken by the MCDD**
- **Set a real deadline of July 1, 2013 for implementation of a new fee structure with a 4 year gradual phase-in.**
- **Provide good community outreach with timely, and clearly defined, information to the landowners affected by this proposed fee.**

Citizens, our neighbors, need to trust that our City leaders have our best interests at heart, and that we are all working to make our City more efficient and cost effective.
We believe our neighbors deserve, and are entitled to, understandable, reliable, and timely public information so we can comprehend the impacts of this rate increase.

We ask you to postpone the implementation of this fee increase until a completely equitable payment structure can be determined, based on known, actual costs, and citizens can be properly informed of the issues and the burdens confronting them.

The 3 points that need your attention:

1. Equity in Payment structure
The City claims to be seeking an equitable payment solution for all ratepayers in Portland. There is no dispute that there should be equitable payments, however, there should be equity for **all** costs and not burden only the residents of the drainage districts for services which benefit the whole city and commerce of the region.

The Multnomah County Drainage District (MCDD) provides vital services that benefit the entire City and should be considered when determining rate structures that are fair and equitable for drainage district landowners, as well as non-drainage district landowners. As part of the MCDD/PEN2 we are currently assessed a fee on our property taxes. With that collected assessment MCDD handles our stormwater, provides needed services to the City, and pays the City on our behalf for off-site charges. Currently MCDD pays the City approximately $600,000 a year for off-site stormwater fees per the negotiated IGA. These additional costs, being paid for by drainage district landowners should be considered in the rate determination to provide true equity for all ratepayers.

Currently the rest of the City does not pay for the costs drainage district landowners pay for which are:
protection to the 35 miles of levee systems
maintenance and operation of pump stations that protect many businesses, Expo Center, PIR, both Interstate freeways but more importantly NE Marine Dr and the airport.
protection to well fields that are a backup to Bull Run water when heavy rains cause turbidity in the drinking water supply, handling stormwater that passes through the districts from other parts of Portland on the way to the Columbia River and levee certification

To quote the Drainage Districts' mission statement: "The primary mission of the Drainage Districts is to manage the Columbia River Floodplain to prevent flooding from high water levels in the Columbia River and from stormwater runoff." These are benefits to the entire City.

2. Direct billing implementation should not begin until July 1, 2013
We want the City to do this right, and not incur any additional costs for unknown problems. At this point there are too many unknowns.
There should be an accurate list of ratepayers. BES has a list of 685 residential ratepayers. There are there are over 1,700 single family residents in East Columbia. Even considering shared meters/accounts this number does not seem accurate.
There should be an inventory of impervious surfaces prior to implementation.
There should be detailed information of actual costs involved and how fees will be structured with a phase-in approach. MCDD is currently undergoing a study to determine costs for services. Results from this study should be used in determining rate structures for the proposed new fee structure. Set a date for completion of this study and for negotiated rates to be complete. The City should provide a cost analysis of how the revenue from the proposed fee increase to drainage district landowners will be utilized.

There is nothing in the current year budget related to this revenue or charges. The impact to citizens and businesses is extraordinary.
Do-overs are costly. We, as taxpayers, want this process to not have additional costs associated with having to make costly corrections.

3. Outreach and Public Process has been poor
Public process on this proposal has been dismal. It needs to be better.

The chairs of Bridgeton and East Columbia organized a meeting with BES in January 2012 for residents. BES had no figures or definite proposal to present – only a concept of a direct billing fee and description of what off-site stormwater fees covered. Future public meetings were promised.
Neighborhood representatives from Bridgeton and East Columbia requested, and had, a meeting with Commissioner Saltzman on March 1st. We presented him with some background information and concerns of the neighborhood. We offered, and requested, that we be involved in the public outreach so we could optimize information sharing with our neighbors.
BES made no contact with us, but in late June landowners received a mailing notice of 2 public meetings. The mailing was postmarked on a Friday for meetings to be held the following Wednesday and Thursday - essentially giving 4 or less days notice. The meetings were held on

consecutive evenings. The tone of the letter was that the proposed fee had already been adopted.
Knowing that 4 or less days notice was not fair, neighborhood leaders organized additional meetings for East Columbia and Bridgeton residents, but were handicapped by the timing being summer months (July) when meetings are usually not held, and short notice.

In developing policy for the Comp Plan we have been charged with identifying those who will benefit and those who will be burdened by change. That same tenet should apply here. Those burdened by the proposal should be given a fair chance to be informed – and in this case they were not, and as a result are not only burdened with extra fees but lack the ability to be properly informed.

Prior to the implementation of the new fee in July 2013, there should be extensive outreach, identification of affected landowners, and ample notice of public meetings.

<u>Other considerations:</u>
There is nothing in the City's current fiscal year budget that relates to the proposed fee increase. There are no costs associated with any increased fees thus no need to implement a new fee structure prior to next fiscal year. Set a target of July 1, 2013 for implementation, with a 4 year phase-in of fees.

Representation of rate paying should not be characterized as drainage district landowners "not paying for offsite charges" when in fact we are, at a different rate. It should also be stated that non-district rate payers are not paying for costs associated with flood control of critical infrastructure and levee management that benefits the entire City, as well as surrounding jurisdictions.

Include the costs of levee certification in the rate structure.
The districts have levees on the North, keeping the Columbia River at bay, and on the South along the lower Columbia Slough protecting properties from the Willamette River.
The districts' levees are a part of the Army Corps of Engineers Federal Levee Program and must be maintained to Federal levee standards. The levees are inspected by the Army Corps of Engineers for compliance to the standards. The district inspects the levees based on the river and seasonal conditions. The levees are inspected for erosion, loss of rip rap, burrowing animals, debris accumulation, invasive weeds, non permitted development on or adjacent to the levee, access roads and gates. Without this level of maintenance and management, the levees would not receive certification from the ACE and the levees would be at risk of failure, creating the potential for great damages and property loss for the entire City. If stormwater levels increased the levees would be at risk.

Maryhelen Kincaid

Maryhelen Kincaid, Land Use chair
For the East Columbia Neighborhood Association Board

Moore-Love, Karla

From: Berg, Dave [dberg@airlines.org]
Sent: Tuesday, September 04, 2012 1:21 PM
To: Moore-Love, Karla
Cc: Vince.Granato@portofportland.com; eric.shaffner@portlandoregon.com; Ian.Whitlock@portofportland.com
Subject: Letter to Mayor
Attachments: PortlandStormwaterSept2012.pdf

Dear Ms. Moore-Love,

Following up on our conversation this afternoon, please forward the attached letter to the Mayor and City Council. The letter relates to item 1002 on the Council agenda tomorrow afternoon (3:00 pm), rates for stormwater management services.

Please contact me if you have any questions. Thank you for your assistance.

Very truly yours,

David A. Berg
Senior Vice President & General Counsel
Airlines for America
We Connect the World
202.626.4234
dberg@airlines.org

Airlines for America
We Connect the World

September 4, 2012

Hon. Sam Adams, Mayor
City Council
City of Portland
Portland City Hall
1221 SW Fourth Avenue
Portland, OR 97204

Re: Proposed Stormwater Management Charges – Multnomah County Drainage District/Portland International Airport

Dear Mayor Adams and Commissioners:

I write on behalf of our member airlines,[1] many of which serve Portland International Airport ("PDX"), to express our concern with the plan to apply the proposed new stormwater management fee to PDX. The airport's share of the new fee, estimated to exceed $4 million annually, would be passed directly to the airlines at PDX in the form of increased operating costs.

The new fee is intended to recover City costs related to managing stormwater runoff from public rights of way. According to published information, including documents on the City's website, the City is proposing that ratepayers, including the Port of Portland which includes PDX, pay for "off-site stormwater management." We understand that the fee also includes a charge for the Harbor Superfund Program.

With respect to the Airport, the new fee would violate federal law and policy, which restricts the use of airport revenues. Specifically, 49 USC § 47133(a) provides that airport revenues may be used only for "the capital or operating costs of – (A) the airport; (B) the local airport system: or (C) other local facilities owned or operated by the airport…and directly and substantially related to the air transportation of passengers or property." An airport owner, in this case the Port of Portland, also must provide written assurance that it will comply with this restriction as part of the process under which it receives federal grants for airport improvement projects. See 49 USC § 47107(b).

[1] Airlines for America (A4A) is the principal trade association of the leading U.S. airlines. A4A's mission is to foster a business and regulatory environment that ensures safe and secure air transportation and enables U.S. airlines to flourish, stimulating economic growth locally, nationally and internationally. A4A's members are: Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines, Inc.; United Parcel Service Co; and US Airways, Inc. Air Canada is an associate member.

These legal requirements are further explained in the Federal Aviation Administration's *Policy and Procedures Concerning the Use of Airport Revenue* (the "Revenue Use Policy").[2] The Revenue Use Policy prohibits direct or indirect payments except as noted above; payments for government services must be for services actually received, must reflect the value of those services and must be fairly and properly allocated.

As you know, PDX has its own stormwater treatment facility; the City does not manage stormwater from PDX. Consequently, the proposed "off-site" charge is for services PDX does not receive and is not permitted revenue use under the Revenue Use Policy. It is no different, for example, than if the City established a special fee for resurfacing City streets or to revitalize an historic neighborhood. In these examples, just as with off-site stormwater management, PDX would not receive City services and the fees would constitute unlawful revenue diversion. For these reasons, we urge you to not apply the new fee to PDX.

I appreciate the opportunity to submit our views concerning the proposed new off-site stormwater management fee. Please contact me if you have any questions.

Very truly yours,

David A. Berg
Senior Vice President and General Counsel

cc: Eric Shaffner, City Attorney
Vince Granato, COO Port of Portland

[2] 64 Fed. Reg. 7695 (Feb. 16, 1999), available at:
http://www.faa.gov/airports/resources/publications/federal_register_notices/media/obligation_final99.pdf

185610

Moore-Love, Karla

From: Glancy, Lise [Lise.Glancy@portofportland.com]
Sent: Friday, August 31, 2012 4:43 PM
To: Moore-Love, Karla
Subject: Port letter on stormwater ordinance - FINAL (typo corrected)
Attachments: 8-31-12 Letter on 2012 Stormwater Ordinance.pdf; FAA Revenue Use Policy.pdf

Karla

Please enter the Port's letter (attached) into the record for the 9/5 3 pm hearing on the City stormwater ordinance. I have provided copies to all commissioners. Thank you.

See you on Wednesday! Have a terrific weekend!

Lise B. Glancy
Regional Government Relations Manager
Port of Portland
503/415-6519
503/548-5532 FAX
lise.glancy@portofportland.com

185610

Mission: To enhance the region's economy and quality of life by providing efficient cargo and air passenger access to national and global markets.

PORT OF PORTLAND
Possibility. In every direction

August 31, 2012

Mayor Sam Adams
Portland City Hall
1221 SW Fourth Avenue, Room 340
Portland, OR 97204

Commissioner Dan Saltzman
Portland City Hall
1221 SW Fourth Avenue, Room 230
Portland, OR 97204

Re: **Proposed Stormwater Rate Ordinance**

Dear Mayor Adams and Commissioner Saltzman:

On September 5, 2012, the Portland City Council will be considering an ordinance directing staff to begin charging stormwater on water accounts in Peninsula 1, Peninsula 2, and Multnomah County Drainage Districts. The impact of these new charges is significant for Portland International Airport (PDX), airlines and tenants, and other business and residential interests in the Columbia Corridor. The off-site stormwater charges for PDX are estimated to increase from approximately $200,000 to over $4 million annually. An increase of this magnitude represents a major rate shock for all affected parties, and does not acknowledge the citywide flood management and stormwater services provided by the drainage districts. As you know, PDX is a medium-sized market with exceptional air service to national and international markets. The over $4 million in proposed annual City stormwater charges to PDX and its tenants will impede our region's ability to preserve this level of air service.

The Port of Portland, owner and operator of PDX, which lies within the boundaries of the Multnomah County Drainage District, is very concerned about the Council's adoption of this ordinance. In addition to the issues highlighted above, the Port has potential Revenue Diversion issues associated with two charges in the proposed stormwater management rates: the "off-site" portion of the charge, and the Harbor Superfund Program charge.

Stormwater from PDX (and other District property) does not enter the City's system, but is instead managed by the District and by the Port's own infrastructure. Consequently, property owners within the District do not pay the "on-site" component of the City stormwater management charge. The proposed "off-site" charge relates to general infrastructure costs and programs having no direct relationship to PDX. The Superfund charge concerns City participation in remediation that is entirely unrelated to PDX.

As a recipient of federal funds, the Port is bound by federal law and policy which prohibits use of airport revenues for purposes other than the capital or operating costs of the airport. Federal law requires that revenues generated by a public airport be expended for the capital or operating costs of the airport, the local airport system, or other facilities owned or operated by the airport owner and directly related to air transportation of people or property. Conversely, the law prohibits diversion of airport revenues to

7200 NE Airport Way Portland OR 97218
Box 3529 Portland OR 97208
503.415.6000

purposes other than capital or operating costs, including direct or indirect payments, which do not reflect the value of services and facilities provided to the airport, or reflect the airport's impact on City infrastructure. [49 United States Code Sections 47107(b), 47133(a); Federal Aviation Administration, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Federal Register 7715 – February 16, 1999]. In the absence of clear guidance from the Federal Aviation Administration on this matter, the Port cannot make payments of the type described in the ordinance.

We expect that you will hear independently from the airlines national trade group, Airlines 4 America, and airlines that are tenants of PDX and will be affected by these new charges expressing a similar view.

Sincerely,

Vince Granato

Vince Granato
Chief Operating Officer

c: Karla Moore-Love, City Recorder
Portland City Council
Dean Marriott, Bureau of Environmental Services
Jim Hagerman, Bureau of Environmental Services
Eric Shaffner, City Attorney

185610

Tuesday
February 16, 1999

Part II

Department of Transportation

Federal Aviation Administration

Policy and Procedures Concerning the Use of Airport Revenue; Notice

185610

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.

FOR FURTHER INFORMATION CONTACT: J. Kevin Kennedy, Airport Compliance Specialist, Airport Compliance Division, AAS–400, Office of Airport Safety and Standards, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–8725; Barry L. Molar, Manager, Airport Compliance Division, AAS–400, Office of Airport Safety and Standards, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3446.

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 provision for general promotional expenses.

