United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC, and TEXAS PNEUMATICS SYSTEMS, INC., *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1091

and

SOLUTIONS MANUFACTURING, INC., and MR. RANDALL C. HIGHSMITH, a natural person, *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1092 (consolidated with Case No. 06-1091)

CORRECTED EMERGENCY MOTION TO STAY EFFECTIVE DATE FOR COMPLYING WITH FAA's NEW DRUG AND ALCOHOL TESTING RULE

Petitioners ask the Court under Fed. R. App. P. 18(a) and D.C. Cir. Rule 18(a) for a nine month stay of the October 10, 2006 [1] compliance date of the FAA's new and drastic drug and alcohol testing rule—making the new compliance date July 10, 2007. This short stay will allow the FAA and the aviation maintenance industry to cope with the confusion resulting from the vagueness and internal inconsistencies of the new rule and its associated guidance, while the Court considers powerful arguments for its invalidation.

[1] All dates are 2006 unless otherwise noted.

A period of nine months will provide ample time to complete the briefing, oral argument and decision steps before the stay expires. This would provide clarity to the industry through judicial intervention or issuance of the informal guidance that the FAA promised (but has yet to deliver), without subjecting the industry to compliance and enforcement of an unconstitutionally vague rule.

Had the FAA kept its promise to provide prompt clear guidance on the new rule, this stay would not be necessary. Instead, on August 15 the agency issued guidance that made the rule even more vague and internally inconsistent, with only days left before the October 10 compliance date. Unless this Court issues a stay, the new rule will remain enforceable against an industry that simply has no way to comply or to avoid liability. A stay pending this appeal was requested from the FAA on September 22 **(Ex. A)** but was denied on September 28 **(Ex. B)**, making a stay from this Court the remedy of last resort.

STATEMENT OF THE STAY REQUEST

Petitioners' stay request is aimed at the FAA's final rule entered on January 10, at 71 Fed. Reg. 1666 (the "Final Rule," *see* **Ex. C**), which became effective on April 10 and which has an October 10 compliance date. Under the thinly-veiled guise that the Final Rule is merely a "clarification," the FAA has drastically changed the drug and alcohol testing regime ***by extending it beyond the aviation industry to include "mom and pop" machine and welding shops, dry cleaners,***

and similar local shops who occasionally support the aviation maintenance industry, but who are not approved by the FAA and therefore have no regulatory privileges. In doing so, the FAA short-circuited legal requirements.

The FAA regulates design, production, operations, and maintenance on civil aircraft and related components under its jurisdiction. It issues certificates to entities that engage in these activities, thus ensuring that the critical links in the safety chain are in place. Each certificate issued by the FAA comes with certain privileges, such as those set forth in 14 CFR §§ 43.3, 43.7, and 145.201.[2] A certificated repair station has the privilege of performing maintenance on any article for which it is rated, and thereafter, approving it for return to service. It accomplishes this by creating a maintenance record under §§ 43.9 or 43.11. These privileges are also given to air carriers and other individual certificate holders, but not to persons referred to herein as non-certificated maintenance providers. Non-certificated maintenance providers, when they perform a "maintenance function," must be under the oversight of a certificated entity.

The FAA's drug and alcohol testing rules apply to certain designated "safety-sensitive" functions when performed for a U.S. air carrier in the United States. At issue here is the safety-sensitive function of ***"aircraft maintenance."***[3]

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[2] All references are to Title 14 CFR unless otherwise noted.

[3] Preventive maintenance is also a safety-sensitive function but the differences between "maintenance" and "preventive maintenance" are not important here.

The definitions of "aircraft," and "maintenance" are found in Part 1. Certificated entities long ago acquiesced to the FAA's testing regime for employees who maintained components even though this was not "aircraft maintenance" under Part 1. Acting in the interests of safety, the aviation maintenance industry accepted that employees of component repair stations should be tested when the work was performed by a certificated entity or under direct contract with an air carrier.

Part 145 contains the rules that apply to certificated repair stations, which are permitted to perform "maintenance." Before obtaining a certificate, the repair-station applicant must make a rigorous showing that it possesses the housing, facilities, equipment, trained personnel, and data to justify the approval sought. Repair stations, once certificated, often subcontract individual "maintenance functions"[4] to non-certificated entities; but these tasks do not constitute "maintenance" under § 43.3, nor is a non-certificated entity authorized to take airworthiness responsibility for the tasks performed under § 43.7.

This longstanding regulatory system and practice made the FAA's drug and alcohol regime crystal clear before the Final Rule. Only three kinds of employees were subject to the rules: (i) air carrier employees, (ii) employees working for

[4] The FAA has defined "maintenance function" as a step or series of steps in the maintenance process that may result in the approval of an article for return to service (**Ex. K** FAA Order 8300.10, Volume 2, Chapter 161, page 161-3).

non-certificated entities having a direct contract with an air carrier to perform a maintenance function, and (iii) employees of certificated repair stations performing maintenance at any tier for an air carrier.

That non-certificated, direct contractors to air carriers were subjected to the rules did not affect an appreciable segment of the industry because the overwhelming number of direct contracts involved certificated repair stations (which, in turn, sometimes subcontracted certain maintenance functions to other entities, including entities that did not hold a repair station certificate). Sensible compliance with the FAA's drug and alcohol rules prevailed because everyone knew the definition of maintenance (as distinguished from "maintenance function"), which entity was responsible for airworthiness, and which persons needed to be tested under the drug and alcohol regulations. The non-certificated entities carried out the subcontracted maintenance function on the aircraft component, and the certificated repair stations verified, through inspections and/or tests, that the work was performed in an airworthy manner. Under the rules as they existed until 2006, there were no safety incidents traceable to the non-testing of employees working at non-certificated entities. The responsibility for all maintenance rested with the certificated repair stations whose employees were subjected to drug and alcohol testing from 1988 (drugs) and 1994 (alcohol).

It is against this backdrop that the Final Rule arrived. The FAA calls it a

"clarification" of existing rules; it is anything but that. It rests on the flawed premise that all tiers "perform" maintenance whether they are certificated or not – a premise that violates the existing regulatory requirements and privileges described above. There is understandable confusion among industry members about how to comply with the vagueness created by the Final Rule. (**Ex D** Bland Declaration ¶¶ 4-9; **Ex E** ARSA Declaration ¶¶ 3-6 & 20-21, 24; **Ex F** Smith Declaration ¶¶ 3-11; **Ex G** Lee Declaration ¶¶ 5-7). Faced with this confusion, the FAA promised the industry guidance on how the new requirements would apply to maintenance functions performed by non-certificated entities. But the FAA's only effort at the promised guidance did not arrive until August 15, less than 60 days before the compliance date. Worse yet, that "guidance" increased the vagueness of the term "maintenance," thereby making compliance with the Final Rule even more difficult. (**Ex F** ARSA Declaration ¶¶ 3-7, 17, 19). To deal with mounting uncertainties, ARSA requested further guidance from the agency on July 18 on August 30, but ARSA's requests remain unanswered.

ARGUMENT

Four factors determine whether the stay should issue: (1) Petitioners' likelihood of success on the merits; (2) the risk to Petitioners of irreparable harm; (3) the prospect that the stay will harm the FAA; and (4) the public interest.[5]

[5] See, e.g., D.C. Cir. Rule 18(a).

Petitioners fully meet the four-factor test.[6]

I. PETITIONERS WILL LIKELY SUCCEED ON THE MERITS

The Final Rule must fall for several reasons, only some of which can be set forth here, and only one of which must be established to warrant the stay:

A. The Final Rule is invalid because it contravenes Congress' mandate that the FAA test only "air carrier employees."

The FAA adopted the drug-testing regulations under its general safety authority in 1988. In 1994, Congress reaffirmed this authority and expanded the testing regime to include alcohol in the Omnibus Transportation Employee Testing Act of 1991. *See* 49 U.S.C. § 45101 et seq. During these times, the FAA did not include non-certificated subcontractors in testing programs because they did not, and could not as a matter of law, perform maintenance or take airworthiness responsibility. This could only be accomplished by the certificated entities whose employees were covered by 14 CFR. Section 45102(a) limits who may be tested:

> In the interest of aviation safety, the Administrator of the Federal Aviation Administration shall prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random and post-accident testing of airmen, crew members, airport security screening contract personnel, and **other air carrier employees** responsible for safety-sensitive functions for the use of a controlled substance . . . and for

[6] Even if Petitioners' arguments for some factors were viewed as weak (which they are not), the stay should still issue if their arguments for one factor are strong. City Fed Fin. Corp. v. Office of Thrift Sup., 58 F.3d 738, 747 (D.C. Cir. 1995); Sereno Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

> use of alcohol in violation of law or a United States Government regulation. [emphasis added]

Thus, the FAA may test only ***air carrier employees*** who perform a safety-sensitive function. To delineate the population who must be tested, Part 121 Appendix I section III and Appendix J section II provided (before the Final Rule) that employees must be tested if they performed a safety-sensitive function "directly or by contract" for an air carrier. This regulation extended testing only to companies having a direct contract with the air carrier.

The Final Rule exceeds the FAA's statutory authority by mandating testing of persons who are neither air carrier employees nor employees of companies who contract directly with an air carrier. The Final Rule requires testing of workers at any tier, no matter how many steps removed from the air carrier. If an air carrier has a maintenance contract with a certificated repair station, and the repair station subcontracts with a local machine shop or dry cleaner to perform a maintenance function, the local shop's employees are subject to drug and alcohol testing. Under any plausible use of the English language, however, these individuals are clearly not "air carrier employees." Thus, the Final Rule has no statutory basis.

B. The Final Rule is unconstitutionally vague.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is vague and standardless." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). To limit the scope of the Final Rule, the FAA has attempted to redefine

"maintenance," initially in the Final Rule preamble **(Ex. C)**, again in the August 15 guidance **(Ex. H)**, and yet again in its September 28 denial of Petitioner's request to extend the compliance date **(Ex. B)**. In so doing, the FAA has adopted a "tail wagging the dog" approach by standing the definition of "maintenance" on its head to a point where it will incoherently mean one thing for the drug and alcohol regulations and something else for maintenance recordkeeping purposes. For example, in its September 28 denial **(Ex. B)**, the FAA states:

> The spot cleaning [of a seat cover] does not meet [the] elements in the FAA's definition of maintenance, and the agency would not consider that task to be maintenance. The fact that in a given case an FAA inspector may require the certificate holder to prepare a maintenance release [i.e., a required record to be completed after maintenance] for either the spot cleaning or the entire cleaning of a seat cover does not make the task maintenance as a regulatory matter.

But this is contrary to law. The FAA states that even though spot cleaning of a seat cover is not maintenance, an FAA inspector may still require a maintenance record to be prepared! Maintenance is defined in § 1.1; it includes inspection, repair, overhaul, preservation, and the replacement of parts. The FAA cannot, as a matter of law, issue guidance that states that maintenance means something different for drug and alcohol purposes.

Worse, an entity cannot "err on the side of caution" by instituting an FAA testing program, because if it does, and maintenance is not being performed, the entity will violate the DOT's mandate at 49 C.F.R. § 40.347(b)(2) (employees not

covered by regs must not be tested). To Petitioners' knowledge, the drug and alcohol rules are unique among FAA regulations in that a covered entity must comply with them exactly. This puts the industry and its subcontractors in a "Catch-22" situation – they may not perform work without a testing program because they *might* be doing maintenance, yet they cannot institute a testing program unless they are *sure* they are performing maintenance. The FAA's lack of clarity on what is "maintenance" has puts an intolerable burden on the industry.

Under the Final Rule, "each person who performs a safety-sensitive function for a regulated employer by contract, ***including by subcontract at any tier,*** is subject to [drug and alcohol] testing." 71 Fed. Reg. 1666. Safety-sensitive functions include "maintenance" as defined in § 1.1. *See* **Ex. H** FAA Guidance Alert 8-15-2006). But not every tier has the privilege of performing maintenance, nor can every tier take airworthiness responsibility. *See* §§ 43.3. and 43.7. Yet the FAA insists that employees of non-certificated entities can perform maintenance at all tiers.

Not surprisingly, the Final Rule caused immediate confusion. (*See* **Ex. E** ARSA Declaration ¶¶ 3-6) While purporting to change only Part 121, the FAA muddied the very definition of "maintenance" embodied in Part 1. Still, the FAA insists that no such amendment is intended. And therein lies the rub. The phrase "including by subcontract at any tier" is definitely new. The FAA relies on the

phrase to say that every non-certificated subcontractor who performs a function in the course of carrying out "maintenance" must be tested. The inescapable predicate for the FAA's reasoning is that non-certificated entities actually "perform maintenance." But §§ 43.3 and 43.7 make that impossible. Under § 43.3, maintenance may only be performed by certificated air carriers, certificated repair stations, and other certificate holders who are the only ones authorized to assume airworthiness responsibility for the work under § 43.7. The FAA cannot have it both ways and expect the industry to figure out how non-certificated entities who are prohibited from performing "maintenance" must nevertheless conduct drug and alcohol testing on the ground that they are performing "maintenance."

Almost immediately after the Final Rule's publication, the industry requested an extension of the compliance date to clarify these issues. The FAA extended the compliance date to October 10, in part precisely because "some . . . entities may be confused as to whether they are performing manufacturing or maintenance and preventive maintenance duties." 71 Fed. Reg. 17000-01. Concurrently, the FAA pledged that it would "soon provide more substantive guidance on a range of subjects." *Id.*

The extension was designed to give both the FAA and the industry an opportunity to determine whether employees were performing "maintenance," and if so, whether that employer would obtain a drug and alcohol testing program, put

their employees in another entity's FAA-regulated program, or cease performing services for the aviation industry. The extension was also intended to provide adequate time for affected parties to act prior to the compliance date, which could not occur until after the FAA provided the promised clarifications. The first pronouncement came on August 15 **(Ex. H)**, less than two months before the compliance date. Unfortunately, it created even more confusion:

Example 1 – Maintenance/Fabrication: Surprisingly, employees who manufacture new aircraft or components have never been covered by the drug and alcohol testing rules. On August 15, the FAA addressed the issue of "maintenance fabrication." This activity occurs when a new part is created during the maintenance process.[7] Frequently, such activities are performed by a non-certificated entity under contract to a certificated repair station. Prior to the Final Rule, when a non-certificated source fabricated a part, it was performing a "maintenance function." Thus, the certificated repair station had to obtain the FAA's approval of the maintenance function under § 145.217(a), and verify airworthiness of the work through inspections and/or tests in accordance with § 145.217(b)(3), so safety was assured.[8] Certificated repair station employees – including those employees who conducted such tests and inspections – have

[7] *See* Advisory Circular 43-18, Fabrication of Aircraft Parts by Maintenance Personnel (available at http://www.faa.gov (click on Advisory Circulars (ACs)).
[8] *See also* Advisory Circular 145-9, page 34 and FAA Order 8300.10, Volume 2, Chapter 161, pages 161-4 and 161-5 **(Ex. K).**

always been subject to the drug and alcohol testing rules.

In the August 15 guidance, the FAA stated that "maintenance fabrication" is now a manufacturing activity, *not* "maintenance." This creates far reaching uncertainty where none existed before. The FAA seems to have created an exception to the drug and alcohol rules for "maintenance fabrication" activities but not for other "maintenance" activities contracted to non-certificated sources. In other words, an employee at a local "mom and pop" machine shop would not be required to be tested if he fabricated a doubler that is used to reinforce aircraft structure; yet the same employee *would be* covered if he was asked to bring a pre-existing machined part back to desired specifications! This makes no sense.

Example 2 – Cleaning Seat Covers: Another example is the FAA's guidance on whether cleaning the covers of aircraft seats is "maintenance." Before the Final Rule, seat cover cleaning was unquestionably "maintenance" under Parts 1, 43, and 145. Thus, a maintenance record had to be created for the cleaning. However, the FAA's recent guidance states that cleaning seat covers is not "maintenance," since it is only a portion of an overhaul, and it is only the overhaul that constitutes "maintenance." This yes-it-is-no-it-isn't inconsistency imposes an undue burden on an industry trying to determine when a particular act is or isn't "maintenance." If the FAA's guidance is to be taken at face value, it unavoidably works an amendment to the very definition of "maintenance" in Parts 1, 43, and

145. If cleaning of aircraft seat covers is not "maintenance," it no longer needs to be recorded in maintenance records, and when a non-certificated entity cleans the seat covers under a contract with the certificated repair station, the certificated repair station no longer has to monitor or approve that cleaning in accordance with § 145.217. Nor does the certificated repair station have to assume airworthiness responsibility for ensuring that the flammability properties of the aircraft seat cover are retained. The resulting threat to aviation safety is plain and immediate.

The FAA's September 28 letter **(Ex. B)** concludes that no stay is needed and that the FAA is anxious to begin enforcing the Final Rule. The FAA is in deep denial about the vagueness in its guidance. ARSA's Declaration **(Ex. E)** shows why unconstitutional vagueness is present and why the requested stay is justified.

C. The FAA has violated the RFA by categorically refusing to consider costs imposed on non-air-carrier small businesses.

The Regulatory Flexibility Act ("RFA") protects small businesses by prescribing a detailed process that a federal agency must follow to assess the impacts of its regulatory proposals on small business and other small entities. So long as a proposed rule will have a significant economic impact on a substantial number of small entities," 5 U.S.C. § 605(a), an agency (1) must provide special notices for small businesses, *Id.* § 609(a), (2) must make available an initial regulatory flexibility analysis, which identifies (among other things) alternatives to the proposed rule that the agency has identified that accomplish its stated

objectives while minimizing any significant economic impact that it is projected to have on small entities, *id.* § 603, and (3) must prepare a Final Regulatory Flexibility Analysis that (among other things) describes the agency's decision making with regard to regulatory alternatives. *Id.* § 604(a)(2), (5).

Here, the Final Rule unquestionably will have a significant economic impact on thousands of small businesses. *First*, the Final Rule will force many small, non-certificated sources to incur the economic burden of establishing an FAA approved testing regime. Indeed, an analysis by a noted aviation industry economist demonstrated that 12,000-22,000 non-certificated sources would be **directly** affected. (**Ex. I** August 16, 2004 comments at 5-7). *Second*, many non-certificated sources will be forced to withdraw their support from the aviation industry because the small percentage of aviation work will not justify the monetary costs or intrusive nature of federal drug and alcohol testing. *Id.* Such a loss would then "significantly increase the cost of doing business" for the certificated entities, particularly those who "typically do not have the capital to invest in the equipment [that non-certificated sources] use." *Id.* at 10.

Despite the Final Rule's obvious impact on thousands of small businesses, the FAA refused to comply with the RFA on the ground that its new rule would not have "a significant economic impact on a substantial number of small entities." The agency reasoned that only air carriers are "directly" regulated by the Final

Rule. This reasoning is preposterous. The whole point of the Final Rule was to extend drug and alcohol testing to the employees of non-certificated entities far removed from the air carriers themselves: entities "at any tier" of the contract/subcontract chain. It is these entities – and the certificated repair stations that oversee their work – that will bear the costs and responsibility of complying with the Final Rule. And certificated repair stations are subject to FAA sanctions if the Final Rule is not followed. To say that air carriers are the only businesses that are "directly affected" by the new rule (71 Fed. Reg. at 1674) is simply to blink reality. A palpable error of law has led the FAA to violate the RFA.

D. The Final Rule offends the Administrative Procedure Act.

The APA specifies that "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The agency's action violates the APA for a variety of reasons, but one stands out: the FAA's untenable characterization of its action as merely a "clarification" of preexisting practice corrupted all aspects of the agency's rulemaking process. At every step in the proceedings, the FAA downplayed its proposed and final action by emphasizing that the FAA was merely "clarifying" a regulatory scheme. From its initial Notice until the Final Rule, the FAA declared: "This final rule does not expand the scope of FAA-regulated drug and alcohol testing programs. Rather, it

clarifies. . . ." 71 Fed. Reg. 1666-01; *accord,* 67 Fed. Reg. 9366-01.

Such assertions ignore reality. Since the FAA instituted drug testing almost 20 years ago, non-certificated entities have not been required to test their employees for drugs or alcohol unless they contracted directly with an air carrier. Under the Final Rule, these employees will now be tested. Thus, the Final Rule was not a clarification, but a radical change -- which is precisely why a fresh formal rulemaking had to be undertaken to bring the Final Rule into effect.

The agency's mischaracterization of its new testing initiative skewed all phases of the decision-making process. For example, the FAA responded to claims that its proposed rule was unjustified by stating that the "final rule is not adding more regulatory requirements." 71 Fed. Reg. 1666. Similarly, the FAA's evaluation of the Final Rule's impact was flawed because the agency refused to actually assess the costs: "The FAA is not changing the current regulations, but is simply clarifying them. As such there should be no additional costs." *Id.* The promulgation of the Final Rule thus rested on a fundamentally faulty legal premise, and therefore is "contrary to law." 5 U.S.C. § 706.

II. IRREPARABLE INJURY

If no stay is issued, and the industry must begin complying with the Final Rule on October 10, Petitioners will suffer irreparable injury for two main reasons. *First,* the Final Rule violates the Petitioners' constitutional rights, and such

violations are per se irreparable. *See, e.g.*, Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998). *Second*, the Final Rule will have an irremediable adverse economic impact on certificated and non-certificated entities. Some non-certificated entities will have to stop performing work for repair stations because they do not know whether they need to institute drug and alcohol tests (*See* **Ex. E** ARSA Declaration ¶¶ 24-26; **Ex. J** Owen Declaration ¶ 4). Other non-certificated entities will elect to stop performing work for certificated repair stations because they neither want to bear the direct costs nor the highly-intrusive nature of the program. **Ex. E** ARSA Declaration ¶¶ 24-26. And non-certificated entities that do continue to work with certificated repair stations will face the costs of implementing unlawful drug and alcohol testing programs, while struggling with both the uncertainties and potential liabilities under the FAA's Catch-22 regime.

