Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

Comments on the Supplemental Regulatory Flexibility Determination published at 76 Fed. Reg. 12559 (March 8, 2011).

Submitted to the FAA docket number FAA–2002–11301 online at http://www.regulations.gov.

Submitted by the
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Docket Operations, M–30
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Dear Sir or Madam:

Please accept these comments in response to the Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Supplemental Regulatory Flexibility Determination (SRFD), which was published for public comment at 76 Fed. Reg. 12559 (March 8, 2011).

Contents

Who is ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace.

ASA and ASA's members are committed to safety and seek to give input to the United States Government regarding government policies so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

ASA agrees that drug and alcohol abuse presents an issue for America as a whole, and ASA's members have taken steps, independently, to confront these issues. Members are concerned, however, that any regulation must meet statutory obligations under the Regulatory Flexibility Act [RFA]. Failure to adhere to the requirements of the RFA can lead to badly drafted regulations that fail to narrowly meet their purported objectives in an effective and efficient manner.

ASA supports efforts to produce regulations that increase safety at reasonable costs. To maximize the benefits of smart regulations, ASA urges compliance with the requirements of the Regulatory Flexibility Act in the process to avoid an undue impact on small business members, and also to avoid an undue impact on small maintenance facilities that might be passed along to ASA members in the form of higher maintenance costs.

Comments

The FAA Failed to Conduct a Regulatory Flexibility Analysis in Good Faith

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-12 (RFA) requires that agencies conduct a regulatory flexibility analysis or summary "at the time of the publication of general notice of proposed rulemaking for the rule." 5 U.S.C. § 603.

In its 2002 Notice of Proposed Rulemaking (NPRM), the FAA amended the definition of "employee" in existing drug and alcohol testing regulations to cover contractors and subcontractors performing safety-sensitive functions "at any tier." 67 Fed. Reg. 9367, 9377 (Feb. 28, 2002). It then issued a supplemental NPRM in 2004, containing identical regulatory language and soliciting industry feedback. The resulting final rule in 2006 summarily concluded that the changes would not have a "significant impact on a substantial number of small entities," seemingly removing the need for a full regulatory flexibility analysis. 75 Fed. Reg. 1666, 1674 (Jan. 10, 2006).

After the Aeronautical Repair Station Association (ARSA) challenged the change for failure to assess the impact on small businesses, the U.S. Court of Appeals for the District of Columbia ordered the FAA to conduct the analysis required under the RFA, paying attention to both contractors and subcontractors. *ARSA v. FAA*, 494 F.3d 161, 178 (D.C. Cir 2007). This analysis consists of either an adequate certification that the rule would not have a significant impact on a substantial number of small entities or completion of initial and final regulatory flexibility analyses.

In order to have an adequate factual basis for an analysis under the RFA, the FAA must both define who is being regulated and support its claims with data that meets the minimum requirements under the Federal Data Quality Act.[1]

To date, even though it is becoming increasingly clear that small businesses will bear the bulk of the rule's impact, 76 Fed. Reg. at 12560, the FAA has not made a good-faith effort to account for the impact on small businesses of covering contractors at any tier and has failed to meet the basic requirements of the RFA.

The Supplementary Regulatory Flexibility Determination Fails to Meet Statutory Obligations under the Regulatory Flexibility Act

The RFA requires agencies that write rules potentially having an impact on a significant number of small businesses to conduct a "regulatory flexibility analysis." That process requires agencies to include: a short statement of purpose; summaries and responses to comments; an estimate of affected parties; a description of compliance requirements; a description of steps taken to minimize the impact on small businesses; and a list of any significant alternatives and the basis for the chosen option. 5 U.S.C. § 603(b)-(c).

The Supplementary Regulatory Flexibility Determination is not a permitted Option under the Regulatory Flexibility Act

If an agency certifies that the rule will not have a significant impact on a substantial number of entities, it does not need to conduct a regulatory flexibility analysis. § 605(b). Such a certification, however, must be supported by a factual basis disclosed in the Federal Register and submitted to the Chief Counsel of Advocacy at the Small Business Administration. *Id.*

[1] OMB guidelines require agencies to comply with the DQA by "develop[ing] information resources management procedures for reviewing and substantiating (by documentation or other means selected by the agency) the quality (including the objectivity, utility, and integrity) of information before it is disseminated." OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (Oct. 1, 2001), http://www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines.

