

[4910-13]

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

**Docket No. 28895**

### **Airport Privatization Pilot Program: Application Procedures**

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

**ACTION:** Notice of final application procedures

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**SUMMARY:** Section 149 of the Federal Aviation Authorization Act of 1996 establishes an airport privatization pilot program, and authorizes the Department of Transportation to grant exemptions from certain Federal statutory and regulatory requirements for up to five airport privatization projects. A request for participation in the airport privatization pilot program will be initiated by the filing of either a preliminary or final application for exemption with the FAA. This statement identifies the issues the Department will consider in granting exemptions and approving the transfer of a public use airport under the program; it also describes the application procedures to be used by interested public airport sponsors and private parties to apply for an exemption under the program.

**DATES:** This policy is effective on publication. With the exception noted below, preliminary and final applications for exemption will be accepted on or after December 1, 1997, and will be handled on a first-come first-served basis until the limits of § 47134 are reached. An otherwise qualifying preliminary or final application for exemption will be accepted before December 1, 1997, if the sponsor has issued, on or before the date of publication of this notice, a formal solicitation or request for proposals for the sale or lease of an airport. All applications will be evaluated in the order of receipt.

**FOR FURTHER INFORMATION CONTACT:** Benedict D. Castellano Manager, (202-267-8728) or Kevin C. Willis (202-267-8741) Airport Safety and Compliance Branch, AAS-310, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591,

### **SUPPLEMENTARY INFORMATION**

#### **INTRODUCTION AND BACKGROUND**

This notice of application procedures to be used by applicants for an airport privatization project is being published pursuant to § 149 of the Federal Aviation Administration Authorization Act of 1996, Pub. L. No. 104-264 (October 9, 1996) (1996 Reauthorization Act), which adds a new § 47134 to Title 49 of the U.S. Code. Section 47134 authorizes the Secretary of Transportation, and through delegation, the FAA Administrator, to exempt a sponsor of a public use airport that has received Federal

assistance, from certain Federal requirements in connection with the privatization of the airport by sale or lease to a private party. Specifically, the Administrator may exempt the sponsor from all or part of the requirements to use airport revenues for airport-related purposes, to pay back a portion of Federal grants upon the sale of an airport, and to return airport property deeded by the Federal Government upon transfer of the airport. The Administrator is also authorized to exempt the private purchaser or lessee from the requirement to use all airport revenues for airport-related purposes, to the extent necessary to permit the purchaser or lessee to earn compensation from the operations of the airport.

In addition to identifying the application procedures, this notice discusses the issues the FAA will consider in determining whether to approve an application for an exemption under § 47134 and other Federal requirements for airport operation. The term “public sponsor” is used in this document to mean the governmental agency or authority that currently owns or operates a public airport and proposes to sell or lease it to a private purchaser or lessee. The term “private operator” is used to refer to a private firm or firms that propose to purchase or lease a public airport under the program; the term “applicant” means all of the parties jointly participating in the application for privatization of a particular airport.

#### *Requirements for transfer of a Federally-assisted public airport*

A request for transfer of the operation of an airport from an existing public sponsor to a new operator, whether public or private, requires FAA approval. The request for exemption under § 47134 would be considered in conjunction with existing approval requirements and processes.

*Grant/deed conditions.* Airport sponsors receiving Federal assistance under a grant program or through donation of surplus property agree as a condition of the assistance to obtain FAA approval before transferring control or ownership of the airport to another party. For example, Assurance No. 5.b. in the Airport Improvement Program (AIP) grant agreements provides that a sponsor will not sell, lease, or otherwise transfer any part of its title or other interests in the airport property subject to the grant assurances, for the duration of the term of the grant agreement, without approval by the Secretary. Assurance No. 5 further provides that the sponsor and the transferee approved by the Secretary shall insert in the contract or document transferring the sponsor's interest, and make binding upon the transferee, all of the terms, conditions and assurances contained in the sponsor's grant agreement. Similar conditions are written into the deeds of conveyance for Federal surplus property donated to an airport sponsor.

The FAA expects that applications will include a statement that the new owner/operator will assume the obligations of the original sponsor under existing grant agreements or deeds. The FAA will consider whether the new owner/operator has the powers and authority to fulfill its obligations under the assurances.

*Regulatory requirements.* An operator of an airport receiving air service by aircraft with more than 30 passenger seats must hold an FAA operating certificate under 14 C.F.R. Part 139. Authority to certificate airports served by aircraft with 9 or more passenger seats was granted to the FAA in the 1996 Reauthorization Act. FAA operating certificates are not transferable; a new operator of a certificated airport must obtain a new certificate issued by the FAA.

*Section 47134.* Section 47134 contains specific provisions for issuance of an exemption in connection with a transfer of airport operation. These conditions supplement and to some extent overlap the factors that FAA would consider under Assurance No. 5.b., but do not replace other requirements for approval of an airport transfer. In summary, § 47134(c) provides that the Administrator may issue exemptions to a public sponsor and a private sponsor only if the Administrator finds that the sale or lease agreement contains provisions satisfactory to the Administrator to ensure that:

- (1) The airport will continue to be available for public use on reasonable terms and conditions without unjust discrimination;
- (2) The operation of the airport will not be interrupted if the private operator experiences bankruptcy or other financial difficulty;
- (3) The private operator will “maintain, improve, and modernize” airport facilities through capital investments, and submit a plan for these actions;
- (4) Airport fees imposed on air carriers will not increase faster than inflation unless a higher amount is approved by at least 65 percent of the air carriers using the airport and the air carriers having at least 65 percent of the landed weight of aircraft at the airport;
- (5) The percentage of increase in fees imposed on general aviation operators will not exceed the percentage increase in fees imposed on air carriers;
- (6) Safety and security will be maintained “at the highest possible levels;”
- (7) Adverse effects of noise from operations at the airport will be mitigated to the same extent as at a public airport;
- (8) Adverse effects on the environment from airport operations will be mitigated to the same extent as at a public airport; and
- (9) Any collective bargaining agreement that covers airport employees and is in effect on the date of the sale or lease of the airport will not be abrogated by the sale or lease.

In addition, the Administrator must find that the transfer will not result in unfair and deceptive trade practices or unfair methods of competition, and that the interests of general aviation users are not adversely affected.

#### *Number of participating airports*

In establishing the privatization pilot program, Congress placed limitations on the number and kind of airports eligible to participate. Paragraph 47134(d)(1) provides that if the applications of 5 airports are approved, then at least one must be a general aviation airport. Paragraph 47134(d)(2) provides that no more than one of the airports approved

may be an airport with more than 1 percent of total passenger boardings (a large hub airport), as defined in 49 U.S.C. § 47102(10).

### **Notice of Proposed Application Procedures; Discussion of Comments Received**

On April 22, 1997, the Federal Aviation Administration published in the Federal Register a Notice of Proposed Procedures entitled “Airport Privatization Pilot Program: Application Procedures,” proposing application procedures for public sponsor participation in the Airport Privatization Pilot Program (62 FR 19638). The notice also included a discussion of issues involved in reviewing applications and a notice of a public meeting. The agency asked for public comment by June 4, 1997. The FAA also solicited and received comments at the public meeting held on May 21, 1997. Verbatim transcripts of the meeting have been included in the docket of this proceeding.

The Agency received more than 22 written comments to the Notice of proposed application procedures. Comments were received from such organizations and individuals as: Aircraft Owners and Pilots Association, (AOPA); Air Line Pilots Association, (ALPA); Air Transport Association, (ATA); Airport Commission City and County of San Francisco; Airports Council International -North America, (ACI-NA); Airport Group International, (AGI); Allegheny County Department of Aviation; American Association of Airport Executives, (AAAE); BAA USA, Inc.; Infrastructure Management Group, (IMG); Johnson Controls; Landrum and Brown; National Air Transportation Association, (NATA); National Organization to Insure A Sound Controlled Environment, (NOISE); New York State Department of Transportation, (NYSDOT); Sam Stuart of ProAir Partners Inc.; Public Employees Department, AFL-CIO, Reason Foundation; Scenic Hudson; Mr. Charles Spence; Stewart Park & Reserve Coalition; Transportation Trades Department, AFL-CIO (TTD).

The summary of comments is intended to represent the general divergence of industry views on various issues. It is not intended to be an exhaustive restatement of the comments received. All comments received were considered by the FAA even if not specifically identified in this summary. In addition to specific changes noted in the discussion of the issues, the FAA has made editorial changes throughout the application procedures to enhance readability and clarity. The Notice of Proposed Procedures included a discussion of issues that would be considered by the FAA in reviewing applications and granting exemptions (62 FR at 19641-19645). This notice addresses comments on that discussion, but does not repeat the separate discussion of those issues.

### ***Application Procedures***

#### ***Required Report to Congress***

**Comments:** A number of comments suggest changes in the reporting requirement to Congress. Allegheny County Department of Aviation suggests the FAA initiate a dialogue with industry groups to identify potential measures of success to monitor and

evaluate the program. Several commenters suggest that industry comments should be solicited annually and the FAA report to Congress on the efficacy of privatization and the pilot program. The Transportation Trades Department, AFL-CIO suggests that the FAA should address employee and collective bargaining relationships in the two year report to Congress; the report should address such issues as the program's effects on wages and working conditions, retention percentages, contracting out practices and other factors deemed relevant. The FAA should also consider a yearly reporting requirement to monitor the long term effects on employees.

**Discussion:** The law requires the FAA to provide a report to Congress on the progress of implementation of the program no later than two years after the approval of the initial application. While the statute requires the FAA to report only on the implementation of the program, a considerable amount of effort has been undertaken to better understand the potential impacts of airport privatization. During the past year, the agency has held a number of meetings with industry leaders and trade groups, both proponents and opponents of airport privatization, both domestically and internationally. In May, 1997, the FAA and DOT conducted a public meeting to obtain public testimony on the topic.