Except as discussed above, the Final Policy does not limit the amounts of airport revenue that can be spent for all permitted promotional marketing and advertising activities. The FAA expects that expenditure of airport revenues for these purposes would be reasonable in relation to the airport's specific financial situation. Disproportionately high expenditures for these activities may cause a review of the expenditures on an *ad hoc* basis to verify that all expenditures actually qualify as legitimate airport costs. Examples of permissible and prohibited expenditures are included in the Final Policy itself.

b. Reimbursement of Past Contributions

The Proposed Policy permitted airport revenue to be used to reimburse a sponsor for past unreimbursed capital or operating costs of the airport. The Proposed Policy did not include a limit on how far back in time a sponsor could go to claim reimbursement, in accordance with the law in effect at the time. In addition, the Preamble noted that the FAA had not to date permitted a sponsor to claim reimbursement for more than the principal amount actually contributed to the airport. The FAA requested comment on whether the FAA should permit recoupment of interest or an inflationary adjustment or whether, in the case of contributed land, recoupment should be based on current land values.

Airport operators: ACI–NA/AAAE and a number of individual airport operators supported recoupment of interest or inflation adjustment on previous contributions or subsidies to the airport.

Air carriers: The ATA objected to the Proposed Policy and commented that recoupment should be subject to a number of requirements to prevent abuses.

The Final Policy: After the proposed policy was issued, Congress enacted legislation to limit the use of airport revenue for reimbursement of past contributions, and to limit claims for interest on past contributions. 49 U.S.C. §§ 47107(l)(5), 47107(p). The Final Policy incorporates these statutory provisions. Based on Congressional intent evidenced by the legislative history of these provisions, airport revenue may be used to reimburse a sponsor only for contributions or expenditures for a claim made after October 1, 1996, when the claim is made within six years of the contribution or expenditure. In addition, a sponsor may claim interest only from the date the FAA determines that the sponsor is entitled to reimbursement, pursuant to section 47107(p). The FAA interprets these statutory provisions to apply to contributions or expenditures made before October 1, 1996, so long as the claim is made after that date.

If an airport is unable to generate sufficient funds to repay the airport owner or operator within six years, the Final Policy permits repayment over a longer period, with interest, if the contribution is structured and documented as an interest bearing loan to the airport when it is made. The interest rate charged to the airport should not exceed a rate that the sponsor received for other investments at the time of the contribution.

c. Donations of Airport Revenue to Charitable/Community Service Organizations

The Supplemental Proposed Policy addressed the use of airport property for public recreational purposes, and addressed the use of airport funds to support community activities and for participation in community events. The FAA proposed that the use of airport revenue for such donations would not be considered a cost of operating the airport, unless the expenditure is directly related to the operation of the airport. For example, expenditures to support participation in the airport's federally approved disadvantaged business enterprise program would be considered permissible as supporting a use directly related to the operation of the airport. In contrast, expenditures to support a sponsor's participation in a community parade would not be considered to be directly related to the operation of the airport.

Airport operators: ACI–NA/AAAE contended that the expenditure of airport revenue for community or charitable purposes is appropriate and should be recognized as legitimate. Airports, regardless of their size, type, and certification or lack thereof, are important members of their local communities and, therefore, must be able to maintain their prominent, highly visible roles in their respective communities. Airports are regarded by their communities as local business enterprises and, consequently, are expected to contribute to local non-profit charitable concerns in the same manner as other local business enterprises.

Individual airport operators generally supported the position of ACI–NA/AAAE, although some individual operators acknowledged that some limitation on the expenditures may be appropriate. One suggested a *de minimis* standard; another proposed a "safe harbor" based on a percentage of the airport's total budget. Another urged that airport owners/operators be allowed leeway to make contributions of airport funds, in reasonable amounts and consistent with the local circumstances, and to use airport property for charitable purposes on the same basis.

Other airport operators commented that the Final Policy should give comparable treatment to the use of airport funds and airport property for community goodwill by recognizing the limited use of airport revenue to support charitable and community organizations as a legitimate operating cost of the airport.

Air carriers: Air carriers did not comment specifically on charitable contributions, although they commented extensively on the use of airport property for community or charitable purposes. Generally the air carriers suggested that use of airport property should be subject to strict conditions to avoid abuse.

Other commenters: An advocacy group in support of a particular airport commented that, in order for an airport to be as self-sustaining as possible, the use of each income dollar is critical, and that federally assisted airports must be fully responsive to the citizens of the community by providing information on the use of airport funds.

Final Policy: The Final Policy generally follows the approach of the Supplemental Notice. Airport funds may be used to support community activities, or community organizations, if the expenditures are directly and substantially related to the operation of the airport. In addition, the policy provides explicitly that where the amount of the contribution is minimal, the airport operator may consider the "directly and substantially related to air transportation" standard to be met if the contribution has the intangible benefit of enhancing the airport's acceptance in local communities impacted by the airport.

Expenditures that are directly and substantially related to the operation of the airport qualify inherently as operating costs of the airport. The FAA recognizes that contributions for community or charitable purposes can provide a direct benefit to the airport through enhanced community acceptance, but that benefit is intangible and not quantifiable. Where the amount of the contribution is minimal, the value of the benefit will not be questioned as long as there is a reasonable connection between the recipient organization and the benefit of community acceptance for the airport.

However, if there is no clear relationship between the charitable or community expenditure and airport operations, the use of airport revenue may be an expenditure for the benefit of the community, rather than an operating cost of the airport. The different treatment of the use of airport funds (direct payments to charitable and community organizations) and the use of airport property (less than FMV leases for charitable or community purposes) is grounded in the applicable laws: the revenue-use requirement (section 47107(b)), which governs the use of airport funds, provides far less flexibility than the requirement for a self-sustaining rate structure (section 47107(a)(13)), which applies to the use of airport property.

Examples of permitted and prohibited expenditures are included in the Final Policy.

d. Use of Airport Revenue to Fund Mass Transit Airport Access Projects

The Supplemental Proposed Policy addressed in Part VII.C., the circumstances in which an airport sponsor could provide airport property at less than fair market value to a transit operator. The Supplemental Proposed Policy did not address the use of airport revenue to finance the construction of transit facilities. That issue, however, was raised in the comments.

Airport Operators: Two airport operators supported the use of airport revenue for the construction of transit facilities. One commenter stated that an airport should be permitted to use airport revenues and assets to provide mass transit service to on-airport commercial uses. Another commenter referred to the AIP Handbook, FAA Order 5100.38A § 555, which provides AIP project eligibility for rapid transit facilities.

Air carriers: Air carriers did not specifically discuss the use of airport revenue to finance transit facilities. However, as discussed below, they objected to providing airport property for transit facilities at nominal lease rates.

Other Commenters: Two commenters representing transit operator interests supported the expenditure of airport revenues to finance transit facilities. A transit operator stated that in order to create a better balance between transit and highway interests, transit facilities should be totally eligible expenses, paid for in the same manner as other road and parking enhancements. A transit trade association urged the FAA to take appropriate actions to ensure that passenger fees and other airport revenues are widely eligible to fund a range of airport surface transportation modes, including public transportation.

The FAA also received extensive comments on providing airport property for use by transit providers at less than FMV rents. These comments are addressed separately below.

Final Policy: The Final Policy has been modified to provide guidance on the use of airport revenues to finance airport ground access projects. The Final Policy states that airport revenue may be used for the capital or operating costs of such a project if it can be considered an airport capital project, or is part of a facility owned or operated by the airport sponsor and directly and substantially related to air transportation of passengers or property, relying directly on the statutory language of § 47107(b).

As an example, the Final Policy summarizes the FAA's decision on the use of airport revenue to finance construction of the rail link between San Francisco International Airport and the Bay Area Rapid Transit (BART) rail system extension running past the airport. In that decision, the FAA approved the use of airport revenues to pay for the actual costs incurred for structures and equipment associated with an airport terminal building station and a connector between the airport station and the BART line. The structures and equipment were located entirely on airport property, and were designed and intended exclusively for use of airport passengers. The BART extension was intended for the exclusive use of people travelling to or from the airport and included design features to discourage use by through passengers. Based on these considerations, the FAA determined that the possibility of incidental use by nonairport passengers did not preclude airport revenues from being used to finance 100 percent of the otherwise eligible cost items. For purposes of this analysis, the FAA considered "airport passengers" to include airport visitors and employees working at the airport.

4. Accounting Issues

a. Principles for Allocation of Indirect Costs

Based on the comments to the Proposed Policy, the FAA addressed the principles of indirect cost allocation in its Supplemental Notice. The Supplemental Notice made clear that the allocation of indirect costs is allowable under 49 USC § 47107(b), and that no particular method of cost allocation will be required, including OMB Circular A–87. To ensure, however, that indirect costs are limited to allowable capital and operating costs, the FAA proposed to apply certain general principles and prohibitions to the allocation of costs. The Supplemental Notice did not limit significantly the development of local cost allocation methodologies, or interfere with the application of Generally Accepted Accounting Principles (GAAP) and other accounting industry recognized standards.

In the Supplemental Notice, the FAA stated that it would expect that a Federally approved cost allocation plan that complied with OMB Circular A–87 or other Federal guidance and was consistent with GAAP would be reasonable and transparent, and would generally meet the requirements of section 47107(b). However, the use of a Federally approved cost allocation plan does not rule out the possibility that a particular cost item allowable under that guidance would be in violation of the airport revenue retention requirement if allocated to the airport.

The Supplemental Notice also required specifically that indirect cost allocations be applied consistently across departments to the sponsoring government agency, and not unfairly burden the airport account. The general sponsor cost allocation plan could not result in an over-allocation to an enterprise fund. In addition, the sponsor would have to charge comparable users, such as enterprise accounts, for indirect costs on a comparable basis.

Lastly, the Supplemental Notice proposed to prohibit the allocation of general costs of the sponsoring government to the airport. However, this prohibition would not affect direct or indirect billing for actual services provided to the airport by local government.

Airport Operators: Generally, airport operators agreed with the proposal to acknowledge that the allocation of indirect costs as allowable under 49 USC § 47107(b), and to provide that no particular allocation methodology, including OMB Circular A–87, be required.

One airport operator requested the FAA to further clarify that it is not imposing on airport sponsors all of the specific elements of OMB CircularA–87. The operator was concerned that the statement in the Supplemental Notice that the FAA "believe[s] the specific principles identified by the OIG are an appropriate construction of the revenue retention requirement" may lead to confusion over whether adherence to OMB Circular A–87 is mandatory for allocating costs to be paid by airport revenue.

Several airport operators were concerned that the FAA would not accept the allocation of costs in accordance with a Federally-approved cost allocation plan, but could review the plan to ensure that allocation of specific cost items meet the special revenue retention requirements. For example, one airport operator commented that the FAA's approach would impose on airport sponsors burdens and requirements in excess of the detailed requirements of OMB-Circular A–87, which are designed to ensure a reasonable and consistent cost allocation system. The airport proprietor proposed that such compliance with a federally-approved cost allocation plan be considered sufficient to satisfy the revenue retention requirement.

Another airport operator proposed that the FAA revise the policy to clarify that a specific cost, as opposed to a type of cost, cannot be treated as both a direct and an indirect cost. The airport operator offered as an example a city-owned and operated airport at which some police services are provided by officers assigned exclusively to the airport and other services are provided by general duty police officers. The commenter suggested that it should be permissible to charge the airport for the officers assigned exclusively to the airport as a direct cost and to charge for the general duty officers as an indirect cost allocation.

Additionally, this commenter proposed revising the policy to clarify that costs that are chargeable to one city department on a direct basis may be charged to other city departments on an indirect basis. The airport operator offered an example in which police are exclusively assigned to a city-owned airport, but are not exclusively assigned to other city departments. The commenter argued that it would be reasonable to charge the airport for police services as a direct cost, and to charge the other departments as an indirect cost allocation.

Several airport operators were also concerned that the supplemental policy implied that a local cost allocation plan must provide that all users for a service be billed equally. For example, ACI-NA and AAAE suggested that the requirement for consistent application should be interpreted to require the local government to go through the exercise of assessing indirect costs against all governmental departments, including those wholly funded by that governmental entity. Likewise, an airport operator requested that the FAA clarify that the supplemental policy does not mean that an airport sponsor must actually bill all of its General Fund agencies for certain municipal costs in order to be able to charge such costs to its airports. All of those airport proprietors that expressed concern over this proposed policy generally commented that this issue was considered and rejected by the Department of Transportation in the Second Los Angeles International Airport Rates Proceeding, Docket OST–95–474. According to the airport proprietors, the DOT recognized that in many cases sponsor agency operations are paid from a common General Fund. Under those circumstances, it is illogical and unnecessary for one General Fund agency to bill another General Fund agency for municipal services.

One airport operator proposed that the word "equally" be removed from VII.B.4 of the proposed policy. The commenter urged that the FAA allow airport sponsors the flexibility to allocate costs to various users on a reasonable, equitable basis relative to the benefits received, even though specific users may sometimes be treated differently. Returning to its example of police services, the commenter suggested that if the sponsor chooses not to charge a housing authority for costs of a special police unit assigned to that authority, it should be of no concern to the FAA as long as those costs are not then charged to the airport.

Another airport operator argued that each of its proprietary departments are unique and governed by different City Charter provisions; that they make different uses of city services; and have different financial arrangements with the sponsor's general fund. This commenter argued that treating the departments the same for cost allocation purposes because the departments are enterprise funds would, therefore, serve no valid purpose.

Several airport operators disagreed with FAA's proposed policy to prohibit the indirect cost allocation of general costs of government. Several commenters stated that the proposed policy would reverse longstanding practice at many airports and could be inconsistent with federally-approved cost allocation plans, which provide for the allocation of a share of indirect costs of various local government functions. One airport operator argued that there is no statutory basis for prohibiting the allocation of general costs of government, other than costs for particular identified services.

Finally, one airport operator commented that the proposed policy does not sufficiently clarify the appropriate allocations for fire and police stations that do not serve the airport exclusively. The airport operator proposed that policy explicitly permit a sponsor to allocate costs based on the intended purpose and value of the station to the airport, not its actual use. The airport operator argues that a more flexible approach could better implement the applicable statutory provision that prohibits "direct payments or indirect payments, other than payments reflecting the value of services and facilities provided to the airport."

Airlines: ATA supports the proposed policy clarification that no particular cost allocation methodology for indirect costs is preferred.

The Final Policy: The Final Policy reflects a different and simplified approach to indirect cost allocation that is intended to facilitate development of permissible cost allocation plans and the review of those plans in the single audit process. The Final Policy specifies that the cost allocation plans must be consistent with Attachment A of OMB Circular A–87. Attachment A sets forth general principles for developing cost allocation plans. Those principles are essentially a restatement of the principles proposed in the Supplemental Policy. By referring to Attachment A, the Final Policy establishes a standard that is well understood by airport cost accountants and by airport operators' independent auditors. The Final Policy does not require compliance with the other attachments to OMB Circular A–87, which include more rigid requirements and defines categories of grant recipient costs that are eligible and ineligible for reimbursement with Federal grant funds.

