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Request submitted to docket: Docket No. FAA-2012-1058

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RE: Docket No. FAA-2012-1058 – Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States
Comments

The undersigned submit these comments in opposition to the rulemaking. The proposal does not comply with the congressional mandate to ensure the provisions are not contrary to foreign laws and regulations. Instead, the aviation safety agency proposes to shift the burden of proof to the foreign citizen by asking it to request a waiver and/or exemption from the U.S. requirements. This is contrary to the plain language provided by the legislator and interferes with foreign commerce without a safety justification.

The items of concern outline the significant subjects the agency must address, specifically the proposal:

- Violates sovereignty, contrary to Congressional mandate.
- Shifts the burden of understanding and complying with international law and regulation to the foreign citizen(s).
- Bypasses current directives on bilateral agreements and procedures required by treaties.
- Fails to provide notice as required by the Administrative Procedure Act to persons at any tier of a maintenance contract.
- Fails to comply with the Regulatory Flexibility Act requirement to consider all regulated parties.
- Mandates foreign citizens not only comply with Federal Aviation Administration (FAA) and Department of Transportation (DOT) requirements, but Department of Health and Human Services (HHS) regulations without accounting for the latter's mandates.

The agency has two simple options:

(1) Finalize the rulemaking by withdrawing it entirely, or

(2) Issue a supplemental notice of proposed rulemaking that removes the burden from foreign nationals and uses the resources of the federal executive agencies to make appropriate determinations of applicability and to issue the required waivers or exemptions.

In either case, the FAA must address the requirement and cost of complying with all requirements

of the two executive agencies in the proposal for all tiers in a contract for maintenance services, and the HHS mandates for certifying laboratories and individuals necessary to comply with 49 CFR part 40.

The most effective and expeditious way the agency could achieve the congressional mandate is to determine the applicability of the U.S. regulations on a foreign repair station at the time the certificate is issued, or upon renewal, and take appropriate measures to ensure the foreign program is either acceptable to the agency, or for FAA, DOT, and HHS to issue the appropriate waivers or exemptions.

To ensure the information provided is comprehensive, the notice of proposed rulemaking (NPRM) has been reiterated in *italics* with comments in **bold**.

I. Overview of Proposed Rule

This proposed rule, which the FAA is required by statute to promulgate, would implement a statutory mandate to require certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform safety-sensitive maintenance functions on part 121 air carrier aircraft are subject to a drug and alcohol testing program, consistent with the applicable laws of the country in which the repair station is located. This proposed rule would require a part 145 repair station located outside the territory of the U.S. to implement a drug and alcohol testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120, which must cover its employees who perform maintenance functions on part 121 air carrier aircraft.

If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (e.g., the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7.

Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, it may apply for a waiver in accordance with proposed waiver authority. This rulemaking would affect approximately 977 part 145 repair stations in about 65 foreign countries.[1] *(Endnotes from original rulemaking in italics.)*

The overview fails to emphasize and account for the requirement each employee who performs a safety-sensitive function directly or by contract <u>at any tier</u> for an employer to be covered.[1] In this case, foreign repair station employers would be required to pass the requirements of the rule to contractors and subcontractors, *et.al.*, performing safety sensitive functions.

Therefore, the estimated number of entities impacted by the proposal is at least three times as great. The average number of maintenance function contractors used by repair stations is three—some repair stations use more contractors, while others use none. The agency needs to include the entire populace that will be impacted by the proposal and provide those parties

[1] See, e.g., 14 CFR §§ 120.105, 145.217.

with a reasonable time to comment. In addition to that basic requirement of the Administrative Procedure Act, the agency must account for the impact on those entities in its Regulatory Flexibility Act cost and benefit analysis.

It is the responsibility of the employer (e.g., the part 121 operator) to ensure that any person who performs safety-sensitive functions (e.g., maintenance or preventive maintenance), directly or by contract (including by subcontract at any tier), is subject to drug and alcohol testing.

The abbreviated mention of "at any tier" does not fulfil the requirements to provide adequate notice to *foreign entities and individuals* that will be subject to the rule. There is no request or emphasis that suggests foreign repair stations notify their contractors, subcontractors, *et.al.* of safety-sensitive maintenance function services, even though the FAA and many of its foreign counterparts require certificate holders keep lists of maintenance providers and whether the entity holds a repair station or approved maintenance organization certificate.

The FAA notes that part 145 repair stations located within the territory of the U.S. may elect to, but are not required to, implement a drug and alcohol testing program under 14 CFR part 120. When hiring by contract, if a part 145 domestic repair station does not have a testing program of its own, the part 121 operator must cover the repair station's safety-sensitive employees under its FAA drug and alcohol testing program.[2] In this scenario, for purposes of drug and alcohol testing, the part 121 operator hires the repair station employees as covered employees[3] and must apply all the regulatory requirements of the program to these employees (e.g., conduct a pre-employment drug test, the records check, the training and educational information distribution requirements, and include the individuals in the random testing pool). Therefore, all employees performing a safety-sensitive function within the U.S. are part of a drug and alcohol testing program, whether it is the part 121 operator's program or the repair station's program. As further discussed in this preamble, the FAA does not propose any changes to its current drug and alcohol testing requirements applicable to employees performing a safety-sensitive function within the U.S. as part of this rulemaking. In addition, the FAA invites comments, with supporting data, on whether the drug and alcohol testing requirements in this proposed rule should be extended to safety sensitive maintenance employees of part 121 certificate holders located outside the United States.

It is the agency that must justify <u>not</u> extending the drug and alcohol testing requirements to air carrier employees working outside the United States. The congressional mandate does not eliminate the Administrative Procedure Act that mandates regulations have a reasonable basis in fact. The agency must use the same logic it is using to enforce its national sovereignty requirements on individuals in foreign countries. The failure to apply drug and alcohol testing in a uniform and consistent manner belies the agency's requirement to "ensure aviation safety." If it is safe for an airline employee to perform maintenance functions abroad without being drug and alcohol tested, how can the opposite conclusion be reached for foreign nationals?

II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is in title 49 of the United States Code (49 U.S.C.). 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. The FAA's authority to issue rules on alcohol and drug testing is in 49 U.S.C. 45102, which directs the Administrator to prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct certain alcohol and controlled substances testing.

This proposed rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (the Act), 49 U.S.C. 44733. Specifically, 49 U.S.C. 44733(d)(2), titled "Alcohol and Controlled Substances Testing Program Requirements," requires the FAA to "promulgate a proposed rule requiring that all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft [be] subject to an alcohol and controlled substances testing program determined acceptable by the [FAA] Administrator and consistent with the applicable laws of the country in which the repair station is located." Additionally, this proposed rule is promulgated under section 2112 of the FAA Extension, Safety, and Security Act of 2016, (the 2016 Act), which directed publication of a notice of proposed rulemaking in accordance with 49 U.S.C. 44733. The 2016 Act also requires that the notice of proposed rulemaking be finalized.

Notices of proposed rulemaking can be finalized by withdrawal of the regulation in its entirety. The demands of this rulemaking cannot conform to the Administrative Procedure Act's basic requirements that regulations have a rational basis. Requiring a foreign national to adhere to regulations that are not applied to U.S. citizens performing the same work in a foreign nation is irrational.

III. Background

A. History

The FAA and the Office of the Secretary of Transportation (OST) have long engaged in a regulatory partnership regarding drug and alcohol testing of persons in the aviation industry. The OST first published its drug testing procedure regulations in 1988 to require antidrug programs for certain transportation industries, including aviation.[4]

In that interim final rule, the OST adopted a modification of Department of Health and Human Services (HHS) guidance in new 49 CFR part 40 to require employers to conduct drug testing in accordance with the HHS's Mandatory Guidelines for Federal Workplace Programs.

Simultaneously, the FAA published a final rule setting forth regulations to certain entities to implement an anti-drug program for employees who perform sensitive safety or security related functions.[5]

These entities included: domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter operators, certain commercial operators, certain contractors to these operators, and air traffic control facilities not operated by the FAA or the U.S. military.

Before this final rule, the FAA's regulatory action pertaining to drug and alcohol use primarily focused not on testing programs, but on restrictions on commercial aviation personnel (e.g., regulations restricting crewmembers such as pilots, flight attendants, flight engineers, and flight navigators from acting as a crewmember within eight hours after drinking an alcoholic beverage, regulations restricting use of any drug that affects faculties contrary to safety.[6]) The final rule required employers to comply with the OST's newly adopted 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs (i.e., comply with the modified HHS guidance). However, rather than following the OST structure, which created a new part to promulgate the regulations, the FAA adopted a new appendix within 14 CFR part 121 and required compliance through various cross-references in 14 CFR parts 61, 63, 65, and 135.

The 1988 FAA final rule applied only to domestic U.S. operators but did not expressly exclude employees located outside the territory of the U.S. from testing. In that final rule, the FAA considered the impact that the regulations would have on foreign laws and policy. Specific to foreign repair stations, individuals at foreign repair stations under contract to U.S. certificate holders would not be able to perform maintenance or preventive maintenance work on U.S.-registered aircraft unless they participated in an anti-drug program. However, as set forth by then-part 121, appendix I, section XII, the rule would not be applicable in any situation where compliance would violate the domestic laws or policies of another country. Additionally, the section provided a longer effectivity date to aid the Department of Transportation (DOT) and foreign governments in reaching permanent resolutions to any identified conflict between the final rule and foreign law.

The effectivity date for the final rule with respect to employees located outside the territory of the U.S. was extended several times,[7] during which time Congress passed the Omnibus Transportation Employee Testing Act of 1991 (OTETA).[8] Section 3 of OTETA added sec. 614 to title VI of the Federal Aviation Act of 1958, which directed the Administrator to prescribe regulations to establish a program that requires both air carriers and foreign air carriers to conduct alcohol and controlled substance testing for certain persons. OTETA specified that the FAA should only establish requirements applicable to foreign air carriers consistent with the international obligations of the U.S. and take any laws and regulations of the foreign countries into account.

Again, the OST and the FAA issued congruent final rules[9] *to implement the legislation, as applicable. Consistent with the legislation, the FAA final rule mandated that no employee located solely outside the territory of the U.S. shall be tested for illegal use of drugs under appendix I of part 121. An employer was required to remove such employees from the random testing pool while the employee solely performed functions in a foreign country, or while under contract outside the territory of the U.S. Concurrently, the FAA proposed and adopted appendix J within part 121 to supplement the existing regulations concerning alcohol misuse to ensure coordination between OST and FAA. The FAA had originally proposed[10] that the alcohol testing rule would apply to direct employees of U.S. air carriers who performed safety-sensitive functions outside the U.S., subject to the laws and regulations of the country in which the testing would occur; however, in*

response to comments, the FAA ultimately decided not to require alcohol testing of any employees located outside the territory of the U.S., mirroring the drug testing requirements.[11]

These drug and alcohol testing regulations remained static for almost two decades, despite occasional proposed rulemaking that did not come to fruition.[12] *These regulations were scattered throughout 14 CFR.*[13]

Most recently, in 2009, the FAA concluded that it would be best to streamline and clarify title 14 to pull the regulations existing at that time into one location. Therefore, FAA adopted new part 120[14] *to set forth a better organizational structure for the drug and alcohol testing program regulations, which is where it is situated today. The FAA has engaged in additional rulemaking since that time to harmonize 14 CFR part 120 with OST's amendments to 49 CFR part 40, as warranted (e.g., aligning prohibited drugs in 14 CFR part 120 with those in 49 CFR part 40.*[15]

B. Legislative and Rulemaking Actions

1. FAA Modernization and Reform Act of 2012

In 2012, Congress passed the FAA Modernization and Reform Act of 2012.[16]

Section 308(d)(2) of the Act, implemented in 49 U.S.C. 44733, requires that the FAA Administrator publish a proposed rule requiring that all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft outside the U.S. to be 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. The FAA considers all maintenance functions performed on part 121 air carrier aircraft to be safety-sensitive under 14 CFR 120.105 and 120.215.

In fact, the agency considers all maintenance functions performed on behalf of air carriers to be safety sensitive, not just work performed on aircraft. As the agency is well aware, the statute[2] and its own regulation define aircraft as the entire product that is used or intended to be used for flight in the air.[3] The agency's current interpretation requires drug and alcohol testing of all persons at any tier in a maintenance contract between an air carrier and its "first tier" maintenance provider.

Extensive confusion has developed as to the definition of a "maintenance function". The agency failed to define the term in its regulation and has left it up to the Flight Standards Division to determine. Consequently, the agency has registered company programs for persons performing activities that are not safety sensitive, i.e., individuals calibrating equipment *used* in maintenance activities. The regulations are violated if a company dilutes the pool by testing persons that do not perform safety sensitive functions yet the agency's inability to administer its drug and alcohol regulation condone that conduct.

[2] See, 49 U.S.C. § 40102(a)(6) stating "'aircraft' means any contrivance invented, used, or designed to navigate, or fly in, the air."
[3] See, 14 CFR § 1.1.

This conflict and uncertainty will extend to foreign nationals that work as subcontractors to approved maintenance organizations under bilateral agreements, and foreign repair station certificate holders. The agency's inability to enforce the regulations in an even-handed and consistent manner will create arbitrary and capricious application of the regulations. Actions that are contrary to the APA and numerous court decisions in administrative law cases.

2. *Advance Notice of Proposed Rulemaking and Comment Response*

In response to the congressional mandate, the FAA published an advanced notice of proposed rulemaking (ANPRM) on March 17, 2014.[17]

The comment period for the ANPRM closed July 17, 2014. The FAA received 74 substantive comments of both support and opposition.

