

Appendix E ► Policies and Procedures Concerning the Use of Airport Revenue

Table of Contents

Section I--Introduction

Section II—Definitions

- A. Federal Financial Assistance
- B. Airport Revenue
- C. Unlawful Revenue Diversion
- D. Airport Sponsor

Section III--Applicability of the Policy

- A. Policy and Procedures Concerning the Use of Airport Revenue and State or Local Taxes on Aviation Fuel
- B. Policies and Procedures on the Requirement for a Self-sustaining Airport Rate Structure
- C. Application of the Policy to Airport Privatization Pilot Program

Section IV--Statutory Requirements for the Use of Airport Revenue

- A. General Requirements, 49 U.S.C. §§ 47107(b) and 47133
- B. Exception for Certain Preexisting Arrangements (Grandfather provisions)
- C. Application of 49 U.S.C. § 47133
- D. Specific Statutory Requirements for the Use of Airport Revenue
- E. Passenger Facility Charges and Revenue Diversion

Section V--Permitted Uses of Airport Revenue

- A. Permitted Uses of Airport Revenue
- B. Allocation of Indirect Costs
- C. Standard of Documentation for the Reimbursement to Government Entities of Costs of Services and Contributions Provided to Airports
- D. Expenditures of Airport Revenue by Grandfathered Airports

Section VI--Prohibited Uses of Airport Revenue

- A. Lawful and Unlawful Revenue Diversion
- B. Prohibited Uses of Airport Revenue

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

- A. Statutory Requirements
- B. General Policies Governing the Self-sustaining Rate Structure Assurance

- C. Policy on Charges for Nonaeronautical Facilities and Services
- D. Providing Property for Public Community Purposes
- E. Use of Property by Not-for-Profit Aviation Organizations
- F. Use of Property by Military Units
- G. Use of Property for Transit Projects
- H. Private Transit Systems

Section VIII--Reporting and Audit Requirements

- A. Annual Financial Reports
- B. Single Audit Review and Opinion

Section IX--Monitoring and Compliance

- A. Detection of Airport Revenue Diversion
- B. Investigation of Revenue Diversion Initiated Without Formal Complaint
- C. Investigation of Revenue Diversion Precipitated by Formal Complaint
- D. The Administrative Enforcement Process
- E. Sanctions for Noncompliance
- F. Compliance with Reporting and Audit Requirements

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, P.L. No. 103-305, 108 Stat. 1569 (August 23, 1994), 49 U.S.C. § 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 revenue, 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 U.S.C. §§ 47107(b) and 47133, is to provide that an airport owner or operator receiving federal financial assistance will use airport revenue only for purposes related to the airport. The *Revenue Use Policy* statement implements requirements adopted by Congress in the FAA Authorization Act of 1994 and the FAA Reauthorization Act of 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 U.S.C. § 47133, which took effect on October 1, 1996, applies the airport revenue-use requirements of Sec. 47107(b) to any airport that has received "federal assistance." The FAA considers the term "federal assistance" in Sec. 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 U.S.C. § 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 Development Act of 1970, or under Section 516 of the Airport and Airway Improvement Act of 1982 (AAIA).

[[Page 7716]]

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 market value rent of the airport property. The fair market value rent 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 Sec. 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 Reauthorization 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.

[[Page 7717]]

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

3. For airport privatization transactions not subject to an exemption under the privatization 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 AIA. 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 Reauthorization 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 nonsponsoring governmental bodies for lost tax revenues exceeding stated tax rates.

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

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
Any amount of airport funds that are used to make a payment or

[[Page 7718]]

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 used 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 Super bowl 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

[[Page 7719]]

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 predetermined 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 nonairport 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

[[Page 7720]]

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 nonsponsoring 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 market value rent, except to the extent permitted by Section VII.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 nonsponsoring 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 air 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

[[Page 7721]]

to charge fair market value 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 value rent 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 (AAIA), and provide services that directly benefit airport operations and safety, such as snow removal and supplementary aircraft rescue and fire fighting (ARFF) capability.