The Final Policy continues to specify that the costs allocated must themselves be eligible for expenditure of airport revenue under section 47107(b). Attachment A to OMB Circular A–87 provides principles for cost allocation methodologies. The cost items that may be charged to airport revenue are determined by the requirements of section 47107(b). Therefore, sponsors, and the FAA, cannot rely solely on compliance with OMB Circular A–87 to assure that the costs items charged to the airport in a Federally approved cost allocation plan are consistent with section 47107(b).

The Final Policy continues to specify that the airport must not be charged directly and indirectly for the same costs. The FAA is not persuaded that the example of police services offered by an airport sponsor requires a modification of this requirement. This provision is not intended to preclude both the direct and indirect billing in the situation cited by the commenter—where police services are provided to the airport on both an exclusive-use and a shared-use basis. In the cited example, it would be preferable to bill for police exclusively assigned to the Airport on a direct cost basis. It would be impossible, however, to bill for the shared-use police without engaging in some form of indirect cost allocation. The FAA did not intend the supplemental policy to preclude treatment of police services as both direct and indirect costs in these circumstances, only to preclude double billing on both a direct and indirect basis, for the same police costs.

Similarly, with respect to the second example of police services where the airport receives exclusive-use police services and other sponsor departments receive shared-use police services, the FAA did not intend the Supplemental Notice to preclude disparate billing methodologies. Inherent in Attachment A is that comparable units of a sponsoring government making comparable uses of the sponsor's services should have costs allocated and billed in a comparable fashion. The clarification noted above should address this situation as well. In the second example sited, the FAA would consider the sponsor departments receiving shared-use police services not to be comparable to the airport receiving exclusive use police services.

The Final Policy also provides that the allocation plan must not burden the airport with a disproportionate share of allocated costs, and requires that all comparable units of the airport owner or operator be billed for indirect costs billed to the airport. The FAA is unwilling to accept the suggestion that comparable users of a service may sometimes be treated differently for billing purposes, so long as the costs attributed to one unit of government are not then charged to the airport. The FAA believes that such practices would result in an unfair burden being placed upon the airport simply because of the airport's ability to pay.

This provision, however, is not intended to require a sponsor's General Fund activities to bill other General Fund activities for indirect costs that are properly allocable to those activities, if the airport is billed. The policy is clear that comparable billing for services is required only for comparable users.

Enterprise funds need not be treated as comparable to units of a sponsoring government financed from the sponsor's general fund, and comparable billing between enterprise funds and other units of government is not required. While the FAA may presume that enterprise funds are comparable to each other, an airport sponsor is free to demonstrate that particular enterprise funds are sufficiently different in material ways—such as the way they consume sponsor services or their overall financial relationships with the sponsor—to justify different practices in charging for indirect costs. The Final Policy does not further define comparability because decisions on comparability will depend on the specific circumstances of a sponsor. The Final Policy also explicitly permits the allocation of general costs of government and central services costs to the airport, if the cost allocation plans meets the Final Policy's requirements. As specified in the Final Policy, however, the allocation of these costs to the airport may require special scrutiny to assure that the airport is not being burdened with a disproportionate share of the allocated costs.

In addition, the FAA continues to recognize that use of airport revenue to pay some expenses not normally considered to be allowable pursuant to OMB Circular A–87, such as fire and police services, is consistent with the revenue retention requirement. If such costs are allocated as an indirect cost in accordance with the Final Policy, they will be considered by the FAA as acceptable charges.

The Final Policy is modified to permit the allocation of certain categories of a sponsor's general cost of government as an indirect charge to the airport. Such charges include indirect expenses of the Office of Governor of a State, State legislatures, offices of mayors, county supervisors, city councils, etc. An airport owner's or operator's central service costs may also be allocated to the airport. The Final Policy specifies that allocation of these categories of costs to the airport may require special scrutiny to assure that the airport is not being burdened with a disproportionate share of the costs.

The FAA proposed to prohibit the allocation of all general costs to the airport on the grounds that the payment of such costs with airport revenue would be inconsistent with the purpose of the revenue use restriction—to avoid subsidy of general sponsor governmental activity. It is clear from the comments that airports routinely pay for a share of the general costs the legislative and executive branches of the governmental unit of which the airport is a part under cost allocation plans prepared in accordance with GAAP. Further, the comments demonstrate that the payment of legislative and executive branch costs by airport revenue can be justified as a cost of the airport because the legislative and executive branches have direct, tangible oversight and control responsibilities for the airport, and their activities provide direct benefits to the airport, such as in the areas of funding, capital development, and marketing.

In addition, under the Final Policy, the costs of shared-use facilities must be allocated to all users of the facility, even if the original purpose of constructing the facility was to provide exclusive use or benefit to the airport. While a sponsor-owned facility may have originally been established for the benefit of the airport, the FAA believes that the purpose of the facility can change from time to time based on local circumstances and that allocation of costs should be based on current purpose, as well as use. The FAA may consider a number of factors in determining current purpose, including current use, design and functionality.

b. Standard of Documentation for the Reimbursement of Cost of Services and Contributions to Government Entities

In its administration of airport agreements, the FAA is not normally concerned with the internal management or accounting procedures used by airport owners. As a matter of policy and procedure, the FAA has consistently required that reimbursement of capital and operating costs of an airport made by a government entity must be clearly supportable and documented.

Neither the Proposed Policy nor the Supplemental Notice explicitly discussed a standard of documentation that must be achieved for a sponsor to claim reimbursement for services and/or contributions it provided to the airport. However, events subsequent to the issuance of both documents indicate a need for FAA to provide specific guidance on the standard of documentation that will support the expenditure of airport revenues.

In the examination of a possible diversion of airport revenue by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys and Palmdale Airports (FAA Docket No. 16–01–96), the FAA reviewed the underlying documentation which the City of Los Angeles offered to support the payment of approximately $31 million in airport revenue to the Los Angeles' general fund as the reimbursement of sponsor contributions and services provided to the airport. In the Director's Determination dated March 17, 1997, the FAA stated its standard of documentation to justify such reimbursements. Accordingly, the

FAA is including that standard in the Final Policy.

The Final Policy requires that reimbursements for capital and operating costs of the airport made by a government entity, both direct and indirect, be supported by adequate documentary evidence. Adequate documentation consists of underlying accounting records and corroborating evidence, such as invoices, vouchers and cost allocation plans, to support all payments of airport revenues to other government entities. If this underlying accounting data is not available, the Final Policy allows reimbursement to a government entity based on audited financial statements, if such statements clearly identify the expenses as having been incurred for airport purposes consistent with the Final Policy statement. In addition, the Final Policy provides that budget estimates are not a sufficient basis for reimbursement of government entities. Budget estimates are just that—estimates of projected expenditures, not records of actual expenditures. Therefore, budget estimates cannot be relied on as documentary evidence to show that the funds claimed for reimbursement were actually expended for the benefit of the airport.

Indirect cost allocation plans, however, may use budget estimates to establish pre-determined indirect cost allocation rates. Such estimated rates must, however, be adjusted to actual expenses in the subsequent accounting period.

5. Prohibited Uses of Airport Revenue

a. Impact Fees/Contingency Fees

The Proposed Policy prohibited the payment of impact fees assessed by a nonsponsoring governmental body that the airport sponsor is not obligated to pay or that exceed such fees assessed against commercial or other governmental entities. The Supplemental Notice did not modify this provision. The term "impact fees" was not defined in the Proposed Policy.

Airport operators: One Florida airport sponsor stated that impact fees should be allowable to either a sponsoring or non-sponsoring governmental body. Another commented that the language referring to a "non-sponsoring" governmental body was vague and confusing. Within the state of Florida, impact fees are typically administered by a non-sponsoring government body. It was stated that the wording did not seem to prohibit impact fee payments when assessed by a "sponsoring" agency, or impact fees that an airport sponsor is obligated to pay.

The Final Policy: For clarity, the Final Policy is modified to delete the reference to "non-sponsoring" governmental body and to delete the reference to fees the sponsor is not obligated to pay. In addition, the FAA is adding a statement that in appropriate circumstances, airport revenue may be used to reimburse a governmental body for expenditures that the imposing government will incur as a result of on-airport development, based on actual expenses incurred.

The effect of the deletions is to broaden the prohibition to all impact fees, within the meaning of the term used in the policy statement. As such, the deletions are consistent with the statutory prohibition on payment of airport revenues that do not reflect the value of services or facilities actually provided to the airport. Until a governmental unit undertakes the activity for which the impact fee is intended to compensate, it is impossible to know with certainty whether the impact fee is an accurate reflection of the cost of the activity attributable to the airport or its value to the airport, or even that the activity will occur. This situation is true regardless of both the status of the governmental unit as airport sponsor and the status of the fee as discretionary. The FAA understands that many local laws or regulations authorizing impact fees do not require the fees to be spent to mitigate or accommodate the results of the airport action that triggers the fee. The FAA has no basis for assuring the payment of impact fees would be consistent with the purpose of section 47107(b)—to prevent an airport sponsor who received Federal assistance from using airport revenues for expenditures unrelated to the airports.

The broader prohibition is consistent with applicable FAA policies. Longstanding FAA policy has permitted a sponsor to claim reimbursement from airport revenue only for "clearly supportable and documented charges, * * * supported by documented evidence." FAA Order 5190.6A, par. 4-20.a(2)(c)(ii). An impact fee assessed before the imposing government incurred any expenses to accommodate airport growth would not meet this standard.

In addition, a standard of documentation required by the Final Policy applies to all expenditures of airport revenues subject to section 47107(b), including impact fee payments. That standard requires that expenditures of airport revenues be supported by data on the actual costs incurred for the benefit of the airport, not by budget or other estimates, which impact fees essentially are. The Final Policy will allow submission of those assessed fees resulting from the proposed development when the amount of the fees become fully quantifiable, as provided for in Section IV of the Final Policy, following implementation by the imposing government of the mitigation measures for which the impact fee is assessed. At that time, the FAA can best determine whether the fees assessed against airport revenue satisfy the requirements of section 47107(b) and this policy. In unusual circumstances, the FAA may permit a prepayment of estimated impact fees at the commencement of a mitigation project, if the funds are necessary to permit the mitigation project to go forward, so long as there is a reconciliation process that assures the airport is reimbursed for any overpayments, based on actual project costs, plus interest.

However, the Final Policy does take into account the potential that an airport operator may be required by state or local law to finance the costs of mitigating the impact of certain airport development projects undertaken by the airport sponsor. Therefore, where airport development causes a government agency to take an action, such as constructing a new highway interchange in the vicinity of the airport, airport revenues may be used equal to the prorated share of the cost. In all cases, the action must be shown to be necessitated by the airport development. In the case of infrastructure projects, such impact mitigation must also be located in the vicinity of the airport. This proximity requirement is not being applied to all mitigation measures because some mitigation measures—especially certain environmental mitigation measures—may not occur in the vicinity of the airport.

The Final Policy also acknowledges the possibility that an airport operator may be bound by local or state law to use airport revenue to pay an impact fee that is prohibited by this policy. The Final Policy states that the FAA will consider any such local circumstances in determining appropriate corrective action.

b. Subsidy of Air Carriers

As discussed in Section V "Permitted Uses," the Supplemental Notice acknowledged the fact that Congress, in the 1994 FAA Authorization Act, effectively authorized the use of airport revenue 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." At the same time, that statutory provision also limited the scope of acceptable promotional activity.

In the Supplemental Notice, the FAA proposed new policy language that more clearly addressed the kinds of promotional and marketing activities that are and are not legitimate operating costs of the airport under 47107(b). In the Supplemental Notice, Section VIII(I), the FAA proposed that "[d]irect subsidy of air carrier operations" is a prohibited use of airport revenue because it is not considered a cost of operating the airport. The FAA drew a distinction between methods of encouraging new service. Supplemental Notice proposed to allow the use of airport revenue to encourage passengers to use the airport through promotional activities, including cooperative promotional activities with airlines and to allow airport operators to enhance the viability of new service through fee incentives, on the one hand. As noted, the FAA proposed to prohibit the use of airport revenue to simply buy increased use of the airport by paying an air carrier to operate aircraft, on the other. The FAA considered the former activities to be a permitted expenditure for the promotion and marketing of the airport and the latter to be a prohibited expenditure for general economic development. The FAA explained in the preamble to the Supplemental Notice that neither promotional activities nor promotional fee discounts would be considered a prohibited direct subsidy of airline operations. 61 FR at 66738.

Airport operators: In their comments on the Supplemental Notice, ACI–NA/AAAE state that, generally, an expenditure or activity should not be considered revenue diversion if there is a reasonable expectation that such an expenditure or activity will benefit the airport. Furthermore, they note that the law does not single out direct air carrier subsidy or fee waivers for more stringent scrutiny than other marketing activities. This argument in favor of the reasonable business judgement of the airport management should be applied to the use of airport revenue for promotion and marketing not unrelated to the airport, including direct air carrier subsidies and fee waivers. ACI/AAAE stated "both forms of financial assistance should be permitted, if an airport has a reasonable expectation that the subsidy will benefit the airport and the subsidy or discount is made available on a non-discriminatory basis."

ACI/AAAE further stated that there is no real distinction between direct subsidy and fee waivers, as well as none between direct subsidy and the residual airport costing methodologies, making the distinction in the policy illogical. They predicted that the proposed policy is likely to promote detrimental effects, including eliminating air service to some small airports, increasing congestion at dominant hubs at the expense of medium-sized airports, reducing potential competition and raising fares.

Several individual airport operators concurred with the ACI–NA/AAAE position. One operator commented that any subsidies should be permitted, as long as the airport remains self-sustaining and the subsidies are not included in airline costs in calculating landing fees, terminal rents and other user charges.

Another airport operator, the LNAA, which is engaged as a party in a 14 CFR Part 13 investigation regarding its former air carrier subsidy program, commented that there is no real difference between an airport making a direct subsidy to an air carrier or waiving fees.

Two airport operators expressed different views. One operator agreed that airport revenues should not be used to subsidize new air carrier service because the practice of subsidization could lead to destructive competition for air service among airports. Another airport operator stated that it "does not currently engage in nor does it contemplate any form of direct subsidy to air carriers in exchange for air service." This operator considers the Supplemental Notice to provide adequate flexibility to airport operators to foster and promote air service development.

Air carriers: The ATA strongly opposed the assertion that direct subsidies of airline operations with airport revenue may be considered to be operating costs of the airport and would extend the prohibition to indirect subsidies. They argued that the distinction in the proposed policy that allows fee waivers under certain circumstances, but prohibits direct subsidy is illogical. Both result in revenue diversion, whether the beneficiary is "a start up carrier, a new entrant in a market, or an existing carrier at an airport." The ATA further commented, in connection with joint marketing endeavors, that the permissible "promotional period" should be defined, as should the scope of permissible marketing activities.

