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Docket Operations, M-30
Department of Transportation
1200 New Jersey Avenue, SE
Room W 12-140
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Washington, D.C. 20590-0001

Submitted Electronically to:
www.regulations.gov

RE: Comments to Docket No. FAA-2012-1058; Notice No. 14-02
Advanced Notice of Proposed Rulemaking; Drug and Alcohol (D&A) Testing of
Certain Maintenance Provider Employees Located Outside of the United States

To Whom It May Concern:

The Aeronautical Repair Station Association (ARSA) respectfully submits its comments to the referenced Federal Aviation Administration's (FAA) advanced notice of proposed rulemaking (ANPRM).

ARSA is the principal association for the international civil aviation maintenance industry. ARSA represents persons certificated by the FAA and other national aviation authorities to design, produce, operate and maintain civil aviation products. The vast majority of its members hold repair station certificates issued under Title 14 Code of Federal Regulations (14 CFR)¹ part 145; most perform contract maintenance for parts 121 and 135 operators. As a result, ARSA and its members are directly impacted by this ANPRM.

(I) The agency must adhere to the legislation and congressional intent

As noted by the agency, the ANPRM was not issued to enhance aviation safety or as the result of any incident (in fact, the agency presented no safety justification for this rulemaking). It is the direct result of the FAA Modernization & Reform Act of 2012 ("The Act")² Sec. 308; legislation enacted following twenty-four (24) short-term extensions of VISION-100,³ more than six years after the expiration of the old law. During that lengthy period, ARSA was directly involved with the legislation's various iterations; therefore, the association has a unique perspective on Congress' intent when enacting this provision.

Numerous attempts to mandate D&A testing of FAA-certificated part 145 maintenance providers outside the United States have been proposed in Congress; indeed, it was

¹ Unless noted otherwise, all references are to 14 CFR.

² Pub. L. No. 112-95, § 308(d)(2), 126 Stat. 11, 62 (2012) (codified at 49 U.S.C. 44733).

³ Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 (2003).

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one of a handful of issues that prevented the passage of FAA reauthorization legislation during the 111th Congress.

The FAA Reauthorization Act of 2009 (H.R. 915) required D&A testing “in accordance with section 45102 of any individual performing a safety sensitive function at a foreign aircraft repair station, including an individual working at a station of a third-party with whom an air carrier contracts to perform work on air carrier aircraft or components.”⁴ If enacted, that legislation would have mandated individuals performing a safety-sensitive function at foreign repair stations be included in the Department of Transportation’s (DOT) D&A testing program.

The significant legal impediments to implementation of DOT testing protocol and the logistics of executing such a requirement (i.e., transportation of samples to DOT-approved test facilities) drew the opposition of aviation industry and civil aviation authorities around the world, delaying finalization of the U.S.-E.U. bilateral aviation safety agreement. Ultimately, the 111th Congress did not pass FAA reauthorization legislation.

In the next Congress, the House and Senate both made FAA bills top priority, moving expediently to approve legislation in each chamber. The House (H.R. 658) and the Senate (S. 223) FAA reauthorization bills included nearly identical provisions mandating the agency issue a proposed rule pertaining to D&A testing of foreign repair station employees performing safety-sensitive maintenance functions on part 121 aircraft that respects a nation’s laws and regulations.⁵

An effort was made to amend the D&A provision when the House Transportation & Infrastructure Committee considered H.R. 658. The proposal would have required the FAA issue a rule mandating D&A testing of foreign repair station employees in the DOT’s program regardless of a sovereign nation’s laws (similar to H.R. 915 from the 111th Congress). The committee demonstrated its wish to respect national sovereignty and adhere to the provisions embodied in the House and Senate bills (and ultimately, the final conference report) by refusing to accept the amendment.

The final conference report for The Act expresses Congress’ commitment to a narrowly tailored, carefully crafted proposal that respects national sovereignty.⁶ Specifically, Sec. 308(d)(2) of the law requires:

⁴ See FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 303(a) (2009).

⁵ FAA Reauthorization and Reform Act of 2011, H.R. 658, 112th Cong. (2011); FAA Transport Modernization and Safety Improvement Act, S. 223, 112th Cong. (2011).

⁶ See H.R. Rep. No. 112-381 (2012) (Conf. Rep).

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Not later than 1 year after the date of enactment of this section, the Administrator shall promulgate a proposed rule requiring that all part 145 repair station employees responsible for safety sensitive maintenance functions on part 121 air carrier aircraft are subject to an alcohol and controlled substances testing program determined acceptable by the Administrator and consistent with the applicable laws of the country in which the repair station is located. (*Emphasis added.*)

This phraseology reflects Congress' direction that the FAA refrain from promulgating a regulation that conflicts with the United States government's obligation under international agreements or with sovereign nations' laws and regulations.