G. Use of Property for Transit Projects

Making airport property available at less than fair market value rent 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 value rent 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 Administration 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 FAA Authorization Act of 1994, 49 U.S.C. § 47107(a)(19), requires airport owners or operators to submit to the Secretary

[[Page 7722]]

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 FAA Authorization Act of 1994 requires a report, for each fiscal year, in a 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 headquarters Airport Compliance Division, ACO-100.

B. Single Audit Review and Opinion

1. General requirement and applicability. The Federal Aviation Administration 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. Sec. 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, Sec. 520 or an airport improvement program grant identified by FAA as a major program in accordance with OMB A-133 Sec. 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 U.S.C. § 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 (ACO-100), 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 pilot program (the Single Audit Act governs only states, local governments and nonprofit 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. Secs. 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 Enforcement 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 Sec. 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 Sec. 16.109 proposing enforcement actions. 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)

[[Page 7723]]

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 U.S.C. § 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 FAA Authorization Act of 1994, 49 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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 U.S.C. §§ 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 U.S.C. § 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 U.S.C. § 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.
[FR Doc. 99-3529 Filed 2-11-99; 8:45 am]
BILLING CODE 4910-13-P

THIS PAGE INTENTIONALLY LEFT BLANK

Appendix E-1 ► Factors Affecting Award of Airport Improvement Program (AIP) Discretionary Grants

Federal Register / Vol. 64, No. 110 / Wednesday, June 9, 1999 / Notices

31031

Environmental Impact Statement (FEIS) as the preferred alternative. The FAA issued the FEIS on April 19, 1999. The FEIS analyzed two alternatives in detail. The first or No Action alternative would require physical replacement of the Baltimore and Dulles TRACONS, but would not consolidate the four facilities. The second or preferred alternative would provide full consolidation at one of two possible locations. The FEIS identified the preferred location as Vint Hill Farms.

FOR FURTHER INFORMATION OR TO OBTAIN A COPY OF THE RECORD OF DECISION CONTACT: Mr. Joseph Champley, Project Support Specialist, Federal Aviation Administration, (800) 762-9531, Email: joe.champley@faa.gov.

The Record of Decision can be viewed on the Internet at <http://www.faa.gov/ats/potomac>.

Dated: June 3, 1999 in Washington, DC.

John Mayrhofer,

Director, TRACON Development Program,

[FR Doc. 99-14616 Filed 6-8-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Factors Affecting Award of Airport Improvement Program (AIP) Discretionary Funding

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) reiterates four factors that may militate against a decision by the FAA to award AIP discretionary funding to an airport sponsor. These factors are: revenue diversion; delinquent submissions of financial reports; unsatisfactory progress on existing grant agreements; and use of AIP entitlements funds on low priority development as calculated under the FAA's National Priority System (NPS) equation.

FOR FURTHER INFORMATION CONTACT: Mr. Barry L. Molar, Manager, Airports Financial Assistance Division, APP-500, on (202) 267-3831.

SUPPLEMENTARY INFORMATION: The FAA manages the AIP in accordance with statutory direction and agency policies and criteria. Decisions to award discretionary grants are made on the basis of a number of factors, including project evaluation under the NPS. The Congress has directed that FAA take certain additional factors into consideration. The FAA hereby

provides notice and explanation of those factors, and the manner in which the FAA will consider them in making decisions on discretionary grants.

1. Improper Diversion of Airport Revenue

Airport sponsors receiving federal grants under the Airport Improvement Program (AIP) are subject to a number of statutory conditions, one of which restricts the use of airport revenue. The FAA published a notice of final policy and procedures concerning the use of airport revenues (64 FR 7696). The Notice defines proper and improper uses of airport revenue and describes actions the FAA may take to address improper revenue use.

It is the intent of the FAA to generally withhold AIP discretionary funding to those airports requesting such funding that are being investigated by the FAA for misuse of airport generated revenue. Airports qualifying under Title 49 U.S.C. 47107(b)(2) are exempted from this policy. This provision recognizes the rights of "grandfathered" airport sponsors to use airport revenues for other purposes. However, as discussed below, payments permitted under the "grandfather" provision may be considered a militating factor against the award of discretionary grants in certain circumstances.