The Final Policy: The FAA has clarified the policy provision on the direct subsidy of air carriers with airport revenue; however, the prohibition remains, as does the distinction between direct subsidy and the waiving of fees and the joint promotion of new service. The FAA has applied the test of section 47107(b) to determine to what extent various kinds and amounts of promotional and marketing activities can be considered legitimate operating costs of the airport.

In pursuit of uniformity, the FAA has integrated references to the section on the permitted uses of airport revenue, as well as to the section on self-sustainability, to assist airport operators in pursuing reasonable strategies to promote the airport and provide incentives to encourage new air service. Among other things, marketing of air service to the airport, and expenditures to promote the airport to potential air service providers can be treated as operating costs of the airport. Of course, support for marketing of air service to the airport must be provided consistently with grant assurances prohibiting unjust discrimination.

The setting of fees is a recognized management task, based on a number of considerations, including the airport management's assessment of the services needed by airport consumers, and the airport management's assessment of the financial arrangements necessary to secure that service. The FAA has consistently maintained that fee waivers or discounts involving no expenditure of airport funds raise issues of compliance with the self-sustaining rate structure requirement, not the revenue-use requirement. The Final Policy therefore, permits fee waivers and discounts during a promotional period. The waiver or discount must be offered to all users that are willing to provide the type and level of new service that qualifies for the promotional period. The Policy limits the fee waiver or discount to promotional periods because of the requirement that the airport maintain a self-sustaining airport rate structure. In addition, indefinite fee waivers or discounts could raise questions of compliance with grant assurances prohibiting unjust discrimination. The Final Policy does not define a permitted promotional period. There is too much variation in the circumstances of individual airports throughout the country to permit adoption of a single national definition of a suitable promotional period.

In contrast, the direct payment of subsidies to airline involves the expenditure of airport funds and hence raises questions under the revenue-use requirements. The FAA continues to believe that the costs of operating aircraft, or payments to air carriers to operate certain flights, are not reasonably considered an operating cost of an airport. In addition, payment of subsidy for air service can be viewed as general regional economic development and promotion, rather than airport promotion. Use of airport revenue for these purposes is expressly prohibited under the terms of the 1994 FAA Authorization Act. The Final Policy does not preclude a sponsor from using funds other than airport revenue to pay airline subsidies for new service, and it does not preclude other community organizations— such as chambers of commerce or regional economic development agencies—from funding a program to support new air service. Therefore, the Final Policy maintains the distinction between direct subsidy of air carriers and the waiving of fees, and prohibits the former.

6. Policies Regarding the Requirement for a Self-Sustaining Rate Structure

As noted in the summary, the Final Policy contains a separate section on the requirement that an airport maintain a rate structure that makes the airport as self-sustaining as possible under the circumstances at the airport, to provide more comprehensive guidance in a single document. The 1994 FAA Authorization Act directed the FAA to adopt policies and procedures to assure compliance with both the revenue uses and self-sustaining airport rate structure requirement. The general guidance repeats the guidance appearing in the Department of Transportation Policy Statement Regarding Airport Rates and Charges, 61 FR 31994 (June 21, 1996). The Final Policy interprets the basic requirement and addresses exceptions to the basic rule for leases of airport property at nominal or less-than fair market value (FMV) to specific categories of users.

Each federally assisted airport owner/operator is required by statute and grant assurance to have an airport fee and rental structure that will make the airport as self-sustaining as possible under the particular airport circumstances, in order to minimize the airport's reliance on Federal funds and local tax revenues. The FAA has generally interpreted the self-sustaining assurance to require airport sponsors to charge FMV commercial rates for nonaeronautical uses of airport property. However, in the case of aeronautical uses, user charges are also subject to the standard of reasonableness. In applying the two standards together for aeronautical property, the FAA has considered it acceptable for an airport operator to charge fees to aeronautical users that are less than FMV, but more than nominal charges. The FAA defines "aeronautical use" as any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations. Policy Statement Regarding Airport Fees, Statement of Applicability, 61 FR at 32017.

Many entities lease airport property for aeronautical and nonaeronautical uses at nominal lease rates. The FAA has determined that nominal leases to many of these entities is consistent with the requirement to maintain a self-sustaining airport rate structure. The Final Policy provides specific guidance regarding nominal leases for six categories of users. This guidance is discussed below.

a. Use of Property at Less Than FMV for Community/Charitable/Recreational Use

Airport operators: The ACI–NA/AAAE agree with the general conclusion that use of airport property for community and charitable purposes at less than FMV should be permissible. However, they argued that the criteria listed in the Supplemental Notice are too narrow. Other criteria should be considered, and an airport should be required to provide no more than one justification. The ACI–NA/AAAE specifically mentioned aeronautical higher education institutions and not-for-profit air and space museums as additional permitted uses, based on H.R. Rep. 104–714, 104th Cong. 2nd Sess. at 39 (1996) reprinted in 1996 USCC.A.N. 3676.

Individual airport operators also requested more flexibility in various forms. One operator suggested that the Supplemental Notice establishes an unnecessary two-part test which many community uses of airport property will fail to satisfy. Another operator argued that such airport property use should not be limited to temporary arrangements, e.g., parks and baseball fields, which indicates that only uses that allow property to be returned rather quickly to the airport inventory would be permitted.

In contrast, another airport operator suggested that, in order to place less burden on the airport operator, such uses should be limited in scope and that the below-market value amount that an airport operator could charge for such usage should be established as some percentage of the appraised value of the property.

Air carriers: The ATA agrees in principle with the concept of limited use of airport property for certain specified community purposes at less than FMV. However, ATA stated that the Supplemental Notice lacks specificity and that its application would consequently be inconsistent with the self-sustaining and revenue-use requirements. The ATA proposed to narrow the first element of the standard to permit contribution of property if the property is put to a general public use desired by the local community and the use does not adversely affect the capacity, safety or operations of the airport. The ATA would narrow the second test by permitting the use of property that is expected to generate no more than minimal revenue, which the ATA would define as minimal revenue equal to or less than 20 percent of revenue that could be earned by similar airport property in commercial or air carrier use. When the property could be expected to earn more than this defined minimal amount, the ATA would permit less than FMV rental if the revenue earned by the community use approximates the revenue that would otherwise be generated.

The ATA would also require that the community use be subject to periodic review and renewed justification and that the airport proprietor retain absolute discretion to reclaim the property for airport use.

Other commenters: A member of the United States House of Representatives expressed concern that the policy, if adopted as proposed, does not provide sufficient flexibility to airport operators to be good neighbors within their community. This commenter suggested that in rural areas, requiring community organizations to pay FMV could reduce airport revenue as paying community organizations are forced off of the airport by higher rents and no new tenants are found.

Final Policy: The Final Policy generally permits below-FMV-rental of airport property for community uses, but generally limits the uses to property that is not potentially capable of producing substantial income and not needed for aeronautical use. Consistent with the suggestions of the ATA, the permitted community uses of such property will be limited to those that are compatible with the safe and efficient operation of the airport and which are for general local use. In addition, the community use should not preclude reuse of the property for airport purposes, if the airport operator determines that such reuse will provide greater benefits to the airport than the continued community use. Leases to private, non-profit organizations generally will be required to be at market rates unless the sponsor can demonstrate a "community goodwill" purpose to the lease, or can demonstrate a benefit to aviation and the airport, as discussed below.

While the Final Policy states that property provided for community use at no charge should be expected to produce no more than minimal revenue, we are not adopting a definition of minimal. For property that is capable of generating more than minimal revenue, a sponsor could charge less than FMV rental rates for community use, if the revenue earned from the community use approximates that revenue that could otherwise be generated. Providing such property for community use at no charge would not be appropriate.

The FAA has determined that this approach to community use strikes an appropriate balance between the needs of the airport to be a good neighbor and the Federal requirements on the use of airport revenue and property. This formulation provides substantial flexibility to airport operators. At the same time, the self-sustaining requirement and the policy goal of the revenue-use requirement justify some limitation on local discretion in this area.

The requirement that community use not preclude reversion to airport use is based on both the self-sustaining requirement and the airport sponsor's basic AIP obligation to operate a grant-obligated airport as an airport.

Under the Final Policy, the lease of airport property to a unit of the sponsoring government for nonaeronautical use at less than fair market value is considered a prohibited revenue diversion unless one of the specific exceptions permitting below-market rental rates applies. If a sponsor's use of airport property qualifies as community use, and the other requirements for community-use leases are satisfied, the FAA would not object to a lease at less than fair market value. Qualified uses could include park or recreational uses or other public service functions. However, such use would be subject to special scrutiny to ensure that the requirements for below-FMV community use is satisfied. The community use provision of the Final Policy does not apply to airport property used by a department or subsidiary agency of the sponsoring government seeking an alternative site for the sponsor's general governmental purposes at less-than-commercial value. For example, a city cannot claim the community use exception for a nominal value lease of airport property for a municipal vehicle maintenance garage. Such usage, while beneficial to the taxpaying citizens of the sponsoring government, would be difficult to justify as benefiting the airport by improving the airport's acceptance in the community.

b. Not for Profit Aviation Museums

The DOT OIG has cited instances in which an aviation museum at a federally assisted airport is leasing airport property at less than a fair market rental rate. In clarifying the revenue diversion prohibitions recommended for inclusion in the FAA Authorization Act of 1996, the House Transportation and Infrastructure Committee urged the FAA to take a flexible approach to the lease of airport property at below-market rates to not-for-profit air and space museums located on airport property. H.R. Rep. No. 104–714, 104th Cong. 2nd Sess. at 39 (1996) reprinted in 1996 U.S.C.C.A.N. 3676 (House Report). The Committee recommended that this type of rental arrangement should not be considered revenue diversion because of the contribution that such museums make to the understanding and support of aviation.

One airport operator commented that long-term, less-than-market value rental arrangements, particularly for leaseholds encompassing permanent facilities, should be permitted when such arrangements serve a clear and valuable aviation-related purpose. This comment could include aviation museums.

One operator of a not-for-profit aviation museum urged the FAA to permit nominal rate leases. This operator stated that a FMV-based lease for its museum property would double its current operating budget.

The Final Policy: The Final Policy permits airport operators to charge reduced rental rates and fees, including nominal rates, to not-for-profit aviation museums, to the extent that the reduction is reasonably justified by the tangible and intangible benefits to the airport or civil aviation. This provision recognizes the potential for aviation museums to provide benefits to the airport by stimulating understanding and support of aviation, consistent with the suggestion contained in the House Report, U.S.C.C.A.N. 3676. Benefits to the airport may include any in-kind services provided to the airport and airport users by the aviation museum. The limitation to not-for profit museums is consistent with the requirement for a self-sustaining airport rate structure, because there is no reason to give for-profit aviation museums preferential treatment over other commercial aeronautical activities. All for-profit aeronautical activities provide some benefit to the airport, by making it more attractive for potential airport users. If this benefit were a sufficient reason to permit reduced rental rates to commercial aviation businesses on a routine basis, the requirement for a self-sustaining airport rate structure would be virtually unenforceable.

The Final Policy permits but does not require below-market rental rates, including nominal rates. The airport operator is free to treat a qualified aviation museum as it would any other aeronautical activity in setting rental rates and other fees to be paid by the museum.

c. Aeronautical Higher Education Programs

The DOT OIG has cited instances in which aeronautical secondary and post-secondary education programs at federally assisted airports are leasing airport property at less than a fair market rental rate.

In the House Report, 1996 U.S.C.C.A.N. 3676, the House Transportation and Infrastructure Committee also urged the FAA to take a flexible approach to aeronautical higher education programs located on airports. The Committee recognized that some federally obligated airports have leased property to non-profit, accredited collegiate aviation programs, and that facilitating these programs will help build a base of support for airport operations by giving students, who will be the future users of the national airspace system, easy access to aviation facilities.

The Final Policy: The Final Policy permits reduced rental rates, including nominal rates, to not-for-profit aeronautical secondary and post-secondary education programs conducted by accredited educational institutions, to the extent that the reduction is justified by tangible or intangible benefits to the airport or to civil aviation. This treatment is justified for the same reason that reduced rental rates and fees to certain aviation museums are permitted. Again, the benefits may include in-kind services provided to the airport and airport users. As with aviation museums, the educational institution and education program must be not-for-profit. For-profit aviation education, such as flight-training, is a standard commercial aeronautical activity at many airports. Permitting reduced rental rates and fees to for-profit aviation education programs would seriously undermine compliance with the self-sustaining requirement and could raise questions of compliance with the grant assurances prohibiting unjust discrimination.

The Final Policy permits but does not require below-market rental rates, including nominal rates. The airport operator is free to treat a qualified not-for-profit aeronautical education program as it would any other aeronautical activity in setting rental rates and other fees to be paid by the education program.

d. Civil Air Patrol Leases

Reduced-rental leases, including nominal leases, to the Civil Air Patrol/ United States Air Force Auxiliary (CAP) at a number of airports have also been criticized in OIG audits. As a result of this criticism, some airport operators have been seeking higher rents from the CAP when leases have come up for renewal.

In its comments, the CAP contends that the current standard airport industry practice of permitting CAP use of airport property for a nominal rent confers substantial benefits to the airport and, in general, to the aviation community. The CAP, therefore, requests that a policy be adopted which would formally permit CAP units to continue to occupy facilities on federally obligated airports at a nominal rent, whether under formal lease arrangements, or otherwise, at the discretion of the airport owner/operator.

The Final Policy: The Final Policy permits reduced rental rates and fees to CAP units operating at the airport, in recognition of the benefits to the airport and benefits to aviation similar to those provided by not-for-profit aviation museums and aeronautical secondary education programs. As with other not-for profit-aviation entities, the reduction must be reasonably justified by benefits to the airport or to civil aviation. In-kind services to the airport and airport users may be considered in determining the benefits that the CAP unit provides. In addition, this treatment of the CAP, which has been conferred with the status of an auxiliary to the United States Air Force, is not identical to the treatment provided to military units in the Final Policy, as discussed below, but is consistent with that treatment.

The reduced rental rates and fees are available only to those CAP units operating aircraft at the airport. For CAP units without aircraft, a presence at the airport is not critical. The airport operator can accommodate those CAP units with property that is not subject to Federal requirements on maintaining a self-sustaining rate structure, without compromising the effectiveness of the CAP units. Of course, if such units provide in-kind services that benefit the airport, the value of those services may be recognized as an offset to FMV rates.

The Final Policy permits but does not require nominal rental rates. The airport operator is free to treat a qualified not-for-profit aeronautical CAP lease as it would any other aeronautical activity in setting rental rates and other fees to be paid by the education program.

e. Police/Firefighting Units Operating Aircraft at the Airport

Many airports host police or fire-fighting units operating aircraft (often helicopters). The OIG has frequently criticized reduced rate or no-cost leases to these units of government as inconsistent with the self-sustaining and revenue-use requirements.