In sum, the Final Rule will impose substantial costs on Petitioners and others. If the Rule is later struck down, even these firms' economic costs (assuming they are calculable) cannot be recovered from the FAA due to governmental immunity and, therefore, are truly irreparable. *See, e.g.*, Woerner v. United States Small Bus. Admin., 739 F. Supp. 641, 650 (D.D.C. 1990).

III. A STAY WILL NOT HARM AVIATION SAFETY

Suspending compliance with the Final Rule for the limited duration of the present appeal will not harm any legitimate FAA interest. *First*, the FAA began

considering this "clarifying" Final Rule more than four years ago. 71 Fed. Reg. 1666. It was not enacted until January 10 and did not become effective until April 10. The FAA then extended the compliance date until October 10. Thus, another several months of postponed compliance with the Final Rule will hardly work any additional hardship on the FAA. *Second*, the industry has operated under the old regime for 18 (drug testing) and 14 (alcohol testing) years. And there is no evidence to suggest that this Final Rule will make aircraft maintenance safer or better. *Accord*, **Ex. D** Bland Declaration ¶¶ 5-6, 9. Against this backdrop, the balance-of-hardships factor strongly favors issuance of the requested stay.

IV. A STAY IS IN THE PUBLIC INTEREST

The public interest favors the grant of a stay to give the industry time to deal with the Final Rule's flaws and to work with the FAA in achieving regulatory clarity. This is especially so, given the longstanding safety record of the drug and alcohol testing regime that prevailed before the Final Rule was enacted. *See* **Ex. D** Bland Declaration ¶¶ 3, 11. Finally, the impact of the Final Rule will fall on countless small businesses spread across the nation. Given the strong congressional policy to guard and promote small business enterprises, *see* 5 U.S.C. § 601 et. seq., a stay of the Final Rule will advance a vital public interest.

RELIEF REQUESTED

Petitioners respectfully ask this Court to stay for nine months the October 10 effective date for complying with the Final Rule, so that the new compliance deadline will be July 10, 2007. If the Court determines sooner that the Final Rule should be set aside and/or that the case should be remanded to the FAA, the stay will no longer be needed and should be dissolved at the time of such determination. If, however, the Court determines that the Final Rule should be upheld as written, the stay should nevertheless remain in force to preserve the July 10, 2007 compliance date. Whether the Court grants or denies the stay, Petitioners respectfully ask the Court to expedite this consolidated appeal in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2006, a true and correct copy of the above and foregoing **CORRECTED EMERGENCY MOTION TO STAY EFFECTIVE DATE FOR COMPLYING WITH FAA's NEW DRUG-TESTING RULE,** was served on each individual shown below via personal hand delivery:

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Albert J. Givray

Exhibit A

For Emergency Motion to Stay

Aeronautical Repair Station Association

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September 22, 2006 VIA E-MAIL TO: nick.sabatini@faa.gov

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Re: Drug & Alcohol Rule Request for Extension of Compliance Date

Dear Mr. Sabatini:

The Aeronautical Repair Station Association (ARSA), on behalf of its members and the other petitioners in the pending appeal concerning the January 10, 2006 drug and alcohol testing final rule (71 FR 1666) (Case Nos. 06-1091 and 06-1092 in the United States Court of Appeals for the District of Columbia Circuit), respectfully requests the Federal Aviation Administration (FAA) to extend the compliance date of its final rule for an additional nine (9) months past the current compliance date of October 10, 2006. This extension may seem unusually long, but given the industry's experience since the promulgation of the new rule, such a period will be needed to resolve the pending issues. The extension will ensure that the Federal Aviation Administration (FAA) can effectively and efficiently enforce the regulation and that industry members affected by the rule may fully comply with its requirements in an informed way.

The additional extension is necessary because, despite the FAA's attempts to clarify the rule through written guidance and presentations to industry, many critical issues remain unresolved. This absence of resolution is causing paralysis for many industry members as they struggle to comply with a rule that is still vague and ambiguous in material respects, thereby making the rule virtually impossible to comply with in a way that will be reasonably free from doubt and confusion.

The critical issues that remain to be resolved go to the very essence of the rulemaking and its implementation, such as which activities constitute maintenance and preventive maintenance and are subject to drug and alcohol testing when the work is performed for U.S. air carriers. This includes basic activities such as rebuilding and alterations, which are similar to maintenance in some technical respects (because they are performed after an article has been placed in service and involve similar work), but which are different as a matter of law (because they are not within the regulatory definition of maintenance and preventive maintenance set forth in 14 CFR parts 1 and 43).

In an effort to help the FAA clarify these issues, ARSA submitted letters of July 18 and August 30, 2006, where ARSA posed several additional questions and requested the FAA to issue a legal interpretation. To date, the letters have not been answered, and ARSA respectfully requests that additional time be provided past the current October 10 compliance date so that the FAA can answer the questions and allow the industry adequate time to ensure compliance with the new rule.

Even if the FAA were to dispatch answers to all clarification requests immediately, an extension to the compliance date would still be needed so that the industry could review, digest, and act upon the new guidance without fear of rule violations. Less than 20 days before the October 10 compliance date is simply not enough for such review, digestion, and action.

ARSA represents repair stations certificated under 14 CFR part 145, many of which have implemented FAA-regulated drug and alcohol testing programs. Under the final drug rule, persons with FAA-regulated testing programs may be held responsible for the failure of any lower tier contractor performing maintenance or preventive maintenance to comply with the testing regime. Consequently, the new rule directly affects a large number of ARSA member companies.

I. The Final Rule and April 5, 2006 Extension

On January 10, 2006, the FAA issued its final rule (71 F.R. 1666), applying the drug and alcohol testing requirements to all tiers of maintenance. The effective date for the requirements was initially April 10, 2006.

ARSA and other industry groups expressed their concerns that entities subject to the new rule would not be able to establish drug and alcohol testing programs in such a short time. Several trade associations submitted a formal request for extension to the FAA on March 8, 2006 (Docket No. FAA-2002-11301-97). On April 5, 2006, the FAA extended the compliance date to October 10, 2006 (71 Federal Register 17000).

In the April extension, the FAA explained that it decided to move the compliance date to October 10 in part because "some original equipment manufacturers (OEMs) and other entities may be confused as to whether they are performing manufacturing or maintenance and preventive maintenance duties." Concurrently, the FAA pledged that it would "soon provide more substantive guidance on a range of subjects...."

The extension was designed to give both the FAA and industry an opportunity to determine whether employees were performing maintenance or preventive maintenance, and if so, whether to obtain a drug and alcohol testing program, put their employees in another entity's FAA-regulated program, or to cease performing those

services for aviation. Most importantly, the April extension intended to provide adequate "reaction" time for affected parties to act, once the FAA provided the promised clarifications. In other words, the extension aimed at not only providing confusion-free clarifications but also the time needed to act in response to the clarifications, all before the October 10, 2006 compliance date.

The first pronouncement from the FAA on the needed clarifications came on August 15, 2006, slightly more than four months after the April 10, 2006 effective date and less than 60 days before the October 10, 2006 compliance date.

On August 15, 2006, the Drug Abatement and Aircraft Maintenance Divisions jointly issued two guidance documents addressing very specific questions about what constitutes maintenance or preventive maintenance. The Memorandum and Guidance Alert included a number of examples of aviation activities along with an explanation of whether the activity constituted maintenance.

ARSA thanks the FAA for extending the compliance date of the rule to October 10, 2006, and for issuing the two guidance pronouncements on what constitutes maintenance. Unfortunately, those pronouncements do not clarify key issues and come late in the "cycle" as the industry heads toward the October 10 compliance date. These pronouncements thus prevent many maintenance providers from making informed and sensible decisions on whether, or how, to test employees – and worse, time is literally running out for these providers, unless a further extension is granted by the FAA to postpone the compliance date.

II. Justification for Extension

Even before the August 15 pronouncements were released (indeed, even before the April 5 extension went into effect), industry members affected by the rule began expressing confusion over the implementation of the final rule, its vagueness and its ambiguity. For example, on April 3, Pratt & Whitney requested a legal interpretation on whether the fabrication of parts as part of a maintenance action constituted maintenance. On August 7 (again with just over 60 days left before the October 10 compliance date), the FAA responded by saying that such fabrication did not constitute maintenance.

The August 15 pronouncement revisited the maintenance/fabrication issue and examined several other aviation activities, such as the cleaning of seat covers versus that same service being performed during engine maintenance and the testing of components by manufacturers.

Many ARSA members utilize articles fabricated during the maintenance process. Frequently, the fabrication is performed by a non-certificated maintenance source under contract to the repair station. The Pratt & Whitney interpretation and the August 15 guidance both conclude that such fabrication is not considered maintenance. However, this raises additional questions relating to compliance with part 145.

Section 145.217 sets forth the requirements repair stations must meet when contracting out maintenance functions, including those contracted to non-certificated sources. Until the FAA's August 15 guidance, maintenance fabrication performed by a non-certificated contractor occurred under the repair station's control. In view of the FAA's recent conclusion that "maintenance fabrication" is a manufacturing activity, however, it appears that the FAA can no longer require the function to be approved under part 145.

In response to the many questions that it has received (and continues to receive) from industry, ARSA has made several inquiries of the FAA. On July 18, 2006, ARSA submitted a request for legal interpretation concerning whether rebuilding or alterations, and certain repairs of entertainment systems, constitute maintenance. On August 30, ARSA submitted another request in which ARSA voiced its concern with the anomalies created by the several examples contained in the FAA's August 15 pronouncements. To date, the FAA has not answered these requests. The anomalies caused by the FAA's pronouncements still await resolution, with less than 20 days left before the formal compliance date of the final rule. Unless a further extension is granted as requested by this letter, the industry continues to be left in the untenable position of facing a rule that is still vague and ambiguous for which there is no reasonably clear way to comply.

ARSA is concerned that the guidance offered by the FAA introduces additional confusion, anomalies, and uncertainty to this complicated issue. For example, the guidance states that cleaning of seat covers is not maintenance, since it is only a portion of an overhaul, ergo the overhaul is maintenance. At the same time, it states that cleaning engine parts is maintenance. This inconsistency, and the resulting anomaly for those trying to comply, imposes an undue burden on the FAA and the industry when trying to determine when a particular, specific act is maintenance. Further, the FAA's guidance may be contrary to the clear definition of that term found in the regulations.

Another anomaly in the guidance is that it states that manufacturers that test components to determine whether repairs are necessary are performing maintenance. However, manufacturers do not possess the privilege of performing maintenance on their articles. Under 14 CFR part 21, they may only rebuild or alter.

The FAA's guidance also raises the issue of companies with multiple repair stations who wish to have a single testing program. Prior to this guidance, the understanding in the

industry was that each repair station that had an FAA-regulated testing program must have paragraph A449 in its Operations Specifications. Indeed, air carriers typically request a copy of paragraph A449 from certificated repair stations performing work on their behalf. The guidance announced that this was no longer the case – a company with multiple repair stations could register a single program with Drug Abatement (via a registration letter), and none of its individual repair stations would need a paragraph A449.

Certain ARSA members with multiple part 145 certificates have expressed interest in registering their drug and alcohol testing programs in such a manner. After speaking with Drug Abatement officials, ARSA has learned that the Division is currently drafting guidance on how companies may register multiple locations. However, in the interim each company must contact Drug Abatement headquarters and receive registration information on a case-by-case basis. This is imposing an undue (and unforeseen) burden, especially as we approach the October 10 deadline. A further extension would relieve this newly created burden by giving everyone more time to deal with this pronouncement without fear of rule violations (or asserted violations) and all that goes with it.

These examples illustrate that the August 15 guidance is presently insufficient and comes too late to permit meaningful action before October 10, both from a regulatory and an implementation standpoint. Should the rule go into effect on October 10, maintenance providers at all tiers will be subject to a rule and guidance that is vague and ambiguous, and simply not possible of being complied with in a reasonably doubt-free way. This will result in unnecessary confusion and expenditures of resources by both the agency and the industry. An additional extension to the compliance date would relieve these pressures and burdens, and would allow both the agency and the industry to work through the present confusion and analytical anomalies without the fear of rule violations.

Therefore, we believe that the extension will give the FAA time to provide clear guidance on how to determine what activities will be considered maintenance under the regulations, while preserving the long-held industry understanding of the concept of maintenance.

The requested extension should not prejudice the agency's goals for its envisioned drug and alcohol regime. We have gone this long without the new regulatory layer. Postponing it for another nine months will not prejudice any goal of the agency. Further, there is ample precedent for an additional extension of the kind requested in this letter. When the FAA amended Part 145, the agency postponed the compliance date at least twice (once from April 2003 to October 2003, and once again from October 2003 to January 2004).

III. Proposed Extension to the Final Rule

Through this letter, ARSA proposes that the FAA extend the compliance date of the final rule for nine months, that is, from October 10, 2006 to July 10, 2007. This would provide the FAA with sufficient time to address the outstanding regulatory and guidance issues, while giving industry the ability to comply fully with the final rule once comprehensive guidance is released that has eliminated the ongoing confusion and anomalies in how to analyze the rule and its surrounding regulations. ARSA will continue to work closely with the FAA during the proposed extension period to find reasonable and effective solutions to the issues raised.

IV. Formal Request for Stay Pending Appeal

If the FAA does not wish to grant ARSA's request for an extension, please treat this letter as a formal request that the FAA stay the compliance date of the final rule pending the outcome of the appeal (Case Nos. 06-1091 and 06-1092) described in the opening paragraph of this letter. For purposes of this formal request, the points above are repeated here verbatim, so that the FAA's denial of the 9-month informal request will serve as a "no" answer to the formal request for a stay pending appeal. If ARSA and the other petitioners choose to file a motion to stay the final rule with the U.S. Court of Appeals for the District of Columbia Circuit, this letter will show the court that a request for relief from the FAA was made and denied prior to the filing of the petitioner's motion. If the FAA grants ARSA's informal request for a 9-month extension, please disregard the formal request for a stay, as ARSA and the petitioners will not be seeking a stay from the Court of Appeals.

If you have any questions or require additional information please feel free to contact the undersigned.

Sincerely,

Marshall S. Filler

Marshall S. Filler
Managing Director & General Counsel

cc: Rebecca MacPherson, AGC-200

Exhibit B

For Emergency Motion to Stay

U.S. Department
of Transportation
**Federal Aviation
Administration**

SEP 28 2006

Marshall S. Filler, Esq.
Managing Director and General Counsel
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Re: Request for Extension of Compliance Date

Dear Mr. Filler:

I have reviewed your request, dated September 22, 2006, for an additional extension of the compliance date for the drug and alcohol testing final rule clarifying subcontractor coverage. In addition, I received your letter of September 27, 2006, in which you referenced a survey that ARSA is currently conducting. Your extension request comes less than two weeks before the rule is set to take effect. I have also received a supporting letter, dated September 25, from the Regional Airline Association, the National Air Transportation Association, the Aviation Suppliers Association, the National Air Carrier Association, and Pratt & Whitney and Sikorsky. The September 25 letter merely reiterates several of the arguments you presented as support for the extension and offers no new information.

As you know, the subcontractor final rule was published on January 10, 2006, with an effective date of April 10, 2006 (71 FR 1666). The final rule provided clarifying language to the existing drug and alcohol regulations adding the parenthetical "including by subcontract at any tier" after the word "contract." The effect of this final rule is to clarify that employees who perform safety-sensitive functions by contract (including by subcontract at any tier) for a regulated employer must be tested, just as employees who perform the same functions directly for the employer must be tested. No other changes were contemplated by the final rule.

On April 5, 2006, we extended the compliance date of the final rule for 6 months, until October 10, 2006 because of concerns that "original equipment manufacturers (OEMs) and other entities may be confused regarding whether they are performing maintenance or preventive maintenance duties subject to testing or manufacturing duties not subject to testing." (71 FR 17000) We determined that the additional 6 months would provide "OEMs and others sufficient time to determine what work is subject to drug and alcohol testing." (71 FR 17000)

Your letter requests that the Federal Aviation Administration (FAA) extend the compliance date for this final rule for an additional 9 months. You assert that the FAA has failed to provide adequate guidance, leaving the rule "vague and ambiguous in material respects." As evidence of this ambiguity, you point to three requests for legal interpretation submitted to

the FAA's Office of the Chief Counsel over the past several months and to survey responses in which some portion of the individual respondents claim they are uncertain what tasks the FAA considers maintenance. The requests for legal interpretation relate primarily to a determination of whether specific work qualifies as maintenance or preventive maintenance, a matter not impacted by the final rule. In your September 27 submission you claim that several non-certificated maintenance sources (NCMS) have told your members that they will refuse aviation-related work rather than subject their employees to drug and alcohol testing. Finally, you assert that a nine-month delay in the compliance date will have no adverse effect on safety but that the loss of experienced NCMS could have precisely that effect.

After full consideration of your request, and for the reasons set forth below, I have decided to deny your request for extension.

Background

The FAA drug testing final rule was published in 1988 (53 FR 47024, November 14, 1988), and the FAA alcohol testing final rule was published in 1994 (59 FR 42911 August 19, 1994). Both regulations require employees who perform safety-sensitive functions directly or by contract for a regulated employer be subject to testing. Maintenance and preventive maintenance are among the safety-sensitive functions set forth in the FAA's testing regulations in 14 CFR part 121, appendices I and J.

While subcontractors have always been subject to testing under the regulations, early guidance appeared to have created some confusion as to whether all subcontractors performing maintenance, or only those subcontractors who took airworthiness responsibility for maintenance, would be subject to testing. By the mid-1990s, the FAA had clarified its position that a plain reading of the regulations did not support such a distinction. Since that time the agency has written numerous letters to individuals and companies clarifying that all subcontractors were subject to testing under the regulations.

In 2002, you wrote to the FAA to request that we resolve the issue of whether subcontractors who did not take airworthiness responsibility were subject to testing. While we believed this issue had already been resolved, we included the subcontractor clarifying language within a notice of proposed rulemaking (NPRM), published on February 28, 2002 (67 FR 9366).

During the course of the rulemaking, we consistently reiterated that we did not think there was much confusion about the issue, based on the more than 3,000 inspections of contractors that we had conducted since the inception of the testing program. These inspections revealed a broad understanding among the aviation community that the drug and alcohol rules applied to subcontractors (71 FR 17001).

In response to the NPRM, several commenters said that the proposed clarification would be costly and requested that we provide costs and benefits for this clarifying change. Your association, the Aeronautical Repair Station Association (ARSA), and Pratt & Whitney both suggested there was specific data to contradict our cost assumptions. We asked that this further information be submitted to the public docket. (See the FAA rulemaking docket

FAA-2002-11301, letters of December 24, 2002) The FAA determined the submitted information did not substantiate the voiced concerns.

On January 12, 2004, we published a final rule addressing all issues proposed in the NPRM, except for the subcontractor issue, which we reserved for a supplemental notice of proposed rulemaking (SNPRM). We published the SNPRM on May 17, 2004 (69 FR 27980), with a regulatory evaluation. We explained that we were offering another opportunity for the public to provide comments to substantiate the concerns expressed about the alleged economic burden this rulemaking would impose on the aviation industry. (69 FR 27981) After a review of the comments presented and a determination that they did not demonstrate a significant economic burden on the regulated air carriers or on the aviation industry, we issued the January 10, 2006 final rule.

Analysis of the Request for a Delayed Compliance Date

In requesting a delay to the compliance date for this final rule, you note that ARSA has submitted two requests for legal interpretation, the resolution of which you claim is needed before compliance with the final rule is merited. While I am not responding directly to those requests for legal interpretation here, I think it is useful to generally outline those requests since you have argued a lack of response leaves the subcontractor final rule ambiguous. The questions, in essence, are as follows:

(1) Does the FAA's position on maintenance fabrication affect compliance with 14 CFR 145, *Repair Stations*?
(2) Are rebuilding or alterations and certain repairs of entertainment systems maintenance?
(3) Is manufacturer testing of components to determine whether repairs are necessary considered maintenance?
(4) To what extent is cleaning considered maintenance?
(5) Are repair stations required to have paragraph A449 added to their operations specifications or is some alternative form of registration acceptable?

None of these questions raises new issues related to the January 2006 rule, and the first four are questions pertaining to the implementation of an entirely separate regulation. It would not be reasonable to assert that all possible questions about maintenance must be answered to the satisfaction of all regulated parties before the FAA may require compliance by subcontractors with its drug and alcohol rules.

The fifth question does pertain to the FAA's drug and alcohol rules, but concerns provisions that relieve, rather than create, burdens for regulated parties. Under the FAA's drug and alcohol testing regulations, repair stations certificated under 14 CFR part 145 are not considered to be regulated employers, instead, they are contractors to regulated employers. Under 14 CFR part 121, appendix I, section IX, a repair station can have a paragraph added to its Operations Specifications to conduct drug and alcohol testing. Also under section IX, a contractor can obtain a registration, under which it may perform the same functions. Since there are certain factual situations where a repair station holds multiple certificates, has

multiple locations, or there are other factors demonstrating unique circumstances, it is sometimes more efficient for the repair station to obtain a registration instead of an Operations Specifications paragraph. Since all part 145 repair stations performing maintenance for a part 121 or 135 air carrier are, by definition, also contractors to the part 121 or part 135 carriers, either option should be available to them. We became aware of some of these unique situations after our 2004 final rule that added the Operations Specifications paragraph option for repair stations. We have continued to work with repair stations and other contractor companies that have come to us for advice on whether it is better to run their programs under an Operations Specifications paragraph or a registration. I do not believe our policy requires any change from existing practice, since it imposes no new restrictions; rather, it offers part 145 entities more flexibility. Accordingly, I have determined there is no need to extend the compliance date of the final rule because of this one issue.

As to the maintenance concerns that you have alluded to in your letter, I have determined that a delay in the compliance date would not address those concerns. By the same token, I am unpersuaded that questions regarding maintenance have introduced a level of ambiguity that would paralyze the industry if compliance with the subcontractor final rule is not delayed. The definitions of "maintenance" and "preventive maintenance" were issued in 14 CFR section 1.1 on May 15, 1962, and have remained unchanged. (27 FR 4588) At no time during the rulemaking did we change the definitions of maintenance or preventive maintenance, or any other safety-sensitive functions identified by the drug and alcohol testing regulations.

