

July 29, 2002

BY ELECTRONIC MEANS TO: <http://dms.dot.gov> to Docket Number 11301

Docket Management System  
Department of Transportation  
Room Plaza 401  
400 Seventh Street, SW  
Washington, D.C. 20590-0001

Re: Docket Number FAA-2002-11301

Dear Ladies and Gentlemen:

The undersigned entities are pleased to submit their comments on the above notice of proposed rulemaking (NPRM), which would among other things, impose drug and alcohol testing on maintenance subcontractors that do not take airworthiness responsibility for the work they perform. While we support drug and alcohol testing in the aviation industry that is essential to safety, this particular proposal fails to meet that standard. The undersigned entities represent companies that are directly and profoundly affected by the FAA's proposal.

If adopted, the proposal would substantially expand the scope of drug and alcohol testing to non-aviation employees without showing that it would enhance safety. The proposed rule would impose significant new costs on companies that are not regulated by the FAA and on certificated entities that are in full compliance with current regulations. As a result, the proposal would increase the costs of aviation maintenance at a time when the industry can least afford it and create an incentive for non-aviation companies to withdraw their support from the industry.

### Background

On February 28, 2002, the FAA published in the Federal Register (67 F.R. 9366) a Notice of Proposed Rulemaking (NPRM) to "clarify" the language of the FAA's anti-drug and alcohol misuse prevention rules (drug and alcohol rules), increase consistency in those regulations and revise certain requirements. Among the issues addressed in the NPRM is the application of the drug and alcohol rules to maintenance subcontractors generally and to non-certificated maintenance subcontractors in particular.

We commend the FAA for providing the public with an opportunity to comment on this significant change in the regulations. However, the undersigned entities strongly oppose the portion of this proposal that would extend drug and alcohol testing requirements to non-certificated maintenance subcontractors. We believe it is based on a fundamental misunderstanding of the maintenance industry's use of these subcontractors. In addition, the proposal did not adequately consider the costs and

benefits as required by Executive Order 12866 or the impact on small entities under the Regulatory Flexibility Act of 1980.

Specifically, the NPRM proposed two significant changes to the regulations affecting maintenance subcontractors. First, it would cover employees “**at any tier**” of the maintenance process, without limitation and no matter how far removed from the contractual relationship between the air carrier and its direct maintenance provider. Second, the proposal would reverse the FAA’s longstanding interpretation that the drug and alcohol rules apply only to those entities that take airworthiness responsibility for the work they perform under the Federal Aviation Regulations (FAR).

In the preamble, the FAA inaccurately described a so-called “pervasive system of drug and alcohol testing in the maintenance side of commercial aviation.” Additionally, it did not mention that non-certificated maintenance subcontractors are not authorized to submit a program of their own. **Therefore, this proposal would be a significant change in the rules, particularly for these non-certificated entities.**

#### The Regulatory and Legislative History of the Drug and Alcohol Testing Rules

##### 1. Regulations Issued Under the FAA’s General Safety Authority

In 1986, the FAA issued an advance notice of proposed rulemaking (ANPRM) (51 FR 44432, December 9, 1986) in which it stated its desire to require that mechanics and repairmen, among others, be subject to drug and alcohol testing. These individuals are certificated under Part 65 of the FAR. The agency’s primary focus was on pilots; however, it asked the public to comment on whether certificated airmen other than flight crewmembers should be tested.

In 1988, the FAA issued an NPRM proposing to establish the framework of drug testing that is in use today, 53 FR 8368, March 14, 1988. The proposal required coverage for those who performed, “directly or by contract,” various safety sensitive functions, including “aircraft maintenance or preventive maintenance” for a Part 121 or Part 135 air carrier. The FAA never defined the term “contractor” and therefore it did not address whether it intended to reach subcontractors that had no direct relationship with an air carrier.

At the same time, the drafters of the NPRM specifically named the types of individuals that would be covered in the maintenance area:

Based on safety considerations, the FAA is proposing that all certificated airmen who are required to perform key safety functions should be included in an anti-drug program. The fact that the FAA requires

certification of these individuals demonstrates that the occupation requires specific knowledge and skills, which are critical to safe aircraft operation. Individuals in this category are: ...**mechanics, repairmen ... Non certified individuals that would be included ... are flight attendants and aviation security screeners and security coordinators.** (Emphasis added.)

The drafters of the NPRM equated individuals that perform maintenance with certificated mechanics and repairmen. That, of course, is not the case since Part 145 repair stations employ many non-certificated persons to perform maintenance. Nevertheless, while it is clear that the FAA considered covering only those maintenance personnel that are authorized to make airworthiness determinations, coverage was extended to all "repair station employees" that perform maintenance for Part 121 and 135 air carriers.

