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PART 158
Passenger Facility Charges

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SUMMARY: This final rule adopts new regulations to establish a passenger facility charge program. The rule implements Sections 9110 and 9111 of the Aviation Safety and Capacity Expansion Act of 1990, enacted November 5, 1990, which requires the Department of Transportation to issue regulations under which a public agency may be authorized to impose an airport passenger facility charge (PFC) of $1, $2, or $3 per enplaned passenger at a commercial service airport it controls. The proceeds from such PFC's are to be used to finance eligible airport-related projects that preserve or enhance safety, capacity, or security of the national air transportation system, reduce noise from an airport that is part of such system, or furnish opportunities for enhanced competition between or among air carriers.

The rule sets forth procedures for public agency applications for authority to impose PFC's, for FAA processing of such applications, for collection, handling, and remittance of PFC's by air carriers, for recordkeeping and auditing by air carriers and public agencies, for terminating PFC authority, and for reducing Federal grant funds apportioned to large and medium hub airports imposing a PFC.

FOR FURTHER INFORMATION CONTACT: Lowell H. Johnson, Office of Airport Planning and Programming, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3831.

SUPPLEMENTARY INFORMATION:

Availability of NPRM's and Final Rules

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484.

Persons interested in being placed on a mailing list for future NPRM's should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The Aviation Safety and Capacity Expansion Act of 1990 authorizes the Secretary of Transportation to approve local imposition of PFC's of $1, $2, or $3 per enplaned passenger and to use PFC revenue for approved projects. Section 9110 of the Act requires the Secretary to issue regulations necessary to implement this authority.

On November 14, 1990, the FAA issued a "Request for Data and Information; Passenger Facility Charges" (55 FR 47483) seeking information helpful in developing this rulemaking. The FAA asked specific questions concerning methods and practices involved in fee collection, handling, remittance, and audit/recordkeeping procedures related to airline passenger ticketing. Thirteen commenters responded to this request for data. The comments are available for inspection in the FAA Rules Docket, No. 26385.

Subsequently the FAA published a Notice of Proposed Rulemaking (NPRM) (56 FR 4678; February 5, 1991) inviting all interested persons to submit written comments, data, views, and arguments.

In addition to requesting written comments, the FAA held a public hearing on February 15, 1991, at FAA headquarters, to hear testimony from interested parties. In all, 18 people testified at the hearing.

On March 7, 1991, the FAA extended the comment period until March 18, 1991. The extension responded to a joint request for additional time from the Air Transport Association of America (ATA), the American Association of Airport Executives (AAAE), and the Airport Operators Council International (AOCI).

The FAA received comments on the NPRM from a wide representation of the aviation and financial communities. Approximately 200 separate responses were received in the docket. The major categories of commenters were airport owners, scheduled air carriers (foreign and U.S.), air taxi and air charter operators, airport concessionaires, car rental companies, state aviation agencies, bond underwriters and financial institutions, and various aviation industry trade associations. Private individuals and several members of Congress also commented on the proposal. The AAAE, ATA, and AOCI jointly submitted comments on the NPRM ("joint submission").

Due to the large number of comments received, not every comment is individually addressed in this preamble, although all have been considered. Many of the less complex suggestions are accommodated by revisions in the final rule but not expressly discussed. In other cases, comments are grouped together with others regarding the same issue. The FAA has considered all comments received. However, this document will not generally address comments that request provisions already in the NPRM and unchanged in the final rule.

The procedures and requirements contained in the NPRM were intended to ensure compliance with the statute. This approach paralleled the AIP grant process to some degree, and many commenters indicate such a process would be excessive and burdensome. Many commenters argue that PFC revenue is local money, not federal, that restrictive procedures are unwarranted, and that the airport grant program should not be used as a model for this regulation.

The final rule is intended to provide public agencies with the flexibility to tailor their PFC programs to their own needs while meeting the requirements of the statute. In addition, it is intended to reduce the administrative burden as much as possible for public agencies and air carriers.

The final rule responds to the public agencies' desire to receive PFC revenue while environmental, airspace, and airport layout plan studies are being accomplished. Revenue collected prior to FAA approval of the project could be used, after approval is obtained to use the funds, to reimburse costs incurred during the project formulation period. It also could be accumulated so that financing needs for construction and other development will be partially (or fully) met when the project is ready for implementation. The final rule contains provisions for advance collection and safeguards to ensure that PFC revenue will be used only on approved projects. This issue is addressed more fully below. In contrast, the NPRM would have required all environmental, airspace and airport layout plan requirements be completed before an application could be submitted to impose a PFC.

Another change adding flexibility to the rule is a provision for public agencies to request that those classes of carriers providing less than one percent of the total annual passenger enplanements not be required to collect or remit PFC's at the airport. This is intended to give public agencies the opportunity to reduce the administrative and financial burden associated with collecting PFC's from carriers whose operations would provide little PFC revenue. It would also reduce the burden on the carriers belonging to these classes.

Foreign carriers and U.S. carriers with international operations express concern about administrative costs and the legal authority of the U.S. to enforce the collection of PFC's outside the U.S. Thus, they recommend air carriers and foreign air carriers not be required to collect the PFC on such tickets. However, sales outside the U.S. represent a substantial number of U.S. enplanements, and, therefore, failure to collect PFC's on such tickets could account for a significant potential loss of revenue at some U.S. airports.