Furthermore, Sec. 308(d)(1) of The Act requires the U.S. Secretaries of State and Transportation to request the International Civil Aviation Organization (ICAO) address D&A testing of maintenance providers. Specifically, it instructs:

The Secretary of State and the Secretary of Transportation, acting jointly, shall request the governments of foreign countries that are members of the International Civil Aviation Organization to establish international standards for alcohol and controlled substances testing of persons that perform safety-sensitive maintenance functions on commercial air carrier aircraft.

ARSA agrees with the Congress; the convention and treaty that created ICAO is the chosen method for the United States to address international issues such as drug and alcohol testing; nonetheless, the FAA's rulemaking process must strictly adhere to the legislative language and congressional direction.

(II) National sovereignty must be respected

Congress unequivocally expressed its desire that any proposed D&A testing requirements on foreign maintenance providers be consistent with the applicable laws of the country in which the repair station is located. Given the complexities surrounding sovereign nations' privacy and employment laws and regulations, a "one-size-fits-all" approach is impossible to implement and enforce.

Knowledge and legality of D&A testing varies greatly by country. An ARSA survey of foreign FAA-certificated part 145 repair stations⁷ illustrates the complex challenges

⁷ See FAA repair station database, available at <http://av-info.faa.gov/repairstation.asp>.

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posed by an international D&A rule.⁸ Regulations must be enforceable by the nation wishing to impose them; in this case, federal pre-emption is unavailable to repair stations in foreign nations. The FAA cannot impose regulations that are prohibited by the sovereign nation; that would be a death knell for foreign repair stations and contrary to congressional direction.

Some nations have a legal framework determining the circumstances under which testing is permitted; however, it requires interpreting various constitutional protections of the right to privacy with a patchwork of national health and safety, labor, and data security laws.⁹

The right to privacy in employment context is scrupulously protected in nations such as the Netherlands, Finland, and Belgium.¹⁰ Even in countries where some type of D&A testing is permitted for “high-risk” or “safety-sensitive” personnel there is no consensus on employees included in those categories.¹¹

Unlike a majority of Europe, some testing in the United Kingdom is recognized. Under current law, *the government* is permitted to conduct drug and alcohol tests of personnel performing “aviation functions” based on reasonable suspicion of drug or alcohol abuse.¹² Importantly, the government is prohibited from conducting random or

⁸ ARSA received six responses from repair stations located in China indicating that D&A testing was mandatory, permitted, or that there were no applicable laws. In the Netherlands, three repair stations indicated that testing was prohibited, permitted for cause or generally permitted. The lack of knowledge and consensus among similarly situated entities establishes the inability of foreign repair stations to understand the implications of the proposal making enforcement problematic.

⁹ Staffing Industry Analysts, *Europe: Drug and Alcohol Screening*, CONTINGENT WORKFORCE STRATEGIES 3.0, Vol. 3.11, Aug. 2011, <http://www.staffingindustry.com/Research-Publications/Publications/CWS-3.0/Archive/2011/August-31-2011-Vol.-3.22/EU-Drug-Screens>; EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, LEGAL STATUS OF DRUG TESTING IN THE WORKPLACE, <http://www.emcdda.europa.eu/html.cfm/index16901EN.html> (last visited July 14, 2014).

¹⁰ See BELG. CONST. ART. 22; FIN. CONST. ART. 7, 10; STATUUT NED. ART. 10-11; Staffing Industry Analysts, *Europe: Drug and Alcohol Screening*, CONTINGENT WORKFORCE STRATEGIES 3.0, Vol. 3.11, Aug. 2011, <http://www.staffingindustry.com/Research-Publications/Publications/CWS-3.0/Archive/2011/August-31-2011-Vol.-3.22/EU-Drug-Screens>; MM. RODRIGUES AND LOURENÇO MARTINS, COUNCIL OF EUROPE, EXPERT COMMITTEE ON ETHICAL ISSUES AND PROFESSIONAL STANDARDS, DRUG TESTING IN THE WORKPLACE: INVENTORY OF EUROPEAN NATIONAL LEGISLATIONS (2007), <https://wcd.coe.int/ViewDoc.jsp?id=1279785&Site=DG3>.

¹¹ ANTONIO CORRAL, ET AL., EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, USE OF ALCOHOL AND DRUGS AT THE WORKPLACE—NATIONAL LEGISLATION AND AGREEMENTS ON ALCOHOL/DRUG USE AT WORK 26-27 (2012), http://www.eurofound.europa.eu/ewco/studies/tn1111013s/tn1111013s_4.htm.

