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RE: Comments to Docket No. FAA-2002-11301
Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Supplemental Regulatory Flexibility Determination

The Aeronautical Repair Station Association (ARSA) respectfully submits the following comments to the supplemental regulatory flexibility determination (SRFD) published in the Federal Register on March 8, 2011.[1]

ARSA is the principal association for the aviation maintenance industry; its members include aviation maintenance facilities that perform work for air carriers. Such facilities contract services to outside service providers which are typically small businesses that are not certificated by the Federal Aviation Administration (FAA). As such, ARSA has great concern and interest in the economic impact of the regulations addressed in the SRFD.

Indeed, the SRFD was published in response to a court order resulting from ARSA's effort to compel FAA's compliance with a 2007 mandate from the U.S. Court of Appeals for the D.C. Circuit. As noted in the SRFD, the Court's decision required the FAA to conduct "the analysis required under the Regulatory Flexibility Act, treating [repair station] contractors and subcontractors as regulated entities"[2] under its anti-drug and alcohol (D&A) testing regulations.

For the reasons set forth below, the SRFD does not provide the required analysis. As a result, the FAA must conduct an initial and final regulatory flexibility analysis in accordance with the requirements of the Regulatory Flexibility Act (RFA).

General Comments

The RFA states that an agency "shall prepare and make available for public comment an initial regulatory flexibility analysis"[3] or certify that the rule will not have a significant economic impact on a substantial number of small entities by "providing the factual basis for such certification"[4]. The FAA has not met either requirement. It did not provide a factual basis for certification. Additionally, it did not account for costs in the

[1] 76 FR 12559.
[2] 494 F.3d 161 at 178.
[3] 5 U.S.C. § 603(a).
[4] 5 U.S.C. § 605(b).

SRFD, and therefore cannot certify due to the significant economic impact the rule has on small entities.

The very nature of the SRFD is questionable. The RFA details requirements for both initial and final regulatory flexibility analysis; it does not provide for a "supplemental determination" or "preliminary certification" identified in the SRFD.[5] The SRFD does not meet RFA requirements. The FAA must either certify the rule utilizing a *factual* basis[6] or prepare and publish an initial regulatory flexibility analysis.

Since an initial regulatory flexibility analysis was required, the FAA must consider alternatives. The RFA explicitly requires the agency to explain "why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected".[7] At the very least, the FAA should have considered exempting the contractors and subcontractors at issue from the D&A testing requirements.[8] Since no alternatives have been considered, the RFA required by the law, and the court, has not been accomplished.

Comments on the data used to determine number of small entities

ARSA agrees with the FAA's conclusion that a substantial number of small entities are impacted by the rule. However, the FAA used unsubstantiated data in making that determination. It is the agency's obligation to ensure the quality, objectivity, utility, and integrity of such information under the Data Quality Act.[9]

The FAA placed complete reliance upon "data compiled by the Transportation Security Administration (TSA) for an aircraft repair station security rule" as well as the list of North American Industry Classification System (NAICS) codes and results of a non-certificated maintenance subcontractor (NCMS) survey ARSA submitted to the docket in 2004.

First, we note that the TSA data includes only persons that are certificated under 14 CFR part 145 and does not contain any element of "sub-contractors" at any tier, which

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[5] See 5 U.S.C. §§ 601 through 612.
[6] The introduction section of the SRFD acknowledges that "certification must include a statement providing the factual basis for [making a] determination, and the reasoning should be clear".
[7] 5 U.S.C. § 604(a)(5).
[8] The January 18, 2011 "Improving Regulation and Regulatory Review - Executive Order" reaffirming Executive Order 12866 also states that agencies must "identify and assess available alternatives to direct regulation".
[9] Public Law 106–554; also see Office of Management and Budget "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" at 67 FR 8452.

are NCMS. Therefore, it is relevant *only* in support of the FAA's conclusion that "most repair stations are small businesses".

Further, the FAA made no effort to validate the TSA data and, though ARSA is flattered by the use of its previous comments, the information it submitted was obtained many years ago and is, at a minimum, outdated. In both instances, the information must be substantiated and *independently verified* by the FAA before it can be used to provide a factual basis for determinations made under the RFA.

The use of the TSA and ARSA data renders the analysis unusable under the RFA and the Data Quality Act.

Comments on the assumptions in the economic analysis

The economic analysis is not only reliant upon unverified data, it is also based on faulty assumptions; the FAA states that it "estimate[s] that the typical subcontracting company has 25 employees" and "believe[s] that a subcontracting company with 25 employees will have annual revenues of $750,000 to $2 million".

It is clear from the information provided in Table 2 of the SRFD that the FAA's estimation of employees is little more than a wild guess. Slightly more than 32 percent of survey respondents had 10 or fewer employees while more than 43 percent had between 11 and 50. Due to the large margin and lack of granularity in the data, it is impossible to draw an accurate conclusion. As a result, there is no factual basis for assuming that a typical NCMS has 25 employees.

Likewise, Table 3 of the SFRD plainly shows that the largest percentage of NCMS, slightly more than 32 percent, had *less* than $750,000 in annual revenue. How much less is not indicated, but it is implausible to assume that revenue for the entities in this category falls at the upper end of the scale. Nevertheless, the low end of the FAA's cost estimate per company is based upon *exactly* $750,000 in annual revenue. Perhaps that figure is used to square the FAA's assumption that the average company has exactly 25 employees, since the percentages of NCMS with 1 to 10 employees and annual revenues under $750,000 are the same[10] but it is not a plain representation of the data presented in the SRFD. There is no factual basis for the FAA's assumption; the number of NCMS with 25 employees that have less than $750,000 in revenue is unclear.

[10] Table 1 indicates that 32.09 percent of companies responding to the NCMS survey had 1 to 10 employees; 32.09 percent also represents the companies with less than $750,000 in annual revenue in Table 2. Since those percentages were the same, it appears that the FAA assumed the categories in Table 1 and Table 2 involved the same companies.

RE: Comments to Docket No. FAA-2002-11301
Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Supplemental Regulatory Flexibility Determination

The determination of employee numbers and annual revenue should not be based on speculations, averages and guesswork. The RFA requires the FAA to have a factual basis before it can certify that the rule does not have a significant economic impact on a substantial number of small entities. The assumptions used in the FAA's economic analysis do not meet that requirement.

Comments on the costs included in the analysis

The FAA assumes the costs of compliance include "(1) Testing, (2) training and education, (3) program development and maintenance, and (4) annual documentation". In addition to those considerations, the analysis should also specifically account for the costs companies will incur in modifying existing processes, conducting drug and alcohol background checks and, most significantly, lost revenue due to testing requirements.

The impact on a company's productivity, or loss in revenue, should be accounted for; the real measure is not simply an employee's hourly wage multiplied by the estimated time required for D&A testing of that employee. Especially for small businesses, the absence of an employee means the company cannot perform the same amount of revenue generating work. As a result, the real cost includes the amount that company charges its customers per hour.

For example, if the hourly shop rate paid by customers is $100 the employer may pay employees $35 per hour; when an employee is sent for D&A testing s/he is not performing work and the company therefore loses revenue *in addition to* paying the employee's hourly wage. The SRFD should include such operational costs to accurately reflect the economic impact on small businesses.

Additionally, the SRFD does not even contemplate the number of small businesses that lost *all* civil aviation revenue due to the rule. The FAA cannot dismiss the fact that there are businesses that will not, or are unable to, take on the added costs and administrative burden of conducting D&A testing and education. Those companies will not realize the revenue previously obtained when D&A testing was not required "at any tier" in the maintenance contracting environment.

RE: Comments to Docket No. FAA-2002-11301
Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Supplemental Regulatory Flexibility Determination

Comments on the general cost and salary assumptions

The SRFD includes a series of assumptions[11] for which the FAA does not provide any source for the data. The RFA does not allow the FAA to certify that the rule does not present a significant economic impact without providing a factual basis for its assumptions, and this data must therefore be independently substantiated.

It is also unclear how the FAA arrived at costs per employee of $45 for drug testing and $35 for alcohol testing; no basis is provided. In contrast to the FAA's numbers, an existing D&A testing service provider recently informed ARSA that the industry rate for such testing is between 60 and 95 dollars, not including labor charges for the person administering the test(s). That service provider also noted that the cost charged per individual test is more for small companies than large companies. The FAA's assumptions greatly underestimate these costs.

