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

PETITION FOR REVIEW OF A FINAL RULE OF AN AGENCY

Notice is hereby given this the 10th day of March, 2006, that Petitioners Aeronautical Repair Station Association, Inc. ("ARSA"), Premier Metal Finishing, Inc. ("PMF"), Pacific Propeller International LLC ("PPI"), and Texas Pneumatics Systems, Inc. ("TPS"), hereby petition the United States Court of Appeals for the District of Columbia Circuit for review of the final rule of the Respondent Federal Aviation Administration ("FAA") entered the 10th day of January, 2006, at 71 Fed. Reg. 1666 (Tue., Jan. 10, 2006), a copy of which is appended as Exhibit A to this Petition For Review (the "Final Rule"), and for review of all subsequent orders, procedures, and agency actions of the FAA concerning the Final Rule.

The Final Rule is entitled "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities" and relates to 14 CFR Part 121 (Docket No.: FAA-2002-11301; Amendment No. 121-315). The Final Rule becomes effective on April

10, 2006, and mandates a drug and alcohol testing regime that is irrational, unreasonable, arbitrary, and capricious; that exceeds the statutory authority of the FAA; that violates principles of fair notice and proper consideration of agency action; and that abridges each Petitioner's rights under the United States Constitution, the Regulatory Flexibility Act, the Administrative Procedure Act, the statutory scheme set out at 49 U.S.C. §§ 45101 et seq., and other applicable rules of law. Petitioners therefore ask this Court to hold the Final Rule unlawful, to set it aside, and to grant Petitioners any additional relief which this Court deems just and proper.

Attorneys for Petitioners

OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

By: Marshall S. Filler
Marshall S. Filler

Albert J. Givray
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 685-4800

Jere W. Glover
Andrew Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

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

Exhibit A
to
PETITION FOR REVIEW OF A FINAL RULE OF AN AGENCY

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

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2006, a true and correct copy of the above and foregoing **PETITION FOR REVIEW OF A FINAL RULE OF AN AGENCY** was served on each individual shown below via US Certified Mail, postage prepaid, with RETURN RECEIPT REQUESTED:

Marion C. Blakey, Administrator (AOA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Robert A. Sturgell, Deputy Administrator (ADA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Andrew B. Steinberg, Chief Counsel (AGC-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

James W. Whitlow, Deputy Chief Counsel for Policy and Adjudication (AGC-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Patrice M. Kelly, Senior Attorney
Regulations Division (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Margaret Gilligan, Deputy Associate Administrator for Aviation Safety (AVR-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Norman Y. Mineta, Secretary (S-1)
U.S. Department of Transportation
400 7th Street, S.W., Room 10200
Washington, D.C. 20590-0001

Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, S.W., Room 10424
Washington, D.C. 20590-0001

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, SW., Room 10424
Washington, DC 20590-0001

Paul M. Geier, Assistant General Counsel for Litigation (C-30)
U.S. Department of Transportation
400 7th Street, SW., Room 4102
Washington, DC 20590-0001

Diane J. Wood, Division Manager
Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dr. Frederick E. Tilton, Federal Air Surgeon
(AAM-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dave Cann, Manager, Aircraft Maintenance
Division (AFS-300)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Vicky L. Dunne, Manager, Program Policy
Branch, Drug Abatement Division (AAM-820)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

The **PETITION FOR REVIEW OF A FINAL RULE OF AN AGENCY** so served was also filed with the Court on the date shown above.

Marshall S. Filler

United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., Case No:
PREMIER METAL FINISHING, INC.,
PACIFIC PROPELLER INTERNATIONAL LLC, and
TEXAS PNEUMATICS SYSTEMS, INC.,

Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent

ON PETITION FOR REVIEW OF A FINAL AGENCY RULE

RULE 28(a)(1) PROVISIONAL CERTIFICATE OF ALL PETITIONERS AS TO PARTIES, RULINGS, AND RELATED CASES

As required by D.C. Cir. Rule 28(a)(1) and Fed. R. App. P. 28(a)(1), Petitioners hereby make the following statements:

Parties and Amici	This is an appeal from a final rule of the Federal Aviation Administration ("FAA"). Several parties submitted comments in response to the FAA's notices of proposed rulemaking. In this Court, the following parties have appeared as Petitioners: Aeronautical Repair Station Association, Inc. ("ARSA"), Premier Metal Finishing, Inc. ("PMF"), Pacific Propeller International LLC ("PPI"), and Texas Pneumatics Systems, Inc. ("TPS") The Respondent in this appeal is the FAA, which has not yet made a formal appearance. There are no intervenors or amici in this appeal as of the filing of this Rule 28(a)(1) Provisional Certificate.