¹² Railways and Transport Safety Act, 2003, c. 5, §§ 94 (defining aviation function), 96 (defining reasonable suspicion and incorporating by reference Road Traffic Act, 1988, pt. 1, § 6), available at <http://www.legislation.gov.uk/ukpga/2003/20/part/5>.

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systematic testing.¹³ Private aviation-related employers are permitted to implement a voluntary drug and alcohol testing process, and employers of Air Operation Certificate holders and Air Navigation Service Providers are encouraged to do so by the United Kingdom Civil Aviation Authority. Random drug testing is permitted only by the private sector.¹⁴

The agency's suggestion that countries could (or may need to) implement authorizing legislation to allow testing within their borders belies the reality of the legislative environment.¹⁵ D&A testing is viewed as an infringement of the fundamental liberties to privacy and bodily integrity in many countries, rights that will not be amended to permit such testing.¹⁶

Indeed, the International Labour Organization—an agency of the United Nations—indicated that governments have avoided the “thorny issue” of drug testing by refusing to “legislate for or against” testing. Instead, they have referred the issue to the courts to determine the permissible bounds of testing.¹⁷ As such, authorizing legislation is not a viable option in most countries because the governments either lack the desire or political will to change current privacy policies.

The juxtaposition of the regulatory schemes in Europe demonstrates that each country's D&A testing policies are unique and multifaceted. In the event that the agency could create a rule that complies with one nation's law, it will invariably conflict with the laws of another; consequently, international D&A issues must be considered by ICAO, not individual countries.

¹³ UK CIVIL AVIATION AUTHORITY, CIVIL AIRCRAFT AIRWORTHINESS INFORMATION AND PROCEDURES, CAP 562, ISSUE 3, AMEND 3, LEAFLET H-50 (NOV. 2013) (FORMERLY AIRWORTHINESS NOTICE NO. 45, ISSUE 3 (SEPT. 2006), available at <http://www.caa.co.uk/docs/33/CAP562%20Issue%203%20Amendment%203%2029%20November%202013%20%28complete%29.pdf>.

¹⁴ See UK CIVIL AVIATION AUTHORITY, INFORMATION NOTICE NO. IN-2013/188 (NOV. 2013), available at http://www.caa.co.uk/docs/33/Drug%20and%20Alcohol%20Policies_v1%20281113.pdf

¹⁵ 79 Fed. Reg. 51, 14623 (Mar. 17, 2014).

¹⁶ BEHROUZ SHAHANDEH & JOANNAH CABRON, INTERNATIONAL LABOUR OFFICE, ETHICAL ISSUES IN WORKPLACE DRUG TESTING IN EUROPE 5 (2003), available at: <http://www.alcoholdrugsandwork.eu/resources/ilo-ethical-issues-in-workplace-drug-testing-in-europe.pdf>; MM. RODRIGUES AND LOURENÇO MARTINS, COUNCIL OF EUROPE, EXPERT COMMITTEE ON ETHICAL ISSUES AND PROFESSIONAL STANDARDS, DRUG TESTING IN THE WORKPLACE: INVENTORY OF EUROPEAN NATIONAL LEGISLATIONS (2007), <https://wcd.coe.int/ViewDoc.jsp?id=1279785&Site=DG3>; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8 (Nov. 4, 1950).

¹⁷ See BEHROUZ SHAHANDEH & JOANNAH CABRON, INTERNATIONAL LABOUR OFFICE, ETHICAL ISSUES IN WORKPLACE DRUG TESTING IN EUROPE 5 (2003), available at: <http://www.alcoholdrugsandwork.eu/resources/ilo-ethical-issues-in-workplace-drug-testing-in-europe.pdf>.

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(III) Bilateral Aviation Safety Agreements must be followed and encouraged

Bilateral aviation safety agreements (BASAs) are country-to-country arrangements that allow cooperation between regulators in areas including design, production, flight operations, environmental certification and maintenance. These agreements contribute to growth in aviation services by dramatically reducing regulatory compliance costs, making government oversight more efficient, and helping aerospace interests grow and compete globally.

A 2011 ARSA study examined the economic impact of existing maintenance BASAs on certificated repair stations.¹⁸ The report found it costs repair stations significantly more (almost three times as much) to become certificated by "foreign" CAAs when the home country does not have a BASA. The study determined that initial FAA certification of a repair station located in the United States on average costs a little over \$15,000. Approval by the European Aviation Safety Agency (EASA) for U.S. facilities costs slightly less (around \$11,500). EASA certification is less expensive because the EU's BASA with the United States allows the FAA certificate to serve as the basis for EASA approval and the EASA certificate to underpin the FAA approval. By contrast, the cost for a repair station in the United States to be certificated by the Civil Aviation Administration of China (CAAC) is more than \$30,000.