The FAA recognized that foreign countries and maintenance providers would have many concerns regarding drug and alcohol testing of certain maintenance personnel outside the territory of the U.S. Therefore, the FAA chose to issue an ANPRM to seek comments from the public and interested governments to help inform the development of a proposed rule. Specifically, the FAA recognized and inquired about the associated legal, practical, and cultural issues related to drug and alcohol testing. Additionally, the FAA asked various questions pertaining to foreign countries' laws and regulations, program elements of acceptable drug and alcohol testing, existing drug and alcohol testing program in other countries, and the scope of a proposed rule to include persons performing safety sensitive maintenance functions on aircraft operated by part 121 air carriers in accordance with part 43. The comment period for the ANPRM, originally set for 60 days, was extended an additional 60 days [18] to allow time for commenters to analyze the ANPRM and prepare comments. Few comments provided specific information on the laws, cultural practices, and existence of drug and alcohol testing programs in foreign countries and instead presented general arguments in support and opposition.

The public is unable to assess the legal ramifications of nations extending their laws beyond their boundaries. Repair station and approved maintenance organization owners and operators are mere citizens, they are not international legal experts.

The government, on the other hand, is not only able but required to ascertain the laws of foreign nations through the myriad departments and agencies responsible for collecting and disseminating such information. It is only through international diplomatic channels that such complex and far-reaching ramifications can be obtained. The public specifically requests the government perform its function by ascertaining the impact of its laws and regulations on foreign countries and their citizens before proposing or implementing them.

Congress directed the government to issue final rulemaking that is consistent with other nation's laws and regulations; the legislature did not provide the option for the agency to require the foreign citizen prove the conflict. The rulemaking itself must not conflict.

The FAA received 74 comments: 40 generally supported the ANPRM; 29 generally opposed the ANPRM; and five stated no position. The 40 commenters who generally supported the proposal

include 33 individuals, including certificated airmen (e.g., mechanics, flight instructors) and members of the flying public; three airline mechanics' unions; two aviation consulting firms; a consumer advocacy group; and an aircraft manufacturer. These commenters generally believed that maintenance personnel both within the U.S. and abroad should be treated the same with respect to drug and alcohol testing.

Supporters additionally proposed that the FAA expand the rule beyond the scope of the statutory mandate to (1) make existing domestic regulations and those that would be extended internationally more stringent, and (2) include part 135 operators, part 91 operators, and fractional ownership operators (under part 91, subpart K) that use part 145 repair station employees outside the territory of the U.S. in the testing requirements. These commenters also recommended expanding the testing requirement to employees of non-certificated repair stations outside the territory of the U.S., such as authorized persons who perform maintenance functions on aircraft operated by part 121 air carriers in accordance with 14 CFR 43.17.[19]

These supporters include the Teamsters Aviation Mechanic Coalition, Aircraft Mechanics Fraternal Association, and the Transportation Trades Department labor unions, who stated an expansion in scope would help improve the safety of maintenance functions that are outsourced to repair stations outside the territory of the U.S. Some commenters asserted that U.S.-based maintenance facilities are operating at an economic disadvantage as maintenance facilities abroad are not required to subject employees to drug and alcohol testing and, therefore, are essentially circumventing the associated costs to maintain a testing program.

Outside of the five commenters that did not state an overt position on the proposal, the remaining comments were from nine foreign repair stations, four foreign governmental aviation organizations, four trade associations, four foreign trade associations, three airline manufacturers, three foreign airlines, one foreign aviation industry coalition, and one foreign government representative. These twenty-nine commenters generally opposed the ANPRM stating that the FAA threatens to overreach its authority and the proposal fails to recognize national sovereignty, existing Bilateral Aviation Safety Agreements (BASAs), the impact of ICAO initiatives,[20] and the economic impact to the aviation industry. The FAA responds to the comments in the subsequent sections.

National Sovereignty

More than half of the opposing commenters cited failure to recognize each nation's sovereignty, stating that the FAA cannot impose regulations on persons outside the territory of the U.S. where those regulations conflict with the laws of sovereign nations. The Coalition of Industry Groups, which includes members from Aeronautical Repair Station Association (ARSA), Airlines for America (A4A), Regional Airline Association (RAA), International Air Transport Association (IATA), and other associations, supported requiring drug and alcohol testing programs outside the territory of the U.S.

The coalitions that purportedly "supported" requiring drug and alcohol testing outside the territory of the U.S." did so with the specific and defined caveat that the United States must

respect national sovereignty and only make American rules applicable if that objective is fully met.

However, these aviation associations also emphasized that many countries have laws protecting the right to privacy in employment, as well as labor and data security laws, that could conflict with the proposed rule. These associations and commenters strongly suggested the FAA respect national sovereignty and ensure the proposal is consistent with applicable laws of the country in which the repair station is located. Commenters asserted that the FAA must not move forward with a proposal that would be applied without respect to national sovereignty.

FAA Response

In evaluating the international implications of requiring part 145 repair stations outside of the United States to implement drug and alcohol testing programs that comply with U.S. domestic testing standards throughout the global community, the FAA has become aware of the difficulties associated with the establishment of such programs. Specifically, any regulation that requires 14 CFR part 145 repair stations located outside the territory of the U.S. to implement drug or alcohol testing programs without respect to national sovereignty may be contrary to international law and might exceed generally recognized limits to extraterritorial jurisdiction. Further, section 308 of the FAA Modernization and Reform Act of 2012 directs that the proposed rule be "consistent with the applicable laws of the country in which the repair station is located."

Given these considerations, should the application of 49 CFR part 40 and 14 CFR part 120 wholly or in part be inconsistent with a country's laws or regulations, the 14 CFR part 145 repair station could apply for an exemption from 49 CFR part 40 using the process described in 49 CFR 40.7. Additionally, the repair station could request a waiver from 14 CFR part 120 following the instructions proposed in new § 120.9. As further discussed in section IV.C. of this preamble, the FAA has proposed language in 14 CFR 120.5 to clarify that the FAA will recognize any 49 CFR part 40 exemptions issued to an employer as meeting the procedures set forth in accordance with that part.

The objectionable word in the justification and the proposed regulation is "could" – the regulation must protect foreign sovereignty on its face. The person subject to the regulation must have absolute assurance that adherence to U.S. drug and alcohol testing requirements will not violate the foreign national's right or obligations under its sovereign laws.

The agency set no objective standard for obtaining an exemption or waiver. If the U.S. standard applies, it may not provide the required protection for the foreign national. The burden of imposing U.S. laws on another nation's citizens cannot be overstated; it is the right of every nation to set standards for its citizens. Another nation cannot merely say, "well, you can ask for an exemption or waiver under *our* laws" by extra-sovereign status. The catch-22 created is unacceptable.

Bilateral Aviation Safety Agreements

Most of the same commenters opposing unilateral application of drug and alcohol testing regulations pointed to the BASAs the U.S. is party to, (e.g., Switzerland, Canada, and the European Union). Commenters detailed that these BASAs include separate detailed agreements on mutual cooperation and technical assistance in the evaluation and acceptance of each country's approved maintenance organization systems (i.e., Maintenance Implementation Procedures agreements). The International Air Transport Association (IATA) commented that BASAs 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. IATA recommended that the FAA focus on working with governments that impose equivalent, not duplicate, measures in its efforts to apply requirements for drug and alcohol testing programs outside the territory of the U.S.

Additional commenters asserted that BASAs contain provisions requiring consultation before unilateral rulemaking, which has not yet happened in relation to this proposal. The commenters expressed that the FAA is obligated to ensure that current international agreements are honored, which would include such consultation. Comments from the UK Department for Transport, International Aviation Safety and Environment Division specifically stated that it is important for the FAA to consider consultations under Article 17 of the EU/U.S. BASA.[21]

FAA Response

The FAA has been directed by Congress to promulgate regulations requiring part 145 repair stations outside the U.S. to have a drug and alcohol testing program for their employees who perform work on part 121 aircraft. To the extent that BASA provisions concerning notice and consultation are applicable to the proposed regulations, the FAA intends to follow those provisions. Commenters have not identified any specific BASAs that are in conflict with the statutory requirements this proposed rule would implement, nor is FAA aware of any at this time. The FAA invites comments as to whether there are any BASAs that would conflict with the requirements of this proposed rule. Additional discussion regarding the FAA's international obligations may be found in section IV.D. of this preamble.

As emphatically stated above, the congressional directive was clear: the rule on its face cannot conflict with a sovereign nation's laws. Placing the burden on a certificate holder to prove its laws conflict with the proposed aviation safety regulations is an unacceptable application of legislative plain language. This position is consistent with the agency's own history on the subject laid out above. The application of these regulations to foreign nationals has been rejected during every previous rulemaking activity.

Bilateral Aviation Safety Agreements are contained within the four corners of the documents. Each nation recognizes the safety system of the other as providing an equivalent aviation safety result. Each country's certificate holders are required to follow their sovereign nation's safety regulations first and then comply with any Special Conditions. If the

requirements for drug and alcohol testing are to be imposed under the BASA, it must be included in the Special Conditions.

So, while the BASAs do not "prohibit" imposition of additional requirements, those demands are not made under and in accordance with the State Department sanctioned processes associated with bilateral partners. The imposition also fails to recognize the equivalent aviation safety result that is confirmed by the bilateral process.

Safety Case

Commenters also raised concerns regarding the lack of supporting evidence indicating that a safety case exists to justify the proposed rule. Commenters noted that there have been no documented aviation accidents in the U.S., the European Union, or Hong Kong in which drug use and/or alcohol misuse has been a direct cause or contributing factor. The Federal Office of Civil Aviation (FOCA)—Swiss Confederation stated that it has found no data that would support the existence of a safety case, and Switzerland and other European Aviation Safety Agency (EASA) Member States have safety management provisions in place for maintenance stations and a verifiable track record demonstrating that drug use and/or alcohol misuse does not currently represent a safety concern requiring further regulatory action. Commenters noted that according to the ICAO Accident Data Reporting system, between 1970 and 2012, there were no occurrence reports of drug or alcohol intake at maintenance facilities. Additionally, commenters pointed out that the FAA's own data demonstrates a low risk of drug use and/or alcohol misuse by maintenance personnel in the U.S.

FAA Response

The FAA does not have sufficient data to estimate a baseline level of safety risk associated with drug use and/or alcohol misuse at foreign repair stations. As previously discussed, the FAA received a minimum amount of information pertaining to foreign countries' laws and regulations, program elements of acceptable drug and alcohol testing, and existing drug and alcohol testing programs in other countries.

These two statements are belied by the information cited in comments and acknowledged above by the FAA. The agency does have data: There is no evidence that misuse has ever caused or contributed to a maintenance function related accident or incident *ergo*, there is no justification for drug and alcohol testing based on a safety risk.

The FAA also recognizes that the number of proven accidents and incidents involving drug use and/or alcohol misuse by maintenance personnel at foreign repair stations is unknown.

There are no "proven accidents and incidents" involving drug or alcohol misuse by maintenance personnel in the United States, European Union, and beyond. It is not "unknown", it is known: There have been none.

Because the FAA does not have testing data or knowledge of existing testing programs in other countries, the FAA is unable to estimate the impact of the proposed rule in detecting and deterring drug use and/or alcohol misuse at this time.

Regardless, safety data is available. The agency does not have to have data on the type and amount of drug and alcohol testing, if any, performed under foreign laws. The aircraft accident and incident reporting systems are not dependent upon drug and alcohol testing data. If an accident or incident report is mandated by civil aviation authority, the fact that drugs or alcohol was involved will be in the required report. The agency is conflating the potential number of persons misusing drugs and alcohol with improper maintenance. The misuse of drugs and alcohol does not automatically equate to an accident or an incident—only the *potential* that a maintenance error *might* result from the individual's condition.

Therefore, the FAA cannot determine whether the rule would have any additional impact on safety or persons performing non-safety sensitive functions and has, accordingly, scoped this proposal to address the specific statutory mandates in 49 U.S.C. 44733(d)(2) and 49 U.S.C. 44733. The FAA invites comments on this issue.

The agency does have data and it points directly to the fact that there is no safety justification. It is incongruous to state that there is insufficient data when the data is merely pointing to a result that does not square with the statutory mandate.

In addition, the FAA is considering how best to deter drug and alcohol misuse for any aircraft mechanic working on a part 121 aircraft regardless of how that mechanic is employed. Therefore, the FAA seeks comments as to whether the testing requirements in this proposed rule should be extended to foreign aircraft mechanics working directly for part 121 carriers. Commenters are asked to submit data that would allow the FAA to quantify the benefits and costs of expanding drug and alcohol testing requirements to these mechanics.

The agency need not make any change to the drug and alcohol testing regulations unless the result squares with the plain language and intent of the Administrative Procedure Act. The latest congressional mandate to complete a rulemaking on applying U.S. drug and alcohol testing requirements on foreign nationals is satisfied by issuance of the ANPRM, this NPRM, and a withdrawal of the regulation entirely.

The alternative is for the regulation to state plainly that when the regulation is contrary to a foreign national's sovereign rights, appropriate exemptions and waivers will be issued.