To accommodate these conflicting concerns, the final rule gives carriers the option of collecting PFC's only at the passenger's departure gateway. Air carriers and those foreign air carriers that serve a point or points in the U.S. will have three choices: (1) They may follow the regular collection procedure for U.S.-issued tickets; (2) They may collect PFC's for the passenger's U.S. departure gateway at the time of ticket issuance outside the U.S.; or (3) They may collect at the time the passenger is last enplaned in the U.S.

Another major issue was carrier compensation. Under the NPRM, the only compensation to which the carrier would have been entitled was the interest earned on PFC revenue prior to remittance. Numerous comments were received on this issue. Most, but not all, agree that additional compensation for carriers is justified. The final rule provides for a specific fee per PFC collected in addition to the interest earned prior to remittance. In addition, the final rule reduces the remitting, reporting, and auditing burdens of collecting carriers.

A number of airport commenters and financial institutions argue that the NPRM did not sufficiently provide for use of PFC revenue to support project-related debt. A primary concern is that uncertainty created by the termination process proposed in the NPRM could lead to lower bond ratings and higher project financing costs. Changes in the final rule are intended to increase investor confidence in PFC-backed bonds, enhance the marketability of such bonds and, ultimately, reduce the amount of PFC revenue needed for interest and financing costs. While the final rule retains the Administrator's statutory authority to terminate a PFC, the process has been significantly revised to provide assurance to all parties that every effort will be made to resolve a problem before termination.

In addition, commenters note the NPRM did not specifically define debt service and bond financing costs as allowable costs reimbursable by PFC revenue. The definition of allowable cost is modified in the final rule to accommodate this concern.

A detailed discussion of the individual subparts in th regulation follows:

Subpart A

Subpart A contains the general provisions of the PFC rule including definitions, information on project eligibility, the authority to impose PFC's and certain limitations.

§ 158.3 Definitions. Several definitions in the NPRM generated numerous comments. After considering these comments, some definitions have been changed and other terms added. The following is a discussion of the significant departures from the NPRM.

Allowable cost. As proposed, allowable costs would have been those considered reasonable and necessary to accomplish the project, including formulation costs incurred before approval to impose a PFC. The comments express concern that this definition does not address debt related costs when PFC revenue is used to finance borrowing.

The final rule spells out allowable costs in more detail, and identifies debt service and bond financing by name as allowable costs. Allowable costs incurred after November 5, 1990, but prior to project approval, are reimbursable once the public agency receives project approval. A public agency's costs of administering its PFC program are also included in allowable costs.

This definition includes multi-phased projects listed in the airport capital plan. As noted in the NPRM, the FAA will retain the authority to do an independent review to determine what costs are reasonable and necessary. However, because a project may be financed entirely with PFC's or other local funds, the FAA would not ordinarily conduct the kind of detailed review associated with the AIP program. In addition, in the event of a dispute, the FAA will first look to local laws and procurement requirements and procedures for guidance in determining what costs are reasonable and necessary.

Approved project and project. The NPRM defined the term "project" to mean airport planning, land acquisition, noise compatibility measures and other such work to be undertaken with PFC revenue. Because of the need to differentiate projects for which approval has been granted to use PFC revenue from projects still under consideration or those for which only imposition of a PFC has been approved, the final rule includes two definitions, "approved project" and "project." As the name implies, an approved project is one that has received FAA approval under Subpart B of this part for use of PFC revenue. The term "project" is used to refer to all projects whether approved or contemplated.

Bond financing costs. A new term, bond financing costs are the costs associated with issuance, underwriting, credit enhancement and the other costs of incurring new indebtedness. It does not include the cost of debt service, which is defined separately. The financial community suggests that these costs do not ordinarily exceed 2 percent of the debt package, but the FAA will not impose a regulatory limit. If such costs prove to be excessive, the FAA has the authority to take action in the future.

Collecting Carrier. The NPRM defined "issuing carrier" to mean an air carrier or foreign air carrier that issues a ticket or whose imprinted ticket stock is used by an agent. All PFC collection would have been accomplished by issuing carriers under the proposal. As discussed below, the final rule has been modified to permit collection of PFC's by other than issuing carriers. The new term "collecting carrier" is added to refer to carriers collecting PFC's whether or not such carriers issue the air travel ticket.

Debt Service. This term refers to items normally associated with the payment of interest, principal and fees.

Exclusive long term lease or use agreement. The NPRM defined "long-term lease and use agreements" as those of 5 years or more. This definition implements the statutory prohibition on exclusive long-term leases of PFC-financed facilities. Some commenters suggest that all exclusive leases be prohibited, and others suggest the definition refer explicitly to exclusive long-term leases.

The final rule modifies the proposed definition by inserting the word "exclusive." The FAA did not adopt the suggestion that all exclusive leases be prohibited because the statute itself bars only long-term exclusive leases. A public agency may adopt a policy of permitting no exclusive lease or use agreements of any duration for PFC-financed facilities, but it is not required to do so.

Implementation of an approved project. This new definition reflects the separate approval process to impose a PFC and to use PFC revenue. As discussed more fully below, the authority to impose a PFC will expire or terminate if a public agency does not begin implementation of an approved project in a timely fashion. This definition specifies the actions required to effect implementation of various kinds of projects. For a construction project, issuance of a notice to proceed to the contractor or the physical start of construction is required. For other projects commencement of work by the contractor or public