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

Nicholas A. Sabatini
Associate Administrator for Aviation Safety
(AVS-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591-0001

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
Managing Director & General Counsel

cc: Rebecca MacPherson, AGC-200