

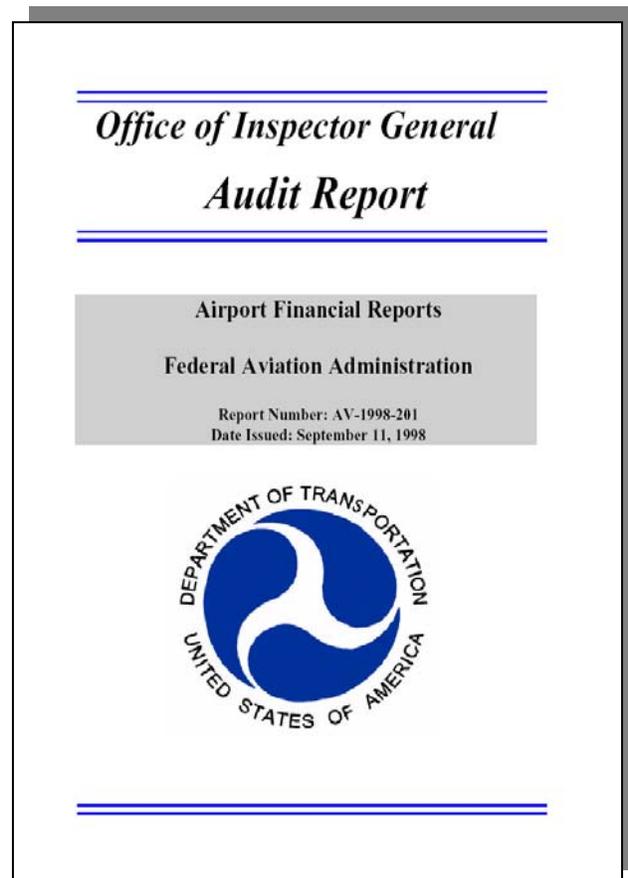
Chapter 16. Resolution of Unlawful Revenue Diversion

16.1. Background. This chapter describes the FAA's responsibility for detecting and resolving unlawful revenue diversion. It is the responsibility of the FAA airports district and regional offices to identify unlawful revenue diversion, to seek sponsor compliance informally before initiating formal investigation, and to monitor corrective action plans. The FAA headquarters Office of Compliance and Field Operations (ACO) is responsible for issuing Notices of Investigation, assessing interest and penalties, issuing formal compliance determinations, and arranging for hearings to be conducted when appropriate.

16.2. FAA Authorization. As a violation of a standard grant assurance required under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, unlawful revenue diversion is subject to the standard investigation and determination procedures discussed in chapter 5 of this Order, *Complaint Resolution*. The 1994 Authorization Act and 1996 Reauthorization Act established specific remedies for unlawful airport revenue diversion.

a. 1982 Authorization Act. The AAIA established the general requirement for use of airport revenue which 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. (Codified at 49 United States Code (U.S.C.) § 47107(b))

b. 1994 Authorization Act. In the Federal Aviation Administration Authorization Act of 1994 (1994 Authorization Act) (Public Law (P.L.) No. 103-305, Congress strengthened the revenue use requirement by adding a new assurance requiring airport owners or operators to submit an annual report listing all amounts paid by the airport to other units of government, and required the FAA to issue a policy on the use of airport revenue. Congress also established specific actions that the FAA is authorized to take when a sponsor fails to correct unlawful revenue diversion. These actions are:



(1). Withholding Airport Improvement Program (AIP) grants and approval of applications to impose and use passenger facility charges (PFCs). (See 49 U.S.C. § 47111, § 47107(n).)

and/or

(2). Assessing a civil penalty for unlawful revenue diversion of up to \$50,000. (See 49 U.S.C. § 46301.)

and/or

(3). Seeking judicial enforcement for violation of any grant assurance. (See 49 U.S.C. §§ 46106 and 47111(f).)

and/or

(4). In deciding whether to distribute funds to an airport from the discretionary fund, the Secretary shall consider as a factor militating against the distribution of such funds to the airport the fact that the airport is using revenues generated by the airport or by local taxes on aviation fuel for purposes other than capital or operating costs of the airport or the local airports system or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property.

The above provision shall only apply if the Secretary is able to find that the amount of revenues used by the airport for purposes other than capital or operating costs in the airport's fiscal year preceding the date of the application for discretionary funds exceeds the amount of such revenues in the airport's first fiscal year ending after August 23, 1994, adjusted by the Secretary for changes in the Consumer Price Index (CPI) of All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor. (See 49 U.S.C. § 47115(f).)

c. 1996 Reauthorization Act. In the FAA Reauthorization Act of 1996 (1996 Reauthorization Act)(P.L. No. 104-264), Congress broadened the revenue use requirements by adding a new section, 49 U.S.C. § 47133. Title 49 U.S.C. § 47133 broadened the applicability of the revenue use prohibition to cover any airport that is the subject of federal assistance, including both public and privately owned public use airports, and airport sponsors that have accepted real property conveyances from the federal government. There is a limited exception to the revenue use prohibition, which is discussed in detail in Chapter 15 of this Order, section 15.10, *Grandfathering from Prohibitions on Use of Airport Revenue*.