**Final Disposition:** The FAA will consider the public comments received from the notice combined with the results of the May 21 public meeting and the background information provided by the industry in the development of the report to Congress. The FAA does not plan further notice and comment on the results of the program at this time, but will consider a public forum for discussion of experience under the program at an appropriate time in the future.

#### *Resale or Lease to Third Party*

**Comments:** ATA suggests that the FAA should establish procedures prohibiting the resale of an airport to a third party and mandating the reversion of the airport to the original public entity.

**Discussion:** Approval of a sale or lease under § 47134 would not eliminate the Federal obligations of the private operator under grant agreements to obtain FAA approval for a subsequent sale or lease. Therefore, a prohibition on resale or sublease is unnecessary.

**Final Disposition:** The final procedures do not include a prohibition on resale or subleasing of the airport.

#### *Number of Airports in Pilot Program*

**Comments:** Landrum and Brown, a consulting firm, requests policy clarification on the number and type of participating airports. Landrum and Brown believes that for the five airports selected for participation in the program, specific limits should be placed

on each hub classification (e.g., large, medium, and small hub) to permit participation by all airport hub classifications. FAA should also provide guidelines and criteria for the development of the sponsor's request for proposal/qualifications (RFP/RFQ).

**Discussion:** Congress did not intend for participation in the airport privatization program to be defined according to airport hub classifications beyond those specifically identified in § 149. The conference report, for the bill which became § 149, indicates that the program should be flexible using neither size or geographical diversity as factors in the selection of airports. H.R. Rep. 104-848 at 27 (September 29, 1996).

**Final Disposition:** The final policy retains the original position as identified in the April 22 Federal Register notice.

#### *Two Year Assessment Period*

**Comments:** Allegheny County Department of Aviation suggests that the statutory two year assessment period provides an insufficient time to fully evaluate the impacts of the program. As an example, the county mentioned a typical capital development schedule can have a longer horizon than two years. If the generation of new capital and investment is a measure of performance, the two year reporting period does not provide sufficient time for determining results. The county suggests that Congress establish a longer horizon to permit a more realistic assessment of the program.

**Discussion:** The statute requires the FAA to submit a report to Congress no later than two years after the approval of the first application.

**Final Disposition:** The report to Congress will be filed 2 years from the date of the first application.

#### *Selection Process*

**Comments:** A number of comments suggest changes to the selection process and application submission dates. San Francisco argues that the FAA's system of "first come first serve" is arbitrary and unfair. San Francisco suggests that the start date of December 1, 1997, should be delayed for three months to allow applicants sufficient time to prepare an exemption application. They also suggest that the selection process be replaced by a lottery of pre-qualified applicants with five airports selected by a disinterested third party.

Johnson Controls, a private airport operator, has two concerns with the "first come first serve" approach. Their first concern is that the first five applications submitted may not be the most qualified to be included in the program. Second, if more than five airports submit applications for the December 1 deadline, some of those airports sponsors and their associated parties will be forced to expend a great deal of preparatory work and expense with no assurance that they will be able to obtain an exemption. As an alternative, Johnson Controls suggests a two step process. The first step requires the

submittal of a preliminary application consisting of a description of the procurement process, a copy of the request for proposal (RFP) and a list of the airport owner's minimum requirements. The second step would consist of the FAA granting conditional approval for five airport sponsors to issue a RFP. A stand-by list would be utilized should one of the first five applicants be unable to complete the process. Airport sponsors would have to request FAA approval of their final applications. This selection process is endorsed by Airports Council International North America (ACI-NA) and the American Association of Airport Executives (AAAE).

Landrum and Brown wants both the airport sponsor and private airport operator to be pre-qualified for exemption and participation in the pilot program. Airport Group International (AGI) proposes that interested airport sponsors submit an expression of interest by a date certain. The statement would include basic information about the facility and a feasibility report demonstrating that the economics of the airport can support privatization. Based upon this submittal, the FAA would select five airports best qualified for participation in the program. Exemptions would be issued upon the completion of the solicitation process.

The Reason Foundation suggests staggered start dates based upon airport classification. Under this proposal, applications for general aviation airports would be accepted from December 1 onward, but approval would be limited to a maximum of two during the initial 18 months, while waiting for applications from air carrier airports. Large and medium hub airports could not submit an application until 18 months later, all other air carrier airports would have 12 months. This type of extended schedule would provide large and medium hub airports a longer time for preparation due to the complexity of preparing a request for proposals.

**Discussion:** We agree with commenters that a revision of the selection procedures is warranted. The FAA drew on several different comments for development of the following two-step selection process. We continue to believe applications should be selected on a first come first served basis, rather than a selection process based on criteria not found in § 47134. First, the direction for a report to Congress within 2 years indicates an interest in early implementation of the program. A first-come first-served selection procedure is most likely to meet this objective, as would the December 1 start date for applications, rather than a date of 12 or 18 months hence. Second, § 47134 does not provide specific authority or guidance for comparative selection of eligible applications, should more than five applications be received, based on their merits as privatization projects. However, FAA agrees that a two-step process, involving both preliminary and final applications, would be beneficial because it will avoid a costly and extensive process by parties that will turn out not be among the first five qualifying applicants. Also, the FAA agrees with the suggestion for a lottery procedure to the extent necessary to assign priority to applications received on the same day.

**Final Disposition:** As a first step, interested public sponsors may submit a summary preliminary application to the FAA for review and approval on or after

December 1, 1997 (with certain exceptions noted below). The preliminary application will consist of: a summary narrative of the objectives of the privatization initiative; i.e., what the sponsor is trying to accomplish; second, a description of the process and timetable to be employed in selecting an operator; third, all the information required to be included in Part II of the final application; fourth, airport financial statements including balance and income statements for the last two reporting periods; and finally, a distribution ready copy of the request for proposals (RFP) that the sponsor will use in seeking a private operator.

The RFP must be specifically for the sale or lease of the airport under the § 47134 Airport Privatization Pilot Program. The document should contain references to this notice and the nine statutory objectives listed in § 47134(c). These preliminary applications will be accepted for review on a first come first served basis. The FAA will review each preliminary application and, if the preliminary application is accepted for review, the FAA will publish the status of the application in the Federal Register. Filing dates for applications, for the purposes of determining filing order under this program, will be the filing date of an approved preliminary application or the filing date of the final application if no preliminary application is filed. The FAA may accept up to five applications. If more than five airports submit applications, the FAA will establish a stand-by list. The FAA agrees to notify an applicant within thirty days of the filing of the preliminary application whether the application has been accepted for review.

Once a preliminary application is accepted for review, an applicant may issue its RFP, select a private operator, negotiate an agreement and submit a final application to the FAA for approval without competing with other applicants for one of the five program slots. The acceptance for review of the preliminary application is time specific and based on the time table submitted with the preliminary application. Extensions may be granted, if the FAA finds that the public sponsor is making reasonable efforts to complete the process. For applications received by the FAA on the same business day, the FAA will hold a public lottery to assign priority.

Final applications and preliminary applications will not be accepted before December 1, 1997, unless an applicant has issued an RFP on or before the date of publication of this notice. Applicants that have already issued a RFP for proposals for the sale or lease of the airport on or before the date of publication of this notice and have selected a private operator may submit a final application for review before December 1, 1997. Applicants that have issued the RFP but have not selected a private operator may file a preliminary application on or before that date. When a final application is accepted for review, the FAA will publish notice in the Federal Register with a 60-day comment period.

The application procedures will be modified to reflect the changes to the selection process.



### *Privately Owned General Aviation Airports*

**Comments:** The State of New York recommends that privately held general aviation airports be excluded from § 47134(a) because they will not “facilitate new forms of airport ownership” as was intended by the statute.

**Discussion:** The statute provides no basis for excluding privately owned airports. Privately owned airports are currently bound by many of the same laws, regulations, and grant assurances that govern publicly owned airports. However, exemptions under the program are granted only “to the extent necessary” for the purposes listed in § 47134(b)(2) and (3). It is likely that no exemption would be necessary for these purposes in a sale or lease of an airport from one private owner to another, and the FAA does not anticipate that applications will be received from private sponsors or that such sponsors would qualify for an exemption under the standards of § 47134.

**Final Disposition:** The FAA will issue exemptions only to the extent necessary for the purposes listed in § 47134(b)(2) and (3).

### *Public Outreach*

**Comments:** Several commenters requested that additional public outreach efforts be written into the procedures. NATA supports the idea of publishing the application in the Federal Register for the solicitation of public review and comment. AOPA wants the airport sponsor to implement measures to improve the opportunity for public comment from the airport’s general aviation community. AOPA suggests that the airport sponsor be required to contact all general aviation tenants individually by mail, to the extent practical, and to post a notice in a prominent location on the airport, to notify all general aviation tenants of a pending application before the FAA. The FAA should also conduct a public hearing at each airport being considered for participation in the pilot program. Scenic Hudson, Incorporated and Stewart Park and Reserve Coalition, two community organizations with an interest in Stewart International Airport, Newburgh, New York, requested the FAA to provide notification by personal mail service to interested parties regarding the acceptance of a final application with a copy of the final application provided upon request. They also suggested that the comment period on each application be for a period of 90 days.

**Discussion:** The FAA supports efforts to inform the public of any expected changes affecting the airport community. However such efforts to obtain tenant participation and comment are best initiated by the airport sponsor in conjunction with local pilot groups and airport tenant and user committees.