The FAA still has not conducted an initial regulatory flexibility analysis. Instead, in response to the court order to conduct an analysis under the RFA, it submitted a Supplementary Regulatory Flexibility Determination (SRFD). 76 Fed. Reg. 12559 (March 8, 2011). The SFRD announced that "the FAA preliminarily certifies that this rule will not have a significant economic impact on a substantial number of small entities." This is not a initial regulatory flexibility analysis. It is also not a certification of no significant economic impact on a substantial number of small entities, because (1) it was not based on data meeting the requirements of the Data Quality Act and (2) it was merely preliminary in nature.

The RFA, which spells out the requirements only for initial and final regulatory flexibility analyses, makes no mention of the option of submitting a SRFD, or of making a preliminary certification of impact.[2] The SRFD is not an adequate initial regulatory flexibility analysis because it lacks any mention of purpose, public comments, meaningful estimates of the number of affected parties, and steps taken to minimize the impact on small businesses. *See generally* Appendix A, *infra*. It is also not an adequate certification because also lacks any factual basis to conclude that the rule would not have a significant impact on a substantial number of small entities.

Because the SRFD does not conform with the requirements of either an initial or a final regulatory flexibility analysis, the FAA has failed to its court order to conduct a full regulatory flexibility analysis. *See ARSA v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007) (ordering the FAA to "conduct[] the analysis required under the Regulatory Flexibility Act"); *In re ARSA*, __ F.3d __ (D.C. Cir. March 1, 2011) (responding to ARSA's petition for a writ of mandamus to force the FAA to conduct a "final regulatory flexibility analysis" by ordering the FAA to "show cause" why the petition should not be granted).

These comments demonstrate that the FAA lacks a factual basis to certify that the rule would not affect a substantial number of small entities, thereby necessitating the completion of initial and final regulatory flexibility analyses. Until the FAA conducts a complete, final regulatory flexibility analysis, addressing each of the five elements therein, it remains outside compliance with the 2007 order.

The Regulatory Flexibility Determination Lacks a Clear Statement of Purpose

The Regulatory Flexibility Act requires agencies to include consider the "stated objectives" of the appropriate statute in carrying out a regulatory flexibility analysis. 5 U.S.C. § 603(c).

[2] *See generally* SBA, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act 4 (June 2010), http://archive.sba.gov/advo/laws/rfaguide.pdf (mapping out the "RFA decision process," which makes no reference to an SRFD).

The FAA did not initially cite a purpose behind the rule because it viewed change as merely a "clarification;" in other words, the change had no goal other than to reinforce an existing rule covering air carriers. *See* 67 Fed. Reg. 9366, 9369 (Feb. 28, 2002). The notion that it is not a substantive change, however, has been rejected. *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007) (finding that the "at any tier" language in the regulation places an additional burden on contractors and subcontractors).

The FAA is not permitted to claim the rule's purpose is merely to promote safety in general, pursuant to its authorizing statute. *See* 49 U.S.C. §§ 44701(a)(5), 45102(a)(1). As the Court of Appeals for the D.C. Circuit recognized in its 2007 opinion, this mandate "does not give the FAA carte blanche to pursue that goal" of safety. *Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d at 179.

The original drug and alcohol rule, covering air carriers, was introduced due to a perceived need to protect the public from drug use by air carrier personnel having contact with customers. *See* Omnibus Transportation Safety Act, Pub. L. 102-143 (Oct. 28, 1991) (listing, among the statute's findings, that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are *involved in the operation* of aircraft, trains, trucks, and buses"). The FAA claimed that the change was a valid interpretation effectuating the goal of reducing the use and abuse of controlled substances and alcohol in such ways that lead to transportation accidents. *See* Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143 (Oct. 28, 1991) (imposing drug and alcohol testing requirements specifically on air carriers and FAA personnel). Existing evidence does not yet support this proposition. Even if evidence did support this proposition, though, the FAA still has an obligation under the RFA to fully explain why amending the definition of "employee" furthers the FAA's safety goals.

The statutory basis for the drug and alcohol rule suggests that regulation of subcontractors at any tier would not further the same goals as the original rule. The Notice of Proposed Rulemaking for the original rule, 53 Fed. Reg. 8368 (March 14, 1988), substantially overlaps with a congressional mandate to craft a drug and alcohol policy embodied in the Omnibus Act. The initial proposed rule discussed the aviation industry broadly, though it focused substantially on Part 121 and 135 certificate holders. 53 Fed. Reg. 8368. Most of the evidence used to support a public concern is focused on pilots, while airline maintenance workers are also mentioned:

> Another issue where the aviation industry organizations are in agreement is in extending the categories of employees to be tested. These organizations want certificated and noncertificated crewmembers, mechanics, and any other employees whose duties could affect the safety of aviation to be tested—generally, those employees participating in operations, maintenance, engineering, and aircraft servicing activities.