In 53 FR 47024, November 21, 1988, the FAA published the final drug testing rule. In the preamble, it discussed the fact that **repair station employees** were covered if they provided "contract service to an employer who is subject to the requirements of this final rule." **There was no discussion about whether the rule applied to non-certificated individuals employed by non-certificated entities that do not have a direct contract with air carriers.**

#### Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 (OTETA), P.L. 102-143 (October 28, 1991) amended the Federal Aviation Act to require the testing of air carrier and foreign air carrier **employees** under regulations to be issued by the Administrator. It was adopted to provide specific legislative authority for the FAA's drug testing regulations and various other purposes, including a new requirement for alcohol testing.

The 1991 law was recodified in 1994 by P.L. 103-272, 49 U.S.C. 45101, et seq. The recodified provision restated the proposition from OTETA that the Administrator was permitted to continue in effect the previously adopted rules.

(c) OTHER REGULATIONS ALLOWED- This section does not prevent the Administrator from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by **airmen**, crewmembers, airport security screening contract employees, air carrier **employees** responsible for safety-sensitive functions (as decided by the

Administrator), or employees of the Administration with responsibility for safety-sensitive functions. (Emphasis added.)

Even if testing of direct contractors' employees can be justified on the grounds that they are the functional equivalent of an air carrier "employee," the logic of extending that coverage to employees of **subcontractors** (who by definition have no contractual relationship to the air carrier) is far more tenuous. Thus, while the OTETA authorized the FAA to continue its existing drug rules in effect, it did not legitimize agency interpretations that were clearly contrary to the plain meaning of its own regulations (covering only those employees who performed a safety sensitive function "directly or by contract").

Moreover, the Congress did not intend to give the FAA *carte blanche* authority to extend the rules' coverage as it is now proposing. In the report of the Senate Committee on Commerce, Science and Transportation that accompanied the OTETA legislation, the Committee stated as follows:

The Committee intends that the Administrator be **very selective in extending the coverage of this provision** to other categories of air carrier and FAA employees. While it is critical that in the interests of safety, **personnel responsible for the safety** of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, new section 614 should not be treated as an open authorization to test all **aviation industry employees**. (S. Rep. No. 102-54, 1991) (Emphasis added.)

### 3. Post-OTETA Rulemaking

The FAA continued to grapple with the distinction between certificated and non-certificated personnel. In 57 FR 59458, December 15, 1992, the agency proposed to adopt alcohol testing regulations as directed by Congress in OTETA. Although it proposed to cover those persons that performed "aircraft maintenance" activities so that the alcohol rules were consistent with the drug rules, the agency sought additional comment on whether to limit coverage only to those certificated maintenance personnel:

The FAA is also considering whether the class of maintenance personnel covered by this rule should be limited to those persons who are in charge of maintenance operations, who perform required inspections and who have the authority to return aircraft to service after maintenance has been performed.

In the final alcohol testing rule, the FAA decided to adopt its proposal and cover persons that performed aircraft maintenance for a U.S. air carrier. **However, the discussion about certificated vs. non-certificated personnel focused on repair station employees—not those that worked at non-certificated entities that were not subject to direct FAA regulation.**

Perhaps the most telling evidence that the FAA never contemplated testing of employees working at non-certificated companies is contained in Part 121, Appendix I and Appendix J. Under the current regulations, the FAA permits repair stations to submit their own drug and alcohol testing plan to the FAA rather than be included the program of an air carrier. This allows a repair station that works for many airlines to have its own drug and alcohol testing program, thereby facilitating the testing process and compliance with the rules' many administrative requirements. Under the current regulations, however, a non-certificated maintenance subcontractor may not submit a drug and alcohol plan to the FAA. Therefore, a non-certificated machine shop that performs work for five different airlines could not, even if it wanted to, request the FAA to approve its plan.

The undersigned entities recognize that the FAA is **NOW** proposing to change that through the registration process for non-certificated contractors. However, to suggest that requiring the testing of maintenance subcontractors that do not take airworthiness responsibility is only a clarifying change is misleading because it ignores the fact that the current rules make no provision for such companies to obtain an FAA-approved plan. There is no doubt that this proposal represents a major change in the regulations. In the view of the undersigned entities, it represents just the kind of over-reaching the Senate Commerce Committee warned about in 1991 when it urged the FAA to be very selective in extending the coverage of these regulations to other employees in the "aviation industry."

#### The History of Testing Maintenance Subcontractors

The FAA requires that **any person** who performs a safety-sensitive function in the United States be covered by the drug and alcohol rules, if the employee works for a company that has a **direct** contract with the air carrier. Therefore, the FAA's expansive reading of the term "by contract" has generally included subcontractor employees with whom no direct contract exists with an air carrier. Prior to the issuance of this proposal, however, the FAA did recognize that the drug and alcohol regulations did not reach all persons performing maintenance.