The Final Policy requires the airport operator to charge reasonable rental rates and fees to these units of government. In effect, these units of government must be treated the same as other aeronautical tenants of the airport. This treatment is consistent with the policy's general approach toward dealings between units of government—fees should be set at the level that would be produced by arm's-length bargaining. The treatment is also justified because police and fire-fighting aircraft units provide benefits to the community as a whole, and not necessarily to the airport. However, as with other police and fire-fighting units located at an airport, the policy does allow rental payments to be offset to reflect the value of services actually provided to the airport by the police and fire-fighting aircraft units.

f. Use of Property by Military Units

The US Air Force Reserve and the Air National Guard both have numerous flying units located on federally obligated, public-use airports. The majority of these aircraft-operating units are located on leased property at civilian airports established on former military airport land transferred by the US Government to the airport owner/ operator under the Surplus Property Act of 1944, as amended, or under other statutes authorizing the conveyance of surplus Federal property for use as a public airport. Frequently, the favorable lease terms were contemplated in connection with the transfer of the former military property and may have been incorporated in property conveyance documents as obligations of the civilian airport sponsor. As with other reduced-rate leases, these arrangements have been criticized in individual OIG audits.

The Final Policy: The Final Policy provides that leasing of airport property at nominal lease rates to military units with aeronautical missions is not inconsistent with the requirement for a self-sustaining rate structure. The Department of Defense (DOD) has a substantial investment in facilities and infrastructure at these locations, and its operating budgets are based on the existence of these leases. Moving those facilities upon expiration of a lease or the payment of FMV rent for facilities to support military aeronautical activities required for national defense and public safety would be beyond the capability of the DOD without additional legislation and enlargement of the DOD operating budget. In all of the enactments on the self-sustaining rate structure requirement and use of airport revenue and the accompanying legislative history, the FAA can find no indication that Congress intended the airport revenue requirements to be applied in a way to disrupt the United States' defense capabilities or add significantly to the cost of maintaining those capabilities. Moreover, Congress specifically charged the FAA, in 49 U.S.C. § 47103, with developing a national plan of integrated airport systems (NPIAS) to meet, among other things, the country's national defense needs. Inclusion in the NPIAS is a prerequisite for eligibility for AIP funding. Thus, Congress clearly contemplated a military presence at civil airports. Therefore, the FAA will not construe the requirement for a self-sustaining airport rate structure to prohibit nominal leases to military units operating aircraft at an airport.

The Final Policy permits but does not require nominal rental rates. The airport operator is free to treat a qualified military unit as it would any other aeronautical activity in setting rental rates and other fees to be paid by the military unit.

7. Lease of Airport Property at Less Than FMV for Mass Transit Access to Airports

The Supplemental Notice proposed that airport property could be made available at less than fair rental value for public transit terminals, rights-of-way, and related facilities, without being considered in violation of the requirements governing airport finances, under certain conditions. The transit system would have to be publicly owned and operated (or privately operated by contract on behalf of the public owner) and the transit facilities directly related to the transportation of air passengers and airport visitors and employees to and from the airport. Twenty-one responses addressed this issue.

Airport commenters: The airport operators concur with the principle of making airport land available for mass transit at rates below fair market value. ACI–NA/AAAE stated that the determination to use airport property for a transit terminal, transit right-of-way, or related facilities at less than fair rental value is consistent with the grant assurance requiring airports to be self-sustaining.

Air carriers: The ATA asserted that FAA has exceeded its statutory authority in the proposal. ATA's considers transit facilities to be like commercial business enterprises, because they occupy airport property and charge their customers for their services. ATA also stressed that airport transit facilities are non-aeronautical facilities which are not "directly and substantially related to the air transportation of passengers or property."

Other commenters: Transit operators, including a transit operator trade association generally supported the position in the Supplemental Notice.

Another commenter stated that making airport property available at less than fair market rental value or making airport revenue available for transit facilities equates to the airport paying a hidden taxation. This commenter argued that it was not the intention of Congress, when it passed the AAIA, to have grant funds used to subsidize, either directly or indirectly, any activity that provides no benefit to air travel.

The Final Policy: The Final Policy incorporates the provision proposed in the Supplemental Notice, with a technical correction to include transit facilities use for the transportation of property to or from the airport. The FAA does not consider public transit terminals to be the equivalent of commercial business enterprises. Rather, they are more like public and airport roadways providing ground access to the airport. Generally speaking, the FAA does not construe the self-sustaining assurance to require an airport owner or operator to charge for roadways and roadway rights-of-way at FMV.

Moreover, even though publicly-owned transit systems charge passengers for their services, they generally operate at a loss and are subsidized by general taxpayer revenue. Charging fair market value for on airport facilities would thus burden general taxpayers with the costs of providing facilities used exclusively by transit passengers visiting the airport. Therefore, a requirement to charge FMV would not further the purpose of the self-sustaining assurance—to avoid burdening local taxpayers with the cost of operating the airport system.

a. Private Transit

ACI–NA/AAAE and four airport operators commented that private transit operators should have treatment equal to public transit operators. They argued that the concepts of public-private partnerships, and privatization of transportation facilities, may be realities in the not-too-distant future. Moreover, private ownership would not detract in the least from the functions identified in the Notice for these facilities, such as bringing passengers to and from the airport. They also noted that the language in the AIP Handbook (Order 5100.38A, Section 6) does not specifically exclude private operators. The language states transit facilities will be allowable provided they will primarily serve the airport.

One state Department of Transportation also urged that reduced rental rates should be offered to privately-owned and operated transit systems on the same basis as publicly-owned systems.

Final Policy. The Final Policy retains some distinctions between privately and publicly owned systems. In general, privately-owned systems are more analogous to other ground transportation providers—private taxis and limousine services, rental car companies—and even private parking lot operators. These entities are commercial enterprises that operate for profit and are a significant source of revenue for the airport. Most importantly, they are not supported by general taxpayer funds, and charging FMV would not raise questions of burdening local taxpayers with the cost of the airport.

However, the FAA is aware that, in many communities with no publicly-owned bus systems or very limited systems, privately-owned bus systems fulfill the role of providing public transit services to the airport. Accordingly, the FAA is revising the Final Policy to permit an airport operator to provide airport property at less than FMV rates to privately-owned systems in these limited circumstances.

b. Airport Passengers

Nine airport commenters addressed the proposed requirement that transit facilities be directly related to the transportation of air passengers and airport visitors and employees to and from the airport to qualify for less-than-FMV rentals. The commenters argue that the provision is too narrow by restricting the transit service to air-passengers and airport visitors and employees. One airport operator states that airport sponsors must have the flexibility to build airport transit systems that principally serve airport passengers, employees and other users but which may also secondarily transport some nonairport users. Two airport operators with general-use rail transit systems planned or operating on or near their airports argue that the airport benefits from improved ground access, reduced traffic congestion and improved air quality of general use systems and that rent-free property should, therefore, be provided to general use systems.

Final Policy: The Final Policy incorporates the language of the Supplemental Notice. That language does not preclude any use of transit facilities constructed on airport property by nonairport passengers if the property is to be leased at less-than-FMV. The requirement that the facilities be "directly related" to the airport does not equate to a requirement that the facilities be "exclusively used" for airport purposes. However, if the intended use of a facility is not exclusive airport use, some rental charge may be necessary to reflect the benefits provided to the general public. The determination on whether the facilities are "directly related" will be made on a case-by-case basis.

It appears that some of the concern about this issue was generated by the language in the preamble, which referred to transit facilities "necessary for the transportation of air passengers, airport visitors and airport employees to and from the airport." The preamble offered a maintenance/repair facility as an example of facilities that would not qualify. The FAA is not convinced that the benefits to the airport of having such facilities on the airport is sufficient to justify less-than-FMV rental rates. However, as noted, the FAA does not construe the policy language "facilities directly related the transportation of [airport passengers]" to require that the facilities be used exclusively by airport passengers.

8. Military Base Conversions Issues

In its comments to the Proposed Policy, one airport operator argued that using airport revenue to assist in development of revenue-generating properties on former military bases that are converted to civil airports should not be considered a prohibited use of revenue.

In addition, ACI–NA/AAAE state that a base closure and conversion to civilian use often results in the existence of significant recreational facilities on property owned by an airport. In regard to these facilities on converted military bases, ACI/AAAE stated, "[a] leasing arrangement whereby a municipality assumes all liability and operating expenses in exchange for a no-revenue lease is beneficial to the airport and should not be prohibited."

Final Policy: The Final Policy provides for no special treatment of converted military bases with respect to airport revenue use, and no special provisions are included in the final policy.

The FAA policy on the use of public and recreational use of property will be consistently applied to airports whether or not they are former military bases. Ordinarily, airport revenue may not be used to finance the costs of public and recreational facilities at the airport, just as airport revenue may not be used to develop other facilities not needed for the airport, even if those facilities will generate revenue for the airport. In addition, unless the recreational facilities qualify under the community-use exception, the airport operator would be expected to receive FMV-based rental payments for the recreational or public property. Operational costs borne by a municipality as a result of a base conversion can be considered in the analysis of whether a reduced rent is justified by tangible or intangible benefits to the airport.

9. Enforcement Policy, Whether to Impose Civil Penalty Even if Funds are Returned

The Proposed Policy provided that if the FAA received information that improper use of airport revenue had occurred, the FAA would investigate the matter and attempt to resolve the issue informally. The matter could be resolved if the sponsor persuaded the FAA that the use of airport revenue was not improper, or if the sponsor took corrective action (which usually would involve crediting the diverted amount to the airport account with interest). The proposed policy provided that the FAA would propose enforcement action only if the FAA made a preliminary finding of noncompliance and the sponsor had failed to take corrective action. The Proposed Policy outlined the enforcement actions available to the FAA as of the date of publication. The actions included: (1) withholding of new AIP grants and payments under existing grants (49 USC §§ 47111(e) and (d), respectively); (2) withholding of new authority to impose PFCs (49 USC 47111(e)); (3) withholding of all Federal transportation funds appropriated in Fiscal Years 1994 and 1995 (as provided in the Department of Transportation appropriation legislation for those years); (4) assessment of civil penalties not to exceed $50,000 (49 USC § 46301); and (5) initiation of a civil action to compel compliance with the grant assurances (49 USC § 47111(f)).

The Proposed Policy outlined the administrative procedural rules applicable to airport compliance matters at the time of publication, 14 C.F.R., Part 13 "Investigation and Enforcement Procedures."

Airport operators: ACI–NA and AAAE strongly urged the FAA to provide in the final policy that remittance of any diverted amounts, together with associated interest, should be sufficient to "cure" instances of revenue diversion, regardless of how those instances come to the attention of the FAA. In particular, a non-airport party should not be given the capacity, through the filing of a formal compliant, to eliminate an airport's ability to cure the problem.

Air carriers: ATA suggested that the proposed policy should be strengthened, backed up by a stronger enforcement policy and aggressive monitoring and vigorous enforcement action. ATA additionally argued that FAA should promulgate one rule that sets forth in detail the substantive requirements regarding revenue retention and diversion and a separate compliance and enforcement policy document.

ATA objected that the proposed policy continues to provide a passive monitoring procedure and this approach is not sufficient to provide prompt and efficient enforcement. IATA objected that the Proposed Policy does not promote prompt or effective enforcement.

ATA suggested that the FAA establish a formal compliance monitoring and inspection program that includes compliance monitoring and audits/inspections similar to those it conducts at certificated airlines, such as for drug and alcohol testing. Further, ATA stated that FAA's enforcement policy should result in civil penalties being assessed with the same vigor with which they are assessed against airlines for alleged regulatory violations. In addition, ATA urged that FAA should maintain the threat of assessing civil penalties for each day an airport or sponsor is in violation of the revenue-use requirement and for each day a sponsor fails to repay amounts determined to have been diverted unlawfully. IATA similarly supported assessment of the maximum civil penalty for each instance of unlawful revenue use.

The Final Policy: After publication of the Proposed Policy, the FAA Reauthorization Act of 1996 mandated new remedies for improper use of airport revenues and new compliance monitoring programs. The Final Policy has been modified to reflect the new requirements. Implementation of the requirements will result in more active and systematic monitoring of airport revenue use and more systematic resolution of questionable airport practices, as requested by the ATA and the IATA. It should be noted that the FAA had already assumed a more active role in monitoring through the implementation of the financial reporting requirements of the 1994 FAA Authorization Act.

In accordance with the requirements of the 1996 FAA Reauthorization Act, the Final Policy reflects the clear congressional intent that the FAA focus compliance efforts on the lawful use of airport revenue. The FAA will use all means at its disposal to monitor and enforce the revenue-use requirements and will take appropriate action when a potential violation is brought to the FAA's attention by any means. To detect whether airport revenue has been diverted from an airport, the FAA will use four primary sources of information: (1) the annual airport financial reports submitted by the sponsor; (2) findings from a single audit conducted in accordance with OMB Circular A–133 (including the audit review and opinion required by the 1996 Reauthorization Act); (3) investigation following a third-party complaint, and, (4) DOT Office of Inspector General audits.

The FAA will seek penalties for the diversion of airport funds if the airport sponsor is not willing to correct the diversion and make restitution, with interest, in a timely manner. This approach is consistent with the FAA's objective of achieving compliance with a sponsor's obligations. Moreover, it is consistent with section 805 of the 1996 Reauthorization Act, which provides for imposition of administrative and civil penalties only after a sponsor has been given an opportunity to take corrective action and failed to do so.

10. Form of Policy

As is reflected in the Proposed Policy and Supplemental Notice, the FAA proposed to implement section 112 of the 1994 Act by publishing a policy statement, rather than adopting a regulation.

The Comments: The ATA argued that the FAA should promulgate a regulation establishing substantive requirements for use of airport revenue and a separate enforcement policy. The ATA argued that a substantive regulation will provide more clarity on prohibited and permitted practices and be less susceptible to conflicts over interpretation.

The AOPA also raised concerns over the prompt and effective enforcement of airport revenue diversion within the terms of this Proposed Policy.

The Final Policy: The FAA will publish policy guidance on airport revenue use and enforcement as a policy rather than as a regulation. Section 112 of the 1994 FAA Authorization Act directs the Secretary to "establish policies and procedures" to assure "prompt and effective enforcement" of the revenue retention grant assurances, which clearly contemplates the issuance of a policy statement for this purpose.

As discussed in connection with specific issues, the wide variation in airport situations makes it impractical for the FAA to promulgate standards with the specificity and inflexibility urged by ATA. Moreover, a regulation is not required to obtain compliance with the revenue-use requirement. Airports are obligated by the statutory assurance in AIP grant agreements pursuant to § 47107(b)(2), or directly under § 47133, and rulemaking is not required to implement those statutes.