Id. at *7.

The Rule is not a "Mere Interpretation" so It Requires a "Reason Why"

A rule is not merely an interpretation when it exercises rulemaking powers beyond that explicitly provided for in an authorizing statute. *See* K. Davis, **Administrative Law Treatise**, § 7:8 (1958). As such, whether the rule is viewed as a valid interpretation turns on the language of the authorizing statute. Michigan v. Thomas, 805 F.2d 176, 183 (6th Cir. 1986). The court in *Thomas* held that an EPA definitional change "clearly harmonizes with the language and purpose of section 172(b) of the Clean Air Act," and therefore constituted a valid interpretation. *Id.*

In the end, the FAA cited a need for an overhaul of drug and alcohol rules for those entities "who operate for compensation or hire and who *provide services to the public* clearly are dependent on *public trust*," thus making clear that the overhaul contemplated aviation companies whose employees would interact with the public. *Id.* at *12. This theme was also a reason for excluding general aviation from the scope of the rule. *Id.* Because the initial statute was clearly limited in scope to air carriers, according to *Thomas*, the FAA's expansion of the rule to cover air carriers is a substantive departure, rather than a simple interpretation. 805 F.2d at 183.

The FAA must clearly announce a reason behind this substantive change in its drug and alcohol rules. This is because section 603(b)(1) of the RFA requires the analysis to contain "a description of the reasons why action by the agency is being considered." Because the FAA's goal cannot be clarification, nor can it be the original statutory mandate to fix a drug problem for aircraft operators, the FAA has a duty to announce the reasons why the agency considered changing the definition of employee to include subcontractors "at any tier."

The Regulatory Flexibility Determination Fails to Consider Alternative Means of Achieving the Goal of the Rule

The Regulatory Flexibility Act requires agencies to include "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c). This involves making a "reasonable, good-faith effort to canvass major options and weigh their probable effects." National Ass'n of Psychiatric Health Sys. v. Shalala, 120 F. Supp. 2d 33, 42 (D.D.C. 2000).

Executive Order 12866 states that, "in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, *including the alternative of not regulating*. Costs and benefits should include both quantifiable measures (to the fullest extent possible) and qualitative measures of costs and benefits that

are difficult to quantify, but essential to consider." Exec. Order No. 12866 § 1(a), 58 Fed. Reg. 51735 (Sept. 30, 1993) (emphasis added).

The Small Business Administration (SBA) has explained that it is "crucial" to explore alternatives at the initial regulatory flexibility analysis stage in order to avoid having the agency commit to one solution. *See* SBA, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act at 36 (June 2010), http://archive.sba.gov/advo/laws/rfaguide.pdf [hereinafter "SBA Guide"]. The SBA Guide cites a Department of Transportation proposed rule on vessel and facility response plans as an example of a proper consideration of alternatives. *See id.* at 74-75 (citing 67 Fed. Reg. 63331). In that initial regulatory flexibility analysis, the Department considered five alternatives and their respective costs and benefits, including an option to take no action and impose no costs. 67 Fed. Reg. 63331, 63337-38 (Oct. 11, 2002). Through this consideration of alternatives, using specific and justifiable cost estimates, the Department could clearly demonstrate that the cited benefits justified taking regulatory action. *Id.* at 63338.

The Supplemental Regulatory Flexibility Determination makes no effort to address any alternatives to its analysis of the impact of its drug and alcohol rule. This requirement is not lifted merely because the final rule already went into effect in 2006. 17 Fed. Reg. 1666 (Jan. 10, 2006). The central focus of the D.C. Circuit Court of Appeals' order was for the Administration to conduct a full, good-faith regulatory flexibility analysis for the rule, a major portion of which concerns a discussion of alternatives. *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 178 (D.C. Cir. 2007); 5 U.S.C. § 603(c).

Even if the purpose of the regulation, from the FAA's perspective, is clarification of an existing rule, the FAA has failed to comply with Section 603(c) by not discussing alternatives. Here, one clear alternative to the current clarification would be to clarify the existing rule by taking the exact opposite route and specifically exempt contractors and subcontractors at all other tiers, as was the common understanding before this change. Such an alternative would have a substantially lower impact on small businesses and would adhere more effectively to the purported goal of the regulation.