Additionally, BASAs help make repair stations more profitable. On average, FAA certification renewal costs consume two cents of every dollar generated by the part 145 certificate, while EASA renewal consumes about four cents. By comparison, renewing a CAAC certificate consumes 16 cents of the average revenue dollar generated. In addition, non-BASA certificates typically generate lower revenues (relative to BASA business). High certification costs obviously make the work more expensive—and less profitable—for the repair station.

A key to ensuring bilateral agreements are created and honored is respecting both the sovereignty of participating nations and ensuring uniform treatment of our key trading partners. A rule mandating D&A testing of FAA-certificated part 145 foreign repair stations inherently treats two of the United States' top aviation allies—Canada and the European Union (EU)—differently.

The U.S. has BASAs with both the EU and Canada, including Maintenance Implementation Procedures (MIP); however, the FAA's agreement with Transport Canada Civil Aviation (TCCA) allows recognition of Canadian Approved Maintenance

¹⁸ For the complete study see "Bilateral Aviation Safety Agreements: Reducing Costs for the Aviation Industry", found on ARSA's website at the following link: <http://arsa.org/new-report-details-benefits-of-aviation-safety-agreements/>.

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Organizations (AMO); the FAA does not issue part 145 certificates to Canadian AMOs.¹⁹ Consequently, a rulemaking mandating D&A testing for FAA-certificated part 145 repair station employees working on part 121 air carrier aircraft will apply to the EU maintenance organizations, but not those in Canada.

Disparate treatment between key allies and trading partners threatens both current and future international accords, violates current international agreements, and risks retaliatory measures by impacted nations. In all stages of the regulatory process, the government is obligated to ensure current international agreements are honored. Furthermore, the FAA must ensure it treats our aviation allies equally, so the U.S. can strengthen and enter more international alliances to enhance safety and efficiency.

(IV) The agency must ensure operational freedom and analyze the economic impact on small businesses

Since “good safety is good business,” all FAA-certificated part 145 repair stations have a vested interest in ensuring the competency and capability of their workforce at all times; this standard isn’t diminished because a company is based outside the United States or there isn’t a government mandate.

The dynamic of the aviation industry is self-policing and forces every sector of the industry to prioritize safety above all else. Indeed, part 121 air carriers will not do business with companies that put their passengers and valuable assets (i.e., aircraft) at risk. The tremendous scrutiny of maintenance operations by the airlines ensures repair stations strictly enforce internal policies.

As such, the agency must consider existing operations, the cost burdens associated with new external standards, and their *de minimus* effect on increasing aviation safety. At best, a single standard will eliminate the ability of individual organizations to tailor programs to their needs. At worst, it will impose harmful cost burdens without improving safety.

Additionally, while the face of the aviation sector tends to be large companies, the backbone of the global industry is a network of small-to-medium sized enterprises.

¹⁹ Agreement Between the Government of Canada and the Government of the United States of America for Promotion of Aviation Safety, U.S.-Can., art. I, June 12, 2000, T.I.A.S. No. 13,118 (providing for promulgation of maintenance implementation procedures between the FAA and TCCA); Maintenance Implementation Procedures Under the Agreement for the Promotion of Aviation Safety Dated June 12, 2000, U.S.-Can., ch. 2, Mar. 13, 2011 (requiring the FAA and TCCA to “accept each other’s monitoring and findings of compliance with their respective requirements as a basis for acceptance of eligible repair stations/AMOs/AMEs and FAA-certificated mechanics.”).

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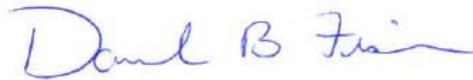
Unfortunately, when smaller entities are involved, the repercussions from government action are even greater. These businesses are incapable of absorbing the costs associated with implementing an expensive D&A testing program that provides no benefit to flight safety.

The FAA must thoroughly assess the economic impact of its mandates and ensure its actions comply with the Regulatory Flexibility Act (RFA)²⁰ (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA]).²¹ The FAA must also ensure costs do not outweigh the benefits of any agency action and that small-to-medium sized aerospace companies aren't detrimentally impacted by a final rule.

(V) Conclusion

ARSA members are committed to ensuring aviation safety; unfortunately, the FAA is attempting to implement an unnecessary congressional mandate that could have widespread ramifications for the global aviation sector. ARSA looks forward to working with the agency to ensure congressional mandates are followed, national sovereignty and BASAs are respected, international treaties are not violated and the industry is not detrimentally impacted should the agency finalize a rulemaking.

Sincerely,



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²⁰ 5 U.S.C. § 601 et seq.

²¹ Pub. L. 104-121, Title II, § 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).