The FAA published an interpretation of the anti-drug and alcohol rules on several different occasions between 1989 and 1995. The fact that certain persons did not have

to be tested was first recognized in August 1989 with publication of the Implementation Guidelines for the FAA Anti-Drug Program, where the agency stated:

Note that the rule defines employee to include persons performing covered functions by contract. Direct/prime contractors whose employees perform a covered function are required to participate in an approved anti-drug program. **Subcontractors to the direct contractor are not required to be included in an approved anti-drug program as long as the direct contractor takes responsibility for the airworthiness of the maintenance on Part 121 or Part 135 aircraft and their component parts.** (Emphasis added.)

In Advisory Circular 121-30, Guidelines for Developing an Anti-Drug Plan for Aviation Personnel, issued March 16, 1989 but apparently cancelled several years later, the FAA stated that:

**Direct/prime contractors** who perform a sizable portion of the maintenance on Part 121 or Part 135 aircraft and their component parts and take responsibility for the airworthiness of that product are required by the rule to be included in the anti-drug program of one of those certificate holders. (Emphasis added.)

In spite of the issuance of AC 121-30, the FAA stated in the preamble to this NPRM that the above guidance "was never officially published in an FAA Advisory Circular or other official FAA policy vehicle ... ." (67 FR 9366, 9369, February 28, 2002).

In June 1990, the FAA's Drug Abatement Branch published its Most Frequently Asked Questions and reiterated its position by stating:

If the direct contractor performs a significant portion of the work and takes responsibility for the airworthiness of the maintenance performed on Part 121 or Part 135 aircraft and their component parts, then only the direct contractor must be included [in an anti-drug program]. If, however, the subcontractor assumes responsibility for the airworthiness, the subcontractor must be included in an anti-drug program. If employees of subcontractors are performing covered functions other than maintenance ... the subcontractor must be included in an anti-drug program.

On September 6, 1995, the FAA's Associate Administrator for Regulation and Certification (AVR-1) confirmed that certain maintenance subcontractors did not have to be tested in a letter responding to an inquiry made by the Hamilton Standard Division of United Technologies Corporation. AVR-1 stated that:

At the same time, however, in interpreting the application of its substance abuse prevention regulations to ensure consistency with other requirements for aircraft maintenance, the FAA has permitted, in the limited circumstance in which the primary contractor accepts airworthiness responsibility for the maintenance, for the work to be performed by subcontractor employees not covered by substance abuse prevention programs. **It is the only situation in which such an exception is permitted, and it is permitted because of the unique regulatory scheme and set of quality control checks that exist in the maintenance area.** (Emphasis added.)

#### Rationale for the Previous FAA Interpretation

The FAR allows certificated repair stations to subcontract work to non-certificated sources provided the certificated repair station takes airworthiness responsibility for the work performed (14 CFR section 145.47). This is normally accomplished through receiving or other types of inspections, periodic auditing of the non-certificated source and other quality oversight activities as specified in the repair station's Inspection Procedures Manual. Because an installer is not entitled to rely exclusively on a maintenance record prepared by a non-certificated source, an air carrier, certificated repair station or other certificate holder must approve for return to service any work performed on its behalf by such a source.

Indeed, the FAA's design, production and maintenance rules authorize a certificate holder to use non-certificated suppliers to assist them. These sources do not have to be certificated in their own right because the certificate holder is responsible for ensuring the conformity of any work accomplished on its behalf. Indeed, these sources do not have to be in the aviation industry.

As stated in the 1995 letter from AVR-1, the longstanding interpretation of the drug and alcohol rules is based on the very same logic. Repair station employees who take airworthiness responsibility for work performed by a non-certificated source are subject to drug and alcohol testing. Therefore, the safety rationale that supported the agency's previous interpretation remains the same today.

In proposing to reach "every tier of the contract," the FAA has concluded that individuals not directly covered by its other safety rules should be subjected to drug and alcohol testing. The agency provided no objective evidence that drug and alcohol testing of these non-airline (and, in many cases, non-aviation) employees is necessary in the interests of safety, a requirement of OTETA. 49 U.S.C. section 45102. The FAA provided no data showing improper maintenance practices, accidents, incidents,

malfunctions, defects or any other service difficulties that could reasonably be attributed to the absence of drug and alcohol testing for employees of non-certificated entities. Moreover, the agency did not explain why the rationale expressed in its 1995 letter was no longer valid.

### Results of Membership Survey

Prior to and following the issuance of the NPRM, the Aeronautical Repair Station Association (ARSA) and the Aerospace Industries Association (AIA) surveyed their membership about maintenance subcontracting practices. 93 companies responded to the survey representing 325 separately certificated repair stations.

The results showed that approximately 96% of those responding subcontracted maintenance under Part 145 of the FAR. These entities identified 3,288 certificated repair stations that assisted them by performing various maintenance functions. Although repair stations are more likely to subcontract maintenance to other certificated repair stations, approximately 25% of those responding also subcontracted work to non-certificated maintenance sources. The survey revealed nearly 5,000 non-certificated providers. While the undersigned entities recognize that some of the survey respondents subcontract to the same non-certificated subcontractors, the number of non-certificated providers that serve the industry is substantially higher than the FAA anticipated.