The rule, however, is not a clarification because it imposes an additional burden. The FAA's own estimate of newly affected repair stations that are small businesses has increased from about 300 non-certified repair stations (at a net cost of $2.29 million over 10 years, or $763 annually per company)[3] to an unspecified, yet larger number of

[3] The 2006 Final Rule predicted that, since it was merely a clarification," the rule would impose no costs whatsoever. It thereby assumed that all certified repair stations were or should have been in compliance with the air carrier rule. It can therefore be assumed that its low cost estimate was based on the 300 non-certified repair stations it identified as possibly changing activity as a result of the 2006 rule. *See* 71 Fed. Reg. at 1675.

subcontractors (costing $12,981 annually per company)[4] over the course of this rulemaking process. *See* 71 Fed. Reg. at 1675; 76 Fed. Reg. at 12562. Despite this drastic difference in cost, the rule has remained unchanged and unresponsive to the magnitude of its scope.

It is against the spirit of the RFA for the FAA to maintain the rule in its current form even though the current cost estimate per company is 17 times more expensive than what had initially been considered. Additionally, the full economic impact cannot be assessed until the FAA makes a greater effort to define the number of affected parties and make a comparable industry-wide impact statement as it attempted to do in the 2006 Final Rule. Still, the SRFD asserts that the rule should mirror the air carrier rule, without even acknowledging the duty to discuss alternatives that might be less burdensome on small subcontractor.

By failing to conduct a full discussion of alternatives at the initial stage, and demonstrating its bias toward one particular solution, the FAA has failed to comply with its writ of mandamus and faithfully conduct a regulatory flexibility analysis. To bring the SRFD into compliance, the FAA should, at a minimum, weigh the alternatives of (1) not extending the rule to all subcontractors at any tier, and (2) exempting the most heavily impacted businesses from the rule.

The Regulatory Flexibility Determination Leaves the Scope of the Rule Unclear

The SBA Guide states that, "[c]learly, an agency should identify the scope of the problem and the impact of the solution on affected entities before moving forward with a regulatory proposal." SBA Guide at 9.

To date, the FAA has not clearly stated what the rule means when it says it would expand drug and alcohol testing requirements to contractors and subcontractors performing safety-sensitive functions "at any tier." *See* 71 Fed. Reg. at 1666. In its 2006 Final Rule, the FAA estimated that the only potential newly-affected parties would be non-certified repair stations. *Id.* at 1675. But this does not clearly answer the question of whether non-repair stations would be affected as well.

In *ARSA v. FAA*, the U.S. Court of Appeals for the District of Columbia Circuit ordered the FAA its regulatory flexibility analysis to account in for all companies, including contractors and subcontractors, affected by the rule. 494 F.3d 161, 178 (D.C. Cir. 2007). Still, it will unclear whether all of these companies are actually affected by the rule until the FAA clearly explains its scope.

[4] This figure represents all repair stations identified as small businesses by the Small Business Administration, the Transportation Security Administration, and FAA internal data. *See* 76 Fed. Reg. at 12560. This figure assumes $0 in savings, as the SRFD cites none, so the total cost is the same as the net cost.

For the past five years, subcontractors have had to guess whether this rule extends to certain companies. The uncertain scope of the rule, coupled with the threat of severe penalties, might force risk-averse companies to comply with a redundant regulatory scheme. In this way, the FAA's failure to define the scope of the rule has imposed an additional burden on small businesses.

In its final regulatory flexibility analysis, the FAA should clearly define the scope of the rule and explain which subcontractors will be affected.

Benefits of the Rule Should Not Be Assumed Without Evidence

It appears that the FAA has assumed that the rule has substantial benefits. Benefits of the rule should not be assumed, especially in light of scholarly reports finding the costs of drug testing are not offset by the benefits. See ACLU, Drug Testing: A Bad Investment (1999) (available online at http://www.aclu.org/FilesPDFs/drugtesting.pdf).

The FAA Appears to Lack Substantial Evidence to Support its Basis for the Drug-and-Alcohol RFA

The FAA appears to have based its RFA entirely on data obtained from the ARSA. While ARSA is a well-respected organization, ARSA's data reflects an incomplete review of the industry. It appears to have been limited to ARSA's members, who are certificated repair stations, and it does not fully address the application of the rule to maintenance providers who do not hold repair station certificates. In fact, ARSA has criticized the FAA's rule because it fails to account for small business entities that provide maintenance services without holding repair station certificates (such as those that provide line services to air carriers under individual Part 65 airframe-and-powerplant mechanic certificates).