Financial and Operational Concerns

While many of the commenters noted that it was difficult to estimate the cost of implementing drug and alcohol testing programs since any testing regime closely resembling U.S. requirements does not exist in most areas abroad, they also noted that it was likely that imposition of drug and alcohol testing requirements would have a disproportionate financial impact on small-to-medium sized aerospace companies. Some commenters, including A4A, Honeywell, and Taikoo (Xiamen) Landing Gear Services Co. Ltd. (TALSCO), among others, provided some level of estimated costs. Pratt & Whitney, for example, provided estimated costs for implementing and maintaining a drug and alcohol testing program, specifics of which may be found in the public docket, and stated those extensive costs are without justification if the FAA cannot quantify the added benefit to safety. The

Coalition of Industry Groups noted its concern regarding the FAA's responsibility to ensure that the costs do not outweigh the benefits of any agency action. Additionally, Hong Kong Aero Engine Services Limited (HAESL) stated that extra costs will be incurred with no significant benefit.

FAA Response

The FAA acknowledges the commenters' concerns. The FAA used a combination of the estimates submitted by commenters and U.S. data to estimate costs to all part 145 foreign repair stations developing a drug and alcohol testing program that meets U.S. requirements. However, not all estimates provided by commenters were used as some estimates were considered high compared to current practice and estimates obtained through industry outreach. The FAA also acknowledges that small-to-medium sized aerospace companies would be impacted by this rulemaking but does not have sufficient data to isolate the impact to small and medium size foreign repair stations. Additionally, although the FAA is unable to quantify benefits, this proposed rule would apply the FAA's primary tool for detecting and deterring substance abuse by safety-sensitive aviation employees throughout the international aviation community to enhance safety.

The cost associated with Title 49 CFR part 40 compliance could not be obtained by the FAA "through industry outreach", since no foreign entity has had to comply with the requirements. The costs of domestic compliance are minimal compared to the burden on the government and the foreign citizens of 49 CFR part 40 requirements dependent upon HHS mandates for Medical Review Officers, qualifications and training for collectors, breath alcohol technicians, substance abuse professionals, screening test technicians, and the myriad other directives associated with collection, testing, re-testing, and other procedures. All facilities capable of being agents for collection and processing under DHHS rules are in the United States. Qualifying entities in other nations would be logistically and exponentially burdensome monetarily.[4]

International Civil Aviation Organization (ICAO)

A significant number of commenters noted that the appropriate vehicle to set standards to require drug and alcohol testing programs worldwide would be an ICAO initiative. Commenters pointed out that the Act mandates dealing with this issue under the auspices of an ICAO initiative.[22]

Many of these commenters, including the European Commission, Boeing Commercial Airplanes, the Embassy of the Netherlands to the U.S., Deutsche Lufthansa, and the Cargo Airline Association, among others, supported proceeding through the ICAO process. Additionally, commenters stated it is inappropriate for the FAA to take further action on this issue without first seeking common ground through ICAO. IATA stated that an ICAO initiative would set a common baseline for safety with adequate flexibility for varying customs and laws, which governments could follow when issuing their own regulations. Most commenters observed that the FAA's

[4] *See*, Title 49 § 40.3 definition of *Laboratory* as well as § 40.81, which only deals with laboratories in Canada or Mexico. Under the proposal, Canadian approved maintenance organizations do not receive 14 CFR part 145 air agency certificates and therefore are exempt from any future rule requirements.

historical position regarding global drug and alcohol testing has been to address testing issues through ICAO.

FAA Response

The FAA supports the development of international standards and believes that they would help deter and detect drug and alcohol use that could compromise aviation safety. However, ICAO standards do not presently require ICAO Member States to establish (or direct industry to establish) testing programs to deter or detect drug use and alcohol misuse by aviation personnel in the performance of safety-sensitive functions. ICAO's Annex 1 sets forth international standards and recommended practices for license holders concerning their mental fitness and use of psychoactive substances, including drugs and alcohol. Annex 1 applies to flight crew members [23] *and other personnel and recommends the identification and removal of license holders from their safety-sensitive functions while under the influence of any psychoactive substance. Specifically, annex 1 section 1.2.7, Use of Psychoactive Substances, states that holders of licenses provided for in this Annex shall not exercise the privileges of their licenses and related ratings while under the influence of any psychoactive substance which might render them unable to safely and properly exercise these privileges and shall not engage in any problematic use of substances.*[24] *ICAO provides further guidance about drug and alcohol testing in its Manual on Prevention of Problematic Use of Substances in the Aviation Workplace*; *the manual outlines suitable methods of identifying license holders who are under the influence, including through biochemical testing under certain circumstances. Although the ICAO standards set forth in Annex 1 and many countries' aviation regulations prohibit the use of drugs and alcohol by certain aviation personnel when use may threaten aviation safety, many countries either do not require testing of aviation personnel to verify compliance or do not extend testing to maintenance personnel. In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to ICAO Standards and Recommended Practices (SARP) to the maximum extent practicable. However, the FAA proposes this rule in accordance with the Act's statutory mandate in an area within which there are no ICAO SARPs. Should ICAO adopt drug and alcohol program standards in the future the FAA will work to ensure its drug and alcohol programs are aligned with such SARPs.*

The agency apparently does have information on when its anti-drug and alcohol regulations would be consistent with ICAO recommendations for many of the nations in which foreign repair stations are located. It seems that at the very least it could use that data to conform any rulemaking to those nations that can adopt the recommendations for individuals and companies performing maintenance-related safety sensitive functions.

The excuse that "Congress made me do it" is based upon a misread of the plain language of the legislation—the rulemaking must comport with the laws of the foreign nation.

3. FAA Extension, Safety, and Security Act of 2016

After the FAA published the ANPRM, as previously discussed, Congress enacted the FAA Extension, Safety, and Security Act of 2016 (2016 Act),[25] *which reemphasized Congress'*

prioritization of drug and alcohol programs for foreign repair station employees in section 2112. Specifically, section 2112 directed the FAA to (1) ensure that an NPRM is published within 90 days of the date of the enactment of the 2016 Act and (2) ensure that the rulemaking is finalized within a year of the NPRM publication.[26]

This NPRM is promulgated in accordance with such direction. The FAA notes that, while section 2112 (using the cross-referenced 49 U.S.C. 44733(d)(2)) specifies minimum content for the NPRM, it does not specify minimum content for the final rule, which may be changed from the NPRM in response to comments.

IV. Discussion of the Proposal

A. Application of 14 CFR Part 120 and 49 CFR Parts 40 Through 145 Certificated Repair Stations Located Outside the Territory of the United States (§§ 120.1, 120.123 and 120.227)

Currently, the drug and alcohol testing regulations in 14 CFR part 120 require certain persons to establish a drug and alcohol program. These persons include all air carriers and operators certificated under 14 CFR part 119 authorized to conduct operations under 14 CFR part 121 or part 135; all air traffic control facilities not operated by the FAA or under contract to the U.S. military; all operators as defined in 14 CFR 91.147; all individuals who perform a safety sensitive function provided in subpart E or F of 14 CFR part 120; all 14 CFR part 145 certificate holders who perform safety-sensitive functions and elect to implement a drug and alcohol testing program; and all contractors who elect to implement a drug and alcohol testing program.[27]

The agency is targeting one type of service provider of nine safety sensitive functions required to be tested under 14 CFR part 120. No other service provider is required to test at "any tier" in the contract, even though, other positions' abuse of drugs and alcohol have been directly linked to the cause or probable cause of accidents.[5]

The FAA-mandated testing program consists of compliance with both the FAA's drug and alcohol testing program requirements, 14 CFR part 120 (as applicable), as well as the OST's procedural regulation, 49 CFR part 40.[28]

Notably, 14 CFR part 120 restricts these activities from occurring outside of the U.S. Specifically, certain regulations bar (1) any part of the drug testing process from occurring outside the territory of the U.S., including specimen collection, laboratory processing, and Medical Review Officer (MRO) actions [29] *and (2) any testing for alcohol misuse while located outside the territory of the U.S.*[30]

These regulations have restricted any drug and alcohol testing under 14 CFR part 120 from applicability outside the territory of the U.S. As it pertains to this rulemaking, these regulations are applicable only to domestic part 145 certificate holders who perform safety-sensitive functions

[5] A simple internet search for pilot error or air traffic error reveals the statistics.

within the territories of the U.S. and elect to implement a drug and alcohol testing program under this part.

The U.S. Government has found that drug and alcohol testing programs for domestic aviation personnel who perform safety-sensitive functions on part 121 aircraft are necessary given the potential of drugs and alcohol to impair human performance. Safety-sensitive personnel are responsible for their own safety as well as the safety of countless others due to the inherent nature of their positions; therefore, the FAA has defined certain persons as those with safety-sensitive functions, which includes individuals employed by a part 145 repair station to perform aircraft maintenance duties [31] *for a part 121 operator. In the absence of data to support another approach to drug and alcohol testing, the FAA would apply its primary tool for detecting and deterring substance abuse by aviation employees performing safety-sensitive maintenance functions throughout the international aviation community*.

Title 49 U.S.C. 44733 requires the Administrator to propose a rule requiring that all employees responsible for safety sensitive maintenance functions on part 121 air carrier aircraft at part 145 repair stations located outside the U.S.[32] *be subjected to an alcohol and controlled substances testing program determined acceptable by the Administrator.*

The FAA notes that the legislation specifically used the term "controlled substances." This term is also used in 49 U.S.C. 45102, which originally charged the FAA with prescribing regulations for air carriers and foreign air carriers to conduct certain drug and alcohol testing (i.e., eventual 14 CFR part 120). Title 49 U.S.C. chapter 447 does not include a definition for "controlled substance." However, the FAA finds that given (1) the deference to the FAA Administrator to determine program acceptability in 49 U.S.C. 44733 and (2) the FAA's firmly established drug and alcohol testing regulations based off the original authority in 49 U.S.C. 45201, "controlled substances" should be intended to mean the FAA current definition of "drug" as based off the definition of "controlled substances" provided by 49 U.S.C. 45201.[33]

Specifically, 49 U.S.C. 45101 states that the definition of "controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 specified by the Administrator of the FAA.[34]

In 14 CFR 120.7, the FAA defines a "prohibited drug" as any of the drugs specified in 49 CFR part 40. OST defines "drugs" as marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids in 49 CFR 40.3. These drugs are aligned with the HHS Mandatory Guidelines established by the HHS for Federal drug-testing programs for scientific testing issues, pursuant to OTETA, as previously discussed [35] *and updated as HHS updates their drug categories. Specifically, the HHS Mandatory Guidelines allow Federal agencies with drug-testing responsibilities to test for certain controlled substances set forth by the Controlled Substances Act (i.e., the drugs as defined in 49 CFR 40.3), which is title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.*[36]

Additionally, the FAA does not believe that Congress intended to expand the scope of testing beyond that required by current airmen and safety-sensitive positions. Should the FAA adopt a

differing definition of "controlled substances," part 145 repair stations outside the U.S. would be held to more stringent standards than those required for domestically situated current airmen and safety-sensitive positions. Neither the FAA, nor the OST, has a mechanism to regulate such standards at this time. Therefore, the FAA finds that the established term "drug" meets the intention of Congress in using the term "controlled substances."

The FAA, as discussed in section III.A. of this preamble, has long held that the standards set forth in 14 CFR part 120 and 49 CFR part 40 are acceptable drug and alcohol testing programs for the aforementioned safety-sensitive functions. The FAA finds that requirements of part 145 repair stations located outside the territory of the U.S. should mirror those inside the U.S. who elect to have a drug and alcohol program. Specifically, the FAA lacks the data or studies that would support a deviation from the current program requirements as applicable to those persons who perform safety-sensitive functions (i.e.,14 CFR part 120 and 49 CFR part 40). Therefore, this proposal would require all employees of part 145 repair stations located outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft[37] *to be subject to the current FAA-mandated testing programs. Accordingly, for purposes of 49 U.S.C. 44733(d)(2), the Administrator finds that the current drug and alcohol testing scheme is acceptable in applicability to the affected part 145 repair stations outside the territory of the U.S.*

The agency's reasoning is flawed. It admits it has no idea of what the sovereign nation's laws are with respect to alcohol and drug use. It also says it has no idea if any employer testing private citizens for alcohol or drug use is allowed and if so, to what extent. Yet, it states positively that only the U.S. testing regime is acceptable.

There are nations with more harsh penalties for alcohol and drug use.[6] As stated above, there are ICAO nations that do perform testing on other safety sensitive positions; those nations must have collection and testing regimes that can be found acceptable particularly as they would have to comport with the sovereign nation's laws.

Therefore, the FAA proposes three revisions to 14 CFR 120.1, which outlines to whom part 120 applies. First, the FAA proposes to revise current 14 CFR 120.1(c) to specify that paragraph (c) applies to those part 145 certificate holders located in the territory of the U.S. who elect to implement a drug and alcohol testing program under 14 CFR part 120. The FAA notes that there is no substantive change to the current applicability of domestic part 145 certificate holders. Next, the FAA proposes to expand applicability of 14 CFR part 120 to all part 145 certificate holders outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft by adding new paragraph (d).[38]

This, in turn, would redesignate current 14 CFR 120.1(d) as paragraph (e).

Additionally, the FAA finds it necessary to provide specific instructions to affected part 145 repair stations outside the territory of the U.S., consistent with the requirements for other affected persons

[6] A simple Google search for "in what country can you be killed for drug use" brings up information from drugabuse.com on "*The 20 Countries With the Harshest Drug Laws in the World*."

(i.e., the persons listed in 14 CFR 120.1), on how to obtain the necessary authority to implement a drug and alcohol testing program. Specifically, 14 CFR 120.117 and 120.225 set forth certain requirements specific to the person implementing a drug and alcohol testing program and do not currently include part 145 repair stations affected by this proposed rulemaking.

The FAA, therefore, proposes three revisions to the charts set forth in 14 CFR 120.117(a) and (c), which would treat applicable part 145 repair stations outside the territory of the U.S. similar to those domestic part 145 repair stations who choose to enact their own drug testing programs. First, 14 CFR 120.117(a) provides the documentation that a company must obtain from the FAA to implement a drug testing program: an Antidrug and Alcohol Misuse Prevention Program Operations Specification (A449), Letter of Authorization (A049), or Drug and Alcohol Testing Program Registration. Second, a revision to paragraph (a)(5) is necessary to specify the requirements in that paragraph, which permit a repair station to elect to implement a testing program, are applicable only to part 145 certificate holders located inside the territory of the U.S. Finally, the FAA proposes to add new paragraph (a)(6) within the chart in 14 CFR 120.117. This paragraph would require a part 145 repair station located outside the territory of the U.S. whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector. The A449 serves as the certification to comply with the drug and alcohol testing regulations, 49 CFR part 40 and 14 CFR part 120. In turn, current 14 CFR 120.117(a)(6) would be redesignated as paragraph (a)(7).

Similarly, 14 CFR 120.117(c) prescribes certain requirements pertaining to the implementation of an Antidrug and Alcohol Misuse Prevention Program. The FAA proposes several revisions to 14 CFR 120.117(c). First, a revision to paragraph (c)(1) is necessary to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S. Next, the FAA proposes new paragraph (c)(2) to require the applicable repair station located outside the territory of the U.S. to (1) obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector, (2) implement the drug testing program no later than one year from the effective date of the regulation [39] (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations), and (3) meet the requirements of 14 CFR part 120, subpart E. In turn, current 14 CFR 120.117(c)(2) would be redesignated as paragraph (c)(3). Finally, the FAA proposes minor grammatical changes to the headings of the chart set forth by 14 CFR 120.117(c) and introductory text of paragraphs (c)(1) and (3) to conform with the heading revisions.

Subpart F of 14 CFR part 120 sets forth the alcohol testing program requirements. The requirements pertaining to implementation largely mirror those set forth in subpart E, Drug Testing Program Requirements. The FAA, therefore, proposes similar amendments to the implementation charts set forth in 14 CFR 120.225(a) and (c) for the same reasons as previously discussed. Specifically, in 14 CFR 120.225(a), the FAA proposes to: first, revise the introductory language of paragraph (a)(5) to specify that paragraph is applicable to part 145 certificate

holders located inside the territory of the U.S.; second, add new paragraph (a)(6) to include the requirements for a part 145 repair station located outside the territory of the U.S. who performs safety-sensitive maintenance functions on part 121 air carrier aircraft; and, third, redesignate current paragraph (a)(6) as new (a)(7). Likewise, in 14 CFR 120.225(c), the FAA proposes to: first, revise paragraph (c)(1) as necessary to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S.; second, add new paragraph (c)(2) to require the applicable repair station located outside the territory of the U.S. to (1) obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector, (2) implement the drug testing program no later than one year from the effective date of the regulation (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations), and (3) meet the requirements of 14 CFR part 120, subpart E; and, third, redesignate current paragraph (c)(2) as (c)(3). Finally, the FAA proposes, first, minor grammatical changes to the headings of the chart set forth by 14 CFR 120.225(c) and introductory text of paragraphs (c)(1) and (3) to conform with the heading revisions and, second, to add the correct introductory text in paragraph (d), which is currently and inadvertently blank in the regulations.

B. Conforming Amendments To Facilitate Drug and Alcohol Procedures Outside the United States (§§ 120.123 and 120.227)

There are certain regulations in 14 CFR part 120 that effectively restrict any drug and alcohol programs from implementation outside of the U.S. Specifically, 14 CFR 120.123(a) bars any part of the drug testing process from being conducted outside the territory of the U.S. and requires that employees assigned safety-sensitive functions solely outside the territory of the U.S. to be removed from random testing pools, only to be returned once the covered employee has resumed functions wholly or partially in the U.S. Additionally, 14 CFR 120.123(b) states that the provisions of subpart E (Drug Testing Program Requirements) do not apply to any individual who performs a function pursuant to 14 CFR 120.105 by contract for an employer outside the territory of the U.S. Likewise, 14 CFR 120.227(a) bars covered employees from being tested for alcohol misuse while located outside the territory of the U.S. and mirrors the requirement of removal of a covered employee outside the territory of the U.S. from the random testing pool as with drug testing programs previously discussed. Additionally, 14 CFR 120.227(b) states that the provisions of subpart E (Alcohol Testing Program Requirements) do not apply to any individual who performs a safety sensitive function by contract for an employer outside the territory of the U.S.

The FAA recognizes that these regulations serve as barriers to the implementation of a drug and alcohol testing program for a part 145 repair station outside the territory of the U.S. Without conforming amendments to except these repair stations from 14 CFR 120.123 and 120.227, it would be impossible to comply with the proposed regulations and the current regulations. Therefore, the FAA proposes to amend §§ 120.123 and 120.227 to allow drug and alcohol testing processes to be conducted on employees of part 145 repair stations located outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft.

Specifically, this proposal would add language at the beginning of 14 CFR 120.123(a), 120.123(a)(1), 120.123(b), 120.227(a), 120.227(a)(1), and 120.227(b) that would except persons under proposed 14 CFR 120.1(d) from applicability of those regulations restricting drug and alcohol testing outside the territory of the U.S.

Currently, part 121 air carriers are responsible for ensuring that individuals who perform safety-sensitive maintenance functions within the territory of the U.S. are subject to testing. If a part 121 air carrier does not include a maintenance worker under their own testing program, it must ensure the worker is included in the FAA-mandated testing program of whomever the air carrier uses to perform safety-sensitive maintenance functions (e.g., a part 145 repair station). In keeping with the congressional mandate, this proposal does not change the language of the regulation that removes part 121 employees located outside of the territory of the U.S. from the testing pool. Thus, part 121 air carriers that directly perform their own maintenance outside the territory of the U.S. would not be required to test their employees for drugs and alcohol. If the part 121 air carrier decides to hire (either as an employee or an independent contractor) the foreign part 145 repair station employees who work on its aircraft, then those employees would not be subject to testing because the part 121 air carrier is restricted from including into its testing pool employees who work solely outside the territory of the U.S.

This approach is consistent with the statutory mandate, which did not address drug and alcohol testing of part 121 employees performing safety-sensitive maintenance functions outside the territory of the U.S. As previously discussed, the FAA lacks safety data and supporting research to support a proposal of drug and alcohol testing beyond that required by the legislation. However, the FAA is considering how best to deter drug use and alcohol misuse for any aircraft mechanic working on a part 121 aircraft regardless of how that mechanic is employed. Therefore, the FAA seeks comments, with supporting data, as to whether the testing requirements in this proposed rule should be extended to foreign aircraft mechanics working directly for part 121 carriers.

C. Exemptions and Waivers to Drug and Alcohol Program Requirements (§§ 120.5 and 120.9)

The FAA recognizes that the different laws and regulations of some countries (including, but not limited to, privacy laws) may place limitations on drug and alcohol testing, prohibit it entirely, or place conditions on how testing would be done. In fact, Congress contemplated this potential barrier in 49 U.S.C. 44733(d)(2), as evidenced by the language requiring the drug and alcohol program to be both acceptable to the Administrator and consistent with the applicable laws of the country in which the repair station is located. As previously discussed in the responses to comments to the ANPRM, the FAA seeks to avoid situations whereby the regulations of the FAA are inconsistent with laws in other sovereign countries. As this proposal extends the drug and alcohol testing requirements beyond the territory of the U.S., the FAA realizes that the different laws of some countries, including, but not limited to, privacy laws, may place limitations on drug and alcohol testing or prohibit it entirely. For example, some countries may bar pre-employment drug testing, which is required by 14 CFR 120.109(a).

The statutory mandate requires the regulations issued by the FAA to be consistent with the applicable laws. It does not allow the agency to issue a rule that is contrary to those requirements. The plain language of the statutory mandate does not give the agency the choice of placing the burden on the foreign national to obtain any waiver or an exemption. The agency must determine with its own resources whether any air agency issued to a foreign entity must comply with the requirements of 14 CFR 120 or the additional burdens imposed by Title 49 CFR 40.

Section 120.5 requires each employer having a drug and alcohol testing program under part 120 to ensure that all drug and alcohol testing conducted under that part complies with the procedures set forth in 49 CFR part 40. In evaluating the effects of the congressional mandate, the FAA has scrutinized the many challenges associated with the establishment and implementation of drug and alcohol testing programs outside the U.S. that comply with both the FAA regulations and the DOT's testing standards and procedures.[40]

Since the requirements of 49 CFR part 40 only apply if the party is required to "…conduct drug and alcohol tests required by Department of Transportation (DOT) agency regulations…", an exemption from the DOT (and resultant DHHS) regulations would not be required if the FAA issues the final rule and provides a waiver from all requirements in 14 CFR part 120.[7]

In cases in which compliance with certain provisions of 49 CFR part 40 would not be attainable due to legal restrictions in the country where testing must occur, the part 145 repair station could apply for an exemption from part 40 using the process described in 49 CFR 40.7. Under § 40.7, an exemption will only be granted if the requestor documents special or exceptional circumstances (e.g., a country's law) that make compliance with a specific provision of 49 CFR part 40 impracticable. To acknowledge the potential need for foreign repair stations to obtain exemptions issued by the DOT from 49 CFR part 40, the FAA proposes to add language to 14 CFR 120.5 to clarify that an employer's drug and alcohol testing conducted pursuant to 14 CFR part 120 must comply with the procedures set forth in 49 CFR part 40, to include any exemptions issued to that employer in accordance with 49 CFR 40.7.

An exemption is granted by section and paragraph; there are over twenty-five hundred (2,500) paragraphs in 14 CFR part 120 and 49 CFR part 40 that must be reviewed to determine whether compliance or an alteration means is available. The FAA's proposal does not even contemplate the requirements of HHS, which appears to only qualify labs in the United States; and only acknowledges Canada and Mexico because of international treaties.

As noted above, the DOT (and resultant DHHS) requirements would only apply if the FAA, i.e., Department of Transportation (DOT) agency, regulations apply. Although if only some of the requirements were waived, there would be a need for DOT and/or DHHS exemptions.

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[7] See, Title 49 CFR § 40.1(a).

Traditionally, when a person cannot comply with an FAA regulation, the person may seek an exemption through the procedures set forth by 14 CFR part 11. However, to streamline and efficiently address potential international legal conflicts, the FAA proposes to add waiver authority in new 14 CFR 120.9 that will allow repair stations located outside of the U.S. to request waivers from specific provisions of 14 CFR part 120. Specifically, proposed 14 CFR 120.9(a) sets forth the waiver authority for those applicable repair stations that would be unable to comply with the requirements of 14 CFR part 120 due to the laws of the country within which the repair station is located. New paragraph (b) would set forth the information required by the Administrator to evaluate and process the waiver request.

The proposal neither streamlines nor efficiently addresses potential international legal conflicts. The ability to decipher and properly apply foreign laws is within the purview of the Departments of State, Commerce, and Justice, but by its own admission, it is beyond the FAA's capabilities, or it would be able to write regulations that ensure the legislative mandate is followed. Instead, it has admitted it cannot find or decipher the information necessary and has placed the burden on the foreign citizen.

The foreign citizen will have to obtain the services of experts in the fields of international law as well as HHS, DOT, and FAA regulations to decipher whether compliance with myriad sections and paragraphs of the rules can be achieved. The analysis is not just whether the DOT and FAA regimes can be followed, but whether the proper certifications can be obtained from HHS to comply with the DOT requirements.

For example, the Administrator requires basic informational details; the specific section(s) of 14 CFR part 120 from which a waiver is sought; the reasons why granting the waiver would not contravene the purpose of 14 CFR part 120, as defined in § 120.5; a copy of the law that is inconsistent with 14 CFR part 120; an explanation of how the law applies to affected employees and how it is inconsistent with 14 CFR part 120; and a description of alternate means used to achieve the objectives of the part 120 provision from which the waiver is sought (or, if it is impossible to achieve the objective by alternative means, a justification of why it would be so). Finally, new 14 CFR 120.9(c) would provide the manner in which the repair station should submit their waiver request.

The information sought is duplicative and circular, the only reason the waiver can be sought is if the laws applying to the affected employees are inconsistent with 14 CFR part 120. The objective of any paragraph of that part is to perform or administer the testing protocol required. There will be no alternative means to achieve that objective if the laws of the country prohibit the testing regime or protocol required by 14 CFR part 120 and/or 49 CFR part 40, and/or the HHS requirements.

The FAA finds that the existing exemption process in 49 CFR part 40 in tandem with the proposed waiver process in new 14 CFR 120.9 would provide sufficient pathways to work with part 145 certificated repair stations outside the territory of the U.S. to ensure these repair stations are not in violation of the laws of the country within which they are situated.

The agency is ignoring the fact that 49 CFR part 40 mandates compliance with HHS requirements. No provision has been made to accommodate the testing labs and protocol. It will be impossible for a foreign "person" to comply with the DOT regulations without compliance with HHS mandates.

The FAA notes that each process is intended to provide relief for its respective regulations. While the FAA requires compliance with 49 CFR part 40 through its regulations, the FAA does not have the authority to exempt a person from the regulations situated there, and person should not request a waiver from the FAA for relief from the DOT's regulations.

Please respond to comments above regarding a waiver of all FAA requirements providing relief from DOT (and subsequently HHS) regulations. Although it may be rare, the situation will arise where a waiver from all FAA drug and alcohol requirements could be or is issued, *e.g.*, if the country in which the foreign air agency exists is subject to the same or similar anti-drug and alcohol testing regime. For example, Australia has drug and alcohol testing requirements like those proposed by this rulemaking.[8]

If a person determines they cannot meet certain 49 CFR part 40 requirements (e.g., if their country's laws do not allow drug testing for one or more of the drugs required under 49 CFR 40.85), the person should follow the process set forth by 49 CFR 40.7; should the DOT grant the exemption, the FAA would recognize the exemption through proposed 14 CFR 120.5. Likewise, the waiver process set forth in new 14 CFR 120.9 provides an avenue by which a person may seek relief from FAA regulations that a person determines they cannot meet (e.g., if their country's laws do not allow pre-employment drug testing, which is required under 14 CFR 120.109(a)). As such, a person may have to appeal to both the DOT and FAA for an exemption and a waiver, respectively, if there are regulations in each part that a person seeks relief from.

How is this certificate-holder-by-certificate-holder painstaking process streamlined or efficient?

The cost of the proposal for both the FAA and the certificate holder is considerable. The work required to determine the ability to comply with every section of the regulations mandated by three U.S. agencies is an onerous and exacting task. Improper completion will result in the foreign national being subject to investigation and enforcement by its sovereign nation, and three U.S. agencies.

D. Impact on International Agreements

As noted in the discussion of comments to the ANPRM, commenters raised concerns regarding the impact of the legislation and enabling regulations on existing Bilateral Aviation Safety Agreements (BASA). However, commenters have not identified any specific BASAs that are in conflict with the statutory requirements this proposed rule would implement, nor is FAA aware of any at this time.

[8] See overview of the Australian Government Civil Aviation Safety Authority Drug and alcohol testing at https://www.casa.gov.au/operations-safety-and-travel/safety-advice/drug-and-alcohol-management/drug-and-alcohol-testing#Whocanbetested.

The FAA invites comments as to whether there are any BASAs that would conflict with the requirements of this proposed rule.

The agency must look beyond the international agreements it has with other civil aviation authorities. Other treaties and agreements covering sovereignty must be analyzed.

V. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of Executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563, as amended by Executive Order 14094 ("Modernizing Regulatory Review"), direct that each Federal agency may propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39 as amended) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the U.S. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is $177,000,000, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule. The FAA has provided a more detailed Regulatory Impact Analysis of this proposed rule in the docket of this rulemaking.

In conducting these analyses, the FAA has determined that this proposed rule: is a "significant regulatory action," as defined in section 3(f) of Executive Order 12866 because it raises legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in Executive Order 12866 as amended by Executive Order 14094; could have a significant economic impact on a substantial number of small entities; could create unnecessary obstacles to the foreign commerce of the U.S.; and would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

A. Regulatory Evaluation

Total Benefits and Costs of This Rule

In response to Congressional direction, the FAA proposes to require certificated part 145 repair stations located outside the U.S. and its territories whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to ensure those employees are subject to a controlled substance and alcohol testing program consistent with the applicable laws of the country in which the repair station is located. This proposed rule would require part 145 repair

station located outside the territory of the U.S. to cover its employees performing maintenance functions on part 121 air carrier aircraft under its own testing program that meets the requirements of 49 CFR part 40 and 14 CFR part 120.

The agency must include compliance with HHS requirements in this analysis for all tiers in a maintenance contract.

However, if a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (e.g., the laws of the country where the repair station is located are inconsistent with the regulations), they may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, they may apply for a waiver in accordance with proposed waiver authority. Although there are no quantifiable benefits, this rulemaking would apply the FAA's existing primary tool for detecting and deterring substance abuse by safety-sensitive aviation employees, especially illegal drug use, throughout the international aviation community to enhance aviation safety. The total cost, at seven percent present value, of this proposed rule equals the foreign repair station cost of $102.3 million, plus FAA cost of $6.3 million for a total of $108.7 million ($122.4 million at three percent present value) over five years.

This estimate does not include the cost of compliance if the rule cannot be implemented as if the repair station was in the United States. It does not account for obtaining the waivers and exemptions that will be needed by the foreign repair station. The cost of evaluating, submitting, issuing, and reissuing waivers and exemptions, cost of standing up a HHS qualified laboratory and training program for personnel performing certain functions such as MRO, collector, etc., and the cost associated with having to transport specimens to the U.S. if HHS compliance cannot be attained are only some of the data that must be evaluated.

Further, the primary repair station would need to educate and implement the same regulations upon its contractors (i.e., subcontractors at any tier).

Who is potentially affected by this rule?

- *Part 145 Certificated Foreign Repair Station outside the U.S. that performs safety-sensitive maintenance functions on part 121 aircraft.*

This is an understatement of major proportion; the last significant rulemaking extended the anti-drug and alcohol regulations to "any tier in the maintenance process." The court specifically admonished the agency for failing to account for the businesses that make up "any tier" in its rulemaking.[9]

- *The FAA Office of Aerospace Medicine.*

The agency fails to mention—

- **Department of Transportation (DOT)**

[9] *See,* generally, Aeronautical Repair Station Ass'n. v. Federal Aviation Administration, 494 F.3d 161 (2007).

- **Department of Health and Human Services (HHS)**

These agencies are directly impacted by the rulemaking and will have to act if the regulation is adopted to (a) process exemptions, and (b) qualify laboratories, collection facilities and personnel, etc.

1. *Costs of This Rule*

Part 145 certificated foreign repair stations outside the U.S. and the FAA would incur the cost of this proposed rule. The estimated cost of the proposed rule to part 145 certificated foreign repair stations are the costs to implement a drug and alcohol testing program that adheres to U.S. domestic testing standards. Cost to foreign repair stations would consist of developing a drug and alcohol testing program, training, testing safety sensitive maintenance employees for drugs and alcohol, and documentations.

The costs include but are not limited to—

- **Obtaining DHHS approval of laboratories, personnel, and the basic requirements needed to comply with 49 CFR part 40 testing protocol and regimes. To estimate the amount, the agency must look to the rulemaking promulgating the DHHS requirements for the costs associated with being approved by that agency to collect and process specimens. If there is insufficient financial incentive to set up the laboratories, train personnel, etc. the cost of using U.S. sources must be determined.**
- **Obtaining exemptions from DOT and DHHS, and waivers from the FAA for over twenty-five hundred sections and/or paragraphs of three regulatory agencies for every country a 14 CFR part 145 foreign air agency certificate is issued. For international organizations with locations in more than one country, the cost of—**
  - **Obtaining international experts or counsel to determine the extent to which the requirements were prohibited or equivalent.**
  - **Obtaining expert review of the sections of each U.S. departments requirements to determine ability to comply or offer alternatives, which include—**
    - ✓ **Filing appropriate documents**
    - ✓ **Refiling if the exemption or waiver is not permanent.**

Total cost to foreign repair stations over five years, at seven percent present value, sums to $102.3 million with and annualized cost of $24.9 million. At three percent present value, estimated total cost to foreign repair stations is $115.2 million with an annualized cost of $25.1 million.

*Table 1—Cost to Part 145 Foreign Repair Stations Over 5 Years [$Millions] **

Year	*Program and training development & maintenance*	*Training*	*Testing (drug and alcohol)*	*Annual reports*	*Total cost (7% PV)*	*Total cost (3% PV)*
1	*$0.5*	*$12.9*	*$0.0*	*$3.8*	*$16.1*	*$16.7*
2	*0.4*	*2.2*	*9.0*	*14.1*	*22.5*	*24.3*
3	*0.4*	*2.3*	*9.4*	*14.7*	*21.9*	*24.5*
4	*0.4*	*2.4*	*9.7*	*15.3*	*21.2*	*24.7*
5	*0.4*	*2.5*	*10.1*	*15.9*	*20.6*	*24.9*
Total	*2.2*	*22.2*	*38.3*	*63.9*	*102.3*	*115.2*

** These numbers are subject to rounding error.*

Under the U.S. requirements, every foreign repair station would have to become familiar with and ensure HHS requirements, protocols, and procedures were followed by the foreign testing laboratories, or ship the drug testing specimen to the United States. Even the breathalyzer machines used must be compliant with HHS requirements. The cost of compliance must be ascertained for all contingencies, not just the most expeditious.

Cost to the FAA would include inspections and the necessary documentation associated with monitoring these repair stations. Total cost to FAA over five years, at seven percent present value, sums to $6.3 million with an annualized cost of $1.5 million. At three percent present value, total cost is $7.2 million with an annualized cost of $1.6 million.

The cost to the agency would include the processing of at least one thousand (1,000) waivers; answers to myriad questions regarding the application of foreign labor and other sovereign laws; coordinating exemptions with the DOT and HHS; and issuing and reissuing appropriate waivers.

The FAA also invites commenters to submit data that would allow it to quantify the costs of extending this proposed rule to foreign aircraft mechanics employed directly by part 121 certificate holders.

The same requirements for waivers and exemptions would apply; if the foreign nation did not allow the testing protocol of its citizens, the U.S. citizen would be subjected to the same prohibitions. The U.S. air carrier would be required to determine compliance with the same thousands of sections and paragraphs. Therefore, quantifying the cost would need to be ascertained in the same manner as if the individual was not "employed directly."

2. *Benefits of This Rule*

Congress mandated that the FAA propose a rule that establishes drug and alcohol testing programs for foreign repair stations. Any benefits of the regulations would result from potential reductions in safety risks, any improvements in safety in detecting and deterring drug use and/or alcohol

misuse, and worker productivity. The FAA concludes that two specific sets of benefits may accrue from this rulemaking:

- *The prevention of potential injuries and fatalities and property losses resulting from accidents attributed to drug use/alcohol misuse or neglect or error on the part of individuals whose judgement or motor skills may be impaired by the presence of alcohol or drugs; and*
- *The potential reduction in absenteeism, lost worker productivity, and other cost to employers, as well as improved general safety in the workplace, by the deterrence of drug use and/or alcohol misuse.*

However, the FAA lacks sufficient data to estimate a baseline level of safety risk associated with a drug and alcohol testing program at part 145 certificated foreign repair stations that perform safety sensitive maintenance on part 121 aircraft. Additionally, it is difficult to estimate (and the FAA does not have data on) the impact of the proposed rule in detecting and deterring drug use and/or alcohol misuse. To estimate safety and productivity benefits that would result from this proposed rule, the FAA would need estimates of the following:

- *Baseline risks attributable to drug use and/or alcohol misuse;*
- *Effectiveness of the rule; and*
- *Value of the reduction in risk of affected outcomes.*

The FAA invites comments on this issue. The FAA also invites commenters to submit data that would allow it to quantify the safety and productivity benefits of extending this proposed rule to foreign aircraft mechanics employed directly by part 121 certificate holders.

There is no discernible safety or productivity benefit for 14 CFR part 120.

Baseline Risks Attributable to Drug Use and/or Alcohol Misuse

The FAA does not have data to estimate a baseline level of safety risk associated with safety-sensitive maintenance personnel drug use and/or alcohol misuse. The FAA acknowledges there have been no accidents or incidents related to safety-sensitive maintenance personnel using drugs or alcohol. The FAA may use accidents or incidents related to part 121 aircraft that list maintenance as either a cause or factor in the accident report as a proxy to assess the decreased risk of injuries, fatalities, and property losses. However, it is difficult to attribute an accident or incident that occurs months after the maintenance was completed to poor maintenance work related to drug use and/or alcohol misuse.

Effectiveness of the Rule

The FAA would also need data on the effect of the rule on maintenance workers' drug use and/or alcohol misuse and the resulting effect on job performance. For example, drug and alcohol programs may serve as a deterrent, resulting in less drug use and/or alcohol misuse by employees and higher productivity. However, it would be difficult to analyze the direct causal effect of less drug use and/or alcohol misuse to improved productivity. The FAA would need to retrieve extensive

data, such as employees' health levels, employees' sleep patterns, changes to operating procedures, levels of education and training, and staffing levels, amongst other factors, to isolate the direct effect of a decrease in drug or alcohol usage on productivity levels. Additionally, even if this data were available, the analysis would be extensive and there would be academic questions regarding whether the causal effect was properly measured.

Additionally, as mentioned above, there are no accidents or incidents directly related to drug use and/or alcohol misuse to estimate the effect of the rule on injuries, fatalities, or property loss. Therefore, there is a lack of information to establish a baseline.

Value of Risk Reduction

The safety risks from drug use and/or alcohol misuse are increased risk of injuries and fatalities in the event of an accident or incident. The FAA values the reductions in such risks using the value of statistical life (VSL) for fatalities and fractions of the VSL based on the Maximum Abbreviated Injury Scale (MAIS) for injuries. The Department of Transportation guidance on valuing reductions in fatalities and injuries [41] could be used to monetize and quantify estimates of the potential safety benefits associated with this rulemaking.

Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not propose to require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through the International Civil Aviation Organization (ICAO) to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, that alternative may not meet Congressional direction due to the multitude of Member State equities considered in the implementation of an ICAO standard. In other words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given the time, resources, and scope of the adoption of an international standard.

The most effective and expeditious way the agency could achieve the congressional mandate is to determine the applicability of the U.S. regulations on a foreign repair station at the time the certificate is issued or renewed and take appropriate measures to ensure the foreign program is either acceptable to the agency, or for FAA, DOT, and HHS to issue the appropriate waivers or exemptions.

The federal government's various departments that have the expertise to understand and apply the appropriate measures while protecting sovereignty must be used; the plain language of the statute demands the executive branch issue regulations that are consistent with the location of the foreign repair station. The executive agency cannot shift that burden to the foreign citizen and comply with congressional dictate.

The alternative offered ensures that sovereign rights of foreign nationals are preserved and ensures the U.S. government is using its power and resources to achieve a mandate without exposing itself or foreign citizens to unnecessary legal actions.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act (RFA) of 1980, Public Law 96–354, (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) and the Small Business Jobs Act of 2010 (Pub. L. 111–240), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term "small entities" comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The FAA is publishing this Initial Regulatory Flexibility Analysis (IRFA) to aid the public in commenting on the potential impacts to small entities from this proposal. The FAA invites interested parties to submit data and information regarding the potential economic impact that would result from the proposal. The FAA will consider comments when making a determination or when completing a Final Regulatory Flexibility Analysis.

Under section 603(b) and (c) of the RFA, an IRFA must contain the following:

(1) A description of the reasons why the action by the agency is being considered;

(2) A succinct statement of the objective of, and legal basis for, the proposed rule;

(3) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and

(6) A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

1.1 Reasons the Action Is Being Considered

The proposed rule is in response to Congressional mandate that the FAA propose a rule to establish drug and alcohol testing program requirements for part 145 repair stations outside the territory of the United States that provide safety-sensitive maintenance functions for part 121 air carriers acceptable to the FAA Administrator.

1.2 Objectives and Legal Basis of the Proposed Rule

This proposed rule would require certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform aircraft maintenance on part 121 air carrier aircraft are subject to a drug and alcohol testing program.

In addition, the repair station would have to ensure all its contractors (i.e., subcontractors at any tier) were covered. The legal obligation extends to multiple layers of commercial relationships that have not been addressed in the rulemaking.

A part 145 repair station located outside the territory of the U.S. would cover its employees performing maintenance functions on part 121 air carrier aircraft under its own testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120. If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (e.g., the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, they may apply for a waiver in accordance with proposed waiver authority.

The waiver and exemption process would also apply to any contractor, sub-contractor, et.al., to cover "any tier" in the maintenance process, increasing complexity and cost.

The FAA's authority to issue rules on aviation safety is in title 49 of the United States Code (49 U.S.C.), specifically 49 U.S.C. 106 and 49 U.S.C. 45102. This proposed rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (the Act) (49 U.S.C. 44733) and section 2112 of the FAA Extension, Safety, and Security Act of 2016, which directed publication of a notice of proposed rulemaking in accordance with 49 U.S.C. 44733.

1.3 All Federal Rules That May Duplicate, Overlap, or Conflict

There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

The requirements in 49 CFR part 40 that mandate adherence to DHHS protocols overlap this proposal and have not been acknowledged.

1.4 Description and Estimate of the Number of Small Entities

This proposed rule would impact part 145 repair stations located outside the territory of the U.S. that perform safety sensitive maintenance functions on part 121 air carrier aircraft. The act defines a small business as "a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."[42]

While the regulatory flexibility determination does not require small foreign entities to be considered, foreign repair stations may be using U.S. components or labor, especially if they are working on U.S. manufactured aircraft; therefore, the FAA assumes the RFA would apply.

The SBA (2022) established size standards for various types of economic activities, or industries, under the North American Industry Classification System (NAICS).[43]

These size standards generally define small businesses based on the number of employees or annual receipts. Table 2 shows the SBA size standard, based on the NAICS code, applicable to repair stations, as it encompasses air transport support activities to include aircraft maintenance and repair services.

Table 2—Small Business Size Standards: Aircraft Maintenance and Repair Services

NAICS code	*Description*	*Size standard*
488190	*Other Support Activities for Air Transportation*	*$40.0 million*

Source: SBA (2022).

NAICS = North American Industrial Classification System.

SBA = Small Business Administration.

Although the FAA was able to identify a size standard for repair stations to be considered small, the FAA lacks financial data to determine if foreign repair stations meet the applicable size standard. Instead, the FAA provides an analysis estimating the total cost to small entities based on available data for domestic repair stations. A 2011 antidrug and alcohol misuse prevention rule for domestic repair stations analyzed the effect on domestic repair stations that were small entities and subcontractors those entities used. That rule based the regulatory flexibility determination analysis on a Transportation Security Administration (TSA) study that used Dun & Bradstreet data to estimate the share of domestic repair stations that would be considered small entities.[44]

The findings show that 93.28% of domestic repair stations would be classified as small entities. Extrapolating this estimate to the 977 foreign repair stations used in the analysis of this rulemaking results in 912 foreign repair stations that could be considered small entities.[45]

The agency must consider *all tiers* of small business that must comply with the current and proposed regulations. The agency must treat the contractors and subcontractors as regulated entities.[10] The impact on U.S. repair stations that use foreign contractors must be considered as well. The agency knew that it needed to do so from the case cited, yet again has failed to acknowledge or attempt to ascertain the number of subcontractors *at any tier* used by U.S. repair stations.

This failure is inexcusable since repair stations must have procedures for maintaining and revising the list of contractors used to perform maintenance functions; the agency must be notified when the list is revised.[11] Additionally, the agency could obtain information on the contractors of certificated repair stations that have registered their own anti-drug and alcohol programs under 14 CFR part 120.

[10] *See*, Aeronautical Repair Station Ass'n. v. Federal Aviation Administration, 494 F.3d 161 (2007) at 177.
[11] *See,* 14 CFR § 145.209(h).

The FAA seeks comment and requests data on how this rulemaking will affect part 145 foreign repair stations.

1.5 Projected Reporting, Recordkeeping, and Other Compliance Requirements

Based on the total nominal cost of the rule to repair stations, $126.5 million, the cost per repair station is $129,473.[46]

Multiplying the cost per repair station by the estimated 912 repair stations that are small entities results in a total cost to small entities of $118.1 million over five years. Table 3 shows the estimated annualized compliance costs by category.

The impact on small entities will be at least four times the amount estimated. Each repair station must evaluate its foreign suppliers to determine if they can be used. That evaluation is above and beyond merely preparing documents and conducting training. First an analysis must be made of whether the contractor, and its subcontractors can obtain their own program, or be placed under the U.S. repair station's program.

The cost of making that determination will depend upon the entity's location; for example, those in Canada will not be impacted by the regulation, whereas other foreign locations will have to be evaluated by international law and regulation experts. Each section and paragraph of Titles 14, 45, and 49 CFR will have to be scrutinized for potential conflicts with foreign sovereignty issues and potential resolution.

While it may be possible to change contractors, there are processes that must be accomplished by limited sources, such as a design approval holder with repair station capabilities. Indeed, there are airworthiness directives that require work only to be performed by specified entities, some of which may be foreign. Therefore, the impact on all regulated parties must be considered, both certificated and non-certificated.

Table 3—Average Cost of Compliance and Small Entities

Category	*Number of small entities*	*Average annualized cost per repair station*
Program and Training Development & Maintenance Cost	*912*	*$444.69*
Training	*912*	*3,689.98*
Testing Cost	*912*	*6,366.88*
Paperwork	*912*	*10,624.49*

[1] *Based on a baseline of existing practices and using a 7% discount rate.*

1.6 Significant Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not propose to require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through the International Civil Aviation Organization (ICAO) to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, 49 U.S.C. 44733(d)(2) requires the FAA to expeditiously proceed with this rulemaking. In other words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given the time, resources, and scope of the adoption of an international standard.

The alternative to apply the regulations at application and renewal so the government can use its resources on a case-by-case, or country-by-country basis to determine whether the repair station can implement some or all requirements can be implemented and enforced would be the most efficient and cost-effective method.

The government has been directed to ensure its regulation is not contrary to the sovereignty of foreign citizens, it must use its resources to perform the analysis. By applying the requirement only if the sovereign nation's laws allow the regime would ensure the congressional mandate was followed and avoid unnecessary delays, incomplete analysis, recurring and repetitive evaluations and myriad issues that will arise if the current proposal is adopted.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the U.S. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the U.S., so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

These treaties require the U.S. to make the determination. Since the agency cannot justify the standard based upon safety, it is imperative that it make the determination that the proposal does not present an unnecessary obstacle to foreign commerce.

The U.S. must ensure its operation, *i.e.*, evaluation of whether a foreign country's laws and regulations meet the U.S. objective; America cannot place that burden on the foreign nation or its citizens.

This rulemaking is congressionally mandated. The FAA assessed the potential effect of this proposed rule and determined that it ensures the safety of the American public while noting some

countries and foreign trade associations, in their comments, voiced their opposition to an FAA drug and alcohol testing standard for foreign repair stations. In comments to the ANPRM, as discussed in section III.B.2. of this preamble, these countries cited failure of the legislation to recognize each nation's sovereignty and cited that the International Civil Aviation Organization (ICAO) would be the appropriate vehicle to set worldwide standards. As a result, this rulemaking could create an obstacle or retaliation to foreign commerce. The FAA invites comments on this issue.

The agency seems to think the public is the expert in foreign treaty requirements, not the government. The government has entered treaties and trade agreements that require each state to determine the impact on others—those treaties don't allow the government to place that burden on its citizens, let alone foreign nationals. The FAA is one of many agencies that must evaluate the impact of this proposal on each nation's sovereignty; a single agency cannot impose its will without the international evaluation required.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) 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 (in 1995 dollars) 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 $177.0 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

This action contains the following amendments to the existing information collection requirements previously approved under OMB Control Number 2120–0535. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted these proposed information collection amendments to OMB for its review.

Summary:

Under §§ 120.1, 120.123 and 120.227, the proposed rule would extend the drug and alcohol testing regulations beyond the territory of the U.S. The proposal would require all employees of part 145 repair stations located outside of the U.S. who perform maintenance on part 121 air carrier aircraft to be subject to a drug and alcohol testing program.

Once again, the analysis does not cover all regulated parties; it does not consider contractors at any tier. The omission is inexcusable as there is a federal case directly on this point from the very rulemaking that extended the 14 CFR part 120 requirements to "any tier" in the maintenance contract.[12]

Of the approximately 977 part 145 repair stations located throughout 66 foreign countries, it is likely that all of these repair stations would continue to perform maintenance on part 121 air carrier aircraft. If the repair stations continue to perform maintenance for part 121 air carrier aircraft, each repair station would be required to obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification.

In addition, each repair station located outside the territory of the U.S. would be required to provide drug and alcohol testing program management information system (MIS) data.

Use:

The information would be used by the part 145 repair station located outside of the territory of the U.S. to certify implementation and maintenance of a drug and alcohol testing program. The FAA's Drug Abatement Compliance and Enforcement Inspectors would use this information to identify those foreign repair stations with an active program for inspection scheduling. Inspections are used to verify compliance with the drug and alcohol testing regulations and requirements. In addition, the Drug Abatement Division would use the annual MIS data reported to calculate the annual random drug and alcohol testing rates in the aviation industry.

Respondents (including number of):

There are currently 977 part 145 certificated repair stations located outside the territory of the U.S.

This number does not include the contractors and sub-contractors, *et.al.* of the 977 foreign repair stations. As the court opined, they are all regulated parties that must be provided notice and an opportunity to comment and must be considered under the regulatory evaluations.[13]

Frequency:

Part 145 repair stations located outside the territory of the U.S. would provide information for program certification only once; however, these repair stations would also incur annual program maintenance: e.g., updates to the programs per new guidance; the random pool list; and the overall testing process. The aggregate annual testing data would be provided electronically through the Department of Transportation's Drug and Alcohol Management Information System.

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[12] *See*, Aeronautical Repair Station Ass'n. v. Federal Aviation Administration, 494 F.3d 161 (2007).
[13] *See*, Aeronautical Repair Station Ass'n. v. Federal Aviation Administration, 494 F.3d 161 (2007) at 177.

Annual Burden Estimate

1. *Burden for Program Certification and Annual Program Maintenance*

Documentation	***Number of repair stations***	***Hours per repair station***	***Hourly wage***	***Total cost***
Antidrug and Alcohol Misuse Prevention Program Operations Specification	*977*	[47]*16.2*	[48]*$26.90*	*$425,757*

At a minimum the number should triple as each foreign repair station will have at least one contractor, some will have more, while others will have none. The agency must account for all regulated parties.

2. *Burden for Annual Test Data*

Documentation	[49] *Total records*	*Time per record (hours)*	*Hourly wage*	*Total cost*	*Average yearly cost* [50]
Training records	*656,720*	*0.25*	[51]*$34.47*	*$5,659,285*	*$1,131,857*
Records related to the alcohol and drug collection process, test results, refusal to test, employee dispute records, SAP reports, follow-up tests	*335,354*	*5.0*	*34.47*	*57,798,262*	*11,559,652*
Total	*992,074*	*N/A*	*N/A*	*63,457,547*	*12,691,509*

To calculate the number of drug and alcohol training records, the FAA took the 2021 data showing 147,194 mechanics and 29,439 supervisors and accounted for a four percent growth rate over five years.

Accounting for these rates results in an initial first year total of 159,205 mechanics and 31,842 supervisors. This is a total of 191,047 employees. In the first year all mechanics and supervisors will take anti-drug and alcohol training. These are two separate trainings. This results in 191,047 records for anti-drug training and 191,047 for alcohol training. In addition, supervisors will have to take an additional supervisor reasonable cause/reasonable suspicion determinations training for drugs and alcohol. This adds another 63,684 records since they are two separate trainings as well.[52]

The current numbers of potential individuals need to be obtained from the Departments of Labor from each location of a foreign repair station and account for the fact that there is a shortage of technical workers in the aviation industry as reported in numerous studies.[14]

[14] *See*, *e.g.,* OliverWyman's Not Enough Aviation Mechanics and Global Fleet and MRO Forecast 2022-2032.

The number must also account for all covered employees, including those of contractors to the certificated repair station, of sub-contractors, et.al. from any tier in the maintenance contract.

Training

Therefore, in the first year, there will be a total of 445,778 records.[53]

For year two and beyond, for drug records, the total records reflect the increase in new mechanics and supervisors which will be required to take the drug training. Using the growth rate this results in 6,368 mechanics and 1,274 supervisors for a total of 7,642 records. The 1,274 new supervisors will also have to take the reasonable cause/reasonable suspicion determinations for drugs training. In addition, there is recurrent reasonable cause/reasonable suspicion determinations for drugs training that all supervisors will have to take every 12 to 18 months. In year two, this results in 31,842 supervisors taking the recurring trainings. Thus, the records for drug training in year two is 40,758.[54]

In addition, new mechanics and supervisors will be required to take alcohol training and supervisors will have to take the reasonable cause/reasonable suspicion determinations for alcohol training. This adds another 8,916 records. There is no recurrent alcohol training for supervisors. Therefore, in year two the total records are 49,674.[55]

The same calculation for year two is repeated for years three through five. There are 51,662 records in year three, 53,729 in year four, and 55,877 in year five. This results in a total of 656,720 total training records over the five years.[56]

To calculate the number of records related to alcohol and drug collection, the FAA sums the number of pre-employment drug tests, random drug and alcohol tests, and post-accident, reasonable cause, return to duty, and follow-up drug and alcohol tests per year beginning in year two. First, for drug testing, every new employee performing maintenance will be required to take a pre-employment drug test but not an alcohol test. Second, the FAA estimates 25 percent of current employees performing maintenance will be randomly drug tested per year. Third, there will be post-accident, reasonable cause, return to duty, or follow-up testing. The FAA estimates 1.70 percent of employees tested in a given year will be tested again under this category. The total drug tests over the five years is 247,521.[57]

For alcohol testing, no pre-employment alcohol testing is required. The other two categories of alcohol testing will be the same as for drug testing. However, the FAA estimates random drug testing will occur at a rate of 10 percent of current employees and 4.10 percent for post-accident, reasonable cause, return to duty, and follow-up tests. The total alcohol tests over the five years is 87,833.[58]

Taking the sum of drug and alcohol tests results in 335,354 records related to alcohol and drug collection.

The calculations do not account for all regulated parties; the numbers must include the employees of contractors, sub-contractors, et.al., at any tier in the maintenance contract with

the air carrier. Contractors, sub-contractors, certificated and non-certificated are regulated parties.

The agency is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

The estimate is inaccurate; the number of impacted persons is at least triple that contemplated. The number must ensure all regulated parties are estimated; it therefore must include employees of contractors at any tier in the performance of maintenance.

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of collecting information on those who are to respond, including by using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The burden would be minimized by the government using its resources to collect the appropriate information. There is public information on both the shortage of aviation technicians and the anticipated growth of the aviation maintenance industry. The numbers must reflect current reality, not be based upon past information.

Individuals and organizations may send comments on the information collection requirement to the address listed in the ADDRESSES section at the beginning of this preamble by February 5, 2024. Comments also should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for FAA, New Executive Office Building, Room 10202, 725 17th Street NW, Washington, DC 20053.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

As mentioned above, the federal government has more obligations than ICAO; it must ensure its laws do not interfere with the sovereign rights of foreign nationals. Nations pick different methods for deterring the use and abuse of alcohol and drugs; some have severe criminal sanctions, while others have regimes like the proposal.

G. Environmental Analysis

FAA Order 1050.1F 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 5–6.6f for regulations and involves no extraordinary circumstances.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

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

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The agency has determined that it would not be a "significant energy action" under the Executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action could create differences in international regulatory requirements. The FAA acknowledges that the FAA may need to revisit certain international agreements, as discussed in section IV.D and invites comments on this issue.

The agency need not revisit any international agreements if it takes alternative action that ensures the requirements are only levied against individuals in countries that do not have equivalent or similar requirements. The alternative would also consider the criminal laws of countries that have harsh penalties for the use and/or abuse of drugs and alcohol as achieving equivalent safety objectives. Nations have different methods of deterring alcohol and drug use and abuse that must be evaluated on a nation-by-nation basis.

VII. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The FAA also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any

recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to https://www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at https://www.dot.gov/privacy.

B. Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to the person in the FOR FURTHER INFORMATION CONTACT section of this document. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

C. Electronic Access and Filing

A copy of this NPRM, all comments received, any final rule, and all background material may be viewed online at https://www.regulations.gov using the docket number listed above. A copy of this proposed rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at https://www.federalregister.gov and the Government Publishing Office's website at https://www.govinfo.gov.

A copy may also be found at the FAA's Regulations and Policies website at https://www.faa.gov/regulations_policies.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

List of Subjects in 14 CFR Part 120

Alcoholism

Air carriers

Alcohol abuse

Alcohol testing

Aviation safety

Drug abuse

Drug testing

Operators, reporting and recordkeeping requirements

Safety

Safety-sensitive

Transportation

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14, Code of Federal Regulations as follows:

The current language should be revised to make it clear that it is the agency's responsibility to determine if the foreign country's citizens can be subject to the proposed regulation without running afoul of civil or criminal sanctions in the home country. Therefore, the language of the proposal needs to be adjusted and a supplemental notice of proposed rulemaking issued.

To demonstrate how the regulations should be written, the agency's proposal is reflected in italics with appropriate strikeouts and additions.

PART 120—DRUG AND ALCOHOL TESTING PROGRAM

1. The authority citation for part 120 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101–40103, 40113, 40120, 41706, 41721, 44106, 44701, 44702, 44703, 44709, 44710, 44711, 44733, 45101–45105, 46105, 46306.

2. Amend § 120.1 by:

a. Revising paragraph (c);

b. Redesignating paragraph (d) as paragraph (e);

c. Adding new paragraph (d).

The revision and addition read as follows:

§ 120.1 Applicability.

* * * * *

(c) All part 145 certificate holders located in the territory of the United States who perform safety-sensitive functions and elect to implement a drug and alcohol testing program under this part.

(d) All part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft and the agency has determined can implement the requirements consistent with the laws and regulations of the country in which the repair station is located or the laws of the country are found acceptable to the agency for purposes of compliance with this part.

3. Revise § 120.5 to read as follows:

§ 120.5 Procedures.

Each employer having a drug and alcohol testing program under this part must ensure that all drug and alcohol testing conducted pursuant to this part complies with the procedures set forth in 49 CFR part 40 and any exemptions issued to that employer by the Department of Transportation in accordance with 49 CFR 40.7.

4. Add § 120.9 to read as follows:

§ 120.9 Waivers for Part 145 Repair Stations Outside the Territory of the United States.

(a) A part 145 repair station whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft outside the territory of the United States ~~may request~~ **will be granted** *a waiver from the Administrator from any requirements under 14 CFR part 120, subpart E or F, if* **the FAA determines** *specific requirements of the subpart are inconsistent with the laws of the country where the repair station is located* **or the FAA finds the country's laws and regulations acceptable for achieving the safety objective of less alcohol and drug use and abuse**.

(b) Each waiver ~~request~~ must **be issued within 30 days of application and** *include, at a minimum, the following elements:*

(1) Information about ~~your~~ **the** *organization, including ~~your~~* its *name*, **certificate number**, *and mailing address and, ~~if you wish, other~~ contact information such as a fax number, telephone number, or email address* of the accountable manager*;*

(2) The specific section or sections of this part from which ~~you seek~~ a waiver **is granted***;*

(3) The reasons why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees;

(4) A copy of the law that is inconsistent with the provision(s) of this part from which a waiver is ~~sought~~ **given***;*

(5) An explanation of how the law is inconsistent with the provision(s) of this part from which a waiver is ~~sought~~ **given***, and;*

(6) A description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver or, if applicable, a justification of why it would be impossible to achieve the objectives of the provision in any other *way*.

(c) Each ~~petition for a~~ waiver must be ~~submitted to~~ **granted by** *the Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591.*

5. Amend § 120.117 by:

a. Revising paragraph (a)(5);

b. Redesignating paragraph (a)(6) as paragraph (a)(7);

c. Adding new paragraph (a)(6);

d. Revising paragraph (c);

The revisions and additions read as follows:

§ 120.117 Implementing a drug testing program.

(a) * * *

If you are . . .	*You must . . .*
* * * * * * * * * * *	* * * * * * * * * * *
(5) A part 145 certificate holder **or maintenance function contractor at any tier** *located inside the territory of the United States who has your own drug testing program.*	*Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591, if you opt to conduct your own drug testing program.*
(6) A part 145 repair station **or maintenance function contractor at any tier** *located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft.*	*Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.*

If you are . . .	*You must . . .*
* * * * * * * * * * *	* * * * * * * * * * *

* * * * *

(c) If you are an individual or company that intends to provide safety-sensitive services by contract **or subcontract at any tier** *to a part 119 certificate holder with authority to operate under part 121 and/or part 135 of this chapter, an operation as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military, use the following chart to determine what you must do if you opt to have your own drug testing program.*

If you are . . .	*You must . . .*
(1) A part 145 certificate holder **or maintenance function contractor at any tier** *located inside the territory of the United States and opt to conduct your own program under this part.*	*(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specification or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591,*
	(ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, and
	(iii) Meet the requirements of this subpart as if you were an employer.
(2) A part 145 repair station **or maintenance contractor at any tier** *located outside the territory of the United States whose employees perform maintenance functions on part 121 air carrier aircraft*	*(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.*

If you are . . .	*You must . . .*
	(ii) Implement a drug testing program acceptable to the Administrator no later than one year from [EFFECTIVE DATE OF REGULATION], or if company operations begin more than one year after [EFFECTIVE DATE OF REGULATION], implement a drug testing program acceptable to the Administrator no later than the date you start operations, and
	(iii) Meet the requirements of this subpart in a manner acceptable to the Administrator.
(3) A contractor **providing maintenance functions to a repair station or air carrier** *who opts to implement a testing program under this part*	*(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591,*
	(ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military, and
	(iii) Meet the requirements of this subpart as if you were an employer.

* * * * *

6. Amend § 120.123 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.123 Drug testing outside the territory of the United States.

(a) Except for those testing processes applicable to persons testing pursuant to § 120.1(d), no part of the testing process (including specimen collection, laboratory processing, and MRO actions) shall be conducted outside the territory of the United States.

~~*(1) Except for those persons testing pursuant to § 120.1(d), each employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.*~~

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of this subpart shall not apply to any individual who performs a function listed in § 120.105 by contract for an employer outside the territory of the United States.

This provision is not discussed in the preamble; does this mean if a U.S. repair station contracts for an individual to perform maintenance outside the U.S., the person is to be removed from the alcohol and drug testing pool? If this is so, it provides an avenue for performing maintenance outside the U.S. for its citizens while applying the regulations to foreign nationals; an unacceptable result.

7. Amend § 120.225 by:

a. Revising paragraph (a)(5);

b. Redesignating paragraph (a)(6) as paragraph (a)(7);

c. Adding new paragraph (a)(6);

d. Revising paragraph (c); and

e. Revising paragraphs (d) introductory text and (d)(1).

The revisions and addition read as follows:

§ 120.225 How to implement an alcohol testing program.

(a) * * *

If you are . . .	*You must . . .*
* * * * * * * * * * *	* * * * * * * * * * *
(5) A part 145 certificate holder **or maintenance function contractor at any tier** *located inside the territory of the United States who has your own alcohol testing program*	*Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW., Washington, DC 20591, if you opt to conduct your own alcohol testing program.*
(6) A part 145 repair station **or maintenance function contractor at any tier** *located outside the territory of the United States who performs safety-sensitive maintenance functions on part 121 air carrier aircraft.*	*Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.*

* * * * * * * * * * *

*(c) If you are an individual or company that intends to provide safety-sensitive services***, or a maintenance function** *by contract* **at any tier** *to a part 119 certificate holder with authority to operate under part 121 and/or part 135 of this chapter, or an operator as defined in § 91.147 of this chapter, use the following chart to determine what you must do if you opt to have your own drug testing program.*

If you are . . .	*You must . . .*
(1) A part 145 certificate holder **or maintenance function contractor at any tier** *located inside the territory of the United States and opt to conduct your own program under this part.*	*(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specifications or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591,*
	(ii) Implement an FAA alcohol testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with the authority to operate under parts 121 and/or 135, or operator as defined in § 91.147 of this chapter, and
	(iii) Meet the requirements of this subpart as if you were an employer.
(2) Are a part 145 repair station **or maintenance function contractor at any tier** *located outside of the territory of the United States who performs maintenance functions on part 121 air carrier aircraft.*	*(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.*
	(ii) Implement an alcohol testing program acceptable the Administrator no later than one year from [EFFECTIVE DATE OF REGULATION], or if company operations begin more than one year after [EFFECTIVE DATE OF REGULATION], implement an alcohol testing program acceptable to the Administrator no later than the date you start operations, and
	(iii) Meet the requirements of this subpart in a manner acceptable to the Administrator.

If you are . . .	*You must . . .*
(3) A contractor **providing maintenance functions at any tier.**	*(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591,*
	(ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military, and
	(iii) Meet the requirements of this subpart as if you were an employer.

(d) To obtain an antidrug and alcohol misuse prevention program operations specification:

(1) You must contact your FAA Principal Operations Inspector or Principal Maintenance Inspector. Provide him/her with the following information:

* * * * *

8. Amend § 120.227 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.227 Employees located outside the U.S.

(a) Except for those persons testing pursuant to § 120.1(d), no covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

(1) Except for those persons testing pursuant to § 120.1(d), each covered employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of this subpart shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

Issued in Washington, DC.

Susan E. Northrup,

Federal Air Surgeon.

The rulemaking is misguided, the preamble is clear—the requirement for U.S. anti-drug and alcohol programs and the testing protocol and procedures are not validated by any discernible safety concern. Therefore, the federal government must ensure the rules do not interfere with foreign commerce or mistreat national sovereignty.

The proposal protects American citizens from potential sanctions for drug and alcohol testing protocols by having U.S. nationals working in foreign countries removed from the anti-drug and alcohol testing rules thereby undercutting its own contention that testing will deter use and abuse of those forbidden substances.

This proposal exposes foreign citizens to potential violations of national criminal and civil laws if implemented improperly. The Congress requires the federal government to use the resources of all executive branch agencies to ensure the implementation is not contrary to foreign laws—period. The statute does not allow that burden to shift to a foreign nation or citizen.

The regulation must be finalized by withdrawing it in its entirety because it does not comport with either the APA or the congressional mandate. Otherwise, a supplemental notice of proposed rulemaking must be issued that ensures the U.S. government makes the determination of compliance and acceptability. If a foreign nations' laws are so harsh as to deter any use of alcohol or drugs, or otherwise deters the abuse of forbidden substances, the agency may find that regime acceptable without any further actions. Alternatively, the agency may find another nation's regime for testing maintenance personnel for drug and alcohol use fully compliant and therefore acceptable without any further actions. By having the government make the determination during the application or renewal process for a foreign repair station, the agency would develop the most efficient and effective method of ensuring the statute was followed.

Respectively submitted,

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(1) *These estimates are current as of April 2021 and sourced from the National Vital Information Subsystem (NVIS). NVIS is a subsystem of the Flight Standards Automation System, a comprehensive information system used primarily by inspectors to record and disseminate data associated with inspector activity and aviation environment. While there are more current estimates (as of March 2023, the rule would affect approximately 962 part 145 repair stations in about 66 foreign countries), the 2021 numbers are used in the regulatory evaluation and Regulatory Impact Assessment to estimate cost.*

(2) *14 CFR 120.1(b), 120.105(e), 120.215(a)(5).*

(3) *A covered employee is defined in § 120.7(e) as an individual who performs, either directly or by contract, a safety-sensitive function listed in §§ 120.105 and 120.215 for an employer (as defined in § 120.7(g)).*

(4) *Interim Final Rule, Procedures for Transportation Workplace Drug Testing Programs, 53 FR 47002 (Nov. 21, 1988).*

(5) *Final Rule, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 53 FR 47024 (Nov. 21, 1988).*

(6) *14 CFR 91.11 (1986).*

(7) *See Final Rule—Request for Comments, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities; 54 FR 15148 (Apr. 14, 1989); Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 54 FR 53282 (Dec. 27, 1989), Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 56 FR 18978 (Apr. 24, 1991), Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 57 FR 31275 (Jul. 14, 1992).*

(8) *105 Stat. 917, Public Law 102–143 (Oct. 28, 1991).*

(9) *DOT Final Rule, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 59 FR 7340 (Feb. 15, 1994). FAA Final Rule, Antidrug Program for Personnel Engaged in Specific Aviation Activities, 59 FR 42922 (Aug. 19, 1994).*

(10) *Notice of Proposed Rulemaking, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities, 57 FR 59458 (Dec. 15, 1992).*

(11) *Final Rule, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities, 59 FR 7380 (Feb. 15, 1994).*

(12) *For example, in 1994, the FAA proposed to require foreign air carriers operating in the U.S. to implement the same testing required of domestic U.S. air carriers unless multilateral action was taken by ICAO to support international standards (59 FR 7420). However, in 1995, ICAO published the Manual on Prevention of Problematic Use of Psychoactive Substances in the*

Aviation Workplace, and the FAA subsequently withdrew this proposed rule in 2000 (65 FR 2079).

(13) *At that time, requirements for affected certificated airmen were located in parts 61, 63, 65, and 67. Requirements for affected air carriers and operators were located in parts 91, 121, and 135. Requirements for affected air traffic control facilities and air traffic controllers were located in subpart B of part 65. Requirements for repair stations certificated under part 145 and contractors who elected to have drug and alcohol testing programs were located in appendices I and J of part 121.*

(14) *Final Rule, Drug and Alcohol Testing Program, 74 FR 22649 (May 14, 2009). Certain inadvertent errors were corrected in a subsequent final rule: Correction, Drug and Alcohol Testing Program, 75 FR 3153 (Jan. 20, 2010).*

(15) *Final Rule, Conforming Amendments and Technical Corrections to Department Rules Implementing the Transportation Drug Testing Program).*

(16) *Public Law 112–95 (Feb. 14, 2012).*

(17) *Advanced Notice of Proposed Rulemaking, Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States, 79 FR 14621 (Mar. 17, 2014).*

(18) *ANPRM—Extension of Comment Period, Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States; Extension of Comment Period, 79 FR 24631 (May 1, 2014).*

(19) *Section 43.17 sets forth requirements for maintenance and preventative maintenance performed on U.S. aeronautical products by persons who hold valid Transport Canada Civil Aviation Maintenance Engineer licenses and Transport Canada Civil Aviation Approved Maintenance Organizations.*

(20) *The FAA notes that as of the publication of the ANPRM, there were (and continue to be) a number of ICAO standards and recommended practices that address misuse of drugs and alcohol by aviation personnel; however, ICAO did not, and does not, require ICAO Member States to establish testing program to deter or detect inappropriate drug and alcohol use by aviation personnel with safety-sensitive responsibilities.*

(21) *In light of the withdrawal of the UK from the EU on January 31, 2020, the UK is no longer part of the EU/U.S. BASA. Consultations between the U.S. and UK are now governed by Article IV of the 1995 UK/U.S. BASA.*

(22) *The FAA surmises that the commenters were indicating § 308(d)(1) of the FAA Modernization and Reform Act of 2012, which states, "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." In response to the Congressional*

mandate, the FAA notes that prior to the publication of the ANPRM, the Department of State, in conjunction with the FAA, sent a demarche request to countries with active part 145 repair stations requesting support in ICAO action. Of the 66 countries surveyed, 29 replied indicating support to establish international standards for effective drug and alcohol testing of all persons performing safety-sensitive functions on commercial air carrier aircraft within their country through ICAO initiatives.

(23) *ICAO defines a "flight crew member" as a licensed crew member charged with duties essential to the operation of an aircraft during a flight duty period. ICAO Annex 1, 1.1. Section 1.2(a) identifies flight crew as private pilots; commercial pilots; multi-crew pilot; airline transport pilot; glider pilot; free balloon pilot; flight navigator; and flight engineer. Section 1.2(b) identifies other personnel as aircraft maintenance (technician/engineer/mechanic), air traffic controllers, flight operations officers/flight dispatchers, and aeronautical station operators.*

(24) *Annex 1, 1.2.7.1, 1.2.7.2.*

(25) *Public Law 114–190 (Jul. 15, 2016).*

(26) *Section 2112(b).*

(27) *14 CFR 120.1.*

(28) *14 CFR 120.5.*

(29) *14 CFR 120.123(a).*

(30) *14 CFR 120.227(a).*

(31) *49 U.S.C. 44733 specifies "aircraft maintenance," but does not include "preventive maintenance." Safety-sensitive functions are defined in 14 CFR 120.7(n) as functions listed in 14 CFR 120.105 and 120.215. The FAA notes that the list of safety-sensitive functions found in 14 CFR 120.105 and 120.215 includes aircraft maintenance and preventive maintenance as separate duties. The FAA draws a clear distinction between maintenance and preventive maintenance (see: 14 CFR 1.1, expressly excluding preventive maintenance from the definition of maintenance and defining preventive maintenance as mutually exclusive from maintenance). Therefore, preventive maintenance is outside the scope of the mandate and is not covered in these proposed regulations.*

(32) *Section 308 was promulgated in the U.S. Code as 49 U.S.C. 44733, Inspection of repair stations located outside the United States. Under 49 U.S.C. chapter 447, "United States" is defined as the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace. 14 CFR 1.1 similarly defines United States, in a geographical sense, as the States, the District of Columbia, Puerto Rico, and the possessions including the territorial waters, and the airspace of those areas.*

(33) *This definition was set forth by Public Law 103–272, section 1(e) (Jul. 5, 1994).*

(34) The FAA, and the legislation itself, recognize that countries may have different laws and regulations that set forth a different set of acceptable or prohibited drugs. Section IV.C. of this preamble discusses this issue in further detail.

(35) Public Law 102–143, title V, 105 Stat. 952 (Oct. 28, 1991). Specifically, OTETA required the DOT and agencies to look to the HHS Mandatory Guidelines for the scientific and technical guidelines regarding the drugs to be tested.

(36) Because this proposal would apply 49 CFR part 40, any type of testing allowed under part 40 would be permitted, including oral fluid testing once at least two labs are approved to test those specimens.

(37) There are currently 977 part 145 repair stations located throughout 65 foreign countries that maintain an FAA-issued certificate. Many of these repair stations provide maintenance functions to part 121 air carrier aircraft.

(38) The FAA notes that domestic repair stations may elect to implement a drug and alcohol testing program; however, foreign repair stations must implement a drug and alcohol testing program covering employees who perform maintenance on part 121 aircraft. If a domestic repair station does not elect to implement a drug and alcohol testing program, then the part 121 air carrier must cover the repair station's safety-sensitive employees under its FAA drug and alcohol testing program.

(39) The FAA finds that a one-year implementation date from the effective date of the legislation would give part 145 repair stations outside the territory of the U.S. sufficient time to identify laws that may contradict the regulations set forth in 14 CFR part 120 and 49 CFR part 40 and provide the FAA and DOT sufficient time to process waivers and exemptions, respectively, addressing such barriers.

(40) 49 CFR 40.3 sets forth the terms used in part 40 and includes the definition for laboratory, which is any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs; or, in the case of foreign laboratories, a laboratory approved for participation by DOT under part 40. Laboratories participating in the DOT drug testing program must comply with the requirements of 49 CFR part 40 and with all applicable requirements of HHS in testing DOT specimens. Currently, a laboratory located in the U.S. is permitted to participate in DOT drug testing only if it is certified by HHS under the National Laboratory Certification Program (NLCP), or, in the case of a foreign laboratory, if it is approved for participation by the DOT with respect to part 40. The FAA recognizes that there are, first, no HHS certified laboratories in any of the foreign countries impacted by this rulemaking and, second, that there is a multitude of differently situated laboratories internationally. Therefore, a foreign laboratory would be required to seek approval in accordance with DOT procedures under 49 CFR part 40.

(41) *DOT Departmental Guidance on Valuation of a Statistical Life. Economic Analyses. Office of the Secretary of Transportation. https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.*

(42) *13 CFR 121.105(a)(1). The Regulatory Flexibility Act defines a "small business" as having the same meaning as "small business concern" under section 3 of the Small Business Act. 5 U.S.C. 601(3). Section 121.105 of 13 CFR contains the Small Business Administration's implementing regulations clarifying the definition of "small business concern."*

(43) *Small Business Administration (SBA). 2019. Table of Size Standards. Effective August 12, 2019. https://www.sba.gov/document/support--table-size-standards.*

(44) *Final Rule, Supplemental Regulatory Flexibility Determination, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities: Supplemental Regulatory Flexibility Determination, 76 FR 12559 (Mar. 8, 2011).*

(45) *The calculation is as follows: 977*.9328 = 911.31. This estimate is rounded up to get 912.*

(46) *$126,495,150/977 = $129,473.03.*

(47) *Based on the previous PRA, the FAA assumes 16 hours in the first year to establish the testing program and one hour to register with the FAA's Drug Abatement Division. Therefore, 17 hours are required for the first year. For each year after, the recurring time to update and maintain the testing list will be 16 hours. The average over five years results in the 16.2 hours per year.*

(48) *Office and Administrative Support Workers, All Other (SOC 43–9119) NAICS 481000—Air Transportation, May 2020; Mean Hourly wage https://www.bls.gov/oes/2020/may/oes439199.htm: Includes Fringe Benefits.*

(49) *Estimated number of records from 2018 to 2022.*

(50) *Average yearly cost is calculated by dividing total cost by five years.*

(51) *Information and Records Clerks (SOC 43–4000) NAICS 481000—Air Transportation, May 2020: Mean Hourly Wage https://www.bls.gov/oes/2020/may/naics3_481000.htm#43-0000:*

(52) *Includes Fringe Benefits.*

(53) *31,842*2 = 63,684.*

(54) *191,047 + 191,047 + 63,684 = 445,778.*

(55) *7,642 + 1,274 + 31,842 = 40,758.*

(56) *40,758 + 8,916 = 49,674.*

(57) *445,778 + 49,674 + 51,662 + 53,729 + 55,877 = 656,720.*

(58) *This is broken down by category as 32,452 pre-employment drug tests, 210,932 random drug tests, 4,137 post-accident, reasonable cause, return to duty, and follow-up tests.*

(59) *This is broken down by category as 84,373 random drug tests and 3,460 post-accident, reasonable cause, return to duty, and follow-up tests.*