On the issue raised by ATA and AOPA concerning the prompt and effective enforcement mechanism to address specific revenue diversion issues, the FAA had been using 14 CFR Part 13. However, on December 16, 1996, 14 CFR Part 16, Rules of Practice for Federally Assisted Airport Proceedings, took effect. Part 16 established new investigation and enforcement procedures for airport compliance matters, including compliance with the revenue-use requirement. Part 16 includes time deadlines and processes to assure that FAA promptly and effectively investigates and adjudicates specific airport compliance matters involving Federally Assisted Airports. The FAA considers the procedural requirements of the Reauthorization Act of 1996 to be self-executing and will apply the statutory provisions in the case of any conflict with Part 16. However, the FAA is in the process of revising Part 16 to incorporate those new procedural requirements.

Paperwork Reduction Act Requirements

The Office of Management and Budget (OMB) has previously approved, pursuant to the Paperwork Reduction Act, the annual airport financial reports described in Section VIII.A of the Final Policy under OMB Number 2120–0569.

Policy Statement

For the reasons discussed above, the Federal Aviation Administration adopts the following statement of policy concerning the use of airport revenue:

Policies and Procedures Concerning the Use of Airport Revenue

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Section I.—Introduction

The Federal Aviation Administration (FAA) issues this document to fulfill the statutory provisions in section 112 of the Federal Aviation Administration Authorization Act of 1994, Pub.L. No. 103–305, 108 Stat. 1569 (August 23, 1994), 49 USC 47107(l), and Federal Aviation Administration Reauthorization Act of 1996, Public Law 104–264, 110 Stat. 3213 (October 9, 1996), to establish policies and procedures on the generation and use of airport revenue. The sponsor assurance prohibiting the unlawful diversion of airport revenues, also known as the revenue-use requirement, was first mandated by Congress in 1982. Simply stated, the purpose of that assurance, now codified at 49 USC §§ 47107(b) and 47133, is to provide that an airport owner or operator receiving Federal financial assistance will use airport revenues only for purposes related to the airport. The Policy Statement implements requirements adopted by Congress in the FAA Reauthorization Acts of 1994 and 1996, and takes into consideration comments received on the interim policy statements issued on February 26, 1996, and December 18, 1996.

Section II—Definitions

A. Federal Financial Assistance

Title 49 USC § 47133, which took effect on October 1, 1996, applies the airport revenue-use requirements of § 47107(b) to any airport that has received "Federal assistance." The FAA considers the term "Federal assistance" in § 47133 to apply to the following Federal actions:

1. Airport development grants issued under the Airport Improvement Program and predecessor Federal grant programs;

2. Airport planning grants that relate to a specific airport;

3. Airport noise mitigation grants received by an airport operator;

4. The transfer of Federal property under the Surplus Property Act, now codified at 49 USC § 47151 *et seq.*; and

5. Deeds of conveyance issued under Section 16 of the Federal Airport Act of 1946, under Section 23 of the Airport and Airway Improvement Act of 1970, or under Section 516 of the Airport and Airway Improvement Act of 1982 (AAIA).

B. Airport Revenue

1. All fees, charges, rents, or other payments received by or accruing to the sponsor for any one of the following reasons are considered to be airport revenue:

a. Revenue from air carriers, tenants, lessees, purchasers of airport properties, airport permittees making use of airport property and services, and other parties. Airport revenue includes all revenue received by the sponsor for the activities of others or the transfer of rights to others relating to the airport, including revenue received:

i. For the right to conduct an activity on the airport or to use or occupy airport property;

ii. For the sale, transfer, or disposition of airport real property (as specified in the applicability section of this policy statement) not acquired with Federal assistance or personal airport property not acquired with Federal assistance, or any interest in that property, including transfer through a condemnation proceeding;

iii. For the sale of (or sale or lease of rights in) sponsor-owned mineral, natural, or agricultural products or water to be taken from the airport; or

iv. For the right to conduct an activity on, or for the use or disposition of, real or personal property or any interest therein owned or controlled by the sponsor and used for an airport-related purpose but not located on the airport (e.g., a downtown duty-free shop).

b. Revenue from sponsor activities on the airport. Airport revenue generally includes all revenue received by the sponsor for activities conducted by the sponsor itself as airport owner and operator, including revenue received:

i. From any activity conducted by the sponsor on airport property acquired with Federal assistance;

ii. From any aeronautical activity conducted by the sponsor which is directly connected to a sponsor's ownership of an airport subject to 49 U.S.C. §§ 47107(b) or 47133; or

iii. From any nonaeronautical activity conducted by the sponsor on airport property not acquired with Federal assistance, but only to the extent of the fair rental value of the airport property. The fair rental value will be based on the fair market value.

2. State or local taxes on aviation fuel (except taxes in effect on December 30, 1987) are considered to be airport revenue subject to the revenue-use requirement. However, revenues from state taxes on aviation fuel may be used to support state aviation programs or for noise mitigation purposes, on or off the airport.

3. While not considered to be airport revenue, the proceeds from the sale of land donated by the United States or acquired with Federal grants must be used in accordance with the agreement between the FAA and the sponsor. Where such an agreement gives the FAA discretion, FAA may consider this policy as a relevant factor in specifying the permissible use or uses of the proceeds.

C. Unlawful Revenue Diversion

Unlawful revenue diversion is the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, when the use is not "grandfathered" under 49 U.S.C. § 47107(b)(2). When a use would be diversion of revenue but is grandfathered, the use is considered lawful revenue diversion. See Section VI, Prohibited Uses of Airport Revenue.

D. Airport Sponsor

The airport sponsor is the owner or operator of the airport that accepts Federal assistance and executes grant agreements or other documents required for the receipt of Federal assistance.

Section III—Applicability of the Policy

A. Policy and Procedures on the Use of Airport Revenue and State or Local Taxes on Aviation Fuel

1. With respect to the use of airport revenue, the policies and procedures in the Policy Statement are applicable to all public agencies that have received a grant for airport development since September 3, 1982, under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, recodified without substantive change by Public Law 103–272 (July 5, 1994) at 49 § U.S.C. 47101, et seq., and which had grant obligations regarding the use of airport revenue in effect on October 1, 1996 (the effective date of the FAA Authorization Act of 1996). Grants issued under that statutory authority are commonly referred to as Airport Improvement Program (AIP) grants. The Policy Statement applies to revenue uses at such airports even if the sponsor has not received an AIP grant since October 1, 1996.

2. With respect to the use of state and local taxes on aviation fuel, this Policy Statement is applicable to all public agencies that have received an AIP development grant since December 30, 1987, and which had grant obligations regarding the use of state and local taxes on aviation fuel in effect of October 1, 1996.

3. Pursuant to 49 U.S.C. § 47133, this Policy Statement applies to any airport for which Federal assistance has been received after October 1, 1996, whether or not the airport owner is subject to the airport revenue-use grant assurance, and applies to any airport for which the airport revenue-use grant obligation is in effect on or after October 1, 1996. Section 47133 does not apply to an airport that has received Federal assistance prior to October 1, 1996, and does not have AIP airport development grant assurances in effect on that date.

4. Requirements regarding the use of airport revenue applicable to a particular airport or airport operator on or after October 1, 1996, as a result of the provisions of 49 U.S.C. § 47133, do not expire.

5. The FAA will not reconsider agency determinations and adjudications dated prior to the date of this Policy Statement, based on the issuance of this Policy Statement.

B. Policies and Procedures on the Requirement for a Self-Sustaining Airport Rate Structure

1. These policies and procedures apply to the operators of publicly owned airports that have received an AIP development grant and that have grant obligations in effect on or after the effective date of this policy.

2. Grant assurance obligations regarding maintenance of a self-sustaining airport rate structure in effect on or after the effective date of this policy apply until the end of the useful life of each airport development project or 20 years, whichever is less, except obligations under a grant for land acquisition, which do not expire.

C. Application of the Policy to Airport Privatization

1. The Airport Privatization Pilot Program, codified at 49 U.S.C. § 47134, provides for the sale or lease of general aviation airports and the lease of air carrier airports. Under the program, the FAA is authorized to exempt up to five airports from Federal statutory and regulatory requirements governing the use of airport revenue. The FAA can exempt an airport sponsor from its obligations to repay Federal grants, in the event of a sale, to return property acquired with Federal assistance and to use the proceeds of the sale or lease exclusively for airport purposes. The exemptions are subject to a number of conditions.

2. Except as specifically provided by the terms of an exemption granted under the Airport Privatization Pilot

Program, this policy statement applies to a privatization of airport property and/or operations.

3. For airport privatization transactions not subject to an exemption under the Pilot Program:

FAA approval of the sale or other transfer of ownership or control, of a publicly owned airport is required in accordance with the AIP sponsor assurances and general government contract law principles. The proceeds of a sale of airport property are considered airport revenue (except in the case of property acquired with Federal assistance, the sale of which is subject to other restrictions under the relevant grant contract or deed). When the sale proposed is the sale of an entire airport as an operating entity, the request may present the FAA with a complex transaction in which the disposition of the proceeds of the transfer is only one of many considerations. In its review of such a proposal, the FAA would condition its approval of the transfer on the parties' assurances that the proceeds of sale will be used for the purposes permitted by the revenue-use requirements of 49 U.S.C. §§ 47107(b) and 47133. Because of the complexity of an airport sale or privatization, the provisions for ensuring that the proceeds are used for the purposes permitted by the revenue-use requirements may need to be adapted to the special circumstances of the transaction. Accordingly, the disposition of the proceeds would need to be structured to meet the revenue-use requirements, given the special conditions and constraints imposed by the fact of a change in airport ownership. In considering and approving such requests, the FAA will remain open and flexible in specifying conditions on the use of revenue that will protect the public interest and fulfill the objectives and obligations of revenue-use requirements, without unnecessarily interfering with the appropriate privatization of airport infrastructure.

4. It is not the intention of the FAA to effectively bar airport privatization initiatives outside of the pilot program through application of the statutory requirements for use of airport revenue. Proponents of a proposed privatization or other sale or lease of airport property clearly will need to consider the effects of Federal statutory requirements on the use of airport revenue, reasonable fees for airport users, disposition of airport property, and other policies incorporated in Federal grant agreements. The FAA assumes that the proposals will be structured from the outset to comply with all such requirements, and this proposed policy is not intended to add to the considerations already involved in a transfer of airport property.

Section IV—Statutory Requirements for the Use of Airport Revenue

A. General Requirements, 49 U.S.C. §§ 47107(b) and 47133

1. The current provisions restricting the use of airport revenue are found at 49 U.S.C. §§ 47107(b), and 47133. Section 47107(b) requires the Secretary, prior to approving a project grant application for airport development, to obtain written assurances regarding the use of airport revenue and state and local taxes on aviation fuel. Section 47107(b)(1) requires the airport owner or operator to provide assurances that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport will be expended for the capital or operating costs of—

a. The airport;

b. The local airport system; or

c. Other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

B. Exception for Certain Preexisting Arrangements (Grandfather Provisions)

Section 47107(b)(2) provides an exception to the requirements of Section 47107(b)(1) for airport owners or operators having certain financial arrangements in effect prior to the enactment of the AAIA. This provision is commonly referred to as the "grandfather" provision. It states:

> Paragraph (1) of this subsection does not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.

C. Application of 49 U.S.C. § 47133

1. Section 47133 imposes the same requirements on all airports, privately-owned or publicly-owned, that are the subject of Federal assistance. Subsection 47133(a) states that:

Local taxes on aviation fuel (except taxes in effect on December 30, 1987) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of—

(a) the airport;

(b) The local airport system; or

(c) Other local facilities owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of persons or property.

2. Section 47133(b) contains the same grandfather provisions as section 47107(b).

3. Enactment of section 47133 resulted in three fundamental changes to the revenue-use obligation, as reflected in the applicability section of this policy statement.

a. Privately owned airports receiving Federal assistance (as defined in this policy statement) after October 1, 1996, are subject to the revenue-use requirement.

b. In addition to airports receiving AIP grants, airports receiving Federal assistance in the form of gifts of property after October 1, 1996, are subject to the revenue-use requirement.

c. For any airport or airport operator that is subject to the revenue-use requirement on or after October 1, 1996, the revenue-use requirement applies indefinitely.

4. This section of the policy refers to the date of October 1, 1996, because the FAA Authorization Act of 1996 is by its terms effective on that date.

D. Specific Statutory Requirements for the Use of Airport Revenue

1. In section 112 of the FAA Authorization Act of 1994, 49 U.S.C. § 47107(l)(2) (A–D), Congress expressly prohibited the diversion of airport revenues through:

a. Direct payments or indirect payments, other than payments reflecting the value of services and facilities provided to the airport;

b. Use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems;

c. Payments in lieu of taxes or other assessments that exceed the value of services provided; or

d. Payments to compensate non-sponsoring governmental bodies for lost tax revenues exceeding stated tax rates.

2. Section 47107(l)(5), enacted as part of the FAA Authorization Act of 1996, provides that:

(A) Any request by a sponsor to any airport for additional payments for services conducted off of the airport or for reimbursement for capital contributions or operating expenses shall be filed not later than 6 years after the date on which the expense is incurred; and

(B) Any amount of airport funds that are used to make a payment or reimbursement as described in subparagraph (a) after the date specified in that subparagraph shall be considered to be an illegal diversion of airport revenues that is subject to subsection (n).

3. 49 U.S.C. § 40116(d)(2)(A) provides, among other things, that a State, political subdivision of a State or authority acting for a State or a political subdivision may not: "(iv) levy or collect a tax, fee or charge, first taking effect after August 23, 1994, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee or charge wholly utilized for airport or aeronautical purposes."

E. Passenger Facility Charges and Revenue Diversion

The Aviation Safety and Capacity Expansion Act of 1990 authorized the imposition of a passenger facility charge (PFC) with the approval of the Secretary.

1. While PFC revenue is not characterized as "airport revenue" for purposes of this Policy Statement, specific statutory and regulatory guidelines govern the use of PFC revenue, as set forth at 49 U.S.C. 40117, "Passenger Facility Fees," and 14 CFR Part 158, "Passenger Facility Charges." (For purposes of this policy, the terms "passenger facility fees" and "passenger facility charges" are synonymous.) These provisions are more restrictive than the requirements for the use of airport revenue in 49 U.S.C. 47107(b), in that the PFC requirements provide that PFC collections may only be used to finance the allowable costs of approved projects. The PFC regulation specifies the kinds of projects that can be funded by PFC revenue and the objectives these projects must achieve to receive FAA approval for use of PFC revenue.

2. The statute and regulations prohibit expenditure of PFC revenue for other than approved projects, or collection of PFC revenue in excess of approved amounts.

3. As explained more fully below under enforcement policies and procedures in Section IX, "Monitoring and Compliance," a final FAA determination that a public agency has violated the revenue-use provision prevents the FAA from approving new authority to impose a PFC until corrective action is taken.