It is possible that the FAA has relied on data other than the data supplied by the ARSA. If this is the case, then the FAA has failed to meet its statutory obligations in failing to reveal this additional data to the public in order to permit reasonable comment. "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 199 (D.C. Cir. 2007).

The Rule's Costs Do Not Support the FAA's Certification

On its own, the SRFD provides estimates that constitute a significant impact on a substantial number of entities. Though any cost without yielding any benefit could be

considered substantial,[5] the 2% of revenues estimated by the SRFD already exceeds the 1% threshold cited by the SBA. Once the FAA takes steps to correct the defects in its factual basis, the impact will be even more significant. Therefore, the FAA must go beyond a certification and submit a full initial regulatory flexibility analysis.

The FAA Underestimates the Cost of Implementation of this Rule

The data relied upon by the SRFD does not accurately reflect the cost of the program. It also underestimates the impact of these costs by using a skewed snapshot of the affected industry.

The SRFD, while identifying most of the relevant cost factors, omits certain other factors necessary to assess the rule's true impact on the industry.

The cost of administering drug and alcohol tests can vary greatly depending on the size of the company. Larger companies often have in-house testing facilities, which are able to provide low-cost tests with fewer lost hours and no transportation costs. Conversely, small companies that are unable to internalize these facilities must turn to private companies. Those companies often charge between $60 and $95, and employees might have to travel long distances in order to be tested. The FAA's current estimate of $35-45 should be revised to account for the higher fees charged by private companies, as well as travel expenses and the resulting increase in lost wages.

Additionally, the FAA's cost estimates do not account for post-accident testing, which is considerably more expensive than random testing. These tests are simply more administratively burdensome, requiring additional paperwork and an escort for the person being tested. The FAA's estimates should account for more than just random drug tests.

Estimates of the value of employee time are also understated. While the tasks involved may only be worth the average maintenance supervisor salary of $39.68, in reality, many of these tasks will be undertaken by higher ranking officers of the smaller companies, whose lost wages would be considerably greater. Additionally, mere lost wages is not a full measure of the impact on a company of one hour of an employee's time being devoted to drug testing. The company also suffers lost productivity due to that employee's absence. If a replacement can be found, the impact of the lost time would not increase; however, this is

[5] When an agency is required by statute to consider the costs of implementation of a regulation, it is required to give some weight to the costs it uncovers. *See* Cass R. Sunstein, **The Cost-Benefit State: The Future of Regulatory Protection** 76 (2002). As a corollary, if a regulation has only costs and no financial benefits, it must be justified on other grounds or otherwise effect the purpose of an implementing statute. *See id.* at 36 (citing *Chemical Manufacturers Ass'n v. EPA*, 217 F.3d 861, 864 (D.C. Cir. 2000)). When the costs exceed the benefits, courts have held the cost-benefit ratios unlawful for the purposes of agency rulemaking. *See id.* at 77.

often not possible. Therefore, an estimate of opportunity cost should be included with the cost of an employee's time.

The rule also requires compliance with a Department of Transportation rule requiring investigation of drug and alcohol use in each new employee's two-year employment history. These costs are both substantial and highly variable. Accordingly, FAA must find a reliable cost estimate for contacting previous employers within the last two years to find and report the drug and alcohol history for new hires.

Finally, the FAA's estimate of the composition of the affected industry is both outdated and misleading. ARSA's unscientific survey on which the FAA relied represents figures from 2004. And while the FAA was right to use an industry survey in considering the composition of the industry, it failed to account for the shortcomings of that limited survey. Despite the fact that 43% of surveyed companies reported revenues of under $750,000 for example, the FAA seemed to consider $750,000 as the bottom threshold when estimating an impact of no more than 2% of revenues. In reality, a significant number of small companies likely have revenues of substantially less than $750,000.

Instead of relying on informal industry surveys, the FAA should consult with the Bureau of Census Data to obtain more reliable information about the number of companies under each NAICS code.

FAA Should Have Used BLS Data for Estimating Costs

The Bureau of Labor and Statistics [BLS] provides cost data for employees in the aviation support fields. This data was not used as the basis for the cost estimates, and there is no reason provided by the FAA for this departure from existing data.

The NAICS code for aviation support functions, like aviation maintenance, is 488100. Under that NAICS code, Human Resources Managers (the people who would be managing drug testing programs internally within a company) should be making (on average) wages of $98,770. This does not include the costs of the employee's benefits. None of the wage figures used by the FAA approach this level. In light of this discrepancy between the FAA's cost figures and the BLS wage figures for the same roles, the FAA's reliance on much lower salary figures does not make sense and seems erroneous.