Carriers and repair stations have managed to determine whether a particular activity constitutes maintenance for over 40 years. They have also managed to determine whether the same activities require drug and alcohol testing for roughly 18 and 12 years, respectively. Nothing in the final rule changes that ability. Given the longstanding history of how the FAA and industry have defined maintenance, I do not believe the resolution of those questions is likely to substantially affect the manner in which the air carrier industry and its contractors operate.

As noted above, in letters dated July 18, 2006, and August 30, 2006 (months after the publication of the FAA's final rule with respect to subcontractor coverage under the drug and alcohol testing program), ARSA requested the FAA's Office of the Chief Counsel to interpret multiple maintenance issues. It is our understanding that the policy of the Office of the Chief Counsel is to respond to requests for legal interpretation within 120 days of when the FAA receives such requests if possible. The Office of the Chief Counsel has determined that this period of time is often needed to coordinate a response throughout the agency. While it is often possible to shorten the response time, many requests require the longer time frame because the issue raised is fact-specific and not specifically addressed by the applicable regulations. Questions regarding whether a particular activity constitutes maintenance generally fall within this category. I have been told that the Office of the Chief Counsel expects to be able to provide a response to both letters within 120 days of receipt.

While these responses will provide additional guidance, it is important to note that maintenance and preventive maintenance are areas that do not lend themselves to a bright-line test or a one-size-fits-all interpretation. Under the 1962 regulations, maintenance means "inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance." Preventive maintenance means "simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." These definitions have worked very well. The definitions are meant to be broad and flexible and are not intended to be a "laundry list" of particular tasks. Each and every subtask comprising any of the elements set forth in the definition, in and of itself, is not necessarily maintenance or preventive maintenance. In the first instance, it is the role of the certificate holder (e.g., air carrier, repair station, or mechanic) to make a determination of whether a particular task or function is "maintenance." In cases where there may be doubt, the certificate holder typically works through the issue with the local FAA flight standards field office.

Aircraft and component maintenance manuals may contain various instructions that pertain to maintenance and servicing of aircraft (these can contain very detailed steps/subtasks), and not all of these instructions are considered maintenance. For example, in your August 30 request for legal interpretation, you attached a page from the Weber Component Maintenance Manual that calls out specific instructions for dry cleaning seat covers. Included are instructions for cleaning a spot on a seat cover. The spot cleaning task does not meet any of the elements in the FAA's definition of maintenance, and the agency would not consider that task to be maintenance. The fact that in a given case an FAA inspector may require the certificate holder to prepare a maintenance release for either the spot cleaning or the entire cleaning of a seat cover does not make the task maintenance as a regulatory matter.

Additionally, in some instances an air carrier or repair station may consider a task to be a maintenance task when the FAA does not consider the task to be maintenance. This may be done for air carrier or repair station "internal" policy/procedural reasons. The FAA expects the certificate holder to determine what constitutes maintenance within the FAA's longstanding definition. The criteria, of course, are in the definition and, as a matter of law, the FAA would make the final determination. That determination would be subject to review in an appropriate legal forum if the certificate holder disagreed with the FAA's conclusion.

In any case, the determination of whether a particular task is maintenance is not impacted by the subcontractor final rule, and the subcontractor rule does not introduce any ambiguity in making determinations about maintenance. If a given task would be considered maintenance or preventive maintenance when performed by an employee of the air carrier, it remains maintenance or preventive maintenance when that task is contracted out. Outsourcing does not change the nature of the task.

You have also stated that the extension of the compliance date "should not prejudice the agency's goals for its envisioned drug and alcohol regime." We disagree. As you are aware, the drug and alcohol rules were implemented to assure aviation safety. Our safety

rationale for the rules is well-established. Pre-employment testing and random testing are necessary to assure that illegal drug-users or otherwise impaired individuals are not performing a safety-sensitive function.

The FAA is concerned that any further extension in the compliance date could send a signal that the agency is not committed to assuring that individuals who perform safety-sensitive functions are subject to drug and alcohol testing. Historically, the level of contractor compliance with the drug and alcohol testing has been fairly high, particularly since the FAA's efforts in the mid-1990s to make it clear that all contractors are subject to the rules. We are concerned that this compliance would be adversely impacted if regulated parties believed that they might later avoid coverage under the drug and alcohol rules – a logical interpretation of continuing delays of compliance dates. Since the entire genesis behind the drug and alcohol rules is to reduce the likelihood of individuals performing safety-sensitive tasks while using illegal drugs or alcohol, any reduction in compliance could adversely affect aviation safety.

As discussed in the SNPRM and in the final rule, the FAA's drug testing program continues to disclose instances of drug and alcohol abuse by safety-sensitive personnel, including individuals who conduct maintenance. In the first 11 years of drug testing, almost half of the 30,192 positive test results were attributable to maintenance workers. In the first 6 years of alcohol testing, almost half of the 876 alcohol violations were attributable to maintenance workers. (71 FR 1669, referencing 69 FR 27984) As we concluded then, the data shows that substance abuse in the maintenance population presents a safety concern sufficient to justify the final rule. (71 FR 1669) More recent data indicates that while maintenance personnel constitute approximately one-third of the population subject to drug and alcohol testing, they account for two-thirds of the positive drug tests. Additionally, the largest number of positive test results for maintenance employees has been in the pre-employment context, demonstrating that the pre-employment drug testing regulations have been successful in screening drug users out of safety-sensitive work. (71 FR 1669) The FAA believes it is necessary to the agency's safety mission to maintain this level of deterrence and detection of substance abuse by safety-sensitive workers throughout the aviation industry, regardless of the identity of their employers.

While you have alleged a high degree of confusion over various matters that are unrelated to the rule, neither you nor any other commenters to the various rulemaking documents have identified any significant adverse economic impacts to regulated parties. Nor have you shown, or is it reasonable, to believe that testing to ensure that safety-sensitive workers covered by the rule are not substance abusers could create irreparable harm to any employer. Further, you have made no showing that it is in the public interest to grant yet another extension request.

You have claimed that the results of your survey indicate that many NCMS will stop providing aviation-related services rather than submit their employees to drug and alcohol testing. The apparent concern is related to the costs of the rule. In the SNPRM the agency estimated that up to 300 non-certificated maintenance providers would develop drug and alcohol testing programs as a result of the final rule, at the cost of approximately $1,900 per

entity if that company employed 17 employees, we determined the economic impact of the subcontractor final rule was minimal. Nothing in you request for an extension of the compliance date or your September 27 submission leads the agency to believe that it was incorrect in that assessment.

The survey appears largely duplicative of a similar survey you conducted during the comment period for the SNPRM. As we explained in the regulatory evaluation supporting the subcontractor final rule, such surveys are inherently biased because it is sent to a targeted audience, i.e., members of your association. Additionally, the new survey allows respondents to remain anonymous, permitting multiple submissions. In any case, the FAA evaluated the possibility that there may be some companies who decide against providing aviation-related services because they do not wish to bear the cost of compliance. However, the FAA determined that businesses previously not subjecting their employees to testing would simply pass those costs on to the party with whom they contract. Your survey results provide no additional data to cause the agency to question its assessment. In any case, a delay in the compliance date would not address this potential concern.

Agency Determination

In summary, you have requested the additional 9-month extension, asserting that "many critical issues remain unresolved" and the resulting ambiguity is "causing paralysis for many industry members as they struggle to comply . . .with a rule that is still vague and ambiguous in material respects." In your letter you have said "the critical issues that remain to be resolved go to the very essence of the rulemaking and its implementation, such as which activities constitute maintenance and preventive maintenance." We disagree. Since the almost 45-year-old definitions of maintenance and preventive maintenance were not changed by the subcontractor clarification rulemaking, we do not believe that extending the compliance date for the subcontractor final rule would have any impact on how maintenance or preventive maintenance is understood by the industry. In addition, since the underlying FAA testing regulations established maintenance and preventive maintenance as safety-sensitive functions in 1988, it appears that the current request to delay implementation of the subcontractor final rule is not meritorious.

Therefore, for the reasons set forth above, I am denying your request for an extension of the subcontractor clarification compliance date as well as your request for a stay of the compliance date pending the outcome of your appeal of the subcontractor final rule before the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 06-1091 and 06-1092).

Sincerely,

Nicholas A. Sabatini
Associate Administrator for Aviation Safety

Exhibit C

For Emergency Motion to Stay

Federal Register

Tuesday,
January 10, 2006

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 121

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No.: FAA–2002–11301; Amendment No. 121–315]

RIN 2120–AH14

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the FAA regulations governing drug and alcohol testing to clarify that each person who performs a safety-sensitive function for a regulated employer by contract, including by subcontract at any tier, is subject to testing. These amendments are necessary because in the 1990s, the FAA issued conflicting guidance about which contractors were subject to drug and alcohol testing. This action also rescinds all prior guidance on the subject of testing contractors.

DATES: These amendments become effective April 10, 2006. Affected parties, however, do not have to comply with the information collection requirements in part 121, Appendix I, Section IX, and Appendix J, Section VII, until the FAA publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) for these information collection requirements. We will publish the control number to notify the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: For technical information, Diane J. Wood, Manager, Drug Abatement Division, AAM–800, Office of Aerospace Medicine, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone number (202) 267–8442. For legal information, Patrice M. Kelly, Senior Attorney, Regulations Division, AGC–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone number (202) 267–8442.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy of this rule using the Internet by:

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (*http://dms.dot.gov/search*);

(2) Visiting the Office of Rulemaking's web page at *http://www.faa.gov/regulations_policies/*; or

(3) Accessing the Government Printing Office's web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html*.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact its local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Chapter 451, section 45102, Alcohol and Controlled Substances Testing Programs. Under section 45102, the FAA is charged with prescribing regulations to establish programs for drug and alcohol testing of employees performing safety-sensitive functions for air carriers and to take certificate or other action when an employee violates the testing regulations. This regulation is within the scope of the FAA's authority because it clarifies the existing regulations regarding individuals who perform a safety-sensitive function for a regulated employer by contract. This rulemaking is a current example of FAA's continuing effort to ensure that only drug- and alcohol-free individuals perform safety-sensitive functions for regulated employers.

Background

History

Since the inception of the FAA drug and alcohol testing regulations, the FAA has not directly regulated contractors or subcontractors of regulated parties. The FAA defines who is a regulated "employer," for drug and alcohol testing purposes as a part 121 certificate holder, a part 135 certificate holder, an operator as defined in 14 CFR 135.1(c), or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military. (14 CFR part 121, appendix I, section II, and appendix J, section I.D.)

On February 28, 2002, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) (67 FR 9366). The NPRM proposed changing several provisions in 14 CFR part 121, appendices I and J. Among other proposals in the NPRM, the FAA proposed to clarify that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for a regulated employer is subject to testing. Currently, both 14 CFR part 121, appendix I, section III and appendix J, section II specify employees performing a safety-sensitive function must be subject to testing if they are performing the function "directly or by contract for an employer." We proposed to add the parenthetical phrase "including by subcontract at any tier" after the word "contract."

Several commenters to the NPRM, including trade associations, repair stations certificated under 14 CFR part 145 (certificated repair stations), and non-certificated entities, indicated the proposed clarification on subcontractors would impose an economic burden on the aviation industry. We did not include any costs or benefits for the subcontractor issue in the preliminary regulatory evaluation accompanying the NPRM because we considered the proposed language to be merely clarifying. On January 12, 2004, we published a final rule addressing all issues proposed in the NPRM, except for the subcontractor issue (69 FR 1840).

Employees affect aviation safety whenever they perform a safety-sensitive function listed in appendices I and J. Thus, it is important that individuals who perform any safety-sensitive function be subject to drug and alcohol testing under the FAA regulations. We recognize the aviation industry frequently uses subcontractors to perform safety-sensitive functions.

For more than a decade, we have required each regulated employer to ensure any individual performing a safety-sensitive function by contract be subject to drug and alcohol testing under the FAA regulations. If the regulated employer wants to use the individual under a contract, there are two options for drug and alcohol testing. One option is for the contractor company to obtain and implement its own FAA drug and alcohol testing programs. Under this option, the contractor company must subject the individual to testing. The other option is for the regulated employer to maintain its own testing programs and subject the individual to testing under these programs.

Our experience indicates that many regulated employers and contractor companies have recognized contractors and subcontractors are subject to testing under the regulations. The FAA believes it would be inconsistent with aviation safety to change the regulations so that regulated employers are no longer required to ensure individuals performing safety-sensitive functions "by contract" are subject to testing.

Many commenters to the NPRM were concerned the proposed language would cause considerable costs by requiring subcontractors to conduct drug and alcohol testing for the first time. However, these commenters did not substantiate their cost concerns with specific data. In response to the economic comments regarding the subcontractor issue in the NPRM, we published a supplemental notice of proposed rulemaking (SNPRM), in the **Federal Register** on May 17, 2004 (69 FR 27980). In the SNPRM, we proposed the same language we proposed in the NPRM. We asked commenters to provide economic information to help us address the concerns they raised in the NPRM.

We prepared a regulatory evaluation for the SNPRM regarding the possible costs associated with explicitly including the words "by subcontract at any tier." We evaluated the costs that could be generated by additional subcontractors who might be subject to testing under the proposal.

Conflicting Guidance

In both the NPRM and the SNPRM, we discussed conflicting FAA guidance about the testing of subcontractors. In the initial implementation phase of the drug testing rule in 1989, the FAA issued informal guidance stating maintenance subcontractors would not be required to be subject to testing unless they took airworthiness responsibility. This guidance was provided to persons and companies as late as the mid-1990s, on an ad hoc basis. However, this guidance constricted the potential reach of the regulation, which offered no exceptions for subcontractors who did not take airworthiness responsibility but performed safety-sensitive activities. Accordingly, this guidance was in conflict with the objective of the regulations, i.e., ensuring that each person who performs a safety-sensitive function is subject to testing. Today's final rule clarifies that the level of contractual relationship with a regulated employer does not limit the requirement that all persons performing safety-sensitive work must be subject to drug and alcohol testing.

As noted in the SNPRM, we are hereby rescinding all prior guidance regarding subcontractors (69 FR at 27981).

Discussion of Comments

General Overview

The comment period for the SNPRM closed on August 16, 2004. The FAA received approximately 35 comments in response to the SNPRM. To ensure we meaningfully considered all comments on the issue, the FAA reviewed both the comments filed to the SNPRM and any comments filed to the NPRM not addressed in the preamble to the SNPRM. We note that none of the commenters opposing the proposal provided specific data challenging the FAA's fundamental economic assumptions. The regulatory evaluation accompanying this final rule specifically addresses the comments about costs and benefits.

Commenters included the Air Transportation Association of America (ATA); Regional Airline Association (RAA); Drug and Alcohol Testing Industry Association (DATIA); International Brotherhood of Teamsters (Teamsters); Aircraft Mechanics Fraternal Association (AMFA); Aviation Suppliers Association; and Aeronautical Repair Station Association (ARSA), which filed joint comments on behalf of itself and 12 other associations.

Approximately 10 of the commenters, including United Technologies Corporation (UTC), the Teamsters, AMFA National, AMFA Local 33, and several individuals, stated they generally support the FAA's Antidrug and Alcohol Misuse Prevention Program regulations. Specifically, UTC said they believe the "regulations are a valuable tool to the aviation industry in ensuring workplace and public safety." One individual stated the proposal makes it clear the duties the individual performs define whether or not the individual will be subject to drug and alcohol testing. Several commenters, including three union commenters, supported the proposal because they believed it would improve aviation safety. One commenter, an individual, stated the regulations will make flying safer.

The remaining 25 commenters opposed the proposal, with many of them citing the comments filed by ARSA. The commenters questioned the FAA's estimates of the cost of the proposal and the benefits to aviation safety. Additionally, ARSA, the Aircraft Electronics Association, and a certificated repair station stated the proposal would substantially expand the scope of the FAA-regulated drug and alcohol testing programs without any evidence it would enhance safety. The Aircraft Electronics Association believes the proposal is based more on a moral preference than on science. ARSA also raised invasion of privacy issues associated with drug and alcohol testing. The Aircraft Electronics Association commented the drug and alcohol testing regulations should not apply to outsourced maintenance.

Commenters also suggested the rule is vague, may add additional regulatory requirements to existing duties, and may exceed the FAA's regulatory mandate. Specifically, ARSA cited the FAA's general regulatory mandate in 49 U.S.C. 44701(d)(1)(A) as a limitation on the FAA's authority to impose requirements on non-certificated entities that supply services to directly regulated parties. The Aviation Suppliers Association was concerned distributors could be recharacterized as performing safety-sensitive functions and opposed the proposal, believing it was not supported by a reasonable government purpose. They requested we publish a statement in the final rule recognizing that the distribution of an aircraft part is not considered to be a safety-sensitive function for the purposes of this rule.

One commenter, who filed comments on behalf of the National Association of Metal Finishers, the American Electroplaters and Surface Finishers Society, and the Metal Finishing Suppliers' Association, requested the

FAA not add regulatory requirements to their members' existing duties. This commenter noted existing regulatory requirements represent a large percentage of their operating expenses.

This final rule does not expand the scope of the FAA-regulated drug and alcohol testing programs. Rather, it clarifies that any individual who performs a safety-sensitive function by contract must be subject to the FAA-regulated drug and alcohol testing requirements, regardless of the tier of the contract under which the individual performs. This rulemaking is not questioning or expanding the current outsourcing process. Instead, the final rule eliminates any confusion that might have existed regarding drug and alcohol testing of subcontractors who are connected to the regulated employer through the outsourcing process. In addition, the issues regarding invasion of privacy were resolved more than 15 years ago when the drug testing regulation carefully balanced the interests of individual privacy with the Federal government's duty to ensure aviation safety. The purpose of this rulemaking is not to reopen the long-settled issue of invasion of privacy.

Further, we do not agree that this rule results in vague standards. We have adopted the proposal as a final rule to create a clear standard for regulated employers to follow for drug and alcohol testing of subcontractors. Contractor companies often choose to conduct their own drug and alcohol testing under the FAA regulations because it improves their marketability. However, the requirement to ensure individuals performing safety sensitive functions are subject to testing ultimately rests with the regulated employer.

In addition, we want to emphasize the proposal does not in any way change the scope of safety-sensitive functions currently covered by the drug and alcohol testing regulations. Drug and alcohol testing applies to any individual who performs a safety-sensitive function, including maintenance or preventive maintenance functions for a regulated employer. The FAA defines "maintenance" and "preventive maintenance" in 14 CFR 1.1 and 14 CFR part 43. The distribution of an aircraft part is not "maintenance" or "preventive maintenance" and is not considered a safety-sensitive activity.

While ARSA cited the FAA's general authority for regulating air carriers, 49 U.S.C. 44701(d)(1)(A), as a limitation on testing authority, the Omnibus Transportation Employees Testing Act of 1991 (Omnibus Act), 49 U.S.C. 45101–45106, gave the FAA specific authority to regulate drug and alcohol testing in aviation. In the Omnibus Act, Congress acknowledged the FAA's existing regulations requiring the testing of air carrier employees performing safety-sensitive functions directly or by contract. Specifically, the Omnibus Act "does not prevent the Administrator from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance * * *." 49 U.S.C. 45106 (c). When Congress gave the FAA authority to "continue" regulations prescribed before October 28, 1991, they were acknowledging the drug testing regulation that was already in existence.

The drug and alcohol testing regulations have always required any individual performing safety-sensitive functions directly or by contract for a regulated employer to be subject to testing. As this final rule is not adding more regulatory requirements, the "reasonable government purpose" of aviation safety that has been the foundation of the drug and alcohol testing regulations since their inception remains valid.

Do Safety Concerns Support Continuing To Subject Subcontractors to Drug and Alcohol Testing?

AOPA, ARSA, and other commenters including certificated repair stations and non-certificated entities, stated the FAA did not show any accident data attributable to drug and alcohol abuse by maintenance personnel to support this rulemaking. In addition, AOPA argued "it is unreasonable for the FAA to require maintenance contractors performing non-safety critical maintenance functions to incur the added expense of developing and implementing a drug and alcohol testing program." Two certificated repair stations and an individual said the redundancies built into the maintenance system already ensure maintenance errors are likely to be caught by someone else through the high level of scrutiny and evaluation in the supervision and inspection process. Also, one certificated repair station noted the largest number of positive test results for maintenance employees exist in pre-employment testing, which indicates individuals who pose a potential threat to aviation safety are being screened out before they enter the performance of safety-sensitive functions.

In addition, the Aircraft Electronics Association commented that it is not correct for the FAA to assume increasing air carrier maintenance outsourcing decreases aviation safety because "part 135 on-demand air carriers have been outsourcing maintenance for years without a decline in aviation safety." This commenter said the proposal would expand the drug and alcohol testing regulations to include all certificated repair stations and their subcontractors. The commenter stated the majority of individuals who would be included in testing programs have not been shown to be substance abusers.

We believe the safety data showing the number of current positive test results offer strong support for this rulemaking. We do not believe we should wait until there is an actual loss of human life before we take action to ensure the remaining subcontractors who are not already subjected to testing are brought into compliance with the regulations. Only one link in the safety chain would have to fail for an accident to occur.

The Aircraft Electronics Association takes issue with the discussion in the SNPRM preamble regarding increased maintenance outsourcing. In the SNPRM preamble, we merely discussed the Department of Transportation Inspector General's reports regarding maintenance outsourcing and offered no independent conclusions (69 FR 27982). We included this information to further explain why it is important for the FAA to clarify its existing drug and alcohol testing regulations regarding outsourced maintenance.

This final rule does not expand the drug and alcohol testing regulations to include all certificated repair stations and their subcontractors. As we said earlier, we have not changed the scope of who is required to conduct testing. We are merely clarifying that a contractor includes a subcontractor. In addition, many certificated repair stations already have drug and alcohol testing programs. According to the FAA's Operations Specifications Subsystem (OPSS), over 3,000 certificated repair stations currently have drug and alcohol testing programs under the existing regulations. This represents more than 60 percent of all certificated repair stations in the FAA's OPSS.