In the survey repair stations were asked whether they currently “flow-down” the drug and alcohol requirements to those subcontractors with whom they have contractual agreements. Approximately 60% of those responding said that they did if their subcontractor was a certificated repair station. The remaining 40% do not.

In contrast, only 7% of those that used non-certificated subcontractors flowed this requirement down to these entities. This is significant because under the NPRM maintenance subcontractors would, for the first time, be directly responsible for their subcontractors’ compliance with the drug and alcohol rules. Under the current rules, the primary responsibility for compliance rests with the air carriers; the only obligation of repair stations is to comply with their FAA-approved plans if they chose to have them. **Under this proposal, however, repair stations will not only be required to flow these requirements down to their direct subcontractors but also to every subcontractor downstream in the maintenance process.** That is a major departure from current industry practice, particularly as it relates to the oversight of non-certificated sources.

These non-certificated sources provide various specialized services including, but not limited to, cleaning, machining, welding, plating, heat-treating, coating and non-

destructive testing (NDT). Among the survey's findings was that many non-certificated maintenance subcontractors support the aviation industry without actually being part of it. For example, a welding or machine shop typically serves customers from many industries. In some cases, the percentage of their work devoted to aviation is significant and, in others, it is relatively small.

Among the more unusual sources of non-certificated maintenance subcontractors are electronics manufacturers that repair components installed in aircraft entertainment systems or dry cleaners that clean aircraft seats in accordance with a component maintenance manual. Repair stations that engage in major alterations of aircraft interiors, for example, subcontract to a variety of other commercial subcontractors, such as those engaging in the cosmetic plating of galley and lavatory fixtures and the repair and refurbishment of rugs, Formica, wood products and plumbing materials. Employees of these non-certificated subcontractors would now be subject to the drug and alcohol rules if this proposal were adopted. **In our view, most of these companies are not even aware that the FAA has issued a proposal that would subject them to mandatory federal drug and alcohol testing.** Nevertheless, they are certainly performing a maintenance function for which a certificated entity must take airworthiness responsibility.

Repair stations also use manufacturing facilities to perform subcontracted maintenance functions. These production facilities may be part of the same company as the repair station doing the subcontracting, or they may be independent. Approximately half of those repair stations that do not also hold their own production approvals subcontract maintenance functions to manufacturing facilities. Many of the ARSA-AIA survey respondents hold both FAA production approvals and repair station certificates. The survey revealed that 80% of those companies subcontract various maintenance functions to their production facilities and, of this number, 62.5% of them include these production workers in their drug and alcohol programs. The remaining 37.5% do not.

The cost information derived from the survey will be discussed below.

#### At Any Tier of the Maintenance Process

In the NPRM, the FAA proposed to require that employees "at any tier" of the maintenance process be subject to drug and alcohol testing if they perform work in the United States for a Part 121 or Part 135 air carrier. The proposal as drafted would make the air carriers and their direct contractors responsible under the regulations for any violation of the rules committed by **any** downstream subcontractor. If the FAA intends to impose liability in this manner, it must fully understand the extent to which multiple tiers of providers are involved in the maintenance process. Accordingly, the following is provided as an example.

An air carrier removes an engine from an aircraft and sends it to a repair station for a shop visit requiring disassembly of the case (i.e., an overhaul). The engine repair station, XYZ, Inc., only services the rotating components and the case. Therefore, it subcontracts out all pumps, gearboxes, generators, fuel controls and similar articles to other facilities.

The main fuel controller is sent to ABC Fuel Services, another certificated repair station. However, this facility does not work on the servo valves or solenoids that are installed in it. Therefore, it removes these components from the main fuel controller and sends them to DEF Servo Valve Services for overhaul. DEF is also certificated under Part 145. During a preliminary inspection DEF determines that a valve has a worn gear assembly and a transducer is outside the required specifications. (XYZ, ABC and DEF all have an FAA-approved drug and alcohol program.)

DEF does not perform chrome plating on the gear so it subcontracts that work to the production facility that originally made the part or to an outside plating provider. Neither the manufacturer nor the outside plating shop is a certificated repair station. DEF does not repair transducer assemblies so it sends them to their manufacturer, another non-certificated source, for repair. Because they are non-certificated entities, neither the plating nor the transducer subcontractor has an FAA-approved drug and alcohol program.

The above scenario illustrates the complexity and degree of specialization in the aviation maintenance industry, particularly when it involves “substantial maintenance” such as an engine overhaul. For this reason, the FAA needs to make it clear in the final rule where the regulatory liability will fall if one of these lower tier providers does not comply with the drug and alcohol regulations. Will it matter whether that subcontractor has a drug and alcohol program of its own? In a multiple tier situation such as the one described above, which of the upstream maintenance providers would be responsible if a violation of the drug and alcohol rules was committed by a lower tier provider?