FAA Estimates for Record Keeping are Absurd

FAA has made recordkeeping estimates that are simply absurd on their face. For example, the FAA has estimated that a positive test or a refusal to test will take about one quarter hour to report. In a small business environment, the manager in charge of this issue will either need to familiarize himself or herself with the appropriate notification obligations and the appropriate options available to himself or herself. This review of the regulations

and guidance will take the average person substantially more than a quarter hour - it will likely take many hours. Failure to fully review the relevant regulations and guidance would likely lead to potential non-compliance which would lead to substantial fines; therefore most managers will err on the side of caution and review the relevant regulations and guidance to assure full compliance. The human resources professional in a small business is likely to also be the company President or General Manager, so that individual will be compensated at a rate on the high end of the spectrum and also will have significant other responsibilities, so it is unreasonable to assume that the individual will be able to engage in compliance without significant review of relevant regulations and guidance.

Cost Estimates Should Include Lost Revenues as Well As Direct Costs

The cost of drug testing to a company is more than just the cost to pay the employee. The costs for paying the employee must still be borne because the employee has to be paid; however, there is also an opportunity cost associated with the lost ability to perform labor. Because the employer is both paying wages and also losing revenue in the transaction, both of these amounts should be considered in the RFA figures.

Post Accident Testing Figures are More Expensive

When an employee is sent for post accident testing, that employee generally requires an escort. This is more expensive because post accident testing tends to be considerably more expensive and also because of the additional costs associated with the use of an ad hoc escort.

Even the Cost Estimates Used by the FAA are Substantial

The FAA's total cost estimate relies in large part on outside surveys conducted by the ARSA to assess the population of repair station subcontractors. These surveys led the FAA to use a benchmark of the near-median company of 25 employees and annual revenues between $750,000 and $2 million. 76 Fed. Reg. at 12561-62. Costs are broken down into four categories: testing costs, training and education, program development and maintenance, and annual documentation. 76 Fed. Reg. at 12562. The sum of these four categories, as estimated by the FAA, comes to a total annual cost of $12,981 per company for drug and alcohol programs combined. *Id.*

Following these estimates, the FAA attempts to put them in context by claiming the fact that the cost would represent "less than 2% of their annual revenue" for companies with revenues of less than $750,000. *Id.*

First of all, the "less than 2%" figure is misleading because it is based on the 1.7% figure, which applies to companies with revenues of exactly $750,000. The ARSA survey estimates that 32.09% of repair stations have revenues of under $750,000, but it does not

indicate how many companies have revenues of significantly less than that amount. For a company with $500,000 of revenues, the FAA's estimated costs would amount to about 2.6%. For a company with $250,000 in revenues, the proportion would jump to about 5.1%.

Therefore, depending on the size of the company, the net costs of the rule can be substantial.

The Regulatory Flexibility Determination Fails to Cite the Specific Benefits to Safety

The Regulatory Flexibility Act requires agencies to "describe the impact of the proposed rule on small entities." 5 C.F.R. § 603(a). Implicit in this requirement is the goal that the benefits should favorably compare (even outweigh) the costs. The current rule lacks any articulated benefits and, more broadly, any overall purpose.

The initial Notice of Proposed Rulemaking for the air carrier drug and alcohol rule cites potential benefits of $870 million, based on a population of 511,628 employees in the commercial aviation industry and using U.S. Department of Health and Human Services savings estimates. 53 Fed. Reg. 8368, *27 (March 14, 1988).

The 2006 Final Rule estimated savings at $790,000 over 10 years, 71 Fed. Reg. at 1675, but that estimate was unsubstantiated and was not referenced in the SRFD. Given that the original rule had vastly underestimated the costs and scope of the rule as it affected subcontractors, it is necessary to provide a more detailed discussion of benefits in order to contextualize those costs. *See* 76 Fed. Reg. at 12560 (estimating the number of repair stations that qualify as small businesses at 3,729); *see also* ARSA, Background on ARSA D&A Legal Challenge, http://www.arsa.org/node/676 (estimating between 12,000 and 22,000 subcontractors that would be affected by this rule).