In addition, the Aircraft Electronics association stated the majority of individuals affected by the proposal have not been shown to be substance abusers. While this may be true, a substantial number of maintenance workers have had positive test results on FAA-required tests. As we noted in the SNPRM preamble, in the first 11 years of drug testing, almost half of the 30,192 positive drug test results were attributable to maintenance workers.

Also, in the first 6 years of alcohol testing, almost half of the 876 alcohol violations were attributable to maintenance workers. (69 FR 27984) Thus, there is data showing substance abuse in the maintenance population causing sufficient safety concern to justify this final rule.

As one commenter noted, the largest number of positive test results for maintenance employees was in the pre-employment testing context. This data demonstrates the existing regulations were successful in screening out many maintenance personnel who use illegal drugs. The individuals who were prevented from entering the aviation maintenance field were pre-employment tested by many types of entities including regulated employers, contractors, and subcontractors. However, as evidenced by the continuing number of positive random drug test results each year, pre-employment testing is not a complete barrier to individuals who use illegal drugs, and random testing is a necessary form of detection and deterrence. Thus, the large number of positive test results for maintenance personnel further demonstrates why it is important for regulated employers to ensure all subcontractors are subject to testing.

Safety-sensitive functions include all maintenance or preventive maintenance performed for a regulated employer. The drug and alcohol testing regulations do not differentiate between safety critical and non-safety critical forms of maintenance. This final rule does not expand the types of maintenance functions that are considered to be "safety-sensitive." While there might be redundancies built into the maintenance system, the supervisory and other quality assurance processes involved in aviation maintenance do not constitute a substitute for the protections afforded by drug and alcohol testing. Therefore, we will continue to require subcontractors be subject to drug and alcohol testing.

RAA commented the rate of positive test results for maintenance personnel was not significantly higher than the rate of positive test results for all safety-sensitive employees. To illustrate its point, RAA used the rates for calendar year 1999 when "the rate for maintenance personnel who test positive for alcohol was 0.02% compared to a 0.18% rate for all employees who tested positive. The rate for maintenance personnel who test positive for drugs was 1.5% compared to a 1.2% rate for all employees who tested positive." The Aircraft Electronics Association also commented about the positive test result data, saying the data failed to distinguish between the positive test results of large businesses versus small businesses.

RAA's analysis, while flawed,[1] simply argues that maintenance personnel should be subjected to the same requirements as other personnel performing safety-sensitive functions. The purpose of today's rule is not to apply more stringent requirements on maintenance personnel, but rather to clarify which maintenance personnel are subject to testing, *i.e.*, all personnel performing a safety sensitive function regardless of who their direct employer is.

The Aircraft Electronic Association is correct in noting the positive test result rates have been declining. We believe this annual decline shows the effectiveness of the FAA drug and alcohol testing regulations in deterring illegal drug use and alcohol misuse. Because the data prove the effectiveness of our regulations, we do not see the declining positive rate as grounds for eliminating any safety-sensitive personnel who are subject to testing, including maintenance subcontractors.

Should Airworthiness Responsibility Be the Determining Factor for Drug and Alcohol Testing?

ARSA stated the FAA regulations do not currently regulate non-certificated maintenance subcontractors or require them to take airworthiness responsibility for the work they perform, so the non-certificated maintenance subcontractors should not be subject to drug and alcohol testing. Several commenters, including certificated repair stations and non-certificated entities, expressed similar concerns. In addition, AOPA referred to "non-aviation contractors that perform non-safety maintenance functions for certificated repair stations," saying they should not be required to comply with the FAA drug and alcohol testing regulations.

Several commenters, including ARSA, UTC, RAA, and several certificated repair stations, believe the current regulatory system for maintenance provides sufficient oversight to ensure certificated repair stations adequately monitor the work performed by non-certificated maintenance facilities. ARSA noted a certificated repair station has the responsibility to sign off on the airworthiness of any repair performed by its non-certificated contractors. ARSA said the proposal would require a certificated repair station to oversee its non-certificated contractors' participation in drug and alcohol testing programs, and this would be beyond the scope of a repair station's competencies. ARSA added that a repair station would need to make investments in procedures and personnel in order to fulfill this new regulatory burden.

ARSA and UTC suggested that because non-certificated maintenance entities ensure quality control when they perform repairs, each subcontractor in the chain of maintenance is responsible for its work and that of its noncertificated subcontractors. Thus, each subcontractor in the chain of maintenance relies on the certificated work that is performed. In addition, ARSA noted certificated mechanics who sign off on airworthiness are subject to drug and alcohol testing. ARSA believes these safeguards protect against even the negligent maintenance that results from drug or alcohol abuse. ARSA asserted that an article repaired under the influence of drugs is no less conspicuous in its inability to conform to airworthiness standards than an article improperly repaired due to a failure to follow prescribed procedures. For these reasons, ARSA and UTC supported testing only for those with airworthiness responsibility.

ARSA and the Aircraft Electronics Association suggested that because the FAA regulations do not allow non-certificated maintenance subcontractors to take airworthiness responsibility for the work they perform, they cannot perform safety-sensitive work. Also, the Aviation Suppliers Association commented the FAA regulations do not regulate non-certificated maintenance subcontractors or require them to take airworthiness responsibility for their work. RAA said the current FAA guidance rightfully limits the group of subcontractors only to those technicians who actually work on the airplane or have airworthiness responsibility for the component before it is installed on the airplane. RAA did not believe all maintenance and preventive maintenance should be considered safety-sensitive, rather the airworthiness of a product or actual work on the airplane itself should be the defining line in describing a safety sensitive position.

There is no "non-safety maintenance" recognized in our regulations. Within certificated repair stations, there are non-certificated individuals such as mechanic's helpers, who have been

[1] We disagree with RAA's analysis of the testing data. When RAA analyzed the calendar year 1999 data, they compared the rate for maintenance with the rate for all personnel (including maintenance). For a true comparison of the data, one should compare the positive rate for maintenance against the positive rate for all personnel, excluding maintenance. For a full discussion of the data, see the Regulatory Evaluation for this final rule.

subject to testing for more than 15 years. Thus, not only are non-certificated individuals allowed to perform safety-sensitive maintenance but the regulations contemplate the performance of maintenance by non-certificated individuals and entities.

The FAA drug and alcohol testing regulations have never articulated a difference between safety-sensitive functions performed by a certificated versus a non-certificated maintenance facility. Our regulations identify all maintenance and preventive maintenance duties as safety-sensitive functions. Anyone performing maintenance or preventive maintenance duties for a regulated employer must be subject to testing, regardless of who signs off on the airworthiness of the maintenance.

As we acknowledged in the NPRM and SNPRM preambles, some of our early guidance only required subcontractors who took airworthiness responsibility to be subject to drug and alcohol testing. By the mid 1990s, the guidance we developed eliminated the airworthiness responsibility component and followed the rule language explicitly. The point of this rulemaking is to clarify that any individual who performs safety-sensitive functions for a regulated employer must be subject to drug and alcohol testing.

The airworthiness signoff process is not designed to address the safety risk arising from safety-sensitive functions performed by individuals who use illegal drugs or misuse alcohol. ARSA spoke of quality control procedures and review by certificated mechanics as the safeguards to ensure "negligent maintenance" will be discovered and corrected. However, the maintenance quality control procedures do not remove individuals who use illegal drugs or misuse alcohol. The FAA drug and alcohol regulations are designed to address exactly this safety risk by deterring drug and alcohol use, and through removing from safety-sensitive functions, individuals who engage in such prohibited practices.

Should the Level of Contractual Relationship Limit Who Is Subject to Drug and Alcohol Testing?

ATA stated it "does not take issue with the premise that individuals actually performing safety sensitive functions for airlines should be subjected to the highest standards for performance, including appropriate drug and alcohol testing." ATA noted "we agree with the statement in the SNPRM that '[t]he level of contractual relationship with an employer should not be read as a limitation on the requirement that all safety-sensitive work be performed by drug- and alcohol-free employees.'" Furthermore, ATA commented "it is the nature of the function being performed by an individual, and not the employment relationship of that individual to the airline, that is relevant."

The FAA agrees with ATA. As we stated in the preamble to the SNPRM, the level of contractual relationship should not limit the requirement for all safety-sensitive work to be performed by drug-free and alcohol-free employees. If individuals are performing safety-sensitive functions for a regulated employer, the individuals must be subject to testing, regardless of the tier of contract under which they are performing.

It would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to drug and alcohol testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing. In addition, if drug and alcohol testing could be avoided by simply sending the maintenance work to a subcontractor, a company could form separate subsidiaries within its organization in order to create an internal subcontracting system that avoids drug and alcohol testing.

Should Subcontractors Be Distinguished From Contractors Based on Differing Contractual Relationships?

ARSA said the language to include subcontractors at any tier is a change in the reach of the regulation, rather than a clarification. In making this assertion, ARSA asserted that a contract is binding only between the parties to the contract, based on the doctrine of privity. In ARSA's opinion, privity does not extend to subcontractors. Thus, ARSA concluded the law does not consider the subcontractor bound by contract to an entity with which it has no direct relationship, in this case the air carrier. UTC echoed this statement, emphasizing the legal concept of privity of contract as being between signatory parties, giving each responsibilities and rights in pursuit of a common goal. Accordingly, UTC asserted that a contractual relationship and all that it incorporates cannot extend to any unnamed party.

In addition, ARSA discussed the Drug-Free Workplace Act (DFWA) requirements that apply to Department of Defense (DoD) contracts.[2] ARSA stated the DoD applies the DFWA to its contractors through specific contract clauses required by regulation. ARSA said DoD does not require the DFWA requirements to extend beyond direct contractors to subcontractors. Based on DoD's practice, ARSA argued it is inconsistent with safety and economics to extend drug and alcohol testing to any tier of the maintenance process, including subcontractors that are not part of a certificated repair station or the aviation industry. DoD's decision to exclude subcontractors from its contracts is not relevant to this rulemaking, and we offer no opinion to the contract practices of other Federal agencies. We note that the DFWA does not apply to the FAA and we are not compelled to follow DoD's lead in this regard.

The issue of subcontractor privity is irrelevant to this regulation, because the FAA will take enforcement action against those employers directly covered by the drug and alcohol regulations by virtue of their part 121 or part 135 operations, as well as those contractors who have voluntarily submitted to our jurisdiction by obtaining their own drug and alcohol programs. This final rule clarifies that these two groups of regulated entities must ensure all individuals performing a safety sensitive function are subject to testing. If the regulated employer or contractor is concerned that there is insufficient privity between itself and a subcontractor to assure that employees of a subcontractor are subject to testing, it can require a testing provision be placed in each contract between its contractors and their subcontractors. Such provisions are common in other contexts and are likely already used by some carriers in this context.

The FAA guidance has always indicated subcontractors were covered by the drug and alcohol testing regulations. The conflict in the guidance was whether all subcontractors or only those subcontractors with airworthiness responsibility were required to be subject to drug and alcohol testing. The guidance requiring all contractors to be subject to testing is consistent with the fact all individuals performing safety-sensitive functions directly or by contract are required to be subject to testing.

[2] DFWA requires Federal contractors to maintain programs for achieving a drug-free workplace, but does not require drug and alcohol testing.

How Will This Rule Affect Contractual Relationships, Including Auditing Contractor's and Subcontractor's Drug and Alcohol Testing Programs?

ATA and ChevronTexaco requested guidance on how air carriers can ensure their contractors and subcontractors are complying with the drug and alcohol testing regulations. In addition, the commenters requested guidance on satisfying the audit requirement for both domestic and overseas contractors and subcontractors.[3] Specifically, ATA asked if air carriers should continue to retain a copy of the contractor's OpSpec or registration. ATA also stated air carriers currently do not independently verify the status of subcontractors' compliance with drug and alcohol testing requirements. ChevronTexaco noted that it currently requests information from its contractors to verify "they have drug and alcohol prevention plans in place and they audit their contractors for the same." ChevronTexaco stated it uses a questionnaire for many of its contractors but not for all subcontractors. Similarly, a certificated repair station said air carriers have used questionnaires as an alternative to performing on-site audits.

ARSA suggested the proposed rule would require certificated repair stations and the air carriers with whom they contract to look beyond the airworthiness of a particular article to the person who performed maintenance, no matter how insignificant the job or how far removed from the aircraft. ARSA also expressed concern that direct contractors would need to ensure their subcontractors actually implemented drug and alcohol testing programs. ARSA stated the proposal would require direct contractors "to take on the role of human resource auditor" for all non-certificated subcontractors. Thus, ARSA asserted the proposal would alter contractual relationships and expectations for non-certificated entities performing contracted maintenance functions on the industry's behalf.

The FAA regulations require a regulated employer to ensure any individuals performing safety-sensitive functions for it by contract are included in the FAA-regulated drug and alcohol testing programs of either the regulated employer or the contractor. While it is advisable for the regulated employer to retain a copy of the contractor's OpSpec or registration, merely retaining this copy does not ensure all individuals performing safety-sensitive functions by contract for the regulated employer are subject to drug and alcohol testing under the regulations. While OpSpec or registration documentation may indicate that a contractor has agreed to implement a drug and alcohol program, it does not provide a regulated employer with specific information to determine if the contractor has actually implemented its programs. Accordingly, more oversight is needed. A regulated employer could ask its contractor specific questions and request documentation to ensure the contractor has fully implemented its testing programs and to ensure the individuals who will perform safety-sensitive functions for the regulated employer are subject to testing. It is also a good business practice for an employer to verify and document that specific individuals performing safety-sensitive functions by contract are currently subject to testing under the contractor's drug and alcohol testing program.

Direct contractors must both determine the airworthiness of an article and ensure subcontractors have actually implemented drug and alcohol testing programs because both have safety implications. Regulated employers and contractors at any tier should not disregard the requirements of either safety responsibility. Accordingly, it is not necessary for companies to become auditors because the FAA's regulations do not specifically require audits to ensure the testing requirements are met.

Finally, we note the commenters have not provided any data or information to support an assumption the proposal would alter expectations and contractual relationships with non-certificated entities. As stated previously, the FAA believes the majority of regulated employers are already ensuring individuals who are performing safety-sensitive functions for them under a contract at any tier are subject to drug and alcohol testing.

Who Is Responsible for Subcontractor Compliance?

Several commenters questioned who would be responsible for ensuring subcontractor compliance with drug and alcohol testing. Specifically, they asked if certificated repair stations or regulated employers (air carriers) would be held responsible for any and all subcontractors at any tier. Prime Turbines commented to both the NPRM and the SNPRM, expressing concern that it will be held liable for all tiers of contract work. Another commenter, ChevronTexaco, stated its current practice is to audit its contractors' drug and alcohol prevention programs. ChevronTexaco also specifies in its contractual agreements that contractors must audit subcontractors' programs because it is common for them to have several tiers of subcontractors. ChevronTexaco was concerned the proposal "would cascade employer responsibility for auditing drug and alcohol programs to ALL these subcontractors with which we have no direct business or contractual relationship." Similarly, UTC questioned whether a third tier subcontractor's non-compliance has any affect on the fourth tier subcontractor or on the second tier subcontractor.

We applaud ChevronTexaco for creating a contract provision to require its contractors to audit subcontractors and ensure individuals performing safety-sensitive functions by contract are subject to drug and alcohol testing. While the contract provision ChevronTexaco describes is an excellent business practice, the FAA's regulations have not required "auditing," and this final rule does not require it. As we discussed in the preamble to the SNPRM, although auditing is a business decision, we believe it is a good way to determine if an entity has FAA drug and alcohol testing programs and is testing its employees (69 FR 27982).

As we said in the preamble to the SNPRM, the safety of the air carrier's maintenance and operations ultimately rests with the air carrier (69 FR 27983). Similarly, in 14 CFR 121.363(a) and 135.413(a), we recognize that air carriers are primarily responsible for the airworthiness of its aircraft. A regulated employer must ensure any individual performing safety-sensitive functions for it is subject to the required drug and alcohol testing. Thus, the regulated employer has the ultimate responsibility to ensure individuals performing safety-sensitive functions for it by contract are subject to FAA-regulated testing.

A contractor company can test individuals performing safety-sensitive functions for a regulated employer under the contractor company's own FAA-regulated testing programs. Once a contractor company obtains its FAA-regulated testing programs, the FAA will hold the contractor company responsible for its compliance with the regulations. There may be circumstances where the regulated employer may also share responsibility for a contractor company's non-compliance.

If a contractor company has FAA-regulated testing programs, it must ensure any individual performing a safety-sensitive function by contract (including by subcontract at any tier) below it is subject to testing. The FAA

[3] FAA drug and alcohol testing regulations prohibit testing outside the United States and its territories. Today's rule does not add an extra territorial testing requirement.

recognizes there may be multiple tiers of subcontractors in the aviation industry. Any lower tier contractor company with FAA-regulated testing programs will be held responsible for its own compliance with the FAA drug and alcohol testing regulations. Also, there may be circumstances where the regulated employer and higher tier contractor companies share responsibility for the lower tier contractor company's noncompliance.

The FAA provides information to assist regulated employers and their contractors to implement drug and alcohol testing programs. Entities can obtain this information by:

—Contacting the Drug Abatement Division at the address in the **FOR FURTHER INFORMATION CONTACT** paragraph listed earlier; or

—Referencing the Drug Abatement Division's Web site: *http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/.*

What Are the Consequences for Subcontractor Noncompliance?

Several commenters, including UTC and ARSA, expressed concern about oversight responsibilities for subcontractors and contended that air carriers would be required to oversee drug and alcohol programs for every subcontractor at any lower tier in the maintenance process. UTC noted the FAA had not proposed to require audits or other specific means of ensuring contractors and subcontractors were properly conducting drug and alcohol testing. UTC believed the lack of an audit requirement would create a wide diversity of compliance standards and a potential variability in enforcement. In addition, UTC was concerned certificated repair stations would audit other certificated repair stations that are subcontractors. This was problematic for UTC because it views certificate oversight as an FAA responsibility.

Since the inception of the FAA drug and alcohol testing regulations, we have had a requirement that any individual who performs a safety-sensitive function directly or by contract must be subject to drug and alcohol testing. The FAA deliberately chose not to specify how regulated employers would ensure subcontractor compliance with the drug and alcohol testing regulations. Similarly, the FAA deliberately chose not to specify how contractors that opt to obtain drug and alcohol testing programs would comply with the regulations.[4] The means for achieving the requirement are somewhat flexible—the regulated employer may conduct the testing or the contractor company may conduct the testing, but the regulated employer must ensure individuals performing safety-sensitive functions for it are subject to testing.

Regulated employers and entities opting to obtain testing programs must include individuals performing safety-sensitive functions by contract in their own programs. Alternatively, they can allow an individual to perform a safety-sensitive function by contract for them if the individual is subject to testing under the contractor company's drug and alcohol testing programs. One way to determine if the individual is subject to testing in accordance with the FAA regulations is to inquire further about the specifics of the contractor company's programs and request supporting documentation from the contractor company. Merely obtaining a program registration or an OpSpec does not indicate a company has implemented compliant drug and alcohol testing programs.

Because each regulated employer currently has a duty to ensure any individual performing a safety-sensitive function by contract for it is subject to testing, several regulated employers might conduct inquiries to ensure the same individual is subject to testing. For example, a contractor company might have personnel with skills that put them in high demand with many regulated employers. Before each of these regulated employers can allow the contractor company's personnel to perform safety-sensitive functions by contract, each regulated employer must ensure the individuals performing safety-sensitive functions by contract for it are subject to drug and alcohol testing in accordance with the FAA regulations. We do not view this as a duplication of effort or as an administrative burden because each regulated employer has a separate duty to ensure drug and alcohol testing occurs.

Furthermore, we acknowledge there will be times when a higher tier contractor company and its lower tier contractors are certificated repair stations. To ensure specific individuals performing safety-sensitive functions by contract are subject to testing, the higher tier contractor company may choose to audit or otherwise inquire into its lower tier contractors' drug and alcohol testing programs. It is possible one certificated repair station might audit the drug and alcohol testing programs of another certificated repair station. We do not see this as a difficulty or a conflict because certificated repair stations can audit their contractors under the current regulations, and the FAA already has and will continue to have oversight responsibilities for certificated repair station certificates.

Should Certificated Repair Stations Disclose Their Subcontractors?

One certificated repair station commented that most air carriers allow repair stations to subcontract, but the identity of these subcontractors normally is not disclosed. Therefore, the FAA should not be allowed to force a repair station to disclose all of its contractors both by name and by contacts. In addition, RAA asserted its members are not able to continuously ensure that subcontractors are being tested. RAA stated that many individuals working for a subcontractor may be an employee only for a short period of time or the contractor may want to quickly replace subcontractors. RAA also said airlines will have difficulty identifying who to include in drug and alcohol testing programs.

We do not agree certificated repair stations should not provide information about subcontractors to regulated employers. The FAA regulations have always required regulated employers to ensure they tested or their contractors tested all contractor and subcontractor employees performing safety-sensitive functions for the regulated employer. This is not a new requirement. At issue in this rulemaking is the confusion resulting from conflicting guidance about which contractors were required to be subject to drug and alcohol testing. The regulated employer must continue to receive information about the drug and alcohol testing programs of contractor companies whose employees are performing safety-sensitive work for the regulated employer under a contract. Regulated employers need this information to continue to ensure individuals performing safety-sensitive functions for them are subject to testing in accordance with the FAA regulations.

We agree regulated employers will have problems identifying who should be subject to drug and alcohol testing if certificated repair stations or other contractors do not provide the regulated employers with current information about which contractors and

[4] There is no difference between the FAA's method for inspecting certificated versus non-certificated maintenance contractors that have opted to obtain drug and alcohol testing programs. Also, we do not vary our inspection method based on the difficulty or criticality of the maintenance performed. While our inspection methodology does not vary by type of company, the sanctions the FAA imposes vary depending on the specific circumstances surrounding the actual violation. We note the FAA has always handled interpretations and enforcement matters on a case-by-case basis. We are not aware that this has caused difficulties in maintenance productivity in the past.

subcontractors are performing safety-sensitive functions. Providing this information is already necessary under the FAA's drug and alcohol testing requirements and is not added by this rulemaking. It is imperative to safety that certificated repair stations and other contractors share current identifying information about subcontractors with the regulated employers to ensure individuals performing safety-sensitive functions for the regulated employers are subject to testing in accordance with the FAA regulations.