The FAA expects that a request for Federal exemption is only one part of a complex process that will involve a considerable amount of preparatory work, will generally also require the sponsor to obtain local government legislative and other types of

approval, and in some cases will require state authorization. Public participation in the process may be required before the application is submitted to the FAA. In addition, we assume that industry organizations will make their membership aware of the opportunity to comment at the appropriate level of government authority. With respect to Federal action, the names of public sponsors submitting preliminary applications will be published in the Federal Register. FAA will institute a 60 day comment period for public review of a sponsor's final application. We believe a 60 day comment period is reasonable considering the earlier requirement for publication in the Federal Register of a sponsor's preliminary application. We encourage airport sponsor to augment our efforts with their local means of communicating with the general public, and we are modifying the procedures to require that applicants describe their public outreach efforts in the final application.

***Final Disposition:*** Upon receipt of a preliminary application, the FAA will publish a notice in the Federal Register. When a final application is accepted for review by the FAA, the application will be published in the Federal Register for public review and comment for a sixty day period. The application procedures will be modified to reflect these changes and to require a description of any local public outreach efforts by the applicant.

*Part II of the application: Airport Property*

***Comments:*** Scenic Hudson and Stewart Park and Reserve Coalition request clarification of what would be considered airport property, specifically as it pertains to Stewart International Airport. The two commenters want to know who will define what is to be included as airport property and the criteria to be employed in this determination.

***Discussion:*** The FAA agrees that property to be transferred must be clearly identified. Airport sponsors, requesting an exemption under § 47134, must provide a description of the airport property to be transferred under the pilot program. They must also provide an acquisition history of the existing airport property. The airport sponsor, as property owner, is in the best position to know the acquisition history of the airport's property and determine what property will be included as part of the transfer.

***Final Disposition:*** Questions regarding the property of a specific airport should be directed to the airport operator.

*Part III of the application: Terms of the Transfer*

***Comments:*** ATA argues that the parties buying or leasing the airport will be interested in recouping all or part of the cost of the initial transaction. ATA recommends that the parties should provide information on the source of reimbursement for purchase or lease payments and the projected impact on the fees charged to airport users.

***Discussion:*** We believe this information will be valuable in evaluating a public sponsor's application. And find the ATA recommendation to be reasonable.

***Final Disposition:*** The application procedures will be changed to incorporate a requirement that the source of funds for reimbursement of the purchase or lease payments be identified, and that the applicants describe the anticipated impact of the reimbursement on aeronautical user fees.

*Part IV of the application: Qualifications of the Private Operator.*

***Comments:*** San Francisco opposes the implementation of a fitness test, because such a test would tend to discriminate against private operators. Allegheny County, ATA and AGI believe that a fitness test could be a valuable exercise for the FAA to perform. Several commenters express the concern that such a test should not be unduly burdensome and the investigation process should be similar to those investigations conducted for public operators. Johnson Controls emphasizes the need to create a “level playing field” for both publicly operated airports and privately operated airports. FAA should not use the exemption approval process as an excuse for placing burdens on the private operator which were not imposed on the public entity previously operating the airport.

***Discussion:*** Commenters supporting the need for a fitness test, raise two concerns. First, a fitness test should not be discriminatory against private operators; any investigation process conducted should be the same for both public and private operators. Second, it should not be unduly burdensome on the operator.

Section 47134 did not change existing requirements applicable to public airport sponsors for ownership of airports or eligibility to receive Federal grants. In contrast, this section did impose new financial and other requirements for private firms undertaking the operation of a public use airport under the pilot program. Accordingly, a fitness test related to the eligibility requirements of the pilot program cannot be considered discriminatory against private operators applying for participation in the program. FAA believes a limited fitness review of private operators, modeled on information reviewed for DOT economic certification decisions, would be beneficial in ensuring that the FAA meets the requirements of § 47134. The information involved is limited to items related to this program, and will not be a burden for applicants.

***Final Disposition:*** In addition to the information previously provided in the proposed application procedures the fitness test will require the following:

1. A private operator’s airport operation and management experience.
2. The identity, experience, expertise and responsibility of key personnel.
3. A description of facilities presently being managed by the company, both domestically and internationally.
4. Copies of the 10K annual reports filed in the past 3 years with the Securities and Exchange Commission. If not filed, balance sheet and income statement and a cash flow statement prepared in accordance with Generally Accepted Accounting Principles, with all footnotes applicable to the financial statements. The above mentioned statement

shall be filed annually, ninety days after the close of the operator's fiscal year.

A finding of fitness in response to an application under this program would apply only to that application and not to other applications filed with the FAA or other offices of the Department of Transportation.

*Part V of the application: Requests for Exemption*

**Comments:** ATA also recommends that information provided as part of the request for exemption to permit airport revenue to be used for compensation of the private operator should include anticipated amount and source of airport funds involved, and a description of the effect, if any, on air carrier or other user fees.

**Discussion:** This request is consistent with ATA's request for additional information requested in Part III, "Terms of Transfer." Consistent with our action on that request, Part V is being modified to include this information in the application. No further action is required.

*Part VI of the application: Certification of air carrier approval*

**Comments:** ATA indicates that statistics for determining landed weight should be based on the preceding calendar year. According to the State of New York, the regulation does not address the manner in which the 65 percent air carrier rule will be calculated in the event one or more carriers announce a decision to discontinue service after the end of the year preceding application review.

**Discussion:** The statistics requested in paragraph B of the procedures for total landed weight must be based on the preceding calendar year. This is a requirement of the statute. Section 47134(b)(1)(i)(ii) requires 65 percent approval of the air carriers serving the airport and 65 percent approval of the total landed weight of air carriers from the preceding calendar year. Carriers discontinuing service during or after the calendar year and not currently serving the airport would not be counted in the total landed weight for the preceding calendar year. This interpretation is necessary to permit the 65 percent statutory carrier approval mechanism to work if a carrier having more than 35 percent of the landed weight at the airport discontinues service. This issue is further discussed under the heading "Issues Considered by the FAA in Granting an Exemption Under Section 47134."

**Final Disposition:** The application procedures have been modified to reflect the discussion.

*Part VIII of the application: Airport Operation and Development  
Five-Year Capital Improvement Plan*

**Comments:** The ATA suggests that information on the five year capital plan should include, if applicable, information on sources and proposed repayment terms of any borrowed funds.

**Discussion:** We find this request reasonable and consistent with our request for disclosure of the source of funds in previously mentioned comments.

**Final Disposition:** A request for a description of this information will be incorporated into the application procedures.

*Collective Bargaining Agreements*

**Comments:** Public Employee Department, AFL-CIO requests that the labor requirements be strengthened. FAA should require the recognition of collective bargaining rights and an adherence to the collective bargaining agreement. The details of workforce standards should be identified in any lease or sale agreement. Transportation Trades Department, AFL-CIO identified a clerical error in Part VII(A)(10) of the proposed procedures. According to the statute, this section should read, “Any collective bargaining agreement that covers employees of the airport and is in effect on the date of the sale or lease of the airport will not be abrogated by the sale or lease”. The commenter suggests that the FAA should more clearly discuss what defines an abrogation of a collective bargaining agreement. The FAA should also include detailed requirements for collective bargaining agreements. The application should address successorship of existing representatives of employees, adverse impacts on civil service employees and a requirement that private operators offer employment to the existing workforce. Transportation Trades Department recommends an addition to Part VII(A)(10) requesting the applicant to determine and describe the long term effects the transfer may have on collective bargaining agreements and employees. Finally, the Transportation Trades Department suggests that the FAA should have an oversight role in the treatment of employees after the agreement is signed.

**Discussion:** Section 47134(c)(9) requires that any collective bargaining that covers airport employees will not be abrogated by the transfer or sale of the airport. The application procedures permit the applicants to satisfy § 47134(c) (9) by providing a certification that the collective bargaining agreement has not been abrogated. We would expect as a part of submitting the exemption application, the issues raised by labor would be the basis for discussion between the private operator, the airport owner and the collective bargaining units. Before issuing an exemption, the FAA would ensure the terms of the agreement met the requirements of the Act.

After transfer of the airport, we assume that existing federal and state agencies with responsibility for labor relations, rather than the FAA, would perform oversight functions on labor agreements at the airport. FAA's role would be limited to assuring that applicant public sponsors and private operators, in the transfer of the airport to private operation, comply with assurances of § 47134. Collective bargaining agreements and Federal labor laws establish employee rights and mechanisms for protecting employee interests. Section 47134(c)(9) is not intended to make FAA oversight an alternative process. Rather, by requiring assurance that collective bargaining agreements will not be abrogated, Congress demonstrated an intent to rely on existing devices to protect employee interests.

***Final Disposition:*** The application procedures will be revised to more closely conform with § 47134(c)(9).

### ***Issues Considered By The FAA in Granting An Exemption Under Section 47134***

*65 percent carrier approval.*

***Comments:*** ATA believes that procedures must be clear that air carriers approving “diverted” funds must constitute 65 percent in number and 65 percent in landed weight.

***Discussion:*** In order for a public sponsor to recover funds from the sale or lease of the airport, the dollar amount must be approved by at least 65 percent of the air carriers serving the airport and at least 65 percent of the total landed weight of the air carriers serving the airport in the preceding calendar year. As discussed above, carriers that have ceased operations at the airport at the time of application will be excluded from the landed weight calculation.

***Final Disposition:*** The final procedures are being modified to reflect this discussion.

***Comments:*** Landrum and Brown suggests that the 65 percent carrier approval requirement is reasonable if obtained in advance of selection of operator. ATA recommends that general aviation airports be exempt from the 65 percent carrier provision rule in lieu of a similar test of the majority of based air craft owners or some other indication of the users.