A detailed description of benefits is especially needed because the same benefits do not flow equally to air carriers and subcontractors after imposing drug testing requirements. First, subcontractors employed by air carriers do not work for these entities exclusively. Second, the work of maintenance subcontractors will be implicitly reviewed at the time of installation by the installer. Therefore, any reduction in drug use by subcontractor employees would have a lesser impact on safety than a reduction in drug use by air carrier employees. Additionally, any defect in repair conducted by a subcontractor will be subject to an additional check by the contractor (as it implements or installs the subcontracted work), as well as by the air carrier before that part is put into operation. Thus, subcontractor work produced for air carriers would see less significant benefits from reduced drug use.

While reduced drug use in all sectors of the workforce would presumably yield equal societal benefits, the scope of FAA's rulemaking is confined to improvements in air safety. To this end, the FAA should clearly articulate how expansion of drug testing requirements to subcontractors at all tiers will yield appreciable safety benefits.

The FAA Should Have Concluded that the Costs Impose a 'Significant Economic Impact on a Substantial Number of Small Entities'

Assuming the FAA's raw cost estimates are justifiable, any genuine effort to fully assess overall costs must put them into context and compare them to average profit margins. The SRFD states the FAA welcomes comments that "support the position of higher cost." 76 Fed. Reg. at 12563. As this section will demonstrate, however, the cost is already high enough to be significant, and raw costs alone cannot be the only consideration determining the impact on small businesses.

In *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, fishermen challenged a Commerce Department plan to regulate shark fishing. Specifically, the court took issue with a seemingly arbitrary cost estimate of $26,000. *Id.* at 1435. Even assuming that figure had a rational basis, the court concluded, NMFS had failed to demonstrate how that sum would not be deemed significant when incurred by the small businesses at issue. *Id.* Ultimately, the court held the agency had not made a good faith effort to adhere to the requirements of the Regulatory Flexibility Act. *Id.* at 1436. The court further criticized the agency for not beginning the regulatory flexibility analysis earlier, thereby attempting to insulate itself from public scrutiny. *Id.* at 1437.

Southern Offshore Fishing underscores the importance of a thorough record and justifiable cost estimates. In particular, it is not enough to estimate costs and label them insignificant – the courts have required agencies to conduct a more in-depth impact analysis.

Here, the SRFD labels the maximum cost of compliance at 2% of total revenue for the smallest affected companies, which it characterizes as including the broad range of companies with revenues under $750,000. 76 Fed. Reg. at 12561.

Even assuming the lowest-revenue companies all have revenues of close to $750,000, 2% of annual revenue is a very significant figure.[6] In fact, the SBA Guide makes clear that even such a small percentage of revenue will represent a significant, negative impact in an industry with low profit margins, such as the food marketing industry. *See* SBA Guide at 17. Normal profit margins for many of these companies might be below 2%, so the imposition of a drug and alcohol program could, on its own, could force some companies out of business.

[6] This figure, for example is twice the threshold for a significant impact as estimated by the Florida Small Business Regulatory Advisory Council, How to Categorize Impact on Small Business DRAFT Guidance for State Agencies at *2, http://www.floridasbrac.org/AgencyInfo/Draft%20How%20to%20Categorize%20Impact%20on%20Small%20Business.pdf (suggesting a finding of significant impact when a regulation imposes costs of 10% of profits, 5% of labor costs, or 1% of revenues).

Additionally, according to the SBA, costs can be substantial when the regulation: "(a) eliminates more than 10 percent of the businesses' profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector or (c) exceeds 5 percent of the labor costs of the entities in the sector." SBA Guide at 18. The current SFRD characterizes the impact to be equal to as much as 2% of revenues - this is significant under traditional guidance addressing such an issue - so the FAA characterization of the impact as insignificant appears to be flawed.

According to the FAA-endorsed ARSA survey, this burdensome cost will be imposed on 43% of industry members, constituting a "substantial number" of small businesses. *See* 76 Fed. Reg. 12561. The FAA should take this conclusion into account and determine how to alleviate some of the rule's burden on small businesses in accordance with the RFA.

Standards of Compliance

Process-Based vs. Performance-Based Standards

In promulgating regulations, agencies are required to "identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." Executive Order 12866 § 1(b)(8)(September 30, 1993).

From a policy perspective as well, performance based standards are generally preferable to process-based standards because the former allow the same goals to be met in a more cost-effective way. *See* Cass R. Sunstein, **The Cost-Benefit State: The Future of Regulatory Protection** 165 (2002).

The Regulatory Flexibility Act underscores this policy by requiring agencies to consider alternative means of meeting its stated goal, including "the use of performance rather than design standards." 5 U.S.C. § 603(c)(3).