Should Subcontractors That Are Not Primarily Aviation-Related Businesses Be Subject to Testing?

Some certificated repair stations and businesses that are not primarily aviation-related commented that the rule, if amended, could place economic pressure on subcontractors that provide service to more than the aviation industry. In addition, several commenters, including ARSA, opposed requiring non-certificated subcontractors be subject to testing. Furthermore, some commenters expressed concern that if non-certificated subcontractors are subject to testing, those entities might stop providing services to the aviation industry.

The FAA disagrees with these commenters' distinction between certificated and non-certificated subcontractors when it comes to the issue of safety-sensitive work. When subcontractors choose to perform safety-sensitive functions for regulated employers, they are choosing to comply with the FAA drug and alcohol testing regulations. The impact these subcontractors have on aviation safety is not related to whether they hold a repair station certificate. Instead, they have an impact because they actually perform safety-sensitive functions.

The commenters did not provide data to support the premise that non-certificated subcontractors would cease providing service to the aviation industry. Furthermore, as discussed in detail in the accompanying regulatory evaluation, the data provided by commenters showed the majority of such contractors would continue doing business with the aviation industry after the final rule becomes effective.

What Is Safety-Sensitive Maintenance or Preventive Maintenance?

ATA believes "individuals actually performing safety-sensitive functions for airlines should be subjected to the highest standards for performance, including appropriate drug and alcohol testing." However, ATA questioned whether many subcontractors doing work for airlines are actually performing safety-sensitive functions.

While ATA recognized the FAA regulations define the terms "maintenance" and "preventive maintenance" (see 14 CFR 1.1 and 14 CFR part 43), they requested additional guidance. Specifically, ATA requested the FAA provide guidance clearly describing "maintenance and preventive maintenance for flight-critical systems, and those components whose failure could have a direct adverse effect on the continued airworthiness of the aircraft." In addition, ATA requested the guidance distinguish safety-sensitive maintenance from other types of "maintenance" that do not have the potential to directly impact airworthiness.

In a related comment, one commenter holding multiple air carrier certificates and a repair station certificate said the proposed rule would cause difficulty whenever an entertainment system component needs repair. This commenter provided cost data on how much revenue air carriers would lose if they had to modify the aircraft to accept a new unit every time an entertainment unit system broke and could not be repaired by a drug and alcohol tested technician. Also, a non-certificated subcontractor company that does interior plating decoration on non-essential components said the proposed rule would have a large impact on the way it does business. This commenter asked the FAA to exclude it from drug and alcohol testing.

The ATA correctly notes the FAA defines maintenance and preventive maintenance in 14 CFR 1.1 and 14 CFR part 43. In the drug and alcohol testing regulations, any maintenance or preventive maintenance (as defined in 14 CFR 1.1 or part 43) an individual performs for a regulated employer is a safety-sensitive function, and therefore subject to drug and alcohol testing.

The FAA Drug Abatement Division defers to the Flight Standards Service for decisions on whether a task is maintenance or preventive maintenance. If we were to attempt to further define maintenance and preventive maintenance functions through a guidance document, it would likely be quickly outdated and would not be helpful. Since job titles and functions vary from company to company, the title of a task performed at one company may not be the title of a similar task at another company. Determining whether a particular task fits under the definitions of "maintenance" or "preventive maintenance" is the responsibility of the regulated employer, working in conjunction with the regulated employer's assigned FAA principal inspector. Once the principal inspector determines a task is maintenance or preventive maintenance, the individual performing the task for the regulated employer must be subject to drug and alcohol testing.

With respect to the specific assertion that repairing an entertainment system could subject an entity to drug testing, we note that repairing entertainment system components usually is not considered "maintenance." Consequently, drug and alcohol testing usually is not required for individuals who repair these components. On the other hand, removing the entertainment system component from the aircraft and reinstalling the repaired component on the aircraft is maintenance and subject to testing. Similarly, interior plating decoration to nonessential components is "preventive maintenance" under 14 CFR part 43, appendix A. Consequently, drug and alcohol testing is required for individuals who perform this type of plating.

Does the Regulatory Flexibility Act Apply to This Rulemaking?

ARSA, several certificated repair stations, and some non-certificated entities stated the FAA failed to conduct a required Regulatory Flexibility Act (RFA) analysis. In ARSA's opinion, the FAA understated "the impact of this regulation on the aviation industry and on those industries providing maintenance support services." ARSA believes an Initial Regulatory Flexibility Act analysis (IRFA) would help the FAA and the public evaluate the costs and benefits of the proposed rule. Also, ARSA argued the FAA failed to meet the RFA requirement to consider significant alternatives to minimize the SNPRM's economic impact on small entities.

The FAA disagrees with ARSA and other commenters who raised RFA issues. In 14 CFR part 121, appendix I, section II, and appendix J, section I.D, the FAA defines which employers are directly regulated by the drug and alcohol testing regulations. Specifically, the directly regulated employers are: Air carriers operating under 14 CFR parts 121 and 135; § 135.1(c) operators; and air traffic control facilities not operated by the FAA or by or under contract to the U.S. military. These directly regulated employers must conduct drug and alcohol testing under the FAA regulations. For drug and alcohol testing purposes, certificated repair stations are contractors, and contractors are not regulated employers. Contractors can

choose to obtain drug and alcohol testing programs. Once a contractor chooses to obtain such programs, it must follow the FAA drug and alcohol testing regulations.

Twenty years ago, the U.S. Court of Appeals for the DC Circuit held the RFA only applies to small entities directly regulated by a proposed rule. "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratus of the national economy." *Mid-Tex Electric Cooperative* v. *FERC*, 773 F.2d 327, 343 (DC Cir. 1985). The DC Circuit held the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 did not change the fact the RFA only applies to directly regulated entities. *American Trucking Associations* v. *EPA*, 175 F.3d 1027, 1044 (DC Cir. 1999). The DC Circuit "has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities." *Cement Kiln Recycling Coalition* v. *EPA*, 225 F.3d 855, 869 (DC Cir. 2001) (citing *Mid-Tex Electric Cooperative* v. *FERC*, and its progeny). In *Cement Kiln*, the Environmental Protection Agency (EPA) had done a regulatory evaluation to cost out the impact on small businesses indirectly affected by the proposed regulation. While the EPA's cost evaluation was based on small businesses indirectly impacted, it was "in the spirit of the RFA because some portion of the burden of compliance might pass through to [these small businesses]." *Cement Kiln*, 255 F.3d at 868. Similarly in the SNPRM, the FAA followed the spirit of the RFA by evaluating the costs of the proposal on indirectly affected small businesses (contractors). However, the DC Circuit said conducting an economic cost evaluation for small businesses indirectly affected does not trigger the requirements of a full RFA analysis. *Cement Kiln*, 255 F.3d at 868–869.

The DC Circuit specifically explained "* * * application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.'" *Cement Kiln*, 255 F.3d at 869 (citations omitted). In addition, the DC Circuit went on to say "The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." *Cement Kiln*, 255 F.3d at 869.

Accordingly, we have determined we are not required to conduct an RFA analysis, including considering significant alternatives, because contractors (including subcontractors at any tier) are not the "targets" of the proposed regulation, and are instead indirectly regulated entities. For the purpose of the RFA, we have evaluated the impact on the regulated employers to reach our decision to certify that this action will not have a significant economic impact on a substantial number of small entities.

While an IRFA can be a tool for evaluating costs and benefits of a proposal, the main tool is the regulatory evaluation. Accordingly, we used the regulatory evaluation to determine the impact on the number of indirectly regulated entities that might be affected by the proposal. This provided a better idea of what the costs to the regulated employers would ultimately be. Evaluating the costs the indirectly regulated entities might bear complied with the spirit of the RFA and provided us with a realistic total cost that could be distributed among regulated employers. We are now explicitly distributing the total cost among regulated employers.

Should FAA Provide More Time for Pre-Employment Testing of Subcontractors?

DATIA (an association of service agents in the drug and alcohol testing industry) and AMFA Local 33 supported the proposed pre-employment provision. The proposal contemplated providing an employer with a 90-day window after the effective date of the rule in which to conduct pre-employment testing of existing subcontractors who have not previously been tested. Both commenters stated the proposed 90-day window would assist air carriers, contractors, and subcontractors to implement any necessary pre-employment testing.

The FAA notes that today's rule merely clarifies an existing requirement that we have estimated at least 60 percent of the industry already follows. Additionally, the regulated parties are not required to establish new testing programs. Accordingly, a 90-day window for pre-employment testing subcontractors appears excessive. In order to provide some additional time to complete testing we have decided to make today's rule effective 90 days after publication rather than our usual 30.

Miscellaneous Comments

One certificated repair station questioned why the FAA requires drug and alcohol testing for a non-certificated entity performing maintenance on a business jet operated under part 135 but not if the same business jet is operated under part 91. This commenter also said it can contract with non-certificated entities "to perform maintenance on a part 91 aircraft and the FAA has no issue with airworthiness or safety."

The commenter is not correct in saying the FAA has "no issue with airworthiness or safety" for part 91 aircraft. We are very much concerned that maintenance on part 91 aircraft is performed in accordance with airworthiness requirements. Aviation safety is not limited to maintenance on air carriers.

However, commercial operators carrying passengers for compensation or hire are required to meet a higher level of safety than general aviation, which operates under part 91. Included in the higher level of safety is the requirement for regulated employers to conduct drug and alcohol testing.

Issues Outside the Scope of This Rulemaking

The FAA received a number of comments concerning: The repeal of the moonlighting exception to drug and alcohol testing; the Antidrug and Alcohol Misuse Prevention Program OpSpec requirement; revising the definitions of certain safety-sensitive functions to tie them to safety risk; drug and alcohol testing outside the United States and its Territories; drug and alcohol testing for manufacturers; and drug and alcohol testing for general aviation. These issues are outside the scope of the SNPRM. Therefore, we have not addressed them in this final rule.

Paperwork Reduction Act

This final rule contains information collection activities subject to the Paperwork Reduction Act (44 U.S.C. 3507(d)). No agency may conduct or sponsor and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. In accordance with the Paperwork Reduction Act, documentation describing the information collection activities was submitted to the Office of Management and Budget (OMB) for review and approval. The FAA will publish the OMB control number for this information collection in the **Federal Register** after the Office of Management and Budget approves it.

This rule imposes additional reporting and recordkeeping requirements on regulated employers (part 121 and 135 certificate holders, and operators as defined in § 135.1(c)). This rulemaking indirectly affects contractors and subcontractors, including non-certificated maintenance contractors, performing maintenance and preventive maintenance for these regulated employers at any tier if they elect to obtain antidrug and alcohol misuse prevention programs.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is the FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The FAA has determined this rule has benefits that justify its costs, is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

This rulemaking directly affects regulated employers (part 121 and 135 certificate holders, and operators as defined in § 135.1(c)). This rulemaking indirectly affects contractors and subcontractors, including non-certificated maintenance contractors, performing maintenance and preventive maintenance for these regulated employers at any tier. Approximately 300 non-certificated maintenance contractors will have to develop anti-drug and alcohol misuse prevention programs, affecting about 5,000 employees in 2006, rising to approximately 5,700 employees by 2015.

The FAA is not changing the current regulations, but is simply clarifying them. As such, there should be no additional costs. However, the FAA recognizes that, due to conflicting guidance, some companies may have to modify their current anti-drug and alcohol misuse prevention programs or implement such programs. The FAA does not know how many additional employees or contractor companies will be subject to anti-drug and alcohol misuse prevention programs, but has conservatively estimated that over 10 years, costs sum to $3.08 million and cost savings sum to $790,300, for net total costs of $2.29 million ($1.76 million, discounted).

The major benefit from this rulemaking will be the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to neglect or error on the part of individuals whose judgment or motor skills may be impaired by the presence of drugs and/or alcohol. The FAA estimates 10-year benefits sum to $15.07 million ($10.59 million, discounted).

A full evaluation of the estimated costs and benefits associated with today's rule is provided in the final regulatory evaluation located in the docket.

Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

For this rule, the small entity group is considered to be small part 121 and 135 certificate holders and operators under § 135.1(c) (North American Industry Classification System [NAICS] 481111). The FAA examined the annual revenues of all the certificated air carriers under part 121, 121/135, 135, as well as operators under § 135.1(c).

For the certificated air carriers under part 121, 121/135, and 135, annual revenue data is not available by 14 CFR part number, so the FAA used Forms 41 and 298C, available from the Bureau of Transportation Statistics (BTS), for this data. In these forms, BTS breaks down the different airplane operators that file Form 41, by revenue. Large certificated carriers (which includes Majors through Medium Regionals), which file Form 41, must fly aircraft with 60 seats or more or have a payload of at least 18,000 lbs.

Carriers reporting on Form 298C are classified as either "Small Certificated" (also known as Small Regionals) or "Commuter" air carriers. While neither of these types of carriers are defined by annual revenues, some small certificated carriers have more than $100 million in annual revenues.

Carriers that file Form 41 that have annual revenue over $20 million (Majors, Nationals, and Large Regionals) report revenue data quarterly, while carriers that File 41 that have annual revenue less than $20 million (Medium Regionals) report revenue data twice a year. All carriers that file Form 298C, report revenue data quarterly. Unfortunately, the data is not consistent as it is not available for some carriers for every reporting period. The FAA examined data from the last 3 years to identify the most recent consecutive four quarters or two half-year periods, whichever was applicable, for each carrier to be used as the relevant operating revenue for that carrier. Using this air carrier operator information, the FAA separated the carriers into part 121, part 121/135, and part 135 certificated carriers, and operators under § 135.1(c). The average annual revenue for these three categories is $1,686.60, $58.74, and $59.10, respectively, in millions of dollars.

The FAA used a different method to calculate the annual revenue for the operators under § 135.1(c), as this information is not collected by BTS. As shown in an earlier (2002) analysis, the FAA collected information on both part 135 and part 91 aircraft engaged in air tours. The FAA determined that the group that was most similar to the operators under § 135.1(c), in this analysis, was the core part 91 operators with the annual revenue per operator of $62,600.

This rule will cost $2.29 million over 10 years ($1.76 million, discounted). The annualized cost is about $800 for each of the approximately 300 contractors to put together an antidrug and alcohol misuse prevention program and then implement it. These

contractors will absorb some of these costs, while the rest will be passed on to both the companies at the other tiers that they are contracting for or with as well as to the regulated employers. Given such low annualized costs, the FAA does not believe that most of the costs will be passed on to companies at other tiers. However, the FAA assumes that all of the additional NCMS cost is passed along to the regulated employers in order to estimate the maximum impact of this regulation on regulated employers.

For this analysis, the FAA considers each part 135 certificate holder and operator under § 135.1(c) to be a small entity, and some of the part 121 and 121/135 certificate holders to also be small entities. The FAA examined the costs of this rule two different ways:

a. The costs are shared equally by all regulated employers; and

b. In order to determine the maximum impact of this rule, the entire cost is borne by one regulated employer.

a. Given 2,562 air carrier certificate holders and 250 operators under § 135.1(c), the cost borne by each regulated employer would equal about $800 ($600, discounted). Using the same capital recovery rate yields an annualized cost of about $100. The costs to each air carrier certificate holder would be less than 0.0002% of their annual revenues, while the costs to each operator under § 135.1(c) would be less than 0.15% of their annual revenues. Given that the majority of § 135.1(c) operators usually has one or two aircraft, and operates in and out of one airport, it is unlikely that they would interact with multiple subcontractors in the regular course of business operations. Therefore, it is unlikely that their annualized costs as a percentage of annual revenues would be much higher than 0.15%.

b. Under this scenario, with the entire cost being borne by one regulated employer that is not a small entity, the costs sum to $2.29 million over 10 years ($1.76 million, discounted). It is highly unlikely that one or a small number of regulated employers would bear the costs of this rule exclusively because the regulated employers vary in size, number of aircraft, and geographic location. The smaller the operator, the fewer aircraft that operator would use, hence the smaller the number of subcontractors that operator would use for safety-sensitive maintenance. Therefore, this scenario would not be applicable to many small entities, including many part 135 operators or any operator under § 135.1(c).

Using the same capital recovery rate yields an annualized cost of about $251,200. Even if one regulated employer absorbed all the costs, these costs would be less than 0.5% of annual median revenue. Clearly, no regulated employer is going to absorb all, or even most, of the costs to the exclusion of the other regulated employers, so the impact on their revenues will be much less than 0.5% of annual median revenue. In addition, it is highly unlikely that all of the additional costs to the NCMS will be passed along to these regulated employers.

Under both scenarios, the economic impact is minimal. Therefore, the Administrator certifies that this action will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this NPRM and has determined that it would have only a domestic impact and therefore no affect on any trade-sensitive activity.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million.

This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined it is not a "significant energy action" under Executive Order 13211 because it is not a "significant regulatory action" under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Alcoholism, Aviation Safety, Charter flights, Drug abuse, Drug Testing, Safety, Transportation.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends part 121 of Title 14, Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105, 46301.

■ 2. Amend appendix I to part 121 by revising the introductory text to section III.

Appendix I to Part 121—Drug Testing Program

* * * * *

III. *Employees Who Must be Tested.* Each employee, including any assistant, helper, or individual in a training status, who performs

a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this appendix must be subject to drug testing under an antidrug program implemented in accordance with this appendix. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

* * * * *

■ 3. Amend appendix J to part 121 by revising paragraph A introductory text of section II.

Appendix J To Part 121—Alcohol Misuse Prevention Program

* * * * *

II. Covered Employees

A. Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this appendix must be subject to alcohol testing under an alcohol misuse prevention program implemented in accordance with this appendix. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

* * * * *

Issued in Washington, DC, on December 22, 2005.

Marion C. Blakey,

Administrator.

[FR Doc. 06–205 Filed 1–9–06; 8:45 am]

BILLING CODE 4910–13–P

Exhibit D

For Emergency Motion to Stay

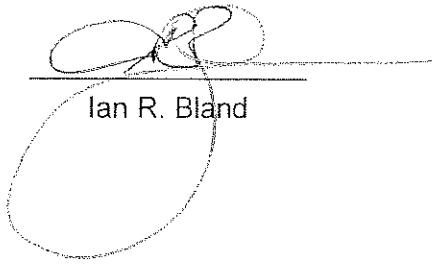
Declaration of Ian Bland

Pursuant to 28 U.S.C. § 1746, I, Ian R. Bland, declare the following under penalty of perjury:

1. I am a Manager of Health and Safety Programs for Loureiro Engineering Associates, Inc. (Loureiro). I have been in my present position for 4 years and have been actively involved in Department of Transportation anti-drug and alcohol misuse prevention program management services since 1994.
2. I have performed numerous due diligence audits for Fortune 100 companies and assisted a wide range of clients in preparing for, managing and following up on Federal Aviation Administration (FAA) Drug Abatement Division inspections. I have also served as an expert witness in a case involving alcohol testing procedures utilized by an air carrier. I am a Certified Substance Abuse Program Administrator (C-SAPA).
3. The original anti-drug and alcohol testing rules, enacted in 1988 and 1994, respectively (53 Federal Register 47024, November 14, 1988; 59 Federal Register 42911, August 19, 1994), worked for the aviation maintenance industry because for the most part, they were well-written, appropriate to the mission set forth by Congress, and manageable. They attempted to balance the FAA's interest in aviation safety against the privacy rights of the individual; they included procedures and guidelines that facilitated regulatory compliance while preserving economic flexibility.
4. Under the original drug and alcohol testing regulations, the Drug Abatement Division has left considerations of what is or is not maintenance to the FAA's Flight Standards Division. As the original rules touched only persons performing work directly or by contract for air carriers, the direct contractors covered by the testing regime were primarily certificated repair stations that performed many types of activities, most of which were clearly maintenance. Accordingly, disputes over what constituted maintenance were relatively rare.
5. With the issuance of the new drug and alcohol testing rule (71 Federal Register 1666, January 10, 2006), the relationships between Drug Abatement and Flight Standards; and between the FAA and industry with respect to drug and alcohol testing and maintenance, were radically altered. This vague and ambiguous new rule, coupled with insufficient and contradictory guidance, has blurred the roles of Drug Abatement and Flight Standards such that industry members who seek to comply with the new rule cannot determine how to do so.
6. With the influx of non-certificated maintenance sources (NCMS) performing highly specialized activities, Flight Standards will be hard-pressed to provide consistent, timely and accurate guidance to each NCMS or repair station that must make critical business decisions based on this muddy rule and its impact on what may or may not be "maintenance."

7. My experience suggests that after the October 10, 2006 compliance date arrives, there will be a log-jam of requests from NCMS to register drug and alcohol testing programs, as well as a flood of requests to Flight Standards on whether specific tasks constitute "maintenance."
8. Should the Court grant the request for a stay of this rule, it will allow much needed time for industry members who are currently unable to determine from the FAA's scant and contradictory guidance whether their activities constitute maintenance to get clear and unambiguous direction from Flight Standards. It will also give entities that have not found vendors to replace NCMS that have chosen to leave the industry rather than submit to testing, to find quality NCMS with FAA-regulated testing programs. It will afford Drug Abatement time to process the large number of requests for program registrations that I believe will begin arriving starting on October 10. It will give Flight Standards the breathing room to issue more comprehensive and clear guidance. Finally, it will allow the FAA to address the significant questions posed by the Aeronautical Repair Station Association in its July 18 and August 30 requests for legal interpretation.
9. The existing system has served the aviation maintenance industry well. It has played its part in ensuring the safest period in the history of U.S. commercial aviation. Keeping the rules in place until this appeal has been decided will not adversely affect safety. To the contrary, allowing this rule to come into force with inadequate guidance from the FAA and mass confusion on the part of industry members will result in paralysis for many aviation maintenance providers, which cannot advance the cause of safety.

Executed this 2nd day of October, 2006.