The FAA has indicated previously that air carriers are responsible for any violations of the drug and alcohol rules committed by a downstream subcontractor, regardless whether there is a contract between the air carrier and that maintenance provider. Does this include violations “at any tier” of the maintenance process? What if the non-certificated subcontractor did not know it was performing work for an air carrier? For example, what if the only instruction it received from its customer was to plate the part in accordance with a particular specification? Is the FAA suggesting that all lower tier repair stations must be included in a drug and alcohol testing program because they **may be asked** to work on an air carrier’s equipment even though they may not know for whom the work is ultimately being performed?

While it is true that an air carrier will be provided with a package of maintenance records showing the identity of each facility that performs a portion of the work, it does not necessarily follow that each subcontractor knew that it was doing work for that particular carrier at the time the work was performed. Since the carrier will not “know” which facilities assisted in the maintenance of its equipment until after the fact, is the FAA expecting it to audit down to the lowest tier to ensure compliance? As impractical and burdensome as that would be, that would be the natural result of holding the carrier potentially liable for violations committed at any tier of the maintenance process.

### Fabrication of Parts Under FAR 43

Under existing FAA policy, a repair station is permitted to fabricate (i.e., manufacture) parts for use in a repair without obtaining a Parts Manufacturing Approval (PMA) under certain circumstances. For example, the repair station may not sell the part separately and the part must be “consumed” in the repair. Sometimes, the repair station fabricates the part itself; on other occasions, it may provide the technical data to a third party that actually produces the part under the repair station’s supervision and control.

Many parts are manufactured under FAR 43 during the performance of maintenance. Frequently, the design data to fabricate small detail parts such as bushings and flanges are contained in a manufacturer’s maintenance manual. In other cases, the data can be developed independently. Repair stations that perform interior modifications also report a significant amount of manufacturing by non-certificated sources under FAR 43. This activity is performed as part of the repair and alteration process.

It is clear that the mere purchase of a part from a distributor, for example, does not constitute maintenance for purposes of the drug and alcohol rules. However, would employees of a non-certificated subcontractor that fabricate parts at a repair station’s direction under FAR 43 be covered by the FAA’s proposal?

In our view, the answer depends on whether the FAA considers the fabrication of a part under FAR 43 as maintenance or production. Since manufacturing is not a safety sensitive function, an entity that produces the identical part under a PMA would NOT be subject to the drug and alcohol rules. For this reason, a non-certificated vendor that fabricates a part under FAR 43 should not be required to conduct drug and alcohol testing for those employees who engage in this activity. However, if the FAA decides this is maintenance, it would add hundreds of non-aviation companies and thousands of new employees to the drug and alcohol testing program.

### Used Parts Purchased by Air Carriers

There are many situations where maintenance is performed on air carrier equipment by employees who are not subject to the FAA's drug and alcohol testing rules. For example, all carriers purchase new and used parts from distributors for installation on their aircraft. In the case of used parts, they often purchase components that have already been maintained. Although these parts will be installed on the carrier's aircraft, they are not covered by the drug and alcohol rules.

Another example are parts pooling and exchange arrangements whereby carriers exchange a used part that requires maintenance for an airworthy part on which maintenance has already been performed. In these cases, drug and alcohol testing has not generally been conducted even though the parts will be installed on a carrier's aircraft. This is because the maintenance provider does not know at the time the work is performed that an air carrier will ultimately use the part. Is the FAA proposing to change this policy?

In addition, many Part 121 and Part 135 air carriers make extensive use of foreign maintenance providers certificated under Subpart C of Part 145. There are over 550 foreign repair stations throughout the world that perform maintenance on equipment operated by U.S. air carriers. These facilities are not required to test their employees for drugs and alcohol because these rules do not apply outside the United States. Nevertheless, these personnel perform the same "safety sensitive" functions as those performed by entities in the United States.

These examples illustrate the fact that a significant amount of maintenance performed for U.S. air carriers is accomplished by employees who are not subject to drug and alcohol testing. (Certainly, the fact that thousands of U.S. manufacturing employees are not subject to these rules shows that they do not apply to many functions that are truly "safety sensitive.") Therefore, we do not understand why the FAA is proposing to (1) reverse a longstanding agency interpretation, (2) impose unreasonably costly, burdensome and impractical requirements on air carriers and upstream maintenance providers, and (3) further increase the surveillance and enforcement burdens on its understaffed drug and alcohol inspection work force.

### Administrative Burdens on Air Carriers and Repair Stations

If the FAA's proposal is adopted it would impose significant administrative burdens on air carriers and repair stations in at least two areas. The first is through the quality auditing process. In the airline industry, carriers periodically audit their direct maintenance providers or accomplish this through the Coordinating Agency for Supplier

Evaluation (CASE). These audits do not extend to maintenance subcontractors with whom they have no direct relationship.