The goal of the drug and alcohol rule is to protect the public from unsafe conditions. *See generally* Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143 § 2 (Oct. 28, 1991). The current standard embodied in the drug and alcohol rule (as applied to maintenance subcontractors) mandates specific behavior by these companies. It would be possible, as an alternative, to establish a performance-based standard that could instead be implemented to ensure that travelers are not exposed to aircrafts or parts that have been improperly maintained by subcontractors who were under the influence of drugs and alcohol.

If such a performance-based standard were implemented, some subcontractors might choose establish a formal drug and alcohol testing program, while others might choose other methods to ensure that possible drug-or-alcohol use did not impair the

airworthiness of work performed. For example, a quality assurance system might monitor and test the work performed to ensure that the work is completed in an airworthy manner. Such a quality assurance system could catch any errors that might be caused by a person acting under the influence of drugs and alcohol. SUch a quality assurance system may be significantly more efficient for small businesses, if the quality assurance system could also effectively detect other quality assurance issues (thus using a single system to effect more than one quality policy of the FAA).

Such a rule could help prevent redundancies that the RFA was enacted to avoid.

The FAA should consider changing the language of the rule to a performance-based standard as it applies to subcontractors in order to reduce systmeatic redundancies.

Summary of Issues to be Addressed in the Final Regulatory Flexibility Analysis

In order to ensure full compliance with the Regulatory Flexibility Act and to be able to fully understand the impact of the new drug and alcohol rule, the industry feels that it is important for the FAA to conduct a full, thorough Final Regulatory Flexibility Analysis as required by the RFA. Because the FAA still has not completed an Initial Regulatory Flexibility Analysis, however, some additional issues should be discussed in the next submission.[7]

Although the FAA has provided detailed cost data, it must collect more substantive and reliable information to fully contextualize these costs before it can assess the full economic impact of the rule on small businesses. This section should include a comparison of costs to average subcontractor profit margins.

Once it submits an initial regulatory flexibility analysis, the FAA must first clearly articulate the purpose and objectives of expanding the drug and alcohol rule to subcontractors at all tiers. Only after it fully explains the benefits of the rule can these benefits be weighed against the impact on small businesses as required by the RFA.

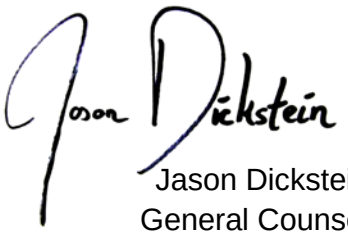
Most importantly, the FAA must identify, explain, and weigh the various alternative means of achieving the goals of this rule, complete with cost estimates for each. Options to adopt performance standards and to take no action should be included among these alternatives.

Overall, the FAA should pay close attention to the requirements of the RFA and heed the advice of the SBA Guide in the future to avoid the costly uncertainty that this inadequate SRFD has caused.

[7] *See generally* Appendixes A-B, *infra*.

Your consideration of these comments is greatly appreciated.

Respectfully Submitted,



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Appendix A: Status of Elements Required in Initial Regulatory Flexibility Analysis[8]

IRFA Requirement	Addressed in SRFD?
A description of the reasons why the action by the agency is being considered.	No
A succinct statement of the objectives of, and legal basis for, the proposed rule.	No
A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.	Yes
A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.	Yes
An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.	No
A description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while accomplishing the agency's objectives.	No

[8] Adapted from SBA Guide at 32.

Appendix B: Status of Questions Suggested by SBA Guide (p. 31)

Question	Addressed in SRFD?
Should the agency redefine "small entity" for purposes of the IRFA?	No
Which small entities are affected the most? Are all small entities in an industry affected equally or do some experience disparate impacts such that aggregation of the industry would dilute the magnitude of the economic effect on specific subgroups?	No
Are all the required elements of an IRFA present, including a clear explanation of the need for and objectives of the rule?	No
Has the agency identified and analyzed all major cost factors?	No
Has the agency identified all significant alternatives that would allow the agency to accomplish its regulatory objectives while minimizing the adverse impact or maximizing the benefits to small entities?	No
Can the agency use other statutorily required analyses to supplement or satisfy the IRFA requirements of the RFA?	No
Are there circumstances under which preparation of an IRFA may be waived or delayed?	No
What portion of the problem is attributable to small businesses (i.e., is regulation of small businesses needed to satisfy the statutory objectives)?	No
Does the proposed solution meet the statutory objectives in a more cost-effective or cost-beneficial manner than any of the alternatives considered?	No