Ian R. Bland

Exhibit E

For Emergency Motion to Stay

Declaration of the Aeronautical Repair Station Association

1. The Aeronautical Repair Station Association (ARSA) was founded in 1984 by ten repair stations as a non-profit trade association to serve the unique needs of civil aviation maintenance. ARSA members perform maintenance, preventive maintenance and alteration of civil aircraft, aircraft products and related components on behalf of U.S. and foreign air carriers as well as other aircraft owners and operators. ARSA currently has nearly 700 members. While the majority of ARSA members are repair stations certificated under 14 CFR part 145, its membership also includes air carriers, manufacturers and companies that distribute parts to international civil aviation businesses. Through its publications, training programs and Annual Repair Symposium, ARSA educates the aviation design, production and maintenance industries on regulatory compliance. For over 20 years, ARSA has represented the industry to the FAA and other federal regulatory bodies.

ARSA and the Subcontractor Testing Rule

2. ARSA has taken an active role on behalf of its members on the issue of extending drug and alcohol testing to subcontractors at any tier of maintenance. The Association, along with other concerned industry members, submitted comments in 2002 and again in 2004. Though these comments illustrated the concern and confusion within the aviation maintenance industry over these new testing requirements, the FAA chose to issue its final rule on January 10, 2006.

3. Even after the rule was issued, ARSA continued its communications with the FAA, in which it stressed the confusion over the new rule and the need for substantive guidance in order to ensure compliance. In April, the FAA granted an extension of the compliance date, moving it from April 10, 2006 to October 10, 2006. ARSA commended the FAA for this action, but reiterated that an extension was meaningless without clear guidance—guidance that the FAA promised, in the extension, to provide the industry.

4. Even before the FAA issued its guidance, ARSA and other industry members recognized that companies seeking to establish compliance with the rule could not do so given the general confusion over the rule. ARSA voiced some of its concerns; on July 18, 2006, the Association asked the agency for an interpretation on certain rebuilding and alteration activities.

5. The FAA finally issued its guidance on August 15, 2006 (Guidance). This consisted of a 5-page Memorandum to Inspectors and a 3-page Guidance Alert for industry members. Unfortunately, the Guidance failed to alleviate the confusion in the industry. Indeed, ARSA's concern with the FAA's Guidance led the Association to submit yet another request for legal interpretation on August 30, 2006. This request addressed several glaring problems within the August 15 documents. To date, the FAA has not answered either of ARSA's requests.

6. ARSA had hoped that the FAA would issue clear and helpful guidance that would allow industry members to make informed decisions on how best to comply with the new testing rule. Unfortunately, the scant and confusing Guidance was wholly insufficient. Furthermore, the fact that the Guidance was released less than 60 days before the compliance date meant that those industry members that had waited for the FAA to act before making decisions on whether to test their employees now had very little time to

implement a program. Higher tier maintenance providers were also put in a difficult position; once the October 10 compliance date arrived, any lower tier vendors without compliant programs could no longer be used.

7. It became evident to the Association that many of its members, and indeed the industry as a whole, were still in a state of confusion and the FAA would likely not answer ARSA's requests for legal interpretation. ARSA therefore requested on September 22 that the FAA extend its compliance date in order to give the agency time to answer the significant outstanding questions and to give companies time to comply once the Guidance was clarified. On September 25, several industry members submitted a letter in support of ARSA' request. On September 27, ARSA supplemented its request with another document in which it summarized the results of a Web survey of industry members. This supplemental document included significant evidence that confusion and paralysis existed among repair stations and non-certificated maintenance sources (NCMS) tasked with ensuring compliance at lower tiers of maintenance.

8. Despite these efforts, on September 28, 2006, the FAA denied ARSA's request. As illustrated below, this denial suggests that the FAA is unwilling to acknowledge the very real problems facing the aviation maintenance industry as a result of this rule and the looming compliance date.

Analysis of the FAA's September 28 Denial of ARSA's Request for Extension of the Compliance Date

9. The FAA's denial of ARSA's September 22, 2006 request for an extension of the compliance date illustrates in particular detail the Association's concerns with the agency's attitude towards the drug and alcohol testing rule. The following examples will show how the FAA has failed to consider credible evidence on the rule's ambiguity by ignoring the salient points in ARSA's request.

10. On page 2 of its denial letter, the FAA states that "while subcontractors have always been subject to testing under the regulations, early guidance appeared to have created some confusion as to whether all subcontractors performing maintenance, or only those subcontractors who took airworthiness responsibility for maintenance, would be subject to testing." ARSA respectfully disagrees with this statement. Subcontractors have **not** always been subject to testing under the regulations, because the guidance on the pre-January 10 rule was clear. In 1989, the FAA issued Implementation Guidelines for the FAA Anti-Drug Program (Guidelines), and Advisory Circular (AC) 121-30. These documents are quite clear on the subject of who is covered by the drug testing rule (the alcohol testing rule was not issued until 1994). Paragraph 5(a)(2) of AC 121-30 states that the rule applies to "direct/prime contractors who perform a sizeable portion of the maintenance on Part 121 or Part 135 aircraft and their component parts and take responsibility for the airworthiness of that product." The Guidelines reiterate this point. The paragraph in Chapter 1 entitled "Who Must Be Tested" holds that "subcontractors to the direct contractor are not required to be included in an approved anti-drug program as long as the direct contractor takes responsibility for the airworthiness of the maintenance on Part 121 or Part 135 aircraft and their component parts." Though the FAA claims that "by the mid-1990s" it had "clarified its position," the agency never issued any superseding guidance that would have sent a clear-cut message to the industry. Indeed, it was not until the January 10 final rule that the FAA officially rescinded this guidance (71 Federal Register 1667). Furthermore, as pointed out in Petitioners' Motion,

certificated repair stations, air carriers and other individual certificate holders have the privilege of performing maintenance under 14 CFR § 43.3. All of these entities may take airworthiness responsibility for the work they perform. Therefore, the FAA's assertion that "all subcontractors performing maintenance" somehow encompasses different entities from "only those subcontractors who took airworthiness responsibility for maintenance" is especially troubling to the Association.[1]

11. The FAA also makes the unsubstantiated claim that "the more than 3,000 inspections of contractors that we had conducted...revealed a broad understanding among the aviation community that the drug and alcohol rules applied to subcontractors." On July 29, 2002, ARSA and other industry members submitted comments to the rulemaking docket, which presented evidence (in the form of a substantiated survey) refuting this contention. The responses to that survey, which represented 325 repair stations, suggested that the vast majority of repair stations did not "flow down" drug and alcohol testing requirements to non-certificated subcontractors. The FAA chose not to address this fact in the January 10 final rule or in its denial of ARSA's extension request. However, ARSA has provided proof that many repair stations, the very entities that have direct contacts with subcontractors, did not (and do not) share the FAA's "broad understanding."

12. While the FAA acknowledges in the denial letter that it asked for further information on the costs and benefits of the new final rule, it suggests that the information provided by ARSA and other industry members "did not substantiate the voiced concerns" over the new rule. ARSA would respectfully ask the court to consider the August 16, 2004 comments (2004 Joint Industry Comments) submitted by the Association and others. In these comments, the aviation maintenance industry presented substantial evidence in the form of a large-scale survey of maintenance providers that cast serious doubt over the FAA's economic assumptions on this new rule. Despite this evidence, which was reviewed and analyzed by a noted aviation economist, the FAA rejected this evidence in the January 10 rulemaking as it did in the denial letter- with a cursory dismissal.[2] ARSA strongly suggests that the data contained in the 2004 Joint Industry Comments would seriously undermine the economic assumptions on which the final rule is built. This would require significant economic analysis by the FAA, as well as raise important issues under the Regulatory Flexibility Act.

13. The FAA's claim in the denial letter that it "published the SNPRM on May 17, 2004...with a regulatory evaluation" neglects to explain why the FAA declined to conduct an Initial Regulatory Flexibility Analysis as required under the Regulatory Flexibility Act. In the denial, the FAA suggests that the rule had no "significant economic burden on the regulated air carriers or on the aviation industry." In the 2004 Joint Industry Comments, as well as in its earlier comments, the industry presented ample evidence that the FAA failed to conduct an Initial Regulatory Flexibility Analysis and indeed incorrectly certified that the new rule "will not have a significant economic impact on a substantial number of small entities." 71 Federal Register 1676. ARSA questions whether the FAA in fact reviewed the industry's comments as suggested in the denial letter.

14. In the "Analysis of the Request for a Delayed Compliance Date" section of the denial letter, the FAA brusquely dismisses four of ARSA's chief concerns relating to the FAA's

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[1] *See* Emergency Motion to Stay Effective Date for Complying with FAA's New Drug and Alcohol Testing Rule, October 3, 2006, p. 3.

[2] In the January 10 final rule, despite the submission of 83 pages of comments by ARSA and others, the FAA noted that "none of the commenters opposing the proposal provided specific data challenging the FAA's fundamental economic assumptions." 71 Federal Register 1667.

August 15 Guidance and two outstanding requests for legal interpretation. It does so by saying "it would not be reasonable to assert that all possible questions about maintenance must be answered to the satisfaction of all regulated parties before the FAA may require compliance by subcontractors with its drug and alcohol rules." ARSA is puzzled by this statement.[3] Four of the questions raised in ARSA's request (concerning whether specific activities constitute maintenance) pertain to the very essence of the drug and alcohol rule. The upcoming implementation of the new drug and alcohol testing rule is directly related to the question of what constitutes maintenance. If an entity does not perform maintenance, it may not institute a drug and alcohol testing program; if it does perform maintenance, it must institute such a program. To deny that the definition of maintenance is directly related to the drug and alcohol testing requirements is a denial of the new rule's basis—aircraft maintenance is safety-sensitive and if performed for an air carrier, drug and alcohol testing must occur.

15. The FAA then dismisses another of ARSA's concerns, which is how repair stations must show compliance with the testing regulations, by saying that the "provisions...relieve, rather than create, a burden for regulated parties." ARSA is unaware to what "provision" the FAA is referring; much of the Association's concern with the concept of whether repair stations must have paragraph A449 in their Operations Specifications stems from the FAA's Guidance. In the August 15 Memorandum to Inspectors (but not, significantly, in the Guidance Alert for industry), the Drug Abatement and Flight Standards Divisions introduced the idea that companies with multiple repair stations might register their testing program with Drug Abatement rather than get a paragraph A449 for each repair station location (and that a paragraph A449 was no longer required for a repair station to show compliance). While this may somehow relieve the burden on air carriers, it has caused, and continues to cause, significant confusion for repair stations. Prior to the Guidance, when air carriers requested evidence of a repair station's compliance with the testing regulations, the repair station could provide a copy of their paragraph A449. Now, not all repair stations will have this paragraph in their Operations Specifications. Since this Guidance was not clearly disseminated to the industry by the FAA, ARSA has already been informed by some repair station members that air carriers are still insisting on paragraph A449 as the **only** method by which a repair station may show compliance. While ARSA appreciates the FAA's efforts to provide additional flexibility to repair stations, it believes that creating this alternate registration and compliance method through internal guidance has only created uncertainty among the entities charged with complying with the rule. This is exactly the kind of confusion that could have been solved had the FAA extended the compliance date.

16. In choosing to ignore ARSA's concerns over whether certain activities constitute maintenance, the FAA suggested that "a delay in the compliance date would not address these concerns," and that the confusion over these questions would not introduce "a level of ambiguity that would paralyze the industry if compliance...is not delayed." ARSA disagrees. Without clearer guidance and precise interpretations of difficult questions facing the industry, maintenance providers and NCMS are being asked to make crucial business decisions with contradictory or incomplete information. The Association hopes that a delay in the compliance date of the rule would allow the FAA the time to answer

[3] One reason for the Association's confusion is that the FAA has steadfastly asserted that only part 121 and part 135 air carriers are regulated parties. See, e.g., 71 Federal Register 1675. The implication of the FAA's statement, however, is that ARSA, or the repair stations it represents, are regulated parties under this new rule. Should this be the case, it bolsters the association's contention that the FAA incorrectly certified the rule under the Regulatory Flexibility Act.

these and other very basic questions fully and accurately, thus providing the industry with solid guidance they can use in making compliance decisions.

17. The FAA further asserts that "the definitions of 'maintenance' and 'preventive maintenance' were issued in 14 CFR section 1.1 on May 15, 1962, and have remained unchanged." Though the definitions have not been altered, the Guidance issued by the FAA has fundamentally changed the way in which maintenance is understood by the industry. The August 15 Memorandum contains a perfect illustration of this problem. On page 2 of the Memorandum, the FAA considers whether a manufacturer that tests a component to determine if repairs are necessary is performing maintenance. In holding that this activity is maintenance, the FAA may not have changed the definition of maintenance, but it directly contradicts the clear language in 14 CFR § 43.3(j) which states that manufacturers have the privilege only to rebuild or alter the articles they produce. Whether the FAA's guidance has changed 14 CFR §1.1 is irrelevant, as its guidance has fundamentally altered the industry's understanding of maintenance. As such, a stay of the final rule is necessary to address these essential issues before the industry is required to comply with confusing and contradictory guidance, rather than a clear and concise rule.

18. The FAA notes that "carriers and repair stations have managed to determine whether a particular activity constitutes maintenance for over 40 years." ARSA agrees—air carriers and repair stations do possess significant experience in these matters. Lower-tier maintenance providers, however, do not possess this knowledge as they have neither the privilege nor the responsibility for making airworthiness determinations. Because many NCMS at lower tiers perform specialized processes, their activities may well present unique challenges. Indeed, the knowledge and experience of air carriers and repair stations explains why the drug and alcohol testing rules have worked so well until now—and why, with the introduction of thousands of untested NCMS into the regulatory scheme, the industry anticipates major problems when attempting to ensure compliance at lower tiers.

19. In addressing the July 18 and August 30 requests for legal interpretation, the FAA mentions that the Office of the Chief Counsel usually takes 120 days to respond. While ARSA regrets that the requests were not submitted earlier, the delay was a direct result of the FAA's own delay in releasing its Guidance. While the FAA specifically stated in its extension of the compliance date that it would "soon provide more substantive guidance," it did not release any guidance until August 15—more than 4 months after extending the compliance date. Until the Guidance was released, ARSA and other industry members had no way of knowing whether the FAA might answer basic yet substantive questions. Unfortunately, the Guidance not only failed to answer questions—it added several new ones. ARSA would therefore like the Office of Chief Counsel to consider its requests for interpretation in a calm and measured way, rather than answering the requests hurriedly. This would best be done before industry members would need to comply with the rule, as the interpretations are essential for companies attempting to make fundamental business decisions involving testing compliance.

20. ARSA agrees with the FAA that maintenance does not lend itself "to a bright-line test or a one-size-fits-all interpretation." It is for precisely this reason that ARSA is concerned with the FAA's suggestions on how to deal with disagreements or questions on whether an activity constitutes maintenance. The FAA says that while "it is the role of the certificate holder (e.g., air carrier, repair station, or mechanic) to make a determination of whether a particular task or function is 'maintenance,' in cases where there may be

doubt, the certificate holder typically works through the issue with the local FAA flight standards field office." While certificate holders certainly make such determinations under the regulations regularly, ARSA is concerned about non-certificated entities, the very entities most affected by this rule. They may go to their local Flight Standards office and get a determination that differs from the rule and longstanding industry practice.

21. Concerning the example of "spot cleaning" a seat cover, the FAA states that the "task does not meet any of the elements in the FAA's definition of maintenance, and the agency would not consider that task to be maintenance"—even if "in a given case an FAA inspector may require the certificate holder to prepare a maintenance release." First of all, the example manual provided and the original question concerned dry cleaning the entire seat cover, not the one sentence about spot cleaning. The manual, the regulation and the industry all establish that dry cleaning seat covers for air carrier passenger and crew seats is maintenance. Failure to perform the task properly (as the warnings in the manual clearly state) will cause a loss of flammability resistance, an element of airworthiness. So, the fact that spot cleaning may not be maintenance does not address whether dry cleaning the entire seat cover is maintenance. Second, under 14 CFR § 43.9, "each person who maintains, performs preventive maintenance, rebuilds, or alters an aircraft, airframe, aircraft engine, propeller, appliance, or component part shall make an entry in the maintenance record of that equipment...(emphasis added)." Therefore, if the FAA through an Aviation Safety Inspector's insistence required a certificate holder to prepare a maintenance release (a required element of a maintenance record under section 43.9(a)(4)), it could only be because maintenance had been performed. ARSA is therefore extremely concerned and confused by the FAA's assertion that a maintenance release doesn't mean that maintenance was performed when the regulation clearly states that it is only needed when maintenance is performed.

22. The FAA justifies its denial of ARSA's extension request in part by saying that the safety rationale behind the new rule would be somehow thwarted by another delay. ARSA disagrees with this contention, and points to the stellar safety record of the U.S. commercial aviation industry since the advent of the current drug and alcohol testing regime. The FAA has produced no evidence in any of the rulemaking documents associated with this final rule that safety in commercial aviation has been adversely affected by drug or alcohol abuse among subcontractors to maintenance providers. We contend that safety may be adversely affected by the constant confusion and conflicting guidance being provided by the FAA; on the national level in its "official" guidance and at a local level where individual inspectors are being forced to determine whether specific tasks are maintenance. If a task is determined to be maintenance for one entity but not for another, safety is definitely affected—please refer to the dry cleaning of seat covers versus spot cleaning example above.

23. The FAA also suggests that a further extension of the compliance date would "send a signal that the agency is not committed" to full compliance with drug and alcohol testing. No industry member is under such a misconception. The FAA has made itself abundantly clear since 2002 that it is committed to extending drug and alcohol testing to all tiers of a maintenance contract. ARSA understands this goal; the Association simply wants the FAA to give the industry coherent and clear guidance based upon the law and regulation before it asks NCMS, many of which are not as knowledgeable about the Federal Aviation Regulations, to comply with the rule.

24. ARSA disagrees with the FAA's contention that the industry has not shown that extending testing requirements to non-certificated entities "could create irreparable harm

to any employer." Many NCMS are small companies; though the cost of implementing a drug and alcohol program is negligible for large air carriers, many NCMS simply cannot afford to implement testing on their employees, especially if the aviation work represents a small percentage of their business. Further, since much confusion exists over whether certain activities constitute maintenance, NCMS implementing a program run the risk of violating the drug and alcohol testing regulations by "overtesting" their employees. Under the Department of Transportation regulation found at 49 CFR section 40.347(b)(2), an employer cannot include persons not covered by the DOT (and by extension, FAA) testing regulations in a DOT (or FAA) regulated testing program. Therefore, until the FAA corrects its guidance and answers these important questions, lower tier providers risk substantial financial loss by incorrectly implementing testing programs.

25. While the FAA believes that ARSA has "made no showing that it is in the public interest to grant...another extension...," ARSA believes that the confusion facing the industry is ample to demonstrate a public interest. The current system works because industry members understand it and can function within its bounds. Once the new rule goes into effect, it will alter (and in some cases, already has altered) the existing relationships within the industry. It has already forced many NCMS out of the industry and will continue to do so, which causes repair stations and other maintenance providers to find other, often less experienced, vendors. ARSA believes that this safety concern is of far greater interest to the public than the issue of drug or alcohol abuse at lower tiers of a maintenance contract, since the FAA has provided no evidence that such a problem even exists or will exist if the compliance date is extended.

26. The FAA dismisses ARSA's concern about NCMS leaving the industry by stating that "businesses previously not subjecting their employees to testing would simply pass those costs on to the party with whom they contract." The Association believes that this is a gross simplification of the situation. As mentioned above, implementing a testing program may be a significant financial burden. Even if this cost may be passed on, however, many NCMS are reluctant to implement testing programs because it subjects them to a further regulatory burden. In order to function as an NCMS, these companies must already agree to allow the FAA to inspect their premises under 14 CFR section 145.223 and must perform the work under a quality system equivalent to the repair station with which it contracts, under section 145.217. For some NCMS, allowing Drug Abatement to inspect them and issue violations is another regulatory burden that they are unwilling to shoulder. Finally, for many NCMS, passing along the cost may be impossible. The FAA drug and alcohol testing regulations do not apply "to any person who performs a [safety-sensitive] function...for an employer outside the territory of the United States. The FAA's contention that NCMS may simply pass along the added costs of testing ignores the reality of the global marketplace for aviation maintenance. NCMS that attempt to pass along their compliance costs to higher tiers will likely lose business to NCMS (or repair stations) located outside the United States that can perform the same function without bearing the costs of drug and alcohol testing.

27. For all of the above reasons, ARSA believes that the FAA erred in denying its extension request. Therefore, ARSA asks the Court to grant its Motion to Stay the final rule pending the outcome of the present appeal, which will give the FAA and industry time to address the outstanding issues surrounding maintenance and testing compliance. If the compliance date is not changed, ARSA members and others in the industry will bear the burden of trying to understand and comply with this unfortunate rule and the vague and ambiguous guidance offered to date by the FAA.

The above reasons more than justify the stay requested by petitioners in Case 06-1091 and 06-1092.

Executed this 13th day of October, 2006.