The Allegheny County Department of Aviation (Allegheny County) argues that it is not appropriate to equate Part 135 operators with Part 121 air carriers, especially at general aviation airports. Allegheny County argues that air taxi operators at general aviation airports are typically fixed base operators that provide on-demand air taxi services as one of a group of aviation related activities. Typically, according to Allegheny County, these operators have not made financial commitments to the airport in the form of long-term leases and they do not commit their credit-worthiness to the financing of the general aviation airport. Allegheny County argues that the test proposed -- that any Part 135

operator with at least 50 annual operations be counted in the 65 percent vote -- would lead to the unfair result that an itinerant air taxi with limited financial connections to the airport would have a right to vote while a fixed base operator (FBO) located at the airport (but with no Part 135 operations) would have no vote. Allegheny County suggests that recognition as an air carrier should be based on one or more of the following tests: 1) a Part 135 operator lease is cited specifically as a security for the sponsor's financing of any airport facility; 2) a Part 135 operator is a signatory to a long term lease with airport; 3) a Part 135 operator paid to the airport within the last twelve months, landing fees for commercial flights which constituted a specified percentage of the airport's total revenues or exceeded a specified dollar amount.

After the comment period closed, Allegheny County filed a request for a complete waiver of the 65 percent approval requirement for Allegheny County Airport, on the grounds that Congress did not intend these airports to be subject to the requirement. The FAA provided the Part 135 operators with lease or use agreements at the airport with an opportunity to respond. To ensure a complete record, the FAA is including in this docket the waiver request and all responses.

The State of New York requested clarification on several aspects of the 65 percent carrier approval rule. New York believes carriers that no longer have an agreement with the airport sponsor should not participate in application approval. They also indicated that landed weight requirements should not include general aviation. Finally, the State of New York wants to know how the FAA will handle an airline, airline holding company, or an affiliate of that airline that becomes an applicant for private operation of the airport and also has participatory rights under the 65 percent carrier approval provision. The state suggests that such an airline would have an inherent conflict of interest.

**Discussion:** The statute requires the airport sponsor to comply with two tests regarding air carrier approval of the amount of funds the sponsor can recover as a result of the initial transaction. While the statute makes no reference to the timing of the approval, the amount of funds to be recovered cannot be determined until the actual business arrangements between the airport sponsor and a specific private operator are known. Therefore, the FAA is not adopting the Landrum and Brown suggestion.

On the question of including Part 135 air taxi operators in the 65 percent approval process, the FAA agrees that the proposed procedure would have been impractical and could have led to results that are undesirable from a policy perspective. However, we do not fully agree with Allegheny County's assessment of Congressional intent regarding Part 135 operators. Therefore, we are not adopting the modifications proposed by Allegheny County Airport. Rather, the FAA is modifying the 65 percent approval requirement to limit participation to Part 135 operators with lease and/or use agreements and with aircraft used in Part 135 operations. Itinerant Part 135 operators, even with 50 or more flights per year, would not be included.

The FAA has reviewed the provisions of § 47134, and we do not find strong evidence that Congress intended to distinguish, as a class, either Part 135 operators from Part 121 operators, or general aviation airports from commercial service airports receiving scheduled airline service. Under the terms of the statute, the public sponsor's receipt of sale or lease proceeds and fee increases exceeding the rate of inflation must be approved by at least "65 percent of the air carriers" serving the airport, without limitation or qualification. The term "air carriers" as defined in 49 U.S.C. § 40102 encompasses Part 135 operators, as Allegheny County recognizes. The FAA assumes that if Congress intended to treat Part 135 operators, as a class, differently, explicit provisions authorizing or mandating different treatment would have been included.

With respect to the comment that the 65 percent approval requirement should not apply at general aviation airports, the FAA notes that § 47134(b)(1) does not expressly exclude general aviation airports from the 65 percent approval requirement. Based on the foregoing, the FAA interprets § 47134(b)(1) (and the parallel provision of § 47134(c)(4)) to reflect a Congressional intent to give Part 135 operators at general aviation airports voting rights as air carriers.

Nevertheless, the FAA recognizes that the differences in on demand Part 135 operators and Part 121 operators justify, on both practical and policy grounds somewhat different treatment.

The nature of Part 135 operator "on-demand" air service would place an undue burden on the airport sponsor in administering the proposed certification requirement, especially as applied to non-based operators. Many Part 135 charter operations may be invisible to airport surveillance. Many operators conduct their business with no visible markings. In many cases it may be difficult to ascertain whether an activity is being done as a commercial flight in air transportation, or as another activity under Part 91.

In addition, providing itinerant Part 135 operators with voting rights could give them more of an influence over the terms of a privatization transaction than other users of a general aviation airport who will be more substantially affected -- fixed base operators without Part 135 operations. The committee report indicates that the approval provisions were added because Congress recognized "that airport users may be concerned that an airport could use its monopoly power to increase their fees to unreasonable levels." Given this concern, there is not a strong policy justification for giving itinerant air taxi operators -- who would likely be less impacted by the increases in airport fees relative to airport tenants -- a greater influence over the terms of the privatization transaction than an entire category of airport tenants -- FBOs without Part 135 operations. Moreover, an airport operator may have no practical means of determining whether an itinerant operation is conducted under Part 135 or Part 91.

Therefore, the FAA has decided to limit participation in the 65 percent approval process to Part 135 operators that have lease and/or use agreements with the airport and



have aircraft used in Part 135 operations based at the airport. This resolution provides those Part 135 operators most likely to be affected by a privatization transaction with the voting rights Congress intended, while avoiding the practical and public policy difficulties associated with extending the voting rights to itinerant operators. This resolution will provide to FBO tenants with a Part 135 certificate voting rights not shared by non-Part 135 FBOs. However, this is a distinction that is clearly contemplated by the terms of the statute.

The FAA also notes that the definition of the term “air carrier” in 49 U.S.C. § 40102 refers to U.S. citizens, and does not include foreign air carriers. While § 40102 expressly governs Part A of Title 49, Subpart VII, and Section 47134 is in Part B of that subtitle, the FAA generally applies the definitions in § 40102 to Part B if the terms are not defined to have a different meaning in § 47102, the definition section for Part B. Section 47102 does not define “air carrier,” but defines “air carrier airport” in a manner that refers to service by U.S. carriers, which is consistent with the § 40102 definition of “air carrier.” Accordingly, the FAA concludes that Congress did not intend the statutory procedure for air carrier approval to include foreign air carriers in the calculation of either 65 percent of air carriers serving the airport or 65 percent of landed weight in the preceding year. The application procedures reflect this conclusion.

However, the FAA notes that this does not in any way affect existing rights of foreign air carriers with respect to reasonable and not unjustly discriminatory fees, or to the rights of foreign air carriers to use the same administrative and legal processes available to U.S. operators to challenge airport fees. Moreover, applicants are reminded that bilateral air service agreements provide for consultation with foreign air carriers. The applicant should conduct timely consultation with foreign air carriers serving the airport on all proposals for which approval is requested under § 47134(b)(1) and § 47134(c)(4), and include a description of the consultation in Part VI of the application.

Finally, the procedures exclude from the 65 percent approval process otherwise qualified air carriers that submitted proposals or that participate in consortia that submitted proposals for the privatization of the subject airport. The vote of such a carrier, whether or not it is the successful proponent, could be based on its interests as a proponent rather than its interests as a user of the airport. To the extent that it is, such a carrier’s vote would not further the Congressional objective of the 65 percent approval requirement.

***Final Disposition:*** The application procedures will be modified to reflect the above discussion. Specifically, in applying the 65 percent approval requirement, carriers serving the airport will consist of all carriers conducting operations at the airport under authority of 14 CFR Part 121 that have a lease and/or use agreement at the airport or that conducted at least 50 flights under such authority in the preceding calendar year; all carriers conducting operations at the airport as a commuter air carrier within the meaning of 14 CFR Part 298 that have a lease and/or use agreement at the airport or that conducted at least 50 flights under such authority in the preceding calendar year; and all

operators conducting operations at the airport under authority of 14 CFR Part 135 that have a lease and/or use agreement at the airport (or similar agreement for use and occupancy of airport premises) and that have at least one aircraft used in Part 135 operations based at the airport. However, an otherwise qualified air carrier will not be permitted to participate in the 65 percent approval process, or be counted in the total landed weight in the previous year, if the air carrier, air carrier holding company, or affiliate of that air carrier responds to a solicitation or submits a proposal to serve as a private operator or participate in a private operator consortium at that airport. In addition, as proposed, an airport that does not keep records of landed weight for purposes of calculating landing fees may seek an appropriate waiver of the landed-weight approval requirement.

*Terms and Conditions Required for Approval--General Approach.*

**Comments:** The State of New York, San Francisco and AGI believe that third party beneficiary rights are not necessary and may exceed FAA's authority. The State of New York believes the FAA has these rights under existing law. Landrum and Brown suggests the FAA should require the sale or lease agreement to include provisions that meet the statutory objectives. Infrastructure Management Group request clarification as to the standards and conditions under which it might completely transfer grant obligations to the private sector without subsequent recourse to the previous public sponsor.

**Discussion:** Section 47134(c) permits the FAA to approve an exemption application only if the sale or lease agreement includes provisions satisfactory to the FAA. The Agency considers the statutory objectives in § 47134(c) as creating a third party beneficiary rights for the United States Government. Congress has authorized the FAA to approve an application for exemption only if the lease or sale agreement contains terms and conditions that ensure the nine statutory objectives are met. To assure that these rights are available, we will require the sale or lease agreement to include provisions explicitly granting third party beneficiary rights to the FAA. The FAA will accept as an alternative a suitably structured tripartite agreement among the FAA, the public sponsor and the private operator in which the three parties agree that the key grant assurances required by § 47134 may be enforced directly against the private operator by the FAA under the agreement as well as under applicable grants.

During the course of the application process, the FAA will determine on a case by case basis, what grant obligations will be transferred. As a result of the transfer, the public sponsor should not be obligated for the airport grant assurances assumed by the private operator. However, the public sponsor may continue to have Federal obligations under the exemption approval. These Federal obligations may depend on 1) the conditions of exemption; 2) third party beneficiary rights and 3) specific terms of the transfer agreement.