Section V—Permitted Uses of Airport Revenue

A. Permitted Uses of Airport Revenue

Airport revenue may be used for:

1. The capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. Such costs may include reimbursements to a state or local agency for the costs of services actually received and documented, subject to the terms of this policy statement. Operating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities.

2. The full costs of activities directed toward promoting competition at an airport, public and industry awareness of airport facilities and services, new air service and competition at the airport (other than direct subsidy of air carrier operations prohibited by paragraph VI.B.12 of this policy), and salary and expenses of employees engaged in efforts to promote air service at the airport, subject to the terms of this policy statement. Other permissible expenditures include cooperative advertising, where the airport advertises new services with or without matching funds, and advertising of general or specific airline services to the airport. Examples of permitted expenditures in this category include: (a) a Superbowl hospitality tent for corporate aircraft crews at a sponsor-owned general aviation terminal intended to promote the use of that airport by corporate aircraft; and (b) the cost of promotional items bearing airport logos distributed at various aviation industry events.

3. A share of promotional expenses, which may include marketing efforts, advertising, and related activities designed to increase travel using the airport, to the extent the airport share of the promotional materials or efforts meets the requirements of V.A.2. above and includes specific information about the airport.

4. The repayment of the airport owner or sponsor of funds contributed by such owner or sponsor for capital and operating costs of the airport and not heretofore reimbursed. An airport owner or operator can seek reimbursement of contributed funds only if the request is made within 6 years of the date the contribution took place. 49 U.S.C. 47107(l).

a. If the contribution was a loan to the airport, and clearly documented as an interest-bearing loan at the time it was made, the sponsor may repay the loan principal and interest from airport funds. Interest should not exceed a rate which the sponsor received for other investments for that period of time.

b. For other contributions to the airport, the airport owner or operator may seek reimbursement of interest only if the FAA determines that the airport owes the sponsor funds as a result of activities conducted by the sponsor or expenditures by the sponsor for the benefit of the airport. Interest shall be determined in the manner provided in 49 U.S.C. 47107(o), but may be assessed only from the date of the FAA's determination.

5. Lobbying fees and attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement. See Section VI: Prohibited Uses of Airport Revenue.

6. Costs incurred by government officials, such as city council members, to the extent that such costs are for services to the airport actually received and documented. An example of such costs would be the costs of travel for city council members to meet with FAA officials regarding AIP funding for an airport project.

7. A portion of the general costs of government, including executive offices and the legislative branches, may be allocated to the airport indirectly under a cost allocation plan in accordance with V.B.3. of this Policy Statement.

8. Expenditure of airport funds for support of community activities, participation in community events, or support of community-purpose uses of airport property if such expenditures are directly and substantially related to the operation of the airport. Examples of permitted expenditures in this category include: (a) the purchase of tickets for an annual community luncheon at which the Airport director delivers a speech reviewing the state of the airport; and (b) contribution to a golf tournament sponsored by a "friends of the airport" committee. The FAA recognizes that contributions for community or charitable purposes can provide a direct benefit to the airport through enhanced community acceptance, but that a benefit of that nature is intangible and not quantifiable. Where the amount of contribution is minimal, the value of the benefit will not be questioned as long as there is a reasonable connection between the recipient organization and the benefit of local community acceptance for the airport. An example of a permitted expenditure in this category was participation in a local school fair with a booth focusing on operation of the airport and career opportunities in aviation. The expenditure in this example was $250.

9. Airport revenue may be used for the capital or operating costs of those

portions of an airport ground access project that can be considered an airport capital project, or of that part of a local facility that is owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, including use by airport visitors and employees. The FAA has approved the use of airport revenue for the actual costs incurred for structures and equipment associated with an airport terminal building station and a rail connector between the airport station and the nearest mass transit rail line, where the structures and equipment were (1) located entirely on airport property, and (2) designed and intended exclusively for the use of airport passengers.

B. Allocation of Indirect Costs

1. Indirect costs of sponsor services may be allocated to the airport in accordance with this policy, but the allocation must result in an allocation to the airport only of those costs that would otherwise be allowable under 49 U.S.C. § 47107(b). In addition, the documentation for the costs must meet the standards of documentation stated in this policy.

2. The costs must be allocated under a cost allocation plan that meets the following requirements:

a. The cost is allocated under a cost allocation plan that is consistent with Attachment A to OMB Circular A–87, except that the phrase "airport revenue" should be substituted for the phrase "grant award," wherever the latter phrase occurs in Attachment A;

b. The allocation method does not result in a disproportionate allocation of general government costs to the airport in consideration of the benefits received by the airport;

c. Costs allocated indirectly under the cost allocation plan are not billed directly to the airport; and

d. Costs billed to the airport under the cost allocation plan must be similarly billed to other comparable units of the airport owner or operator.

3. A portion of the general costs of government, such as the costs of the legislative branch and executive offices, may be allocated to the airport as an indirect cost under a cost allocation plan satisfying the requirements set forth above. However, the allocation of these costs may require special scrutiny to assure that the airport is not paying a disproportionate share of these costs.

4. Central service costs, such as accounting, budgeting, data processing, procurement, legal services, disbursing and payroll services, may also be allocated to the airport as indirect costs under a cost allocation plan satisfying the requirements set forth above. However, the allocation of these costs may require special scrutiny to assure that the airport is not paying a disproportionate share of these costs.

C. Standard of Documentation for the Reimbursement to Government Entities of Costs of Services and Contributions Provided to Airports

1. Reimbursements for capital and operating costs of the airport made by a government entity, both direct and indirect, must be supported by adequate documentary evidence. Documentary evidence includes, but is not limited to:

a. Underlying accounting data such as general and specialized journals, ledgers, manuals, and supporting worksheets and other analyses; and corroborating evidence such as invoices, vouchers and indirect cost allocation plans, or

b. Audited financial statements which show the specific expenditures to be reimbursed by the airport. Such expenditures should be clearly identifiable on the audited financial statements as being consistent with section VIII of this policy statement.

2. Documentary evidence to support direct and indirect charges to the airport must show that the amounts claimed were actually expended. Budget estimates are not sufficient to establish a claim for reimbursement. Indirect cost allocation plans, however, may use budget estimates to establish pre-determined indirect cost allocation rates. Such estimated rates should, however, be adjusted to actual expenses in the subsequent accounting period.

D. Expenditures of Airport Revenue by Grandfathered Airports

1. Airport revenue may be used for purposes other than capital and operating costs of the airport, the local airport system, or other local facilities owned or operated by the sponsor and directly and substantially related to the air transportation of passengers or property, if the "grandfather" provisions of 49 U.S.C. § 47107(b)(2) are applicable to the sponsor and the particular use. Based on previous DOT interpretations, examples of grandfathered airport sponsors may include, but are not limited to the following:

a. A port authority or state department of transportation which owns or operates other transportation facilities in addition to airports, and which have pre-September 3, 1982, debt obligations or legislation governing financing and providing for use of airport revenue for non-airport purposes. Such sponsors may have obtained legal opinions from their counsel to support a claim of grandfathering. Previous DOT interpretations have found the following examples of pre-AAIA legislation to provide for the grandfather exception:

b. Bond obligations and city ordinances requiring a five percent "gross receipts" fee from airport revenues. The payments were instituted in 1954 and continued in 1968.

c. A 1955 state statute for the assessing of a five percent surcharge on all receipts and deposits in an airport revenue fund to defray central service expenses of the state.

d. City legislation authorizing the transfer of a percentage of airport revenues, permitting an airport-air carrier settlement agreement providing for annual payments to the city of 15 percent of the airport concession revenues.

e. A 1957 state statutory transportation program governing the financing and operations of a multi-modal transportation authority, including airport, highway, port, rail and transit facilities, wherein state revenues, including airport revenues, support the state's transportation-related, and other, facilities. The funds flow from the airports to a state transportation trust fund, composed of all "taxes, fees, charges, and revenues" collected or received by the state department of transportation.

f. A port authority's 1956 enabling act provisions specifically permitting it to use port revenue, which includes airport revenue, to satisfy debt obligations and to use revenues from each project for the expenses of the authority. The act also exempts the authority from property taxes but requires annual payments in lieu of taxes to several local governments and gives it other corporate powers. A 1978 trust agreement recognizes the use of the authority's revenue for debt servicing, facilities of the authority, its expenses, reserves, and the payment in lieu of taxes fund.

2. Under the authority of 49 U.S.C. § 47115(f), the FAA considers as a factor militating against the approval of an application for AIP discretionary funds, the fact that a sponsor has exercised its rights to use airport revenue for nonairport purposes under the grandfather clause, when in the airport's fiscal year preceding the date of application for discretionary funds, the FAA finds that the amount of airport revenues used for nonairport purposes exceeds the amount used for such purposes in the airport's first fiscal year ending after August 23, 1994, adjusted by the Secretary for changes in the Consumer Price Index of All Urban

Consumers published by the Bureau of Labor Statistics of the Department of Labor.

Section VI—Prohibited Uses of Airport Revenue

A. Lawful and Unlawful Revenue Diversion

Revenue diversion is the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, unless that use is grandfathered under 49 U.S.C. § 47107(b)(2) and the use does not exceed the limits of the 'grandfather' clause. When such use is so grandfathered, it is known as lawful revenue diversion. Unless the revenue diversion is grandfathered, the diversion is unlawful and prohibited by the revenue-use restrictions.

B. Prohibited Uses of Airport Revenue

Prohibited uses of airport revenue include but are not limited to:

1. Direct or indirect payments that exceed the fair and reasonable value of those services and facilities provided to the airport. The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value.
2. Direct or indirect payments that are based on a cost allocation formula that is not consistent with this policy statement or that is not calculated consistently for the airport and other comparable units or cost centers of government.
3. Use of airport revenues for general economic development.
4. Marketing and promotional activities unrelated to airports or airport systems. Examples of prohibited expenses in this category include participation in program to provide hospitality training to taxi drivers and funding an airport operator's float containing no reference to the airport, in a New Years Day parade.
5. Payments in lieu of taxes, or other assessments, that exceed the value of services provided or are not based on a reasonable, transparent cost allocation formula calculated consistently for other comparable units or cost centers of government;
6. Payments to compensate non-sponsoring governmental bodies for lost tax revenues to the extent the payments exceed the stated tax rates applicable to the airport;
7. Loans to or investment of airport funds in a state or local agency at less than the prevailing rate of interest.
8. Land rental to, or use of land by, the sponsor for nonaeronautical purposes at less than fair rental/market value, except to the extent permitted by SectionVII.D of this policy.
9. Use of land by the sponsor for aeronautical purposes rent-free or for nominal rental rates, except to the extent permitted by Section VII.E of this policy.
10. Impact fees assessed by any governmental body that exceed the value of services or facilities provided to the airport. However, airport revenue may be used where airport development requires a sponsoring agency to take an action, such as undertaking environmental mitigation measures contained in an FAA record of decision approving funding for an airport development project, or constructing a ground access facility that would otherwise be eligible for the use of airport revenue. Payments of impact fees must meet the general requirement that airport revenue be expended only for actual documented costs of items eligible for use of airport revenue under this Policy Statement. In determining appropriate corrective action for an impact fee payment that is not consistent with this policy, the FAA will consider whether the impact fee was imposed by a non-sponsoring governmental entity and the sponsor's ability under local law to avoid paying the fee.
11. Expenditure of airport funds for support of community activities and participation in community events, or for support of community-purpose uses of airport property except to the extent permitted by this policy. See Section V, Uses of Airport Revenue. Examples of prohibited expenditures in this category include expenditure of $50,000 to sponsor a local film society's annual film festival; and contribution of $6,000 to a community cultural heritage festival.
12. Direct subsidy of air carrier operations. Direct subsidies are considered to be payments of airport funds to carriers for air service. Prohibited direct subsidies do not include waivers of fees or discounted landing or other fees during a promotional period. Any fee waiver or discount must be offered to all users of the airport, and provided to all users that are willing to provide the same type and level of new services consistent with the promotional offering. Likewise prohibited direct subsidies do not include support for airline advertising or marketing of new services to the extent permitted by Section V of this Policy Statement.

Section VII—Policies Regarding Requirement for a Self-Sustaining Airport Rate Structure

A. Statutory Requirements

49 U.S.C. § 47107(a)(13) requires airport operators to maintain a schedule of charges for use of the airport: "(A) that will make the airport as self-sustaining as possible under the circumstances existing at the airport, including volume of traffic and economy of collection."

The requirement is generally referred to as the "self-sustaining assurance."

B. General Policies Governing the Self-Sustaining Rate Structure Assurance

1. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible. In considering whether a particular contract or lease is consistent with this requirement, the FAA and the Office of the Inspector General (OIG) generally evaluate the individual contract or lease to determine whether the fee or rate charged generates sufficient income for the airport property or service provided, rather than looking at the financial status of the entire airport.
2. If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible.
3. At some airports, market conditions may not permit an airport proprietor to establish fees that are sufficiently high to recover aeronautical costs and sufficiently low to attract and retain commercial aeronautical services. In such circumstances, an airport proprietor's decision to charge rates that are below those needed to achieve a self-sustaining income in order to assure that services are provided to the public is not inherently inconsistent with the obligation to make the airport as self-sustaining as possible in the circumstances.
4. Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self sustaining as possible in the circumstances existing at such airports.
5. Under 49 U.S.C. § 47107(a)(1) and the implementing grant assurance, charges to aeronautical users must be reasonable and not unjustly discriminatory. Because of the limiting effect of the reasonableness requirement, the FAA does not consider the self-sustaining requirement to require airport sponsors

to charge fair market rates to aeronautical users. Rather, for charges to aeronautical users, the FAA considers the self-sustaining assurance to be satisfied by airport charges that reflect the cost to the sponsor of providing aeronautical services and facilities to users. A fee for aeronautical users set pursuant to a residual costing methodology satisfies the requirement for a self-sustaining airport rate structure.

6. In establishing new fees, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent under 49 U.S.C. § 47107(b)(1), including reasonable reserves and other funds to facilitate financing and to cover contingencies. While fees charged to nonaeronautical users are not subject to the reasonableness requirement or the Department of Transportation Policy on airport rates and charges, the surplus funds accumulated from those fees must be used in accordance with 49 U.S.C. § 47107(b).

C. Policy on Charges for Nonaeronautical Facilities and Services

Subject to the general guidance set forth above and the specific exceptions noted below, the FAA interprets the self-sustaining assurance to require that the airport receive fair market value for the provision of nonaeronautical facilities and services, to the extent practicable considering the circumstances at the airport.