Sarah MacLeod

Exhibit F

For Emergency Motion to Stay

Declaration of David A. Smith

Pursuant to 28 U.S.C. § 1746, I, David A. Smith, declare the following under penalty of perjury:

1. I am the Director of Quality Assurance, U.S. Maintenance at Jet Aviation of America, Inc. (Jet Aviation), in Teterboro, New Jersey. I have been in my present position for approximately 6 years and have been an employee of Jet Aviation for over 10 years.
2. Jet Aviation is an FAA-certificated repair station under 14 CFR part 145 that performs maintenance on small, medium, and long-range business jets. Its customers include air carriers certificated under 14 CFR part 135.
3. Jet Aviation currently possesses an FAA-regulated drug and alcohol testing program.
4. Jet Aviation has contracted out the refurbishing of medical kits to a non-certificated maintenance source (NCMS) for over 3 years. The NCMS is ISO-certified and manufactures the kits for aviation and other uses.
5. Jet Aviation has always considered the activities of this NCMS to constitute "maintenance" covered by 14 CFR part 1 and 14 CFR part 43. The NCMS is named on Jet Aviation's contractor list as required under 14 CFR § 145.217(a)(ii), and Jet Aviation has generated maintenance records under 14 CFR part 43 for the work done by the NCMS.
6. As a direct result of the drug and alcohol testing rule (71 Federal Register 1666), and the confusing FAA guidance, the NCMS has indicated its belief that it does not perform "maintenance" on the medical kits, and therefore will not test its employees who refurbish the kits for Jet Aviation.
7. In reaction to the new drug rule and the FAA's guidance which muddies the previously clear issue of what constitutes "maintenance" under 14 CFR parts 1 and 43, the NCMS now states that it "rebuilds" the medical kits, an activity that may or may not constitute part 43 "maintenance," depending on what guidance the FAA gives in response to this very question that ARSA has submitted to the FAA. Accordingly, Jet Aviation is now paralyzed on this question because Jet Aviation simply cannot determine whether the activities of the NCMS are "maintenance" covered by parts 1 and 43, whether the new drug rule applies to the NCMS, and most importantly, whether Jet Aviation will be exposed to liability by reason of having legal responsibility under the FAA regulations for any failure by the NCMS to comply with the new drug rule.
8. This issue has caused irreconcilable confusion for Jet Aviation and other customers of the NCMS (air carriers and repair stations), some of which have taken a view opposite to Jet Aviation's view: while Jet Aviation considers this activity to constitute "maintenance," these other customers have taken the view that the activity of the NCMS is ***not*** "maintenance." This NCMS, Jet Aviation, and these other customers will all be

immediately and dramatically affected should the NCMS' rebuilding activities be found to constitute "maintenance" when the FAA has finally clarified this issue by offering guidance that the FAA promised months ago when the new drug rule first became final.

9. While Jet Aviation understands that the Aeronautical Repair Station Association requested a legal interpretation on July 18 on the subject of whether rebuilding and alterations constitute "maintenance," the FAA has not yet answered the request. Even if the FAA provided guidance on this subject today, there would not be enough time before October 10 for the NCMS to institute testing or for Jet Aviation to find another vendor, should these activities constitute "maintenance." Indeed, the NCMS' kits are standard equipment for many aircraft manufacturers; if the NCMS is not able to rebuild its items, and if its actions constitute "maintenance," this could have immediate and irreparable repercussions for many maintenance providers, Jet Aviation included. Jet Aviation has the impossible task of trying to comply with a new drug rule and avoid legal liability in the teeth of the rule's present vagueness and ambiguity.
10. Were the compliance date not days away, but several months into the future, Jet Aviation and its NCMS would have a reasonable opportunity to work with the clarification that is expected from the FAA, all without being at the horns of a dilemma by facing immediate liability no matter what steps Jet Aviation takes as the new rule becomes enforceable in a matter of days.
11. As a result of the vague and ambiguous language in the drug and alcohol testing rule, and due to the lack of clear guidance issued by the FAA, Jet Aviation has no way to tell whether the activities of this NCMS constitute "maintenance." As a result, Jet Aviation has no way of knowing whether it will be in compliance with the drug and alcohol regulations as of October 10, 2006, and more importantly, whether it will face liability for the responsibility that it has for the activities of the NCMS, should this NCMS be found to be conducting "maintenance" that is subject to the new drug rule. More importantly, Jet Aviation has no way to protect itself against a rule that is so vague that it is not capable of being complied with. Only an extension to the imminent compliance date would relieve this legal pressure to which Jet Aviation will be exposed starting in a few business days.

Executed this 28TH day of SEPTEMBER, 2006.

David A. Smith

Exhibit G

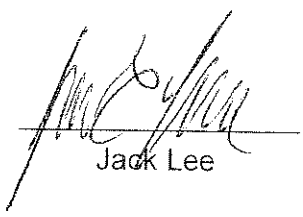
For Emergency Motion to Stay

Declaration of Jack Lee

Pursuant to 28 U.S.C. § 1746, I, Jack Lee, declare the following under penalty of perjury:

1. I am the Technical Support Manager for Prime Turbines in Hyannis, Massachusetts. I have been in my present position for over 16 years. I also serve as the company's Designated Employer Representative for Prime Turbines' drug and alcohol program.
2. Prime Turbines is an FAA-certificated repair station that specializes in repairs of Pratt & Whitney PT6 turbine engines. Prime Turbines maintains an FAA-regulated drug and alcohol testing program.
3. Prime Turbines uses non-certificated maintenance sources (NCMS) and repair stations to perform various repairs and overhauls. One vendor has a repair station certificate and is also a manufacturer. This vendor performs repairs and overhauls in addition to its manufacturing functions and has an FAA-regulated drug and alcohol testing program.
4. Prime Turbines has asked all of its repair contractors to provide evidence that they are in compliance with the new drug and alcohol testing rule (71 Federal Register 1666), and that any subcontractors they utilize are also in compliance. The manufacturer vendor has provided Prime Turbines with evidence of its compliance. However, the vendor notified Prime Turbines that some of its subcontractors are not subject to testing.
5. The vendor informed Prime turbines that its contractors that perform specialized processes (e.g., certain welding, drilling and machining activities) as part of the vendor's repairs were not subject to testing because the subcontractors are performing detail manufacturing processes. The vendor's stated rationale for this position was that its subcontractors perform these identical tasks when they perform manufacturing functions for the vendor. The distinction between a manufacturing activity (for which drug testing is *not* required) and a maintenance activity (for which drug testing *is* required) has not been resolved by the FAA. Because of this confusion, Prime Turbines is concerned that these subcontractors are performing maintenance and must be tested. Prime Turbines has no way to resolve this distinction, but Prime Turbines will nevertheless be held responsible for the actions and omissions of its lower tiers.
6. Because the new drug and alcohol rule stated in the preamble that once an entity (i.e., a repair station or NCMS) chooses to start an FAA-regulated program, it is responsible for its own compliance as well as the compliance of maintenance providers at lower tiers, Prime Turbines may be held responsible for the noncompliance of its subcontractors.
7. As a direct result of this new rule, Prime Turbines therefore has no reasonable way to know whether its drug and alcohol testing program, as well as the programs of subcontractors at lower tiers, will be in compliance with the new rule on October 10, 2006 or on any day thereafter.

Executed this 2 day of OCTOBER 2006.



Jack Lee

Exhibit H

For Emergency Motion to Stay

Federal Aviation Administration

Memorandum

Date: AUG 15

To: All Flight Standards Service Airworthiness Inspectors
All Drug Abatement Inspectors

From: Manager, Aircraft Maintenance Division, AFS-300
Manager, Drug Abatement Division, AAM-800

Reply to the Attn of: R. Domingo, AFS, (202) 267-3807
K. Leamon, AAM, (202) 267-8442

Subject: Guidance—Maintenance and Preventive Maintenance

There have been numerous questions regarding whether certain tasks are considered maintenance and/or preventive maintenance by the FAA's regulations. This memorandum will provide direction for these specific areas, but will also attempt to convey a general sense of direction to be used in determining when an action falls under the definitions of maintenance/preventive maintenance as defined in the regulations (14 CFR parts 1 and 43). Additionally, this memorandum will provide clarification of the oversight responsibility of the drug and alcohol testing program in 14 CFR part 121, appendices I and J.

It is important to note the primary responsibility for compliance with the drug and alcohol testing program and ensuring that all persons performing maintenance and/or preventive maintenance duties are covered at any tier, lies with the air carrier. Any work an air carrier traditionally performed themselves must be covered by a drug and alcohol program if that work is now outsourced (at any tier).

It is also important to remember, any maintenance or preventive maintenance an air carrier or employer would have performed in-house is still covered under the drug and alcohol testing program when the maintenance and/or preventive maintenance is outsourced at any tier.

Cleaning the Aircraft—The physical cleaning of an aircraft is not normally considered maintenance or preventive maintenance within the context of the regulations. However, there may be occasions where the preparation of the aircraft for the cleaning process requires removal of components or protection of components that fall under the definition of maintenance or preventive maintenance. For example, prior to cleaning an aircraft, it may be necessary to close and secure the upper and lower fan cowl doors on a transport

category aircraft. The FAA considers the closing and securing of the engine fan cowl doors maintenance. Additionally, after the cleaning process, it may be necessary to reapply lubrication compounds and preservatives to aircraft components, which could be considered maintenance/preventive maintenance. Conversely, cleaning of seat cushions/covers would not be considered maintenance.

Decorative Coatings—14 CFR part 43, appendix A defines the "refinishing of decorative coating of fuselage,...cabin, or cockpit interior..." as preventive maintenance.

Repair to Cargo Containers - Are repairs/maintenance to cargo containers loaded on the aircraft in cargo operations included? These are considered part of the airplane.

- Yes. These types of repairs/maintenance are covered under part 43 and must be performed by persons covered under a program.

Building Parts – Does the person who physically manufactures a part during the process of a repair to an aircraft have to be covered?

- No. The person who physically manufactures a part does not have to be a covered employee because manufacturing is not considered maintenance, or preventive maintenance. However, the person who takes that manufactured part and consumes it while repairing the next higher assembly must be covered under a program.

Line Service Maintenance – Do persons that an air carrier arranges with to perform servicing at line maintenance facilities or locations outside of their normal routes need to be covered?

- Yes, if those persons are performing line servicing functions that would be considered maintenance and/or preventive maintenance (as listed in part 43 appendix A).

Manufacturers – Is a manufacturer that performs a test on a component to determine the extent of repairs necessary or to determine the serviceability of a component required to be covered under a drug and alcohol program when performing work for a 121/135 air carrier?

- Yes. The testing is being performed to a standard required by the manufacturer or other standards acceptable to or approved by the Administrator. The testing standard may be part of an inspection requirement in the technical data being used in the testing process.

Mechanic's Helpers – Do non-certificated helpers that perform some maintenance duties, as part of a process under direct supervision, need to be covered even though they will not sign off the work?

- Yes. All employees who conduct maintenance or preventive maintenance are required to be covered by an FAA drug and alcohol testing program regardless of whether they sign off the work or not.

Third Level Subcontracting – If an air carrier makes an arrangement for an outsource maintenance provider to perform maintenance on its aircraft, or components thereof, and that provider contracts out portions of that maintenance (third level), does the third level contactor have to be covered under a drug and alcohol program?

- Yes. The regulations require any persons, at any level, to be covered under a program. It is the air carriers' responsibility to ensure that any maintenance contracted out is done with persons covered by a program. The air carrier cannot delegate its regulatory responsibility to ensure all persons who perform maintenance or preventive maintenance are covered.

Anyone performing maintenance or preventive maintenance would fall under the requirements of part 121, appendices I and J.

The definition of maintenance contained in 14 CFR part 1.1 states:

> "*Maintenance* means inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance."

Any person performing these functions is performing maintenance.

In the performance of an overhaul, 14 CFR part 43.2 states:

(a) No person may describe in any required maintenance entry or form an aircraft, airframe, aircraft engine, propeller, appliance, or component part as being overhauled unless—

> (1) Using methods, techniques, and practices acceptable to the Administrator, it has been disassembled, cleaned, inspected, repaired as necessary, and reassembled; and
>
> (2) It has been tested in accordance with approved standards and technical data, or in accordance with current standards and technical data acceptable to the Administrator, which have been developed and documented by the holder of the type certificate, supplemental type certificate, or a material, part, process, or appliance approval under Sec. 21.305 of this chapter.

Therefore, performing all these functions (when testing is required by the type certificate holder, STC holder, or approval under § 21.305) constitutes an overhaul and is considered to be maintenance. Some have interpreted cleaning to be maintenance because cleaning components is part of an overhaul, and overhaul is maintenance. However, when cleaning is performed *as part* of the overhaul "process," it is the overhaul that is defined as

maintenance. Cleaning by itself is not considered maintenance. This is evident in the case of cleaning seat covers, which, as explained above, is not considered maintenance.

The definition of preventive maintenance in 14 CFR part 1.1 states:

> "*Preventive maintenance* means simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations."

Appendix A (c) 14 CFR part 43 lists the work the FAA has long considered preventive maintenance, provided it does not involve complex assembly operations. Any person performing the listed functions is performing preventive maintenance.

If maintenance and/or preventive maintenance duties are being performed on an aircraft that is operating under a 14 CFR part 121 or part 135 certificate or an airplane or rotorcraft that is operating under section 135.1(c), the individuals performing those maintenance and/or preventive maintenance duties, directly or by contract, including by subcontract at any tier, must be included in FAA-mandated drug and alcohol testing programs (14 CFR part 121, appendices I and J) no later than October 10, 2006.

If there is a need for further clarification on the above points, contact your local Flight Standards Manager. Questions regarding what is or is not maintenance or preventive maintenance should not be transferred to the Drug Abatement Division in the Office of Aerospace Medicine.

The oversight responsibility for FAA-mandated drug and alcohol testing programs resides solely with the FAA Office of Aerospace Medicine, Drug Abatement Division, AAM-800. Airworthiness Inspectors conducting certificate management responsibilities must defer all concerns and questions regarding FAA-mandated drug and alcohol testing programs to the following Drug Abatement managers:

- Karen Leamon, Manager of the Special Investigations and Enforcement Branch (202) 267-8442
- Virginia Lozada, Acting Manager of the Eastern Compliance and Enforcement Center, (305) 716-3560
- James Ronan, Manager of the Central Compliance and Enforcement Center, (817) 222-5327
- Andrew Monetti, Manager of the Western Compliance and Enforcement Center, (310) 322-2066, ext. 10

Additionally, there are no requirements for 14 CFR part 145 air agencies to submit and acquire FAA-mandated drug and alcohol testing programs. **Airworthiness inspectors must not require repair stations to obtain these programs.**

An air carrier operating under 14 CFR part 121 and/or part 135 cannot use any contractor to perform safety-sensitive functions unless the contract employee is covered under that air carrier's FAA-mandated drug and alcohol program or covered under the contractor's

own FAA-mandated drug and alcohol program. If a 14 CFR part 121 or part 135 certificate holder uses a 14 CFR part 145 air agency to perform maintenance/preventive maintenance work, the 14 CFR part 145 air agency can comply with the drug and alcohol testing regulations by choosing one of the following:

- It may be included in the 14 CFR part 121 or part 135 certificate holder's drug and alcohol program for whom they are performing safety-sensitive duties;
- It may choose to have a drug and alcohol program by obtaining an A449 paragraph in their Operations Specifications; or
- It may choose to have a program registration obtained from the Drug Abatement Division that may cover multiple certificates, locations, or functions for the same company.

The current 14 CFR part 145 Operations Specifications paragraph A004 states that the certificate holder is not authorized to conduct operations for 14 CFR part 121 or part 135 certificate holders without the issuance of paragraph A449. AFS-300 will be revising paragraph A004 to correct any restrictions on a 14 CFR part 145 certificate holder from performing safety-sensitive functions when that 14 CFR part 145 certificate holder chooses not to have a paragraph A449 because it has complied with an FAA-regulated drug and alcohol testing program in one of the ways listed above.

To avoid any confusion in the future, any non-standard paragraph language within Operations Specifications paragraph A449 must be coordinated with Diane J. Wood, Manager of the Drug Abatement Division, AAM-800.

If you have any further questions, please contact your manager.

Federal Aviation Administration
Office of Aerospace Medicine and

Flight Standards Service

14 CFR Part 121, Appendices I and J

GUIDANCE ALERT

On January 10, 2006, the Federal Aviation Administration (FAA) published a final rule in the Federal Register amending 14 CFR part 121, appendices I and J, "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities." A copy of the final rule may be obtained from the Drug Abatement Division's web page (http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/).

The final rule was issued to clarify that each individual who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for a company operating under part 121, part 135, or section 135.1(c), is subject to drug and alcohol testing. The final rule became effective on April 10, 2006, with a compliance date of October 10, 2006.

The guidance in this alert addresses specific issues that have been raised to the FAA by the aviation industry regarding the final rule. All of the following issues are being restated for clarity but have been unchanged by the January 10 final rule.

- The following types of safety-sensitive functions are covered by the FAA's drug and alcohol testing regulations:
    - Flight crewmember duties
    - Flight attendant duties
    - Flight instruction duties
    - Aircraft dispatcher duties
    - Aircraft maintenance and preventive maintenance duties
    - Ground security coordinator duties
    - Aviation screening duties
    - Air traffic control duties

- The definition of maintenance is addressed in 14 CFR part 1 and preventive maintenance is addressed in 14 CFR part 43.

- Any maintenance or preventive maintenance an air carrier or employer would have performed in-house is still covered under the drug and alcohol testing program when the maintenance and/or preventive maintenance is outsourced at any tier.

- The Flight Standards Service's Aircraft Maintenance Division has compiled and listed below some of the frequently asked questions submitted about whether certain functions are considered maintenance and/or preventive maintenance by the Federal Aviation Regulations. It is important to note that the primary responsibility for compliance with the drug and alcohol testing program and ensuring that all persons performing maintenance and/or preventive maintenance duties are covered at any tier lies with the air carrier.
    - Cleaning the Aircraft—The physical cleaning of an aircraft is not normally considered maintenance or preventive maintenance within the context of the regulations. However, there may be occasions where the preparation of the

aircraft for the cleaning process requires removal of components or protection of components that fall under the definition of maintenance or preventive maintenance. For example, prior to cleaning an aircraft, it may be necessary to close and secure the upper and lower fan cowl doors on a transport category aircraft. The FAA considers the closing and securing of the engine fan cowl doors as maintenance. Additionally, after the cleaning process, it may be necessary to reapply lubrication compounds and preservatives to aircraft components, which could be considered maintenance/preventive maintenance. Conversely, cleaning of seat cushions/covers would not be considered maintenance.

- Decorative Coatings---14 CFR part 43, appendix A defines the "refinishing of decorative coating of fuselage....cabin, or cockpit interior..." as preventive maintenance.

- Repair to Cargo Containers - Are repairs/maintenance to these containers that are loaded on the aircraft in cargo operations included? These are considered part of the airplane.

    - Yes. These types of repairs/maintenance are covered under part 43 and must be performed by persons covered under a program.

- Building Parts – Does the person who physically manufactures a part during the process of a repair to an aircraft have to be covered?

    - No. The person who physically manufactures a part does not have to be a covered employee because manufacturing is not considered maintenance, or preventive maintenance. However, the person who takes that manufactured part and consumes it while repairing the next higher assembly must be covered under a program.

- Line Service Maintenance – Do persons that an air carrier arranges with to perform servicing at line maintenance facilities or locations outside of their normal routes need to be covered?

    - Yes, if those persons are performing line servicing functions that would be considered maintenance and/or preventive maintenance (as listed in part 43 appendix A).

- Manufacturers – Is a manufacturer that performs a test on a component to determine the extent of repairs necessary or to determine the serviceability of a component required to be covered under a drug and alcohol program when performing work for a 121/135 air carrier?

    - Yes. The testing is being performed to a standard required by the manufacturer or other standards acceptable to or approved by the Administrator. The testing standard may be part of an inspection requirement in the technical data being used in the testing process.

- Mechanic's Helpers – Do non-certificated helpers that perform some maintenance duties, as part of a process under the direct supervision, need to be covered even though they will not sign off the work?

    - Yes. All employees who conduct maintenance or preventive maintenance are required to be covered by an FAA drug and alcohol

testing program regardless of whether they sign off the work or not.

- Third Level Subcontracting – If an air carrier makes an arrangement for an outsource maintenance provider to perform maintenance on its aircraft, or components thereof, and that provider contracts out portions of that maintenance (third level), does the third level contactor have to be covered under a drug and alcohol program?

    - Yes. The regulations require any persons, at any level, to be covered under a program. It is the air carriers' responsibility to ensure that any maintenance contracted out is done with persons covered by a program. The air carrier cannot delegate its regulatory responsibility to ensure all persons who perform maintenance or preventive maintenance are covered.

- The Federal Aviation Regulations require a regulated employer to ensure any individuals performing safety-sensitive functions by contract for it are included in a FAA-mandated drug and alcohol testing program. How an employer determines whether an individual is included in a FAA-mandated drug and alcohol testing program is a business decision. The FAA's drug and alcohol regulations do not require a company to audit the testing programs of a contractor.

- Anyone performing such functions must be included in a FAA-mandated drug and alcohol testing program.

- The drug and alcohol testing regulations do not apply to employees who are assigned to perform safety-sensitive functions solely outside of the United States and its territories. This has not changed since 1988.

The FAA has provided its inspectors with internal guidance to help them oversee compliance with this regulation. Additionally, the FAA has provided the public with an internet site to ask and view questions about drug and alcohol testing. This site can be accessed by going to www.faa.gov and selecting the link titled Frequently Asked Questions (FAQ). At the FAQ site select the category Medical and then select the subcategory Drug and Alcohol Testing.

If you have any questions concerning the drug and alcohol testing regulations, please contact the Drug Abatement Division via telephone (202-267-8442) or email (drugabatement@faa.gov). If you need further clarification concerning the definition of maintenance and preventive maintenance, please contact your local Flight Standards District Office.

Exhibit I

For Emergency Motion to Stay

(Extracted from August 16, 2004 industry comments to Rulemaking Docket No. FAA-2002-11301)

Joint Industry Comments

Drug and Alcohol Testing
Supplemental Notice of Proposed Rulemaking

Docket Number FAA-2002-11301

Submitted August 16, 2004

are explained through examination of the specific portions of the SNPRM set forth in italics below.

A. *The FAA is basing costs on an increase of 25% [from the 1,188 non-certificated contractors now participating in DOT/FAA-approved programs], for an additional 297 contractors.* 69 Fed. Reg. at 27,985.

The undersigned entities dispute the FAA's basic assumption that only 297 additional entities would be affected by the proposed rule. As part of the rulemaking process, the RFA requires an agency to perform a detailed analysis of the potential impact of a proposed rule on small entities. 5 U.S.C. § 603(b). The agency must identify the number of entities in a class, the number of classes, and then develop at least an estimate of the number of small entities within each class. The agency must also list each of the affected classes by its NAICS code. FAA's baseless assumption that the rulemaking would only affect 297 entities compromises the validity of the FAA's IRFA. The FAA must gather sufficient data and perform a proper IRFA before it can implement the proposed rule.