Additionally, we are requesting sponsors to identify in the application their approach to handling the protection of the airport's runway protection zones and the

acquisition and retention of aviation easements, in consideration that a private operator will have neither condemnation authority nor zoning power for adjacent property.

**Final Disposition:** The application procedures will be changed to incorporate the request for information on the airport's runway protection zones and aviation easements and to incorporate the requirement for third-party beneficiary rights or a tripartite agreement. None of the other comments required changes to the procedures.

*Terms and Conditions to Assure Public Access on Reasonable Terms Without Unjust Discrimination.*

**Comments:** Landrum and Brown recommends that a private operator should operate an airport without discrimination under the same assurances required of a public sponsor. The State of New York argues the introduction of requirements that would hold privately operated airports to a higher standard than public airports would be contradictory and deterrent.

NATA opposes the ability to transfer proprietary exclusive rights to a private operator. It argues that a private operator exercising a proprietary exclusive right in an area as fuel sales, for example, will impact existing fuel operators. A proprietary exclusive operation may result in the closure of existing fixed base operators or the denial of market entry by potential new operators.

**Discussion:** Under existing FAA policy, the owner of a public-use airport may elect to provide any or all of the aeronautical services needed by the public at an airport. The statutory prohibition against exclusive rights does not apply to these airport owners. They may exercise, but not grant the exclusive right to conduct an aeronautical activity. Existing policy permits airport owners to engage in these services using only their employees and resources. Delegation or subcontracting of the proprietary exclusive right is prohibited. As a practical matter, public agencies recognize these services are often best performed by a profit-motivated private enterprise.

Private owners of a public use airport are currently permitted to exercise proprietary exclusive rights on the same basis as public agencies. The FAA sees no reason to grant a private operator a lesser right than other operators just because the operator came into control of the airport under § 47134. However, the FAA may object in circumstances when the private operator attempts to exercise a proprietary exclusive right through consortiums, joint or limited partnerships when the intent is to circumvent the exclusive rights provision or the limited exception.

**Final Disposition:** FAA will review each request for proprietary exclusive on a case by case basis.

*Reasonable Rates and Charges Imposed by Airport Operator.*

**Comments:** San Francisco believes the FAA lacks the authority to apply the Rates and Charges Policy and that the policy should not be imposed on the transferee. It proposes that the FAA delete the provision that subject fees imposed by the private operator to the Policy on Airport Rates and Charges.

San Francisco argues that under the rule, airlines already have adequate protection against unreasonable rates and charges. First, 65% of the air carriers must approve the initial agreement in the form of revenue to be retained by the airport sponsor; second, air carriers must approve all rates and charges (except for those rate increases resulting from new capital improvements). Application of the policy to the agreed upon rates and charges could result in challenges to the rate structure as new users enter the market. This could potentially undermine the investment expectations of the private operator by lowering the level of rates and charges.

**Discussion:** Before responding to the comments, it is necessary to discuss a judicial decision in a challenge to the Rates and Charges Policy that was pending when the FAA issued the NPP. The Air Transport Association (ATA) and the City of Los Angeles each petitioned for judicial review of the Airport Rates and Charges Policy. Los Angeles challenged the requirement to use historic cost accounting in establishing fees for the use of the airfield. The ATA challenged the provisions in the policy that permit the airport operator to (a) use any reasonable method to establish other aeronautical fees and (b) charge imputed interest on the airport operator's own funds from specified sources invested in the airfield. On August 1, 1997, the United States Court of Appeals issued its opinion, which vacated and remanded the Airport Rates and Charges Policy to the Department.

The effect of the opinion on the provisions of that Policy that were not challenged is unclear. Even if the effect of the opinion is to vacate the entire policy, it is reasonable to expect that readoption of the unchallenged provisions would not be objectionable. In addition, the provisions of the policy most directly related to the privatization pilot program -- provisions on airport operator/user consultation, application of the policy to fees set by agreement, and allowable rate of return to private equity owners of airports -- were not challenged. Therefore, the FAA has assumed that those provisions continue to be in effect in the discussion of the comments on this issue. We have made appropriate editorial changes to the text of the procedures to reflect the uncertain status of the Airport Rates and Charges Policy.

The comment that the FAA lacks authority to apply the Rates and Charges Policy to transferees under the pilot program is not supported by the statutory language authorizing the pilot program. Section 149(d) of the Reauthorization Act, which established the privatization pilot program, also included a revision to 49 U.S.C. § 47129, the existing statute which requires adoption of a DOT rates and charges policy and

process for adjudication of disputes. The new provision directs the Secretary, “in evaluating the reasonableness of a fee imposed by an airport receiving an exemption under § 47134 of this title [to] consider whether the airport has complied with § 47134(c).” 49 USC § 47129(a)(4). This provision does not exempt fees that meet the 65 percent approval requirement from review under § 47129. On the contrary, the provision contemplates that the fees will be reviewed, with consideration given to whether the fees meet the 65 percent approval requirement.

The FAA considers the Airports Rates and Charges Policy, in particular the first principle and associated guidance, and this policy to be consistent with the statutory direction discussed above. The first principle states the Department’s preference for direct local negotiation between the airport operator and aeronautical users. This principle recognizes a generally held industry wide practice that produces reasonable results. The Airport Rates and Charges Policy was amended to avoid the need for investigation of complaints about the reasonableness of fees set by agreement if filed by parties to the agreement.

However, as we indicated in the Airport Rates and Charges Policy, we believe that Congress did not intend to deprive non-signatory carriers of the opportunity to have their fees reviewed by the FAA, solely because they were not a signatory to the original agreement. Section 47129 does not, by its terms, exempt fees set by agreement from the requirement of reasonableness. Furthermore a difference in rates between signatory or non-signatory carriers is not necessarily a basis for a determination of unreasonable fees. Interested parties should consult the section, “Charges to Non-Signatory Carriers” of the OST/FAA Policy on Airport Rates and Charges for further details.

***Final Disposition:*** The final policy is not modified from the proposal.

*Reasonable Compensation for the Airport Operator.*

***Comments:*** Several commenters voiced concerns about the compensation to the private operator. Landrum and Brown suggests that the rate of return should be subjected to a reasonableness test. This should be handled on a case by case basis. Compensation is driven by the “price” paid for the lease or sale of the airport. The State of New York believes agreement between equity owner and airport users is most appropriate to determine charges. Infrastructure Management Group suggests that the FAA should not directly intervene on the issue of reasonable rate of return. These issues should be left to the three consenting parties in the privatization process, the airport owner, the private operator and the airlines. The FAA would still have the authority to exercise remedying powers under its current Policy on Airport Rates and Charges. ATA argues that the private operator’s rate of return must be evaluated in light of its impact on user fees, within the context of exemptions being proposed under § 47134(b)(3). The ATA encourages the FAA to “look at all payments in the aggregate, not as individual pieces.”

**Discussion:** A basic premise for determining the reasonableness of compensation for the airport operator must begin with three consenting parties in the privatization process, the airport owner, the private operator and the airlines. As we have indicated, in order to protect the general public interest, and the interest of airport users affected by but not a party to the agreement, the FAA has a responsibility to determine the reasonableness of airport fees paid by aeronautical users and compensation to the airport operator included in those fees. The FAA will examine an airport operator's rate of return for reasonableness on a case by case basis. While we recognize the value of agreement on compensation to the airport operator by all consenting parties, the FAA reserves the right to ensure that the rate of return charged for aeronautical facilities and services meets the applicable reasonableness requirements.

**Final Disposition:** The final procedures retain the substance of the proposed procedures.

*Carrier Approval of Fee Increases.*

**Comments:** Landrum and Brown recommends private operators should be allowed rate increases to cover at least their cost of capital. The definition of capital improvements should be clearly stated so that both airlines and the private operator can assess the impact on rates and charges.

ATA and NATA oppose provisions that allow airport fee increases based solely on new capital investment without approval of 65 percent of the airport's air carriers. Both suggest that all capital improvement resulting in fee increases should be subject to air carrier approval. ATA argues that the provisions allow the proposed private operator to make unnecessary investments for the sole purpose of increasing their rate of return, exempt from the revenue retention requirements. NATA believes that this automatic approval of capital improvements will raise rates and charges, adversely affect its membership, which represent many of the aviation businesses servicing aeronautical users. ACI-NA, AAAE and the State of New York support the measure that excludes capital improvements from the 65 percent air carrier rule. Supporters believe without this provision, few capital improvements would be made. ACI-NA and AAAE in their joint statement, indicated, "It would be simply too easy for carriers taking a short-term view of expenses and profits to veto an airport's more long term assessment of growing needs for capital investment."

**Discussion:** FAA reaffirms its position that the 65 percent air carrier rule should not apply to new capital improvement. As we have stated before, Congress, in establishing the program, expressed an intent to determine if private investment could be employed as an alternative funding source. Applying the 65 percent air carrier rule to new capital investment would give carriers undue power over an airport's capital improvement program and possibly reduce an airport operator's ability to meet the long term needs of the market

Carriers are afforded sufficient protection by provisions of § 47134(b)(1)(A)(i) and (ii). This provision of the statute effectively requires the consent and participation of the carriers for the airport sponsor to transfer the airport to a private operator. The FAA expects that during this time carrier concerns and issues will be addressed. Additionally, tenants and carriers have the protection of their leases, an airport's grant assurances and the federal requirements for airport rates and charges.

***Final Disposition:*** The FAA retains the provisions of the draft notice. The text is being modified to explicitly state the exclusion of fee increases attributable solely to capital improvements.