Additionally, as noted in the *Revenue Use Policy*, airport sponsors that have 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. However, 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. Moreover, in accordance with 49 U.S.C. § 47153(b), the FAA does include the revenue use requirement as a required term in Surplus Property Instruments of Conveyance in order to protect and advance the interests of the United States in civil aviation. These actions are:

(1). Withholding any amount available to the sponsor under Title 49 of the United States Code, including transit or multimodal transportation grants. (See 49 U.S.C. § 47107(n) (3).)

and/or

(2). Assessing a civil penalty up to three times the amount of diverted revenue. The Administrator may impose a civil penalty up to \$50,000. The FAA must apply to a U.S. district court for enforcement of a proposed civil penalty that exceeds \$50,000. (See 49 U.S.C. § 46301.)

and/or

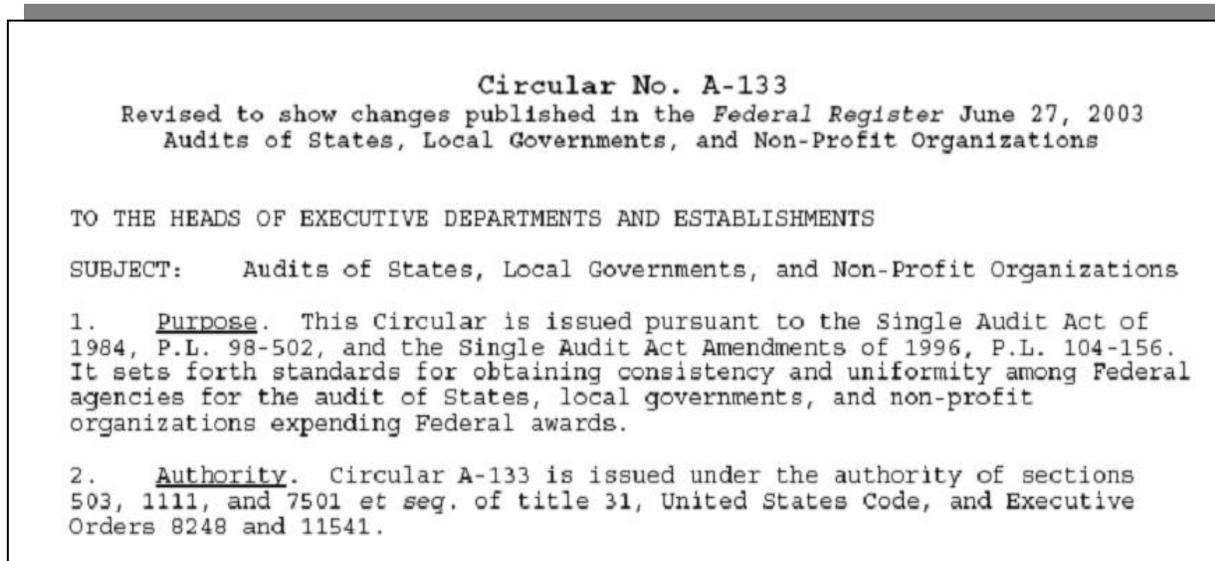
(3). Requiring assessment of interest on the amount of diverted revenue. (See 49 U.S.C. § 47107(o).)

16.3 Section 47133 and Grant Assurance 25, Airport Revenues. As stated above, since enactment of the AAIA in 1982, sponsors – as a condition of receiving AIP grants – have been required to comply with Grant Assurance 25, *Airport Revenues*, on the use of airport revenue. In the 1996 Reauthorization Act, Congress broadened the applicability of the revenue use prohibition to cover any airport that is the subject of federal assistance, including both public and privately owned public use airports, and airport sponsors that have accepted real property conveyances from the federal government. These revenue use requirements are codified at 49 U.S.C. § 47133.

Accordingly, revenue use violations may be enforced as a violation of contract obligations under the grant assurances, as a violation of federal law under 49 U.S.C. § 47107(l)(m), and may be enforced as a violation of a Surplus Property Deed or other federal land conveyances when applicable.

16.4. Agency Policy.

FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, February 16, 1999, (*Revenue Use Policy*) defines airport revenue and implements the requirements of the AAIA and the above acts. (See chapter 15 of this Order, *Permitted and Prohibited Uses of Airport Revenue*.)