Training costs are estimated at $149 per supervisor and $135 per employee; no basis is provided for these numbers. Again in contrast to FAA's estimate, after conferring with an existing service provider ARSA learned that the cost of training material alone is approximately $100 per employee;[12] the added costs for the instructor[13] and training facility[14] result in numbers that greatly exceed the FAA's estimate.

Program development and maintenance costs are estimated at $336 per company per year; although the FAA arrived at this figure by assuming "16 administrative hours per program at $21 per hour", there is no factual basis for those assumptions.

Similarly, the annual documentation costs which are "estimated at $50 per company for the first year and $4.50 per company for subsequent years" are based upon dedicated administrative help at $21 per hour. In fact, it is unlikely that a small business employs administrative help, or would hire such a person for the sole purpose of developing and maintaining its D&A program; most small businesses must contract these services to specialized providers. According to an existing service provider, the development, maintenance and documentation cost would involve an initial fee of approximately $250 plus a fee of approximately $25 per employee per *month*. The cost per company per year is therefore far greater than the FAA's estimate; even without considering the initial

[11] Those assumptions include: maintenance supervisor salary ($39.68); maintenance employee salary ($33.07); instructor salary ($36.37); supervisor to employee ratio (1 to 8); instructor to employee ratio (1 to 20).
[12] The FAA's estimated cost is $65 per employee.
[13] Estimated, but not substantiated, in the SRFD as $84 per supervisor and $70 per employee.
[14] The SRFD did not, but should include the facility cost for training employees.

fee, a company with 25 employees would incur an annual cost of approximately $7500 for these services.

The rule does present a significant economic impact

Even by the FAA's analysis in the SRFD, the rule has a significant impact on small businesses. Although the FAA concludes that the impact is insignificant because "compliance cost will be less than 2% of annual revenue for all companies", its view does not comport with policy requirements.

The FAA must consider profit margin as well as annual revenue in assessing economic impact. In the context of the aviation industry -- which is not known for high profit margins -- costs approaching 2 percent for a small business are substantial. As stated by the Small Business Administration Office of Advocacy:

> One measure for determining economic impact is the percentage of revenue or percentage of profits affected. For example, if the cost of implementing a particular rule represents 3 percent of the profits in a particular sector of the economy and the profit margin in that industry is 2 percent of gross revenues…the implementation of the proposal would drive many businesses out of business (all except the ones that beat a 3 percent profit margin). That would be a significant economic impact.[15]

Since, as mentioned previously, the FAA did not include the costs of lost business, modifying existing processes or operational costs[16] and has underestimated the cost for testing, training and program development and maintenance and documentation, the real impact is greater than estimated.

The FAA must revisit its analysis in light of these additional costs. Undoubtedly, the rule represents a significant economic impact for small businesses.

Conclusions

To meet RFA requirements, the FAA must perform an initial regulatory flexibility analysis that accurately considers the economic impacts on the substantial number of small entities that the FAA admits are affected by the rule. In performing that analysis, the FAA must provide independent verification or substantiation of the data it relies upon and must consider alternatives.

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[15] See "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act: Implementing the President's Small Business Agenda and Executive Order 13272" dated June 2010.
[16] Lost revenue that results from employee testing and unavailability.

RE: Comments to Docket No. FAA-2002-11301
Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Supplemental Regulatory Flexibility Determination

The SRFD is not supported by the RFA and therefore does not meet its requirements. The data used is unreliable or outdated. In any case, it does not support the FAA's assumptions for average number of employees or annual revenue; it does not provide a factual basis. Further, the FAA's cost and salary assumptions are undocumented and therefore cannot be evaluated. The FAA's use of such data violates the obligation to ensure quality, objectivity, utility, and integrity of information under the Data Quality Act.

The SRFD, and therefore the entire analysis, does not properly assess the economic impact on small entities. The FAA has failed to account for costs of lost business, modifying existing processes or operations, and has underestimated costs for testing, training and program development and maintenance and documentation. Considering these additional expenses, the rule clearly has a significant economic impact on small businesses.

Until the FAA conducts the required analysis – which includes an initial and final regulatory flexibility analysis – it has not satisfied the RFA or the Court's mandate.

Respectfully submitted,

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