*Terms and Conditions to Assure Continued Operation in the Event of Bankruptcy or Insolvency*

***Comments:*** AGI believes that existing Federal bankruptcy laws are adequate to handle leased facilities. Title 11 U.S.C. §365(d)(3) (1995) was originally enacted to protect a lessor of commercial realty in the event that the tenant seeks bankruptcy protection and performance of the contract is essential. This section requires the trustee to meet the tenant's obligations under the contract. AGI argues that these provisions could apply to operators of leased airports.

The State of New York suggests that the FAA should require the parties to enter into an agreement that addresses bankruptcy within the framework of existing law. Landrum and Brown and Infrastructure Management Group suggest a reversion to the public sponsor in the event of bankruptcy along with reasonable cure provisions in the agreement. The operators or creditors of a facility should be given time to rectify the problem before the original public owner steps in. The only lingering issue in such instances is whether and how the parties must compensate each other.

ATA offers a number of options for addressing bankruptcy. These include: 1) the transfer agreement should include an automatic reverter to the public sponsor in the event that the airport ceases operations due to bankruptcy or reorganization (the transfer agreement would not be recognized as an executory contract subject to assumption, rejection or assignment under Section 365 of the Bankruptcy Code); 2) FAA required contingency plan for sponsor takeover in defined circumstances; 3) Record as an encumbrance on the airport property the obligation to operate the property as an airport; 4) establish an escrow fund or bond fund to ensure funds are available to pay essential costs of operating the airport; 5) Use Chapter 9 insolvent municipality provisions instead of Chapter 11 or 7 for airport bankruptcies.

ATA also suggests that the FAA pursue rigorous auditing of private operators and impose the requirement for financial fitness similar to those imposed by the Department of Transportation on air carriers.

**Discussion:** Given the breadth of suggestions and divergence of views there is no consensus on a specific requirement. As a part of the exemption application submittal, the airport sponsor and private operator should provide a plan that specifically addresses the requirements of § 47134(c)(2). Because it would involve the application of bankruptcy law, the plan should include legal justification and a legal opinion. The proposed approach will assure continued operation of the airport in the circumstances specified in § 47134(c)(2). FAA reserves the right to modify, or totally reject the plan and require the airport operator to submit a new plan.

**Final Disposition:** The FAA will revise the application procedures to require the public sponsor and private operator to specifically address the requirements of § 47134(c)(2).

*Terms and Conditions to Assure Capital Investment and Improvements by the Airport Operator.*

**Comments:** San Francisco questioned whether FAA has the legal authority to require that the private operator “exceed or accelerate” the public sponsor’s capital improvement plan (CIP). While San Francisco recognizes that offering such a five year CIP is one method of ensuring sufficient private investment, it suggests that this not be a requirement for obtaining FAA approval. FAA should make it clear that the private operator’s CIP does not have to exceed or accelerate the public sponsor’s CIP. Such a requirement may decrease the attractiveness of private investment, when the public sponsor has made high investments in the airport prior to privatization. San Francisco believes that the air carriers will effectively ensure that the private operator will invest sufficient amounts in capital projects. FAA should exercise its role concerning capital investment on a case by case basis without a predetermined level of investment.

ACI-NA and AAAE support the procedural provisions that require the transfer agreement to include a provision to assure the airport operator will maintain, improve and modernize the airport facilities as specified in the CIP and subsequent updates. Landrum and Brown suggests that the private operator should be required to submit a master plan for FAA approval along with the five year CIP.

ATA raises concerns that the requirement to implement a five year program could lead to inefficient expenditures of funds for capital projects. They recommend the FAA require purchaser/lessor to provide annual documentation showing sources of funds for the projects to be implemented in next 12 months including, if applicable, information on borrowed money and proposed means of repayment of borrowed funds.

BAA USA is concerned that the requirement for a “reasonable rate of return” may prove to be a source of controversy and generate wasteful capital expenditure. Airport operators could be induced to spend more on capital projects, just to extend the scope of the “reasonable rate of return”.



AGI believes that the public sponsor has the greatest incentive to ensure the private operator's CIP is sufficient for the needs of the airport.

**Discussion:** In enacting the airport privatization pilot program, it was the intent of Congress to determine if new investment and capital from the private sector can be attracted through innovative financial arrangements. The FAA and the public have a reasonable expectation that a private operator will provide new capital and create new investment opportunities at the airport. A comparison of the public sponsor's five-year CIP with the private operator's CIP will be useful in evaluating the private operator's commitment. The example of exceeding or accelerating the public sponsor's most recent five year CIP is only one of several examples of means that a private operator can use to assure a sufficient minimum investment of the private operator's funds. The FAA will not, however, require the private operator's commitment to do so.

The final procedures do not identify a predetermined level of investment. Rather, the private operator is required to provide an assurance that the operator will provide sufficient resources of its own funds in conjunction with other financial resources for carrying out the maintenance, improvements and modernization of the facility as required by the statute. This should be accomplished on an annual basis with documentation provided showing the source of all funds.

One commenter suggested that the private operator should be required to submit a master plan for FAA approval along with the five year CIP. While there is no requirement for a master plan development, we would expect all capital development to be performed in accordance with the airport sponsor's grant assurances.

**Final Disposition:** The application procedures are modified as discussed.

#### *Terms and Conditions Relating to Safety and Security*

**Comments:** Both the Air Line Pilots Association and the Transportation Trades of AFL-CIO recommend that private operators should conduct public hearings on safety and operational considerations at the specific airport with an opportunity for input by representatives of aviation employees. It was also suggested that private operators conduct monthly or bi-monthly safety meetings.

**Discussion:** Such mechanisms as tenant advisory committees and airport safety and security meetings are basic management tools for ensuring a safe and secure airport. We expect all airports, depending on their level of activity, degree of complexity and regardless of whether they are privately or publicly operated to have some program for addressing the safety and security needs of the airport.

As we have indicated, we will require private operators to obtain a Part 139 airport operating certificate and comply with Part 107 airport security requirements at

facilities where appropriate. Existing certificates held by the public operator are not transferable. Private operators will be required to demonstrate their fitness for approval in the same manner that public operators are presently required to comply. For general aviation airports, we will expect the private operator to provide the same level of safety and security as required of the public sponsor under the existing grant obligations.

***Final Disposition:*** The FAA believes that existing airport procedures and practices are adequate to ensure tenant and employee input on safe airport operating practices and conditions. The application procedures are modified to encourage the private operator to maintain the public sponsor's existing mechanisms for communicating with airport users and the public on safety and security issues. No other modifications have been made.

*Terms and Conditions Relating to Noise Mitigation.*

***Comments:*** The National Organization to Insure a Sound Controlled Environment (NOISE), in their comments, asked several questions regarding the application procedures. First, NOISE wants to know if the terms and conditions of existing grants applicable to noise mitigation will be a part of the obligations of the private operator; Second, will the new airport owner be obligated to comply with the determination of the existing Part 150 Noise Compatibility Plan. Third, will notice of the proposed sale of the airport be served on local jurisdictions that surround the airport or that are located a specified distance from the airport within a certain number of miles, or within a specified DNL noise contour. NOISE's concern is that Federal Register notification maybe insufficient to reach many of small communities. Finally, NOISE would like to see a public hearing in the airport community before an exemption is granted.

AGI indicates that the statute limits AIP grant funding to 40% Federal share at § 47134 airports. The procedures are unclear as to whether the reduced Federal share applies to both new applications and projects approved but not funded.

***Discussion:*** Standard grant assurance No. 5 requires a transferee approved by the Secretary to assume all of the terms, conditions and assurances contained in the sponsor's grant agreement. These requirements are inserted in the contract or document transferring the sponsor's interest, and become binding upon the transferee.

In reviewing a request for transfer, the FAA will consider whether a proposed private operator under a privatization pilot project will assume the obligations of the original sponsor under existing grant agreements or deeds, and whether the new owner has the powers and authority to fulfill its obligations under the assurances. The FAA would expect a private operator to assume any existing Part 150 noise mitigation program for the airport to the extent applicable to a private firm. However, we note that under Part 150, implementation of approved noise mitigation measures is voluntary.

With respect to the request for a public hearing, as we previously indicated, we encourage airport sponsors to actively solicit public comment. However, we do not intend to dictate to airport sponsors a single method for conducting public outreach. We believe public outreach should be conducted at the local level and in accordance with applicable state and local laws .

On the subject of the applicability of reduced Federal share for AIP funded projects, it makes no difference whether the application is pending or in preparation. If a grant of discretionary funds is approved by the FAA prior to the airport sponsor being granted an exemption under § 47134, the conventional Federal share would be used, even if the project is not completed at the time of the transfer. Any grant of discretionary funds executed after the transfer would be at the Federal share of 40% for allowable project costs.

***Final Disposition:*** No modification is required to address the concerns of the commenter.

#### *Unfair Competition Finding.*

***Comments:*** AGI wanted to know what constitutes “unfair and deceptive practices”. The concept is not defined. The commenter suggests the standard for ensuring reasonable access without unjust discrimination replace the “unfair and deceptive practice “ standard.

***Discussion:*** The statute permits the FAA only to approve an application, if the approval will not result in unfair and deceptive practices or unfair methods of competition. While there may be some overlap between this standard and the standard of reasonable access without unjust discrimination, the FAA is not prepared to treat the standards as identical. Doing so would make one of the standards meaningless. This outcome should be avoided in construing statutory language. We will not further define “unfair and deceptive practices” or “unfair methods of competition” in the procedures. Ample guidance on this subject can be found in agency and court decisions interpreting § 411 of the Federal Aviation Act of 1958, as amended, 49 USC 41712 and § 5 of the Federal Trade Commission Act, 15 USC § 16. However, to assist in making this determination, the final procedures are being modified to require information on any findings that the private operator or key personnel have engaged in unfair or deceptive practices or unfair methods of competition, or are the subject of pending investigations..

#### *Protection of General Aviation Interests*

***Comments:*** AOPA recommended that each private operator should specifically address in the application how proposed changes at the airport will impact general aviation.

**Discussion:** Congress intended that general aviation users not be adversely impacted as a result of the transfer of the airport from public to private operation. This is demonstrated by the provisions in the statute governing fee increases, § 47134 (c)(5) and the protection of general aviation interests, § 47134(f). In order for the FAA to fulfill its responsibility under the statute, we would expect to see what actions the airport sponsor and private operator plan to take to comply with the requirements of these provisions. At a minimum, we would expect to see how the proposed changes in the management and operation of the airport would affect general aviation users. Additionally, we would expect to see some effort by the airport sponsor and private operator to undertake reasonable consultations with affected parties using the airport. The requirements of this section could also be addressed by providing a description of the operator's plans for the development of general aviation .

**Final Disposition:** The application procedures will be revised to request that the applicant private operator provide information on its plans for consulting and communicating with the general aviation users regarding the planned privatization of the airport, and on the applicants' projections of the impact of the proposal on general aviation.

#### *Revocation Procedures*

**Comments:** Several commenters argue that the FAA should not require automatic reversion of the airport to the public sponsor. Automatic reversion should be one of many options available. The FAA should retain discretion to take appropriate action. ACI-NA and AAAE request that revocation procedures should be crafted in such a way that they are not an impediment to the bond issuing ability of the airport sponsor. The Transportation Trades Department of the AFL-CIO suggests that the FAA consider revocation procedures for termination of the program when privatization has been found to be contrary to the public interest.

**Discussion:** The FAA did not propose to require reversion to the public sponsor in the event of default or violation of the exemption conditions, as a condition of granting an exemption, and the final procedures do not add a requirement for reversion. However, the application must provide for continued operation of the airport and compliance with other obligations in the future under all foreseeable circumstances. The provisions will vary according to the circumstances of the airport privatization proposed. For example, where a public sponsor does not operate any other airports and will no longer maintain a capability to assume operation of an airport on short notice, the applicants may provide means other than reversion to the former public sponsor as a first recourse for correction of problems in the private operation of the airport.

The FAA is aware of effect that the potential enforcement action, even if the probability is very small, can have on the predictability of a future revenue stream for purposes of determining investment risk. As the ACI-NA and AAAE comments noted,

the FAA has developed enforcement procedures for passenger facility charge (PFC) collection requirements that permit underwriting of bond issues based on PFC collections alone. While the FAA does not intend to prescribe separate procedures for agency enforcement of grant assurances and exemption conditions involved in a privatization project, we can give assurance that in the unlikely event any enforcement action was necessary in such a case, the agency will be sensitive to the financial commitments and covenants associated with the financing of the project. Moreover, by requiring a three-way agreement or the inclusion of third-party beneficiary rights for the FAA as part of the original transaction, the FAA has provided means for limited, targeted correction of deficiencies without relying on the revocation of the underlying exemption.

Termination of the pilot program, as opposed to action to correct deficiencies in a specific privatization project, is not within the FAA's authority.

***Final Disposition:*** As discussed previously, the FAA will require the parties to provide third party beneficiary rights to the FAA or to execute tripartite agreements. These remedial options in addition to revocation will assure that the FAA's compliance program is effective.

#### *Administration of AIP Grants*

***Comments:*** The State of New York, Landrum and Brown, and AGI argue that the system of prioritization of discretionary AIP funds should continue to make no distinction between public or private airports. Projects should be selected solely on their merits.

***Final Disposition:*** Discretionary AIP funds will be awarded in accordance with existing policy on priority of projects. Private ownership *per se* will not affect grant priority or eligibility, but the FAA will continue to consider the availability of other sponsor resources and the sponsor's use of available funds in granting applications for discretionary grants.

## **PROCESS FOR APPLYING FOR AN EXEMPTION UNDER § 47134**

### ***Exemption Application and Review Process: Overview***

The FAA will apply the following policies and procedures for filing and review of requests for privatization of a public airport under 49 U.S.C. § 47134:

1. A request for participation in the airport privatization pilot program will be initiated by the filing of a preliminary application for exemption under § 47134(a). A public sponsor may also elect to file a final application without the prior filing of a preliminary application, if the public sponsor has selected a private operator.
2. With the exception noted below, preliminary and final applications for exemption will be accepted on or after December 1, 1997, and will be handled on a first-come first-served basis until the limits of § 47134 are reached. An otherwise qualifying preliminary application for exemption will be accepted before December 1, 1997, if the sponsor has issued, on or before the date of publication of this notice, a formal solicitation or request for proposals for the sale or lease of an airport, but has not selected an operator. If the sponsor has selected the operator on or before the date of publication of this notice, the FAA will accept only a final application before December 1, 1997. All applications will be evaluated in the order of receipt .
3. Participation in the program is limited to five airports. The maximum of five participants in the program will be considered to have been reached based on applications under review, not exemptions granted, so that an airport with an application on file will not be in a race for inclusion in the program. A standby list will be established for airports not selected.
4. An application received by the FAA will be considered to be filed on the date received. Application packages will be date-stamped on receipt in Room 600 East, FAA headquarters building. The FAA will not determine order of filing based on the time of day received. If multiple applications are received on the same day, their order of filing will be determined by public lottery rather than by time of day received.
5. FAA will review the application to determine if it meets the procedural requirements stated in this notice.
6. The FAA will accept preliminary applications filed before the applicant has commenced the procurement process for the selection of an operator. The preliminary application must contain the information listed under the section titled "Contents of Applications" The FAA will notify applicants of its decision on the acceptance of the application for review within thirty days of the filing of the preliminary application.
7. If the preliminary application meets the procedural requirements described in this notice, the applicant will be notified that the application is "accepted for review." The FAA may request additional information before accepting the application for review, but the original filing date will remain in effect. The applicant is authorized to select a private operator, negotiate an agreement and submit a final application to the FAA.
8. If the preliminary application does not meet the procedural requirements described in this notice, and cannot be brought into compliance with those requirements with information requested by the FAA during its 30-day review, the preliminary application will be rejected. The FAA will notify the applicant that the application is rejected and that

the application is no longer on file. The applicant may file a new application at any time, and receive a new “on file” date at that time.

9. The FAA will publish in the Federal Register a notice that a preliminary application has been received under 49 U.S.C. § 47134, and that the FAA has accepted the application for review.

10. Applicants may file a final application after the public sponsor has selected a private operator and reached substantial agreement on the terms of the privatization transaction. If an application cannot reasonably be brought into compliance with the requirements of § 47134 and other applicable Federal statutes with current information in accordance with the time schedule submitted during the preliminary application, the FAA will notify the applicant that the application is rejected and that the application is no longer on file. The applicant may file a new application at any time, and receive a new “on file” date at that time.

11. The FAA will publish in the Federal Register, a notice of receipt of the final application, establish a docket, and accept public comment on the application for a period of 60 days. Selection as one of the 5 airports eligible to participate in the program will be evidenced by the issuance of an exemption under § 47134(b). If an application is approved, an exemption will be issued after the execution of all documents necessary to fulfill the requirements of § 47134 and other laws and regulations within the FAA’s jurisdiction (e.g., issuance of a Part 139 certificate to the private operator; FAA approval of a security program under Part 107). FAA representatives will be available to meet with parties interested in an airport privatization project both before and after the filing of a preliminary application for exemption to discuss the Federal statutory requirements and policies that apply to applications under § 47134.

### ***Filing An Application***

1. Applicants must submit one original application package and four copies containing the information described under “Content of Applications” in this notice to :

Susan L. Kurland  
Associate Administrator for Airports, ARP-1  
Room 600 East  
Federal Aviation Administration  
800 Independence Avenue, SW.  
Washington, DC 20591

2. All preliminary and final applications may be delivered or mailed, but will not be considered to be “on file” with the FAA until received and date stamped in the Office of the Associate Administrator for Airports, Room 600 East.

3. There is no required form for an application. However, the application package must be submitted with a cover letter, signed, in the case of the preliminary application, by appropriate officials of the current public sponsor or in the case of the final application, jointly by appropriate officials of the current public sponsor and the private operator proposing to buy or lease the airport, requesting an exemption pursuant to 49 U.S.C. § 47134 for the purpose of the privatization of an airport. Please title each section

according to the appropriate sections of the application. Officials signing for the public sponsor must provide evidence of their authority to file the application.

## **CONTENTS OF THE PRELIMINARY APPLICATION**

The preliminary application should consist of:

1. As much of the information required by Part I, "Parties to the Transaction," for the Final Application, as is available.
2. Summary narrative of the objectives of the privatization initiative; what the public sponsor wants to accomplish by the solicitation.
3. A description of the process and a reasonable, realistic timetable to be employed in selecting an operator and completing transfer of the airport. This should include the identification of all local approvals and the time frame when the FAA can anticipate the final application will be submitted for review.
4. All of the information required by Part II. "Airport Property," from the Final Application.
5. Financial statements including balance, income and cash flow statements for the last two reporting periods.
6. A distribution ready copy of the request for proposals for the management and operation of the airport under § 47134. The document should contain references to this notice and the nine statutory objectives listed in § 47134(c).

## **THE FINAL APPLICATION**

The following statements and information must be included in the final application. The FAA realizes that some documents, figures, and other information will not be available until shortly before the execution of the transfer transaction. The final application must be filed after the public sponsor has selected a private operator and reached sufficient agreement with the operator on the terms of the transaction to represent those terms in an application. The FAA will not require that all information listed below be provided at the time of the application, however. For each item below for which information is not available, the applicant may substitute a description of the expected response and the date by which the final information will be available. Information not provided with the application should be submitted to the FAA as soon as it becomes available.

### **Part I. Parties to the Transaction**

- A. Name of the airport proposed for sale or lease.
- B. Name and address of the public sponsor of the airport; name, address, telephone number and fax number of the person to contact about the application.
- C. Name and address of the private operator proposing to purchase or lease the airport; name, address, telephone number and fax number of the person to contact about the application.



- D. If the private operator proposing to purchase or lease the airport is a partnership, joint venture, or other consortium of multiple interests, the name and address of each of the participating members.
- E. Citizenship of the private operator and/or each member of the private operator consortium, and percentage of interest of each such member.
- F. A statement of the public sponsor's authority to sell or lease the airport, with a citation to legal authorities.

## **Part II. Airport Property**

- A. A description of the airport property to be transferred. Applicants should describe property in sufficient detail to identify the parcels of property and facilities to be transferred; a map and a legal description of the property may be included but are not required.
- B. A history of the acquisition of existing airport property: applicants should include information on grants, types of deeds, the dates and means of conveyance, e.g. Surplus Property Act other Federal conveyance of donated property, parcels purchased with Federal funds and parcels purchased with only local funds..

## **Part III. Terms of the Transfer**

- A. A detailed description of the terms of the transfer, other than financial, including:
  - The form of the transaction (sale, lease, other);
  - Term of the lease or other transfer agreement;
  - Description of any rights, authority, or interests retained by the public sponsor, including reversion of title to facilities;
  - If the private operator is a consortium, a description of the respective rights and responsibilities of each member;
- B. Financial terms of the transaction:
  - Amounts and timing of payments to public sponsor.
  - Amounts of payments to sponsor to be used, respectively, for airport purposes (including recoupment of public sponsor investments not previously recovered) and other purposes.
  - Financing arrangements, including source of the funds used by the private operator for purchase payment or initial and future lease payments.
  - Projected impact of the initial transaction on the fee structure for charges to airport users.
  - Projected impact of future purchase or lease payments to the public sponsor on the fee structure for charges to airport users.
  - Other relevant financial terms of the transfer.
- C. Copies of all documents executed as part of the transfer, to be provided as they are executed or are in sufficiently final form to indicate the substantive nature of the expected final document.

D. If applicable, a request for confidentiality of any particular document or information submitted, with supporting information.

E. Provisions in document conferring third party beneficiary rights on behalf of the FAA to enforce key obligations, or the alternative tripartite agreement among the FAA, the public sponsor and the private operator giving the FAA the right to enforce directly against the private operator key obligations contained in AIP grant agreements and the assurances required by § 47134..

#### **Part IV. Qualifications of the Private Operator.**

A. Complete description of airport management and operations experience. The identity, experience, expertise and responsibility of key personnel. A description of the facilities and airports presently being managed by the company, both domestically and internationally. If the private operator is a newly formed entity, describe the experience of the constituent members and the proposed management structure to integrate operational functions.

B. Financial resources for operating/capital expenses of the airport. Copies of the 10K annual reports filed in the past 3 years with the Securities and Exchange Commission, if not filed, balance sheet and income statement prepared in accordance with Generally Accepted Accounting Principles, with all footnotes applicable to the financial statements.

C. Timing/details of application for Part 139 certificate, if applicable.

D. Plan for compliance with Part 107, if applicable.

E. A description of the private operator's capability of complying with the public sponsor's existing grant assurances, including the assurance of compatible land use around the airport; the protection of navigation aids, approach lights, runway safety areas, and runway protection zones; and the continuation and extension of aviation easements.

F. Affiliations with air carriers or other persons engaged in aeronautical business activity at an airport (other than airport management).

G. A description of all charges of unfair or deceptive practices or unfair methods of competition brought against the private operator, private operator's key personnel and in the case of a private operator that is a joint venture, partnership or other consortium, the separate members of the entity in the past 10 years. The description should include the disposition or current status of each such proceeding.

#### **Part V. Requests for Exemption**

A. Describe the specific exemption requested by the public sponsor under 49 U.S.C. § 47134(b)(1), from the prohibition on use of airport revenue for general purposes, including the amount of funds involved. The description should include sale or lease proceeds as well as funds in existing airport accounts that would be transferred to general accounts.

B. Describe the specific exemption requested by the public sponsor under 49 U.S.C. § 47134(b)(2), from the requirement to repay Federal grant funds or return property.

C. Describe the specific exemption requested by the private operator under 49 U.S.C. § 47134(b)(3), from the prohibition on use of airport revenue for general purposes. The description should include the anticipated amount of airport revenue to be used for compensation of the private operator, the source of airport funds involved, and a description of the effect, if any, on air carrier or other aeronautical user fees.

## **Part VI. Certification of Air Carrier Approval**

- A. Provide a certification that air carriers meeting the requirements of 49 U.S.C. § 47134(b)(1)(A) approve the exemption described in Part V.A. above.
- B. Provide 1) a list of all U.S. air carriers serving the airport, to include all carriers conducting operations at the airport under authority of 14 CFR Part 121 that have a lease and/or use agreement at the airport or that conducted at least 50 flights under such authority in the preceding calendar year; all carriers conducting operations at the airport as a commuter air carrier within the meaning of 14 CFR Part 298 that have a lease and/or use agreement at the airport or that conducted at least 50 flights under such authority in the preceding calendar year; and all operators conducting operations at the airport under authority of 14 CFR Part 135 that have a lease and/or use agreement at the airport and that have at least one aircraft used in Part 135 operations based at the airport; but excluding any carrier that is not currently serving the airport or that has responded to a solicitation or submitted a proposal to serve as a private operator or participate in a private operator consortium at that airport; 2) a list of the air carriers that have approved the exemption; 3) the total landed weight of all operations by air carriers listed under VI.B.1 above at the airport for the preceding year; 4) the total landed weight of each air carrier listed under VI.B.1 above that has approved the exemption; and 5) a list of carriers serving the airport in the previous or current year but excluded from the list in VI.B.1, with the reason for exclusion.
- C. Provide a copy of each document indicating air carrier approval of or objection to the exemption requested.
- D. Provide a description of consultation with foreign air carriers serving the airport on proposals for air carrier approval under 49 U.S.C. § 47134(b)(1)(A).

## **Part VII. Airport Operation and Development**

- A. Provide a description of how the private operator, the public sponsor, or both will address the following issues with respect to the operation, maintenance, and development of the airport after the proposed transfer.
  - 1. Part 139 certification. A request for Part 139 certificate should be filed with the local FAA regional Airports Division. The exemption application needs only to reflect the private operator's intentions and the status of a certificate application, if applicable.
  - 2. Continuing access to the airport on fair and reasonable terms and without unjust discrimination, in accordance with § 47134(c)(1).
  - 3. Continued operation of the airport in the event of bankruptcy or other financial or legal impairment of the private operator, in accordance with the specific terms of § 47134(c)(2).

The application should include any provision for reversion to the public sponsor. The application should include a legal opinion and certification that the proposed plan will be effective under operation of all applicable law, including but not limited to bankruptcy law, in assuring the continued operation of the airport.

4. Maintenance, improvement, and modernization of the airport, in accordance with § 47134(c)(3), including the public sponsor's most recent 5-year capital improvement plan (CIP) and the 5-year CIP proposed by the private operator. Applicants should identify the sources of funds to be used for capital development, including any continuing contributions by the public sponsor. If funds are to be borrowed, applicants should identify the expected sources, anticipated repayment terms of any borrowed funds, and the source of revenue to be used for repayment. Applicants should also include any financial security provisions, such as a letter of credit or performance bond, for the accomplishment of the maintenance, improvement, and modernization projects committed to by the private operator.

5. Compliance with the limitations on air carrier fees, pursuant to § 47134(c)(4), not imposed for funding of new capital development undertaken after the transfer to the private operator.

6. Compliance with the limitation on general aviation fees described in § 47134(c)(5).

7. Maintenance of safety and security at the airport, in accordance with § 47134(c)(6). The application should note the applicant's contacts with the Airports District Office on Part 139 and the Office of Aviation Security on Part 107, but does not need to duplicate information filed in connection with those actions. The application should include planned efforts by the private operator to maintain the public sponsor's existing mechanisms for communicating with airport tenants and users and the public on safety and security issues.

8. Mitigation of adverse effects of noise from airport operations, in accordance with § 47134(c)(7). The applicant should specifically describe its intentions with respect to an existing or future Part 150 noise compatibility program for the airport, with respect to the public sponsor's commitments under past records of decisions on airport development projects, and other measures the private operator intends to take in the future.

9. Mitigation of adverse effects on the environment from airport operations, in accordance with § 47134(c)(8).

10. Recognition that § 47134(c)(9) provides that any collective bargaining agreement that covers employees of the airport and is in effect on the date of the sale or lease of the airport will not be abrogated by the sale or lease.

11. The private operator's intentions regarding consultation with general aviation users regarding the planned privatization of the airport, and the projected effect on general aviation of the proposed changes in operation and management of the airport.

12. Private operator's plans (if known) for development of general aviation.

B. The private operator's acceptance of the grant assurances contained in the public sponsor's grant agreements with the FAA. Assurance 25 need not be addressed. In addition, either (1) the applicants' agreement that the grant assurances and the assurances required for granting an exemption under § 47134 create third-party beneficiary rights enforceable by the FAA in an administrative or judicial legal proceeding, or (2) a proposed tripartite agreement among the FAA, the private operator and the public sponsor granting

to the FAA the right to enforce directly against the private operator the grant assurances and the assurances required for granting an exemption under section 47134.

C. Provide a description of the parties' efforts to consult with airport users about the proposed transaction and of the parties' community outreach efforts.

#### **Part VIII. Periodic Audits.**

Section 47134(k) provides that the FAA may conduct periodic audits of the financial records and operations of an airport receiving an exemption under the pilot program. Applicants should indicate their express assent to this provision in the application.

Issued in Washington, DC on September 9, 1997

Susan L. Kurland  
Associate Administrator for Airports

Confidential  
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