Rulings Under Review	The ruling at issue in this Court is the Final Rule of the FAA published on January 10, 2006, at 71 Fed. Reg. 1666 (Tue., Jan. 10, 2006). The Final Rule being challenged is entitled "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities" and relates to 14 CFR Part 121 (Docket No.: FAA-2002-11301; Amendment No. 121-315).
Related Cases	The case presently on review has not been previously before this Court or before any other court. There are no related cases currently pending in this Court or in any other court.

The information required to be supplied under D.C. Cir. Rule 26.1 and Fed. R. App. P. 26.1 appears in the Rule 26.1 Disclosure Statement being filed by Petitioners simultaneously with this Rule 28(a)(1) Provisional Certificate.

Attorneys for Petitioners

OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

By: Marshall S. Filler
Marshall S. Filler

Albert J. Givray
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 685-4800

Jere W. Glover
Andrew Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2006, a true and correct copy of the above and foregoing **RULE 28(a)(1) PROVISIONAL CERTIFICATE OF ALL PETITIONERS AS TO PARTIES, RULINGS, AND RELATED CASES** was served on each individual shown below via US Certified Mail, postage prepaid, with RETURN RECEIPT REQUESTED:

Marion C. Blakey, Administrator (AOA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Robert A. Sturgell, Deputy Administrator (ADA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Andrew B. Steinberg, Chief Counsel (AGC-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

James W. Whitlow, Deputy Chief Counsel for Policy and Adjudication (AGC-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Patrice M. Kelly, Senior Attorney
Regulations Division (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Margaret Gilligan, Deputy Associate Administrator for Aviation Safety (AVR-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Norman Y. Mineta, Secretary (S-1)
U.S. Department of Transportation
400 7th Street, S.W., Room 10200
Washington, D.C. 20590-0001

Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, S.W., Room 10424
Washington, D.C. 20590-0001

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, SW., Room 10424
Washington, DC 20590-0001

Paul M. Geier, Assistant General Counsel for Litigation (C-30)
U.S. Department of Transportation
400 7th Street, SW., Room 4102
Washington, DC 20590-0001

Diane J. Wood, Division Manager
Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dr. Frederick E. Tilton, Federal Air Surgeon
(AAM-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dave Cann, Manager, Aircraft Maintenance
Division (AFS-300)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Vicky L. Dunne, Manager, Program Policy
Branch, Drug Abatement Division (AAM-820)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

The **RULE 28(a)(1) PROVISIONAL CERTIFICATE OF ALL PETITIONERS AS TO PARTIES, RULINGS, AND RELATED CASES** so served was also filed with the Court on the date shown above.

Marshall S. Filler

United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., Case No:
PREMIER METAL FINISHING, INC.,
PACIFIC PROPELLER INTERNATIONAL LLC, and
TEXAS PNEUMATICS SYSTEMS, INC.,

Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent

ON PETITION FOR REVIEW OF A FINAL AGENCY RULE

RULE 26.1 DISCLOSURE STATEMENT COVERING ALL PETITIONERS

As required by D.C. Cir. Rule 26.1 and Fed. R. App. P. 26.1, each Petitioner hereby makes the disclosures shown opposite such Petitioner's name below:

Petitioner Aeronautical Repair Station Association, Inc. ("ARSA") 121 North Henry Street Alexandria, VA 22314-2903 (703) 739-9543	ARSA is headquartered in Alexandria, Virginia, and exists as a not-for-profit corporation organized under the laws of Virginia. ARSA is a continuing trade association of roughly 700 organizations, aircraft repair stations, and others operated for the purpose of promoting the general, commercial, and other interests of the ARSA membership in the aeronautical industry. ARSA's members have no ownership interest in ARSA.
General nature and purpose, as relevant to the appeal	ARSA regular members are maintenance entities certificated under 14 CFR Part 145 by the Federal Aviation Administration ("FAA"); many members perform maintenance or preventive maintenance for air carriers by contract or subcontract; many members have Department of Transportation ("DOT")/FAA anti-drug and alcohol programs which will require them to ensure that all persons (certificated or non-certificated) performing maintenance functions or steps by contract be tested under the regulations of the Final Rule promulgated on 1-10-2006.

Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Premier Metal Finishing, Inc. ("PMF") 640 North Meridian Avenue Oklahoma City, OK 73107 (405) 947-0200	PMF is a privately held corporation organized under the laws of the State of Oklahoma.
General nature and purpose, as relevant to the appeal	PMF is not certificated or approved by the FAA but performs maintenance functions for 14 CFR Part 145 certificated repair stations. PMF has no direct contract with any air carrier. Until the promulgation of the 1-10-2006 Final Rule, neither PMF nor its employees were required to be tested under the anti-drug and alcohol requirements of the DOT/FAA, since the certificated repair stations for which PMF performed work were tested and took airworthiness responsibility for the work PMF performed. Under the regulations of the new Final Rule, PMF must either test its employees or cease to perform work for certificated repair stations.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Pacific Propeller International LLC ("PPI") 5802 South 228th Street Kent, WA 98032-1810 (800) 722-7767	PPI is a privately held limited liability company formed under the laws of the State of Washington.
General nature and purpose, as relevant to the appeal	PPI is a repair station certificated under 14 CFR part 145 by the FAA; PPI performs maintenance and preventive maintenance by contract for air carriers. PPI has contracts with

	non-certificated maintenance providers that will now have to be brought under a DOT/FAA anti-drug and alcohol testing program or be discontinued as a maintenance provider by PPI.
Parent Companies	As a limited liability company, PPI has one member: Precision Aerospace Products LLC, which is itself a limited liability company formed under the laws of the State of Washington
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Texas Pneumatics Systems, Inc. ("TPS") 2404 Superior Drive Arlington, TX 76013-6015 (817) 794-0068	TPS is a privately held corporation organized under the laws of Texas.
General nature and purpose, as relevant to the appeal	TPS is a repair station certificated under 14 CFR part 145 by the FAA; TPS performs maintenance and preventive maintenance by contract for air carriers. TPS has contracts with non-certificated maintenance providers that will now have to be brought under a DOT/FAA anti-drug and alcohol testing program or be discontinued as a maintenance provider by TPS.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Each Petitioner will file a revised Rule 26.1 Disclosure Statement should a change in corporate ownership interests occur that would affect the above disclosures.

Attorneys for Petitioners

OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

By: Marshall S. Filler
Marshall S. Filler

Albert J. Givray
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 685-4800

Jere W. Glover
Andrew Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2006, a true and correct copy of the above and foregoing **RULE 26.1 DISCLOSURE STATEMENT COVERING ALL PETITIONERS** was served on each individual shown below via US Certified Mail, postage prepaid, with RETURN RECEIPT REQUESTED:

Marion C. Blakey, Administrator (AOA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Norman Y. Mineta, Secretary (S-1)
U.S. Department of Transportation
400 7th Street, S.W., Room 10200
Washington, D.C. 20590-0001

Robert A. Sturgell, Deputy Administrator (ADA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, S.W., Room 10424
Washington, D.C. 20590-0001

Andrew B. Steinberg, Chief Counsel (AGC-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, SW., Room 10424
Washington, DC 20590-0001

James W. Whitlow, Deputy Chief Counsel for Policy and Adjudication (AGC-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Paul M. Geier, Assistant General Counsel for Litigation (C-30)
U.S. Department of Transportation
400 7th Street, SW., Room 4102
Washington, DC 20590-0001

Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Patrice M. Kelly, Senior Attorney
Regulations Division (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Margaret Gilligan, Deputy Associate Administrator for Aviation Safety (AVR-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Diane J. Wood, Division Manager
Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dr. Frederick E. Tilton, Federal Air Surgeon
(AAM-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dave Cann, Manager, Aircraft Maintenance
Division (AFS-300)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Vicky L. Dunne, Manager, Program Policy
Branch, Drug Abatement Division (AAM-820)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

The **RULE 26.1 DISCLOSURE STATEMENT COVERING ALL PETITIONERS** so served was also filed with the Court on the date shown above.

Marshall S. Filler