16.5. Responsibility.

Regional offices are responsible for resolving single audit findings. The Office of Management and Budget (OMB) single audit clearinghouse will forward the audit findings to the Office of Inspector General (OIG), and the OIG will then forward the finding to the regional offices. New guidance from the Department of Transportation (DOT) requires the FAA to resolve single audit findings within 30 days. The Airport Compliance Division (ACO-100) will provide technical support to the regions, and it will provide status reports to FAA management and to the DOT.

16.6. Detection of Airport Revenue Diversion.

a. Sources of information. To determine if a sponsor has unlawfully diverted revenue, the FAA depends primarily on various sources of information, including:

- (1). Annual financial reports submitted by sponsor.
- (2). Single audit reports conducted in accordance with the OMB Circular A-133.
- (3). Part 16 formal complaints (under 14 CFR Part 16).
- (4). Audits conducted by the DOT/OIG.
- (5). Financial reviews conducted by the FAA Office of the Associate Administrator for Airports.
- (6). Part 13 informal complaints (under 14 CFR Part 13).
- (7). Land-use inspections.
- (8). Airport staff.

b. Reports. Audit reports on revenue diversion may be issued by the DOT/OIG or by an independent auditor performing a single audit under OMB Circular A-133.

The single audit (or A-133 audit) is an audit of financial statements and federal awards of local governments receiving federal assistance, conducted in accordance with OMB Circular A-133. If audit findings are reported in an A-133 audit, the DOT/OIG will send a copy of the report to the FAA regional airports division. The cognizant office will coordinate with the DOT Single Audit Coordinator to resolve any reported audit findings. ACO-100 will monitor the resolution of those audits and provide guidance and interpretation on the audit requirements.

The OIG may also conduct audits and issue reports on revenue diversion. National reports with revenue diversion findings will be sent to ACO-100; audits on individual airports may be sent to the regional airports division. ACO-100 will monitor the follow-up on those reports. Semi-annually, the DOT/OIG reports to Congress on the status of the FAA's responsiveness and resolution of those revenue diversion findings.

c. Release of Audit Reports. Regional airports divisions shall coordinate the release of any audit report prepared by the OIG to the public with Regional Counsel and ACO-100 shall coordinate such releases with the Assistant Chief Counsel for Airports and Environmental Law, AGC-600, to ensure that the release is in accordance with the Trade Secrets Act (18 U.S.C. 1905) and the Freedom of Information Act (FOIA) (5 U.S.C. 552). (See AIP Handbook, Order 5100.38, chapter 13.)

d. Compliance Reviews. ACO-100 will conduct a financial compliance review of two airports each fiscal year.

e. Interest. Interest on revenue diversion is computed at simple interest at the rate in effect at the time the debt becomes overdue. The rate of interest remains fixed for the duration of the indebtedness. Interest is computed in accordance with the procedures specified in § 47107(o).

f. In cases where the FAA must ascertain compliance with the requirements, reviewing published airport financial data may be useful. In each case, differences among the audit report or complaint, published financial data, and information presented by the sponsor should be discussed and resolved to the extent possible.

16.7. Investigation of a Complaint of Unlawful Revenue Diversion.

a. General. The FAA enforces the requirements imposed on sponsors as a condition of their acceptance of federal grant funds or property through the administrative procedures set forth in 14 CFR Part 16. As such, the FAA has the authority to receive complaints, conduct informal and formal investigations, compel sponsors to produce evidence, and adjudicate matters of compliance within the jurisdiction of the Associate Administrator for Airports.

b. Formal Complaint. When the FAA receives a formal complaint against a sponsor for unlawful revenue diversion, ACO-100 follows the procedures in Part 16 for adjudicating the complaint. After conducting an investigation, the Director of Airport Compliance and Field

Operations (ACO-1) will either dismiss the complaint or issue a Director's Determination, which can impose immediate sanctions or propose future enforcement action, or both.

c. Corrective Action. If, at any point, the airport sponsor takes the corrective action specified in the order, the Director will dismiss the complaint. This is consistent with the practice discussed elsewhere in this Order that the best results can be achieved by a positive, continuing educational program to assist sponsors in knowing what their obligations are and promoting their voluntary compliance with their obligations.

16.8. Investigation without a Formal Complaint.

a. General. When a formal complaint has not been filed but the FAA has an indication from one or more sources that unlawful revenue diversion has occurred, the FAA airports district office (ADO) or regional airports division will notify the sponsor and request that it respond to the allegations. If, after evaluating the sponsor's arguments and submissions, the office determines that unlawful diversion of revenue did not occur, then it will notify the sponsor and take no further action.

b. Finding. If the office makes a preliminary finding that there has been unlawful revenue diversion and the sponsor has not taken corrective action (or has not agreed to take corrective action), the office may forward the matter to ACO-100 for investigation under Part 16. If, after further investigation, ACO-100 finds there is reason to believe there is, or has been, unlawful revenue diversion and the sponsor refuses to terminate or correct the diversion, the Director will issue a Director's Determination under Part 16. However, ACO-100 will close the Part 16 proceeding if the airport sponsor agrees to return the diverted revenue amount plus interest.

c. Office of Inspector General. When the Office of the Inspector General (OIG) issues a report of an investigation with a revenue diversion finding, ACO-100 will proceed with an investigation and attempt to resolve and close the OIG audit.

16.9. Administrative Sanctions. When the Director of Airport Compliance and Field Operations (ACO-1) makes a preliminary finding of unlawful revenue diversion and issues a Director's Determination, ACO-100 first seeks voluntary compliance. Should that fail, the Director may pursue any or all of the following enforcement remedies at his/her discretion subject to any appeal and affirmation by the Associate Administrator for Airports following appeal:

a. Withholding approval of an application for future grants.⁴¹ (See 49 U.S.C. § 47106(d).)

and/or

⁴¹ As stated in the policy document, *Factors Affecting Award of Airport Improvement Program (AIP) Discretionary Funding*, 64 Fed. Reg. 31031 (June 9, 1999), it is the intent of the FAA generally to withhold AIP discretionary funding to those airports requesting such funding that are being investigated by the FAA for misuse of airport generated revenue.

b. Withholding modification of existing grants. (See 49 U.S.C. § 47111(e).)

and/or

c. Withholding payments under existing grants. (See 49 U.S.C. § 47111(d).)

and/or

d. Withholding approval of a passenger facility charge. (See 49 U.S.C. § 47111(e).)

e. Withholding any amount from funds otherwise available to the sponsor, including funds for other transportation projects, such as transit or multimodal projects. (See 49 U.S.C. § 47107(n)(3).)

f. For violations of the grant assurance or 49 U.S.C. § 47133, the Associate Administrator for Airports may file suit for enforcement in the U.S. district court. (See 49 U.S.C. § 47111(f).)

g. Reverter. FAA may, at its discretion, exercise its right of reverter and enter and, on behalf of the United States, take title to all or any part of the property interests conveyed. (See 49 U.S.C. §§ 47133 and 47151, et seq.) Reverter is discussed in detail in Chapter 23 of this Order, *Reversions of Airport Property*.

16.10. Civil Penalties and Interest.

a. Civil Penalties up to Three Times the Diverted Amount. The Associate Administrator for Airports may seek a civil penalty for a violation of the AIP sponsor assurance on revenue diversion of up to three times the amount of unlawful revenue diversion. Civil penalties up to \$50,000 are imposed and adjudicated under 14 CFR Part 13, subpart G. For a proposed civil penalty in excess of \$50,000, the FAA must file a civil action in the U.S. district court to enforce the penalty. (See 49 U.S.C. §§ 46301, 46305).

b. Office of the Chief Counsel. The FAA Office of the Chief Counsel (AGC-600) initiates civil penalty actions. AGC-600 must be consulted when considering whether to impose a civil penalty action for airport revenue diversion.

c. Use of Authority. In general, a civil penalty sanction may be appropriate when two conditions apply:

(1). Sponsor Noncompliance. The Director of Airport Compliance and Field Operations has clearly identified a violation to the airport sponsor and has given the sponsor a reasonable period of time to take corrective action to restore the funds or otherwise come into compliance before a penalty is assessed, but the sponsor has not complied.

(2). Other Remedies Fail. Other enforcement actions against the sponsor, such as withholding grants and payments, would be unlikely to achieve compliance.

d. Interest. The amount necessary for a sponsor to come into compliance includes interest calculated in accordance with 49 U.S.C. § 47107(o). The maximum civil penalty allowed under § 46301(a) of three times the amount unlawfully diverted may also include interest calculated in accordance with 49 U.S.C. § 47107(o).

16.11. Compliance with Reporting and Audit Requirements. The ADOs and regional airports divisions will monitor airport sponsor compliance with the Airport Financial Reporting Requirements and Single Audit Requirements, as described in the *Revenue Use Policy*. Failure to comply with these requirements can result in withholding future AIP grant awards and further payments under existing AIP grants.

16.12. Statute of Limitations on Enforcement. The 1996 Reauthorization Act included a statute of limitations that prevents the recovery of funds illegally diverted more than six years after the illegal diversion occurs. (See 49 U.S.C. § 47107(n)(7). Accordingly, the FAA may not bring an action for recovery of unlawfully diverted funds later than six (6) years after the date on which the diversion occurred. (See 49 U.S.C. § 47107(n)(7).)

16.13. through 16.17. reserved.