ARSA commissioned its chief economist, Dr. Darryl Jenkins, to perform an analysis of the Association's surveys to determine the likely number of NCMS that the proposed rule would affect.[6] According to Dr. Jenkins, Repair Station Survey respondents representing nearly seven percent of the approximately 5,000 FAA certificated repair stations[7] are a statistically valid sample of the repair station industry. Based on their answers to Repair Station Survey Question 11, and accounting for the appropriate number of duplicative responses, Dr. Jenkins determined that the weighted average of NCMS per repair station was approximately 4.53. Dr. Jenkins then applied this weighted average across the repair station industry to arrive at a statistically valid estimate of 12,000 to 22,000 NCMS to which the proposed rule could apply. According to Dr. Jenkins, this result disproves the FAA estimate of 297 affected NCMS by a greater than .01 level of significance.[8] This means that there is a one percent chance that Dr. Jenkins statistical analysis wrongly rejected the FAA's estimate.

Even significantly discounting Dr. Jenkins' estimates, it is clear that the FAA's estimated number of NCMS (297) is unfounded. Through the sampling of seven percent of FAA-certificated repair stations, ARSA discovered 580 distinct NCMS – nearly twice the FAA's total estimate. As Dr. Jenkins explains, it is highly unlikely that ARSA's 580 NCMS represent an exhaustive list. In addition, Dr. Jenkins estimate of 12,000 to 22,000 NCMS includes only those NCMS

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[6] Appendix D.
[7] See, http://av-info.faa.gov/dd_sublevel.asp?Folder=%5CRepairStations (last modified Aug. 15, 2004) for list of FAA-certificated repair stations.
[8] Appendix D.

contracting directly with a certificated repair station. The estimate did not account for NCMS on the second contractual tier and below. The true number may be exponentially larger than 22,000. This can only lead to the conclusion that the FAA woefully underestimated the number of NCMS in its regulatory evaluation. FAA, Draft Regulatory Evaluation, Supplemental Notice of Proposed Rulemaking, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities at 4 (Sept. 2003).

This underestimation results from flawed assumptions on the FAA's part. The agency is under the impression that its list of non-certificated *contractors* is a valid predictor of *subcontractors* to whom the proposed rule would apply. While the FAA eliminated most certificated entities from its list, it failed to distinguish between those entities that subcontract with repair stations and those that directly contract with air carriers under Parts 121 and 135. Under the current D&A Program rule, any entity that *directly* contracts to perform safety sensitive maintenance for an air carrier, whether a certificated repair station, a non-certificated fixed based operator (FBO), or other non-certificated entity must participate in a D&A Program. Thus, even though most of the entities on the FAA list do not hold certificates, it is impossible to determine which are currently required to participate in D&A Programs and which chose to do so voluntarily.

Of the 580 distinct NCMS identified by the ARSA surveys, only three appear on the FAA's list. The FAA believes, however, that the contractors on this list "would be the most likely to be affected by this rulemaking." FAA, Draft Regulatory Evaluation at 3. This demonstrates that the FAA does not appreciate the actual effect of this rulemaking. The contractors on that list would, in fact, be one of the groups least likely to be affected. They already have D&A Programs and do not need to alter their behavior or face additional costs. It is the subcontractors that have no direct relationship with air carriers who will be affected the most. That only three of the 580 NCMS that ARSA has identified appear on the FAA's list demonstrates that the agency failed to seriously consider NCMS in developing its IRFA. **A list of non-certificated entities with direct contractual relationships with air carriers is irrelevant to development of an estimate of NCMS that contract with repair stations and non-certificated entities.**

In addition, the FAA elected to use 25% as the number of additional non-certificated entities that would possibly be affected. The FAA offers no explanation for how it determined this figure, and in fact, makes no attempt to suggest that any rational basis exists for it. See, FAA, Regulatory Evaluation at 4. As Dr. Jenkins explains, "[w]ithout any empirical data to support its assertion, the FAA's estimate that only 297 NCMS would be affected by the proposed rule has

no significance. Lacking empirical support, the FAA cannot justify its reliance on this number for their regulatory flexibility analysis."[9]

As ARSA's economic analysis demonstrates, the FAA's conclusion that the proposed rule would affect, *at a maximum*, 297 NCMS is without scientific merit. Based on ARSA's statistically valid survey results, an estimated 12,000 to 22,000 NCMS could find themselves subject to the proposed rule. The FAA "based its cost [for this rulemaking] on an increase of 25%, for an additional 297 contractors." 69 Fed. Reg. 27,985. ARSA has demonstrated that the actual increase would be between 1000% and nearly 2000%. Based on this gross underestimation alone, the FAA must perform another IRFA with the proper data to accurately project the cost of the rulemaking.

B. *For this rule, the small entity group is considered to be Part 145 repair stations (SIC Code 4581, 7622, 7629, and 7699).* 69 Fed. Reg. 27,986.

The FAA's inclusion of only those SIC Codes related to Part 145 repair stations under-represents the industries that this rulemaking will affect. In performing the IRFA, the FAA must identify the classes and numbers of small entities subject to the rulemaking. 5 U.S.C. § 603(b)(1). For an IRFA to be valid, "[i]t is crucial that the agency [performing the rulemaking] list all industry classes affected by this rule." Small Business Administration, A Guide to Government Agencies: How to Comply with the Regulatory Flexibility Act (May 2003).

The preceding section demonstrated that the FAA failed to properly identify the number of entities, particularly the number of small entities the rulemaking would affect. The FAA's inclusion of only those SIC Codes[10] applicable to Part 145 repair stations demonstrates the agency's failure to consider all applicable industries and further weakens the value of the IRFA for this rulemaking.

As part of its NCMS Survey, ARSA asked respondents to identify the type of work they performed for the Repair Stations with which they had contracts.[11] Survey respondents represented a wide array of industries, such as metal finishing, heat treating, fabric fireproofing, upholstery cleaning, metallurgical consultation, hydrostatic testing, painting, and electronics repair. From those responses, ARSA has compiled a list of 21 different NAICS Codes categories, including:

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[9] Appendix D.
[10] The Small Business Administration indicates that "[a]gencies must identify each of the affected classes according to their *NAICS* code [emphasis added]." Small Business Administration, A Guide to Government Agencies: How to Comply with the Regulatory Flexibility Act (May 2003). For the purposes of this comment then, ARSA uses the NAICS Codes instead of the SIC Codes.
[11] See Appendix B, Question 4.

Exhibit J

For Emergency Motion to Stay

Declaration of David Owen

Pursuant to 28 U.S.C. § 1746, I, David Owen, declare the following under penalty of perjury:

1. I am Chief Inspector for Precision Fuel Components, LLC (PFC). I have been in my present position for 2 years. PFC split from its sister repair station, Precision Engines, LLC, and received its own repair station certificate in 2004. I also serve as Chief Inspector for Precision Engines and have worked for the company for 25 years.
2. PFC is an FAA-certificated repair station. It repairs small engine fuel controls manufactured by Honeywell and other aviation manufacturers.
3. When performing repairs on a fuel control, PFC utilizes the manufacturer's maintenance manual.
4. Some of the repairs PFC performs include rework processes that are highly specialized. The manufacturer's maintenance manual often contains a list of approved vendors who may perform these operations. Many of these approved vendors do NOT have an FAA-regulated drug and alcohol testing program, nor do they intend to test their employees, as most of their work is done for manufacturers and is not covered under 14 CFR part 121, Appendices I and J.
5. PFC began looking for other approved vendors to replace those that will not be available for use after the compliance date of the drug and alcohol testing final rule.
6. PFC requested an individual one-year extension from the Drug Abatement Division in March 2006, but was denied because the compliance date was moved to October 10, 2006.
7. Despite its best efforts, PFC has not yet been able to find approved vendors for each process that will have a testing program or consent to placing its employees under PFC's program.
8. Once the final rule goes into effect, PFC will be in a difficult situation when offered air carrier work involving parts with specialized processes for which PFC does not have a replacement vendor. If the compliance date was delayed by several months, it would afford PFC the opportunity of securing approved vendors with FAA-regulated testing programs.

Executed this 28 day of Sept., 2006.

David Owen

Exhibit K

For Emergency Motion to Stay

CHAPTER 161. INTRODUCTION TO PART 145 REPAIR STATIONS

SECTION 1. BACKGROUND

1. PURPOSE. This chapter defines relevant terms for Title 14 of the Code of Federal Regulations (14 CFR) part 145, Repair Stations. It also explains the policies and procedures applicable to a repair station, regardless of its geographic location.

2. GENERAL.

A. Definitions.

(1) Air Agency Certificate. Federal Aviation Administration (FAA) Form 8000-4, Air Agency Certificate, is the authority granted by the FAA for a repair station to conduct business. The certificate states the following information:

(a) Repair station number.

(b) What the repair station's ratings are to include:

- Class ratings
- Limited ratings
- Limited specialized service ratings

(c) The location and name of the repair station.

(d) The expiration date, as applicable.

(2) Accountable Manager. The person designated by the certificated repair station as responsible for and with authority over all repair station operations that are conducted under part 145. This person's duties include ensuring that repair station personnel follow the regulations and serving as the primary contact with the FAA.

NOTE: The FAA Accountable Manager definition may differ from the Joint Aviation Authorities (JAA) Accountable Manager; however, one person may serve both positions. The operations specifications (OpSpecs) and Vital Information Subsystem (VIS) have been revised to include both.

(3) Article. An aircraft, airframe, aircraft engine, propeller, appliance, or component part.

(4) Capability List (CL). A list of articles of which the repair station is rated to perform maintenance, preventative maintenance, or alterations.

(5) Class Ratings. Ratings issued if the repair station can prove the capability to maintain a representative number of products under this rating. A class rating should not be issued and then restricted to a specific product. For such a case, a limited rating should be issued.

(6) Contracting. Entering into an agreement between two or more persons for the performance of maintenance functions on an article.

(7) Correction. An action taken to eliminate a detected nonconformity as it relates to the articles or maintenance processes.

(8) Corrective Action. An action taken to eliminate the cause of a detected nonconformity or other undesirable condition to prevent its recurrence.

(9) Correspondence Acceptable to the FAA—Documents, Manual or a Revision Submitted to the FAA for Acceptance. The air agency may immediately initiate and utilize the submitted correspondence contents without formal FAA acceptance. A document, manual or revision is considered acceptable to the FAA unless a list of discrepancies is provided to the air agency explaining the unacceptability of the submitted correspondence. There is no requirement for the FAA to acknowledge receipt of or initiate a formal letter of acceptance upon review of the submitted correspondence. This document may be submitted as a written or electronic document.

(10) Directly in Charge. Responsible for the work of a certificated repair station that performs

maintenance, preventive maintenance, alterations, or other functions affecting aircraft airworthiness.

(a) A person directly in charge doesn't need to physically observe and direct each worker constantly, but must be available for consultation on matters requiring instruction or decision from a higher authority.

(b) A person designated as "directly in charge" of maintenance, preventive maintenance, or alterations must hold an appropriate airman certificate.

NOTE: This provision is not required for repair station certificated outside the United States.

(c) It is the responsibility of the repair station to provide adequate personnel who can perform, supervise, and inspect the work for which the station is rated. Additionally, each repair station has the responsibility to determine the abilities of its supervisors and ensure that there are enough supervisory personnel for all phases of its activities. The repair station is primarily responsible for the satisfactory work of its employees.

(11) Domestic Repair Station. A term used in the automated OpSpecs to describe an FAA-certificated facility located within the United States that performs maintenance, preventive maintenance, or alterations on articles.

(12) Foreign Repair Station. A term used in the automated OpSpecs to describe an FAA-certificated facility located outside of the United States that performs maintenance, preventive maintenance, or alterations on articles.

NOTE: The part 145 rule has removed the "foreign" and "domestic" terms; however, these terms are still valid when revising OpSpecs due to the current repair station certificate numbering system.

(13) Geographic Authorization. An authorization that is issued to a certificated repair station located outside the United States to maintain U.S.-registered aircraft at a location where an appropriately rated repair station is not available. This provision is limited to repair stations located solely outside the United States that hold an airframe rating for an aircraft of the same make and model for which the repair station is rated.

(14) Limited Ratings. Ratings issued to repair stations for the performance of maintenance on particular makes and models of airframes, powerplants, propellers, radios, instruments, accessories, and/or parts.

(15) Limited Specialized Service Ratings. Ratings issued for a special maintenance function when the function is performed in accordance with a specification or data acceptable to the FAA. The OpSpecs must include the specifications or data used by the repair station to perform that service in accordance with part 145, § 145.61(c).

NOTE: The repair station may request a limited rating for specialized services utilizing a civil or military specification currently used by industry, the principal inspector (PI) should carefully consider if this specification covers all areas required for the repair prior to approval. Will this repair when completed, allow approval for return to service for the article? In some cases, the PI may need assistance from the Aircraft Certification Office (ACO) to determine if the specification is adequate for the rating requested, however it is ultimately the PI's responsibility to assure the applicant can accomplish the work specified by the specification even though the ACO concurs with the specification. If the specification does not meet the requirements of 14 CFR part 43, § 43.13, then the PI should inform the applicant the specification may be used as part of a process the applicant can develop under the provisions of § 145.61(c)(2). The PI should not accept the process at face value, but must evaluate if the process is appropriate for the article. The PI should annotate if any additional limitations are needed in the limitation section of the OpSpecs. Many civil and military specifications currently used by industry are generic. The PI should verify the repair station has provisions in its manual for evaluation of the article to determine if anything would prohibit the specification utilization.

(16) Line Station Maintenance. Unscheduled maintenance resulting from unforeseen events, or scheduled checks that contain servicing and/or inspections that do not require specialized training, equipment, or facilities.

(17) Maintenance Function. A step or series of steps in the process of performing maintenance, preventive maintenance, or alterations, which may result in approving an article for return to service. Only persons authorized under part 145, §§ 145.157(a) and 145.213(d) may approve an article for return to service, perform a final inspection, or sign a maintenance release.

(18) Operations Specifications. OpSpecs are issued by the FAA to indicate the authorizations and limitations to ratings as specified on the air agency certificate.

(19) Quality Control Manual (QCM). A manual that describes the inspection and quality control procedures used by the repair station.

(20) Repair Station Manual (RSM). A manual that describes the procedures and policies of a repair station's operations.

(21) Satellite Repair Station. An additional certificated facility or location under the managerial control of another certificated repair station.

B. CL. A certificated repair station with a limited rating may perform maintenance, preventive maintenance, or alterations on an article if it is listed on a current CL acceptable to the FAA or on the repair station's OpSpecs.

(1) If the repair station chooses to use a CL, the RSM must:

- Contain procedures for revising the list and notifying the certificate-holding district office (CHDO)
- Include how often the CHDO will be notified of revisions
- Contain procedures for the self-evaluation required under part 145, § 145.215(c) for revising the CL
- Describe the methods and frequency of such evaluations
- Contain procedures for reporting the results to the appropriate manager for review and action

(2) The CL itself may be included as part of the RSM or as a separate document; however, the procedures for revising the list and for performing the self-evaluation must be in the manual.

(3) If the repair station elects to maintain a separate CL, it must perform a self-evaluation before adding an article to the CL. The individual(s) performing the self-evaluation should be qualified to perform an audit to determine compliance with part 145. The self-evaluation procedures in the RSM should ensure that the repair station has the appropriate limited rating; adequate housing and facilities; the recommended tools, equipment, and materials; current technical data; and sufficient qualified personnel.

(4) The results of the self-evaluation must be reported to the appropriate repair station manager for review. If the self-evaluation was satisfactory, the CL may be revised. The revised list and any other necessary technical data can be submitted with a transmittal document to the PI at the CHDO.

NOTE: Transmittal documents include cover letters, memos, e-mails, faxes, or any other media acceptable to the Flight Standards District Office (FSDO).

(5) If the capabilities are maintained on the OpSpecs, each article will be listed by make, model, or manufacturer's name under each limited rating. If the repair station maintains a separate CL, the OpSpecs will indicate that the certificate holder is authorized to use a CL as revised.

(6) If the repair station does not maintain the necessary tools, equipment, housing, facilities, and trained personnel to perform the required maintenance on the article(s) listed on the CL, the article(s) should be deleted from the CL.

NOTE: The repair station must maintain, or provide written evidence that it can obtain, the tools and equipment required to maintain the articles on the CL.

C. Additional Fixed Locations. A repair station may have additional fixed locations (facilities) without certificating each facility as a stand-alone or satellite repair station. This authorization may be

granted if all of the facilities are localized and within a defined area, such as several buildings or hangars, which may be on or near the same airport or at or near the address stated on the repair station certificate. All locations will be operated under the authority of a single repair station certificate.

(1) Additional locations are not separate facilities and must collectively be considered one repair station. A geographic authorization or other repair station certificate is not required. However, the repair station must have procedures in its manual to describe how it will operate in this manner and remain in compliance with its manual and with the requirements of part 145. This situation is not considered work away from the station.

NOTE: The aviation safety inspector (ASI) and repair station accountable manager must collaborate when making a determination that additional locations are required for repair station operations. A primary concern to the FAA is that all the facilities be localized and within a defined area of operation. ASIs must be assured reasonable access to all locations and not be inconvenienced by extended travel distances. It is expected that extended travel between facilities may have an adverse impact on FAA oversight and surveillance capabilities.

(2) Multiple locations may be particularly useful when other federal laws or local ordinances require a repair station to use remote sites when performing some maintenance actions, such as functional testing of turbine engines. Local laws and noise abatement programs may force a repair station to another work site. The FAA may find that the additional locations do not have a significant impact on the maintenance performed, provided the manual has sufficient procedures to ensure the airworthiness of articles being maintained.

(3) All additional locations must be under the full control of the primary facility. It is not necessary that each location be completely equipped since tools, equipment, parts, etc., can be transported between facilities.

(4) The repair station must apply for the use of additional locations and have that request approved before exercising the privileges of its certificate and ratings at these facilities. The application must list each facility and the physical address of the facilities. The repair station must submit a revision to its manuals detailing the procedures it will follow when transporting equipment or parts, how it will ensure adequate and appropriate personnel are available at each site when needed, and how it will continue to meet the requirements of part 145.

NOTE: Under normal circumstances, additional fixed locations should not be authorized across FSDO or regional boundaries since ASIs are responsible to oversee the entire operation. Consideration of additional fixed locations outside the FSDO's area of responsibility must be coordinated with the Aircraft Maintenance Division, AFS-300, via the Flight Standards regional office.

(5) Additional fixed locations outside regional boundaries should be coordinated with each regional aircraft maintenance division with concurrence from AFS-340, General Aviation and Repair Division.

D. Maintenance Functions.

(1) Maintenance functions must be approved by the FAA prior to a certificated repair station contracting out the performance of maintenance, preventative maintenance, or alterations of an article. Maintenance functions requiring approval are those items for which a repair station is rated to maintain but chooses to outsource as referenced in part 145, § 145.201(a) to a noncertificated maintenance provider.

(2) Maintenance function approval is not required for the following contract providers:

(a) Certificated repair stations listed on the repair station's contract maintenance list.

(b) Certificated or noncertificated facilities performing maintenance on an article for which the repair station is not rated.

NOTE: The repair station rule already prohibits a repair station from maintaining any article for which it is not rated. Outsourcing of these maintenance functions will not require

approval since the repair station cannot approve the article for return to service.

E. Contract Maintenance. A repair station must have the material and equipment necessary to perform the functions appropriate to its rating. However, it need not have the tools and equipment for functions it is authorized to contract out pursuant to its FAA-approved list of maintenance functions. The repair station must request approval before it can contract a maintenance function to a noncertificated provider. If the FAA approves the contracted maintenance function, the repair station can determine who will perform the maintenance.

NOTE: Although the repair station is allowed to contract a maintenance function to an outside source, the ASI must verify the repair station requesting the rating is capable of performing the maintenance under the rating requested. Contracted maintenance functions must not circumvent the certification requirements.

NOTE: A repair station may contract maintenance functions to both FAA-certificated and non-FAA certificated facilities. The FAA only approves the maintenance functions contracted to a noncertificated facility that are within the scope of its ratings.

(1) If a repair station contracts a maintenance function to another FAA-certificated repair station, the repair station performing the maintenance function is responsible for providing the approval for return to service of maintenance performed on each article. The originating repair station must determine that the contracted repair station is properly rated to perform the maintenance. The contracted repair station performing the maintenance must approve the article for return to service for the work they perform. Articles received from a certificated facility must be properly processed through the repair station's receiving inspection procedures before further maintenance is performed.

(2) If the repair station contracts to non FAA-certificated facilities, the repair station must include provisions that allow the FAA to inspect and observe the work performed on those articles at the noncertificated facilities. The individual in charge of the contract maintenance program may be required to accompany the FAA during these inspections. These inspections may determine if the repair station is able to continue to contract the maintenance functions to this source and ensures that:

- The non-FAA certificated facility follows a quality control program equivalent to the FAA certificated repair station's system with respect to the work being performed for the certificated repair station
- The work performed on the article is verified by testing and/or inspection
- The article is airworthy with respect to the work performed by the noncertificated source
- The RSM should include a procedure ensuring that contracts contain a provision for FAA inspections

(3) The repair station is responsible for approving for return to service any article on which work has been performed and for ensuring the article's airworthiness. Inspection procedures within the manual must enable the repair station to determine the airworthiness of the work performed on each article received. If the repair station cannot determine the quality of the contracted work by inspection or test, the work can be contracted only to an FAA-certificated facility that is able to inspect the work performed for compliance with part 43.

NOTE: It is not enough for the contracting repair station to give its QCM to the noncertificated contractor and assume the proper procedures will be followed. The certificated repair station must provide adequate surveillance to ensure its quality control procedures are followed.

(4) Contracting to Canadian Approved Maintenance Organizations. Part 43, § 43.17(c) authorizes an Approved Maintenance Organization (AMO) whose system of quality control has been approved by Transport Canada to perform maintenance on U.S. aeronautical products. Section 43.17(d) requires that this maintenance be performed in accordance with part 43, §§ 43.13, 43.15, and 43.16.