General Rule

Title 49 U.S.C., Sections 47107(b) and 47133; generally requires airport revenues to be used for the capital or operating costs of the airport, the local airport system, or other facilities owned or operated by the airport sponsor and directly and substantially related to the actual air transportation of persons or property. If the FAA finds that an airport is not complying with this statute, after providing notice and an opportunity for hearing, and the sponsor does not take satisfactory corrective action, various enforcement actions are mandated or authorized. The enforcement actions affecting AIP funding that the FAA is authorized or required to take include any of the following, or combination thereof: withholding of future AIP entitlement and discretionary grants (49 U.S.C. 47106(d), 47111(e)); withholding approval of the modification of existing grant agreements that would increase the amount of AIP funds available (section 47111(e)); and withholding payments under existing grants (section 47111(d)).

Grandfather Provision

Under the "grandfather provision" of the revenue use requirement, sections

47107(b) and 47133(b), an airport operator may use airport revenues for local purposes other than those proscribed in sections 47107 and 47133 if a provision of law controlling the airport operator's financing enacted on or before September 2, 1982 or a covenant or assurance in an airport operator's debt obligation issued on or before September 2, 1982 provides for the use of airport revenues from any facility of the airport operator to support general debt obligations or other facilities of the airport operator. The statutory revenue-use provisions also permit local taxes on aviation fuel in effect on December 30, 1997 to be used for any local purpose.

Thus, the use of airport revenue for local purposes under these exceptions does not preclude the award of AIP grants to an airport operator. However, under 49 U.S.C. §47115(f), the FAA must, in certain circumstances, consider as a factor militating against the distribution of discretionary AIP funding, the use of airport revenue for local purposes under the "grandfather provision." This militating factor applies only if the airport revenue so used in the airport's fiscal year preceding the date of the application for discretionary funds exceeds the amount of revenues used in the airport's first fiscal year ending after August 23, 1994, and adjusted for changes in the Consumer Price Index. In addition, the airport's failure to provide information needed by the FAA to determine whether Section 47115(f) applied to a specific grant application would prevent the FAA from making an evaluation required by Section 47115(f), and thus, would prevent the FAA from considering an application for discretionary funds.

2. Annual Financial Reports

Section 111(c) of the Federal Aviation Administration Authorization Act of 1994 (the 1994 Act) requires the Secretary of Transportation to submit to the Congress, and to make available to the public, in annual report listing in detail certain financial information requiring individual airport revenues and expenditures. The data is derived from reports by airport owners or operators, also required by Section 111(a)(19) of the 1994 Act. Under the authority of Assurance 26 of the Airport Sponsor Assurances, airport sponsors are required to submit annual reports. The FAA's September 10, 1998, Advisory Circular (AC) titled *Guide for Airport Financial Reports Filed by Airport Sponsors* specifies the report format and due dates.

31032

Federal Register / Vol. 64, No. 110 / Wednesday, June 9, 1999 / Notices

Failure of an airport sponsor to file airport financial reports by the due date will cause FAA to withhold award of AIP discretionary funds. The sponsor will not be considered for discretionary funds until it provides acceptable corrective action and is determined by the FAA to be in compliance with the reporting requirements. If the FAA makes a determination that the sponsor is in noncompliance with Assurance 26, it may withhold all sources of AIP funding (both discretionary and entitlement). The FAA will suspend processing of discretionary grants (grants for funds not apportioned under Section 47111(e)) immediately upon determining that a sponsor's airport financial reports are overdue.

3. Progress on Existing Grant Agreements

As a general policy, the FAA encourages sponsors to take construction bids prior to submitting an application of AIP grants. Bid-based grants more accurately reflect actual project costs, allow for more efficient management of AIP obligations, and help to ensure sponsors proceed timely with projects. When AIP funds are obligated by a grant, airport sponsors are encouraged, to the extent practicable, to make timely AIP draw downs as they incur costs leading to completion of their projects. FAA financially closes AIP projects as soon as possible following physical completion of the project. Close adherence to this policy helps to ensure that AIP funds do not remain idle after they are obligated in a grant, that a sponsor complete projects in a timely manner, and that the need to amend grants to accommodate higher costs is minimized. This policy has been developed and applied by the FAA, prior to the advent of the AIP, to foster effective financial management of federal grant funds.

The airport sponsor's management of past AIP grants can influence FAA's consideration of AIP discretionary funds for proposed projects. Efficient and expeditious implementation by airport sponsors of past grant is encouraged. Factors which may militate against the distribution of discretionary funds include: failure to financially close a physically completed project in a timely manner; inability to commence or complete work under an approved grant in a timely manner; and, having an excessive number of open, uncompleted grants.

The FAA understands that there may be compelling that justify relaxation of the general policy in light of specific local factors. FAA will take these factors into consideration when evaluating

requests that contemplate the use of discretionary funds, and in accordance with FAA policy, thoroughly document exceptions to this general rule.

4. Sponsor Use of Entitlement Funds

The FAA encourages airport sponsors to use entitlement funds on the "highest priority" work at the airport as calculated under the FAA's National Priority System (NPS) equation. A detailed discussion of the NPS was published in the *Federal Register* Notice dated August 25, 1997, entitled *Revisions to the Airport Capital Improvement Plan (ACIP) National Priority System*. For purposes of determining whether sponsor entitlements are being used on high priority projects, the FAA will calculate the priorities of sponsor work items from the NPS equation. This policy helps ensure that AIP funds in the aggregate are used for projects that contribute most to the safety, security, capacity, and efficiency of the Nation's system of airports. Conversely, if sponsors use entitlement funds for lower priority projects and FAA agrees to use discretionary funds for the highest priority projects, the aggregate result of AIP investments is likely to provide less benefits to the national system than under FAA's policy.

Therefore, if the FAA determines that an airport sponsor is using its entitlement funds on low priority rated projects while requesting discretionary funds for higher priority rated work, the FAA may withhold discretionary funds requested by the sponsor.

As with a sponsor's rate of progress on existing grants, the FAA understands that there may be legitimate circumstances for a sponsor to use its entitlement funds for lower priority work. In addition, the FAA is fully cognizant that the NPS equation cannot always demonstrate the total benefit of a project to the airport or the national system. Consequently, the FAA will thoroughly evaluate a sponsor's justification prior to denying a request for discretionary funding on the basis of the sponsor's use of entitlements for lower priority projects. In accordance with FAA policy, such exceptions must be documented by the airport sponsor and submitted to FAA. Issued in Washington, DC on May 25, 1999.

Paul L. Galis,

Director, Office of Airport Planning and Programming.

[FR Doc. 99-14481 Filed 6-8-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Deadline for Submission of Application Under the Airport Improvement Program (AIP) for Fiscal Year 1999 for Sponsor Entitlement and Cargo Funds

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces July 12, 1999, as the deadline for each airport sponsor to have on file with the FAA an acceptable fiscal year 1999 grant application for funds apportioned to it under the AIP.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley Lou, Manager, Programming Branch, Airports Financial Assistance Division, Office of Airport Planning and Programming, APP-520, on (202) 267-8809.

SUPPLEMENTARY INFORMATION: Section 47105(f) of title 49, United States Code, provides that the sponsor of each airport to which funds are apportioned shall notify the Secretary by such time and in a form as prescribed by the Secretary, of the sponsor's intent to apply for the funds apportioned to it (entitlements). Notification of the sponsor's intent to apply during fiscal year 1999 for any of its available entitlement funds including those unused from prior years, shall be in the form of a project application submitted to the cognizant FAA Airports office no later than July 12, 1999.

This notice is promulgated to expedite and prioritize grants prior to the August 6, 1999, AIP expiration date as established by Public Law 106-31 (1999 Emergency Supplemental Appropriations Act). Absent an acceptable application by July 12, FAA will defer an airport's entitlement funds until the next fiscal year. Pursuant to the authority and limitations in section 47117(g), FAA will issue discretionary grants in an aggregate amount not to exceed the aggregate amount of deferred entitlement funds.

In prior fiscal years, FAA has had sufficient program flexibility to permit sponsors to provide notice later than the deadline date, or to use entitlement funds later in a fiscal year in spite of filing no notice to that effect. In FY 1999, however, FAA must make all discretionary grant awards prior to August 7, 1999, including discretionary grants of entitlement funds that are available to, but will not be used by, the airport sponsors to which they have been apportioned. Airport sponsors that