D. Providing Property for Public Community Purposes

Making airport property available at less than fair market rental value for public recreational and other community uses, for the purpose of maintaining positive airport-community relations, can be a legitimate function of an airport proprietor in operating the airport. Accordingly, in certain circumstances, providing airport land for such purposes will not be considered a violation of the self-sustaining requirement. Generally, the circumstances in which below-market use of airport land for community purposes will be considered consistent with the grant assurances are:

1. The contribution of the airport property enhances public acceptance of the airport in a community in the immediate area of the airport; the property is put to a general public use desired by the local community; and the public use does not adversely affect the capacity, security, safety or operations of the airport. Examples of acceptable uses include public parks, recreation facilities, and bike or jogging paths. Examples of uses that would not be eligible are road maintenance equipment storage; and police, fire department, and other government facilities if they do not directly support the operation of the airport.

2. The property involved would not reasonably be expected to produce more than *de minimis* revenue at the time the community use is contemplated, and the property is not reasonably expected to be used by an aeronautical tenant or otherwise be needed for airport operations in the foreseeable future. When airport property reasonably may be expected to earn more than minimal revenue, it still may be used for community purposes at less than FMV if the revenue earned from the community use approximates the revenue that could otherwise be generated, provided that the other provisions of VII. D. are met.

3. The community use does not preclude reuse of the property for airport purposes if, in the opinion of the airport sponsor, such reuse will provide greater benefits to the airport than continuation of the community use.

4. Airport revenue is not to be used to support the capital or operating costs associated with the community use.

E. Use of Property by Not-for-Profit Aviation Organizations

1. An airport operator may charge reduced rental rates and fees to the following not-for-profit aviation organizations, to the extent that the reduction is reasonably justified by the tangible or intangible benefits to the airport or to civil aviation:

a. Aviation museums;

b. Aeronautical secondary and post-secondary education programs conducted by accredited educational institutions; or

c. Civil Air Patrol units operating aircraft at the airport;

2. Police or fire-fighting units operating aircraft at the airport generally will be expected to pay a reasonable rate for aeronautical use of airport property, but the value of any services provided by the unit to the airport may be offset against the applicable reasonable rate.

F. Use of Property by Military Units

The FAA acknowledges that many airports provide facilities to military units with aeronautical missions at nominal lease rates. The FAA does not consider this practice inconsistent with the requirement for a self-sustaining airport rate structure. Military units with aeronautical missions may include the Air National Guard, aviation units of the Army National Guard, U.S. Air Force Reserve, and Naval Reserve air units operating aircraft at the airport. Reserve and Guard units typically have an historical presence at the airport that precedes the Airport and Airway Improvement Act of 1982, and provide services that directly benefit airport operations and safety, such as snow removal and supplementary ARFF capability.

G. Use of Property for Transit Projects

Making airport property available at less than fair market rental for public transit terminals, right-of-way, and related facilities will not be considered a violation of 49 U.S.C. §§ 47107(b), 47133 or 47107(a)(13) if the transit system is publicly owned and operated (or operated by contract on behalf of the public owner), and the facilities are directly and substantially related to the air transportation of passengers or property, including use by airport visitors and employees. A lease of nominal value in the circumstances described in this section would be considered consistent with the self-sustaining requirement.

H. Private Transit Systems

Generally, private ground transportation services are charged as a nonaeronautical use of the airport. In cases where publicly-owned transit services are extremely limited and where a private transit service (i.e., bus, rail, or ferry) provides the primary source of public transportation, making property available at less than fair market rental to this private service would not be considered inconsistent with 49 U.S.C. §§ 47107(b), 47133 or 47107(a)(13).

Section VIII—Reporting and Audit Requirements

The Federal Aviation Administration Authorization Act of 1994 established a new requirement for airports to submit annual financial reports to the Secretary, and the Act required the Secretary to compile the reports and to submit a summary report to Congress. The Federal Aviation Reauthorization Act of 1996 established a new requirement for airports to include, as part of their audits under the Single Audit Act, a review and opinion on the use of airport revenue.

A. Annual Financial Reports

Section 111(a)(4) of the 1994 Authorization Act, 49 U.S.C. § 47107(a)(19), requires airport owners or operators to submit to the Secretary and to make available to the public an annual financial report listing in detail (1) all amounts the airport paid to other government units and the purposes for which each payment was made, (2) all services and property the airport provided to other government units and compensation received for each service or unit of property provided. Additionally, Section 111(b) of the 1994 Authorization Act requires a report, for each fiscal year, in an uniform simplified format, of the airport's sources and uses of funds, net surplus/loss and other information which the Secretary may require.

FAA Forms 5100–125 and 126 have been developed to satisfy the above reporting requirements. The forms must be filed with the FAA 120 days after the end of the sponsor's fiscal year. Extensions of the filing date may be granted if audited financial information is not available within 120 days of the end of the local fiscal year. Requests for extension should be filed in writing with the FAA Airport Compliance Division, AAS–400.

B. Single Audit Review and Opinion

1. General requirement and applicability. The Federal Aviation Reauthorization Act of 1996, Section 805; 49 U.S.C. § 47107(m) requires public agencies that are subject to the Single Audit Act, 31 U.S.C. § 7501–7505, and that have received Federal financial assistance for airports to include, as part of their single audit, a review and opinion of the public agency's funding activities with respect to their airport or local airport system.

2. Federal Financial Assistance. For the purpose of complying with 49 U.S.C. § 47107(m), Federal financial assistance for airports includes any interest in property received, by a public agency since October 1, 1996, for the purpose of developing, improving, operating, or maintaining a public airport, or an AIP grant which was in force and effect on or after October 1, 1996, either directly or through a state block grant program.

3. Frequency. The opinion will be required whenever the auditor under OMB Circular A–133 selects an airport improvement program grant as a major program. In those cases where the airport improvement program grant is selected as a major program the requirements of 49 U.S.C. § 47107(m) will apply.

4. Major Program. For the purposes of complying with 49 U.S.C. § 47107(m), major program means an airport improvement program grant determined to be a major program in accordance with OMB Circular A–133, § 520 or an airport improvement program grant identified by FAA as a major program in accordance with OMB A–133 § 215(c); except additional audit costs resulting from FAA designating an airport improvement program grant as a major program are discussed at paragraph 9 below.

5. FAA Notification. When FAA designates an airport improvement program grant as a major program, FAA will generally notify the sponsor in writing at least 180 days prior to the end of the sponsor's fiscal year to have the grant included as a major program in its next Single Audit.

6. Audit Findings. The auditor will report audit findings in accordance with OMB Circular A–133.

7. Opinion. The statutory requirement for an opinion will be considered to be satisfied by the auditor's reporting under OMB Circular A–133. Consequently when an airport improvement program grant is designated as a major program, and the audit is conducted in accordance with OMB Circular A–133, FAA will accept the audit to meet the requirements of 49 USC § 47107(m) and this policy.

8. Reporting Package. The Single Audit reporting package will be distributed in accordance with the requirements of OMB Circular A–133. In addition when an airport improvement program grant is a major program, the sponsor will supply, within 30 days after receipt by the sponsor, a copy of the reporting package directly to the FAA, Airport Compliance Division (AAS–400), 800 Independence Ave. SW 20591. The FAA regional offices may continue to request the sponsor to provide separate copies of the reporting package to support their administration of airport improvement program grants.

9. Audit Cost. When an opinion is issued in accordance with 47107(m) and this policy, the costs associated with the opinion will be allocated in accordance with the sponsor's established practice for allocating the cost of its Single Audit, regardless of how the airport improvement program grant is selected as a major program.

10. Compliance Supplement. Additional information about this requirement is contained in OMB Circular A–133 Compliance Supplement for DOT programs.

11. Applicability. This requirement is not applicable to (a) privately-owned, public-use airports, including airports accepted into the airport privatization program (the Single Audit Act governs only states, local governments and non-profit organizations receiving Federal assistance); (b) public agencies that do not have a requirement for the single audit; (c) public agencies that do not satisfy the criteria of paragraph B.1 and 2; above; and Public Agencies that did not execute an AIP grant agreement on or after June 2, 1997.

Section IX—Monitoring and Compliance

A. Detection of Airport Revenue Diversion

To detect whether airport revenue has been diverted from an airport, the FAA will depend primarily upon four sources of information:

1. Annual report on revenue use submitted by the sponsor under the provisions of 49 U.S.C. § 47107(a)(19), as amended.

2. Single audit reports submitted, pursuant to 49 U.S.C. § 47107(m), with annual single audits conducted under 31 U.S.C. §§ 7501–7505. The requirement for these reports is discussed in Part IX of this policy.

3. Investigation following a third party complaint filed under 14 CFR. Part 16, FAA Rules of Practice for Federally Assisted Airport Proceedings.

4. DOT Office of Inspector General audits.

B. Investigation of Revenue Diversion Initiated Without Formal Complaint

1. When no formal complaint has been filed, but the FAA has an indication from one or more sources that airport revenue has been or is being diverted unlawfully, the FAA will notify the sponsor of the possible diversion and request that it respond to the FAA's concerns. If, after information and arguments submitted by the sponsor, the FAA determines that there is no unlawful diversion of revenue, the FAA will notify the sponsor and take no further action. If the FAA makes a preliminary finding that there has been unlawful diversion of airport revenue, and the sponsor has not taken corrective action (or agreed to take corrective action), the FAA may issue a notice of investigation under 14 CFR § 16.103.

If, after further investigation, the FAA finds that there is reason to believe that there is or has been unlawful diversion of airport revenue that the sponsor refuses to terminate or correct, the FAA will issue an appropriate order under 14 CFR § 16.109 proposing enforcement action. However, such action will cease if the airport sponsor agrees to return the diverted amount plus interest.

2. Audit or investigation by the Office of the Inspector General. An indication of revenue diversion brought to the attention of the FAA in a report of audit or investigation issued by the DOT Office of the Inspector General (OIG)

will be handled in accordance with paragraph B.1 above.

C. Investigation of Revenue Diversion Precipitated by Formal Complaint

When a formal complaint is filed against a sponsor for revenue diversion, the FAA will follow the procedures in 14 CFR Part 16 for notice to the sponsor and investigation of the complaint. After review of submissions by the parties, investigation of the complaint, and any additional process provided in a particular case, the FAA will either dismiss the complaint or issue an appropriate order proposing enforcement action.

If the airport sponsor takes the corrective action specified in the order, the complaint will be dismissed.

D. The Administrative Enforcement Process

1. Enforcement of the requirements imposed on sponsors as a condition of the acceptance of Federal grant funds or property is accomplished through the administrative procedures set forth in 14 CFR part 16. Under part 16, the FAA has the authority to receive complaints, conduct informal and formal investigations, compel production of evidence, and adjudicate matters of compliance within the jurisdiction of the Administrator.

2. If, as a result of the investigative processes described in paragraphs B and C above, the FAA finds that there is reason to proceed with enforcement action against a sponsor for unlawful revenue diversion, an order proposing enforcement action is issued by the FAA and under 14 CFR 16.109. That section provides for the opportunity for a hearing on the order.

E. Sanctions for Noncompliance

1. As explained above, if the FAA makes a preliminary finding that airport revenue has been unlawfully diverted and the sponsor declines to take the corrective action, the FAA will propose enforcement action. A decision whether to issue a final order making the action effective is made after a hearing, if a hearing is elected by the respondent. The actions required by or available to the agency for enforcement of the prohibitions against unlawful revenue diversion are:

a. Withhold future grants. The Secretary may withhold approval of an application in accordance with 49 USC § 47106(d) if the Secretary provides the sponsor with an opportunity for a hearing and, not later than 180 days after the later of the date of the grant application or the date the Secretary discovers the noncompliance, the Secretary finds that a violation has occurred. The 180-day period may be extended by agreement of the Secretary and the sponsor or in a special case by the hearing officer.

b. Withhold approval of the modification of existing grant agreements that would increase the amount of funds available. A supplementary provision in section 112 of the 1994 Authorization Act, 49 USC § 47111(e), makes mandatory not only the withholding of new grants but also withholding of a modification to an existing grant that would increase the amount of funds made available, if the Secretary finds a violation after hearing and opportunity to cure.

c. Withhold payments under existing grants. The Secretary may withhold a payment under a grant agreement for 180 days or less after the payment is due without providing for a hearing. However, in accordance with 49 USC § 47111(d), the Secretary may withhold a payment for more than 180 days only if he or she notifies the sponsor and provides an opportunity for a hearing and finds that the sponsor has violated the agreement. The 180-day period may be extended by agreement of the Secretary and the sponsor or in a special case by the hearing officer.

d. Withhold approval of an application to impose a passenger facility charge. Section 112 also makes mandatory the withholding of approval of any new application to impose a passenger facility charge under 49 USC § 40117. Subsequent to withholding, applications could be approved only upon a finding by the Secretary that corrective action has been taken and that the violation no longer exists.

e. File suit in United States district court. Section 112(b) provides express authority for the agency to seek enforcement of an order in Federal court.

f. Withhold, under 49 USC § 47107(n)(3), any amount from funds that would otherwise be available to a sponsor, including funds that would otherwise be made available to a State, municipality, or political subdivision thereof (including any multi-modal transportation agency or transit agency of which the sponsor is a member entity) as part of an apportionment or grant made available pursuant to this title, if the sponsor has failed to reimburse the airport after receiving notification of the requirement to do so.

g. Assess civil penalties.

(1) Under section 112(c) of Public Law 103–305, codified at 49 USC § 46301(a) and (d), the Secretary has statutory authority to impose civil penalties up to a maximum of $50,000 on airport sponsors for violations of the AIP sponsor assurance on revenue diversion. Any civil penalty action under this section would be adjudicated under 14 CFR Part 13, Subpart G.

(2) Under section 804 of Public Law 104–264, codified at 49 USC § 46301((a)(5), the Secretary has statutory authority to obtain civil penalties of up to three times the amount of airport revenues that are used in violation of 49 USC §§ 47107(b) and 47133. An action for civil penalties in excess of $50,000 must be brought in a United States District Court.

(3) The Secretary may, under 49 USC § 47107(n)(4), initiate a civil action for civil penalties in the amount equal to the illegal diversion in question plus interest calculated in accordance with 49 USC § 47107(o), if the airport sponsor has failed to take corrective action specified by the Secretary and the Secretary is unable to withhold sufficient grant funds, as set forth above.

(4) An action for civil penalties under this provision must be brought in a United States District Court. The Secretary intends to use this authority only after the airport sponsor has been given a reasonable period of time, after a violation has been clearly identified to the airport sponsor, to take corrective action to restore the funds or otherwise come into compliance before a penalty is assessed, and only after other enforcement actions, such as withholding of grants and payments, have failed to achieve compliance.

F. Compliance With Reporting and Audit Requirements

The FAA will monitor airport sponsor compliance with the Airport Financial Reporting Requirements and Single Audit Requirements described in this Policy Statement. The failure to comply with these requirements can result in the withholding of future AIP grant awards and further payments under existing AIP grants.

Issued in Washington, DC on February 8, 1999.

Susan L. Kurland,

Associate Administrator for Airports.

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