Rather, the carriers rely on the repair station that uses a subcontractor to ensure that the work is performed in accordance with its requirements and the FAR. Therefore, the quality requirements are flowed down in such a way that each entity focuses on its own work and the work performed by the tier immediately below them with whom they have a contract. If this proposal is adopted and potential liability is imposed on air carriers and repair stations for violations committed by all lower tier providers, the carriers and upstream maintenance providers will have no choice but to audit every tier beneath them, an extremely costly and burdensome proposition.

The other area where administrative problems would be significant is in determining whether the non-certificated subcontractor would have its own drug and alcohol program, an option under the FAA's proposed registration mechanism, or whether it would be included in an existing program of its contractor. The undersigned entities believe that many non-certificated providers, particularly those that also support other industries, will elect not to have their own program even if they decide to continue providing services to the aviation industry. Many will prefer to be covered by a certificate holder's program; however, this will be difficult given the fact that many subcontractors are often located in different cities, thereby complicating administration of a common drug and alcohol program.

#### Federal Government and Department of Defense Contracting Practices

The federal government has implemented drug-testing requirements under the Drug-Free Workplace Act (DFWA) of 1988 (P.L. 100-690). These obligations are imposed on certain contractors through 48 CFR Subpart 23.5 of the Federal Acquisition Regulations (FAR) and on those entities with Department of Defense contracts through Subpart 223.5 of the Defense Federal Acquisition Regulations Supplement (DFARS). The DOD obligations are implemented by the inclusion of a drug-free work place contract clause (252.223-7004) in defense contracts.

Discussions with several companies that perform maintenance both under military contracts and FAA regulations reveal that the acquisition regulations determine whether a particular contractual obligation must be flowed down from the prime contractor to subcontractors. Contract clauses that require flow down are specifically mentioned, such as clause 252.223-7002, Safety Precautions for Ammunition and Explosives (see Subpart 223.370 of the DFARS). **In contrast, there is no flow-down requirement for military maintenance providers to ensure that their subcontractors comply with the requirements of the DFWA.** DFWA requirements apply only to the entity that has the direct relationship with the government.

In contrast, the FAA has proposed to extend its rules to any tier of the maintenance process, no matter how far removed from the primary repair station and without regard to whether the subcontractors hold Part 145 repair station certificates or are even in the aviation industry. We do not believe the FAA's approach can be justified on safety or economic grounds.

FAA Regulatory Evaluation, Initial Regulatory Flexibility Determination, Trade Impact Assessment and Unfunded Mandates Determination

As required by various statutes, executive orders and internal department procedures, the FAA's regulatory evaluation analyzed the proposal's costs, benefits and related impacts. The undersigned entities offer the following comments.

1. Cost Impact

The FAA stated that the proposals would result in a cost savings of \$281,600 to industry and \$51,800 to the FAA for a net cost savings of \$333,400. The agency acknowledged that certain new costs would be incurred if the proposals were adopted, such as eliminating the so-called "moonlighting exception."<sup>1</sup> However, it believes these costs would be more than offset by the savings that would result from the elimination of various administrative requirements, such as the need to file certification statements, obtain FAA approval for individual drug and alcohol programs and periodic testing under Appendix I.

Conspicuous by its absence in the FAA's regulatory evaluation is any discussion of the cost impacts of requiring non-certificated subcontractors to be tested. Also not discussed are the increased costs of auditing lower tier suppliers because of the proposed requirement that air carriers and repair stations would be responsible for any non-compliance committed by **any** downstream maintenance provider. In fact, the FAA did not evaluate the costs and other impacts associated with testing "any tier of the contract."

On page 5 of the regulatory evaluation, under the heading of "Proposed Changes with Cost Implications," the FAA acknowledges that its proposal to eliminate the "moonlighting exception" will result in increased costs to the industry. However, there is no discussion about the cost implications of testing every maintenance subcontractor. On the contrary, the FAA concluded on page 14 of the regulatory evaluation that this was a "clarifying change" that would not involve any additional costs.

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<sup>1</sup> The "moonlighting exception" allows employees who work for more than one company to be included in only one drug and alcohol program.

The costs of testing every tier in a contract between an air carrier and a repair station will be substantial. Results of the ARSA-AIA survey concluded that the respondents would incur over \$2.5 million in initial costs to cover those production workers that actually perform, or are available to perform, a subcontracted maintenance function. In addition, the initial costs of ensuring that the drug and alcohol rules are being complied with by downstream Part 145 subcontractors was estimated at \$2.25 million. An additional \$4.2 million represents the cost of ensuring that downstream **non-certificated** subcontractors are complying with Part 121, Appendix I and J.

With respect to recurring costs, the survey respondents stated that they would incur costs in excess of \$1.0 million annually to include those production workers that are not currently in a drug and alcohol testing pool. The recurring costs to flow down these requirements to certificated and non-certificated downstream providers was estimated at \$2.2 million and \$1.45 million, respectively.

These estimates do not include the costs associated with the dislocations that would occur if non-certificated companies withdrew from supporting the industry. The undersigned entities are very concerned about the prospect of losing that support and the FAA has not considered this potential impact. In addition, these cost estimates were supplied by only 325 repair stations, approximately one-seventh the number the FAA believes are affected by these proposals. In our view, many more repair stations will have to be included in the drug and alcohol program because of the possibility that they will be asked to perform maintenance as a lower tier provider without having actual knowledge that their work relates to an air carrier's equipment. Therefore, if we assume that 3,250 repair stations will be covered by the new rules (an increase of about 1,000), each of the above cost estimates should be multiplied by a factor of 10 to determine the proposal's estimated cost to the aviation industry.

On page 5 of its regulatory evaluation, the FAA assumed that a drug-screening test would require 15 minutes of a person's time to complete the chain-of-custody forms and provide a sample for laboratory analysis. This estimate is unrealistically low because it fails to consider the need to train new employees on their obligations under the FAA regulations. This requires approximately one hour. In addition, while the 15 minutes estimated by the FAA may be appropriate once the person has arrived at the place where the sample will be taken, it does not consider the fact that many companies use off-site testing facilities. It is reasonable to assume that, on average, an additional one-hour or more of a person's time would be required for the entire testing process, including travel to and from the testing facility.

The agency also estimated the average cost of a drug test to be from \$12 to \$14. While that may be accurate if a company has its own in-house testing program, most of these

companies will use third party administrators (TPAs) to handle these activities for them. Discussions with industry representatives revealed that the average cost per test is approximately \$60. This includes specimen collection, lab processing, and medical review officer (MRO) verification. TPAs also charge additional amounts for initiating and maintaining the program. Although these vary depending on the size of the program and the amount of additional services requested (such as policy development, training, pool management and referrals to substance abuse professionals), industry sources knowledgeable in this area estimate that a TPA would reasonably charge an additional \$25-\$50 per employee for these additional administrative services.

The undersigned entities believe that the FAA significantly under-estimated the number of non-certificated maintenance subcontractors (985 "other contractors") that would be required to comply with these requirements. In responding to the ARSA-AIA survey, 325 repair stations advised that they collectively used almost 5,000 non-certificated maintenance subcontractors, or an average of approximately 15 per repair station. Even if some non-certificated subcontractors are used by many repair stations, we believe the number of such providers is much greater than the FAA estimated. In addition, the FAA provided no estimate of the additional costs that would be incurred by these non-certificated subcontractors.

## 2. Regulatory Flexibility Determination

In discussing the requirements under the Regulatory Flexibility Act of 1980 (RFA), the FAA addressed the impact these proposals would have on certain small entities. However, only air carriers and repair stations were considered to be small entities and the FAA asked for comments on the number of repair stations that met the relevant criteria under RFA.

The FAA concluded that small entities would save a modest amount of money if the proposals were adopted. This is consistent with the agency's view that the proposals would result in a net cost savings to industry. However, there was no discussion of the numerous non-certificated, small entities that work primarily in other industries yet are willing, at least for now, to support aviation maintenance activities. Similarly, there was no discussion of the increased costs that certificated repair stations would have to bear because they will be required to ensure the regulatory compliance of all downstream maintenance subcontractors.

We believe this is simply another indication that the FAA has significantly underestimated the costs and other impacts of its proposal to require testing of all tiers in a contract. Because these non-certificated companies generally have no reason to be aware of FAA rulemaking activities, they will not know about this important change in

policy until they are confronted with having to choose between compliance with the drug and alcohol rules or withdrawing their support from the aviation industry.

### 3. Absence of a Safety Justification

In the preamble to the NPRM, the FAA concluded that these proposals “could result in enhanced safety.” The agency cited several specific benefits that would accrue, none of which directly applied to the non-certificated subcontractor proposal. For example, the FAA did not state how safety would be enhanced by testing these employees, particularly since certificated repair stations are currently required under section 145.47(b) of the FAR to take airworthiness responsibility for the work performed by non-certificated entities. Similarly, the FAA did not cite any evidence that the current system was inadequate to ensure safety without imposing drug and alcohol testing on non-certificated entities, particularly when many **certificated** entities, such as manufacturing employees, are not subject to these requirements.

### 4. International Trade Issues

The undersigned entities are concerned about the proposal’s potential adverse impact on the competitive position of non-certificated U.S. companies that currently support the aviation industry. If faced with the choice of subjecting their employees to drug and alcohol testing or withdrawing from the aviation industry altogether, those that do not perform a large amount of subcontracted maintenance will likely choose the latter.

Domestic repair stations will then have three choices. Either they can bring the work in-house (thus adding costs), find a non-certificated entity in the United States that elects to comply with the drug and alcohol rules or send the work to foreign non-certificated companies that are not required to comply. In the opinion of the undersigned, this will result in a net loss of business for U.S. companies. In effect, the FAA would be extending the same cost advantage currently enjoyed by foreign repair stations (that are not subject to U.S. drug and alcohol testing rules) to non-certificated foreign companies that support the industry. We do not believe this result is desirable.

### Phase-in of the New Rules

We strongly urge the FAA to reconsider its proposal to apply the drug and alcohol rules to persons working in non-certificated maintenance facilities. However, if the agency adopts the proposal, it will have to determine how these thousands of additional covered employees will be integrated into the program.

Specifically, if the FAA requires a verified negative drug test before they are allowed to perform further safety-sensitive work, this will result in severe disruptions to the industry.

Therefore, we recommend that the FAA permit them to be added to the existing pool of covered employees for purposes of random testing without subjecting them to pre-employment testing. This “grandfather provision” would be much less disruptive and recognize the fact that they have been previously performing these functions without being covered by the drug and alcohol rules and without any adverse effect on safety.

#### Elimination of the Moonlighting Exception

The FAA’s proposal states that “an employer [i.e., an air carrier, etc.] may use a contract employee who is not included under that employer’s program ... only if the contract employee is subject to the requirements of the contractor’s program and is performing work within the scope of employment with the contractor.” As proposed, the language would cause great difficulties in those cases where a non-certificated maintenance subcontractor performed work for many different repair stations, a common practice.

As written, the above language would allow a non-certificated subcontractor company to establish its own program and its employees would be covered even if the company worked for many different contractors. However, if the non-certificated subcontractor wanted to be covered by the program of one of their contractors (also a common practice), they would be unable to do so without having to be included in the program of each contractor for whom they worked. This would, in effect, force these non-certificated entities to establish a program of their own, thereby subjecting themselves to direct FAA regulation. Many of these companies will refuse to do so. Indeed, certificated contractors and subcontractors face the same dilemma.

For these reasons, we recommend that the FAA allow employees of contractor and subcontractor companies to be included either in the program of their employer, or the program of their direct contractor.

#### Compliance and Enforcement

Since the drug and alcohol rules were adopted, the FAA has taken the position that liability for non-compliance rests with the air carriers, including acts or omissions committed by their direct contractors and lower tier subcontractors. If a repair station has its own approved program, it is also responsible under the regulations for its own compliance.

This interpretation has resulted in air carriers being responsible for the acts or omissions of companies with whom they have no direct relationship. Because the FAA has recognized the practical difficulties of holding the carriers responsible under these circumstances, it has generally exercised its discretion to forego prosecution of such

cases. Unfortunately, the current proposal would exacerbate this problem by holding the carriers and their direct maintenance contractors responsible for the acts or omissions of all downstream maintenance subcontractors, no matter how far removed from the carrier and regardless whether they are certificated to perform maintenance.

We urge the FAA to abandon this approach in favor of one that requires persons covered by the rules to comply with their own requirements. Air carriers would be responsible for the testing of their own employees. Similarly, repair stations that have direct contracts with airlines would also be responsible for their own compliance, as would any subcontractors.

At most, responsibility for drug and alcohol compliance should not be extended beyond the level where a direct contractual relationship exists, and only in those cases where the entity takes airworthiness responsibility for the work it performs. In other words, a company should not be held responsible for the compliance of any entity with whom it has no direct contractual relationship. Moreover, even where a direct relationship exists, only those entities that hold certificates authorizing them to perform maintenance and approve articles for return to service should be included.

We believe this approach is preferable to the fiction that an air carrier or any of its direct contractors can reasonably and practically be expected to ensure the compliance of lower tier providers with whom they have no direct relationship. This recommendation applies to the drug and alcohol program generally and is independent of the maintenance subcontractor proposal. The FAA may be concerned that it does not have the legal authority to hold individuals liable for their acts or omissions if they are not "air carrier employees." However, the FAA is proposing an unprecedented expansion of this program, in many cases including employees outside the aviation industry. Since it obviously believes it has the legal authority to adopt this proposal, any entity required to test its employees should also be responsible for ensuring its own compliance.

#### The FAA's Drug Abatement Work Force

In discussing the number of companies that would be affected by these proposals, the FAA concluded that there were 144 Part 121 air carriers, 3,074 Part 135 air carriers and 2,412 Part 145 repair stations that were subject to the rules. Therefore, there are a total of 5,630 companies that are currently overseen by the FAA's Drug Abatement Division. Based on the results of the ARSA-AIA survey, the undersigned entities estimate that the FAA is proposing to add nearly 5,000 non-certificated entities to this program. While these entities may not be required to register with the FAA, their employees will have to be part of a drug and alcohol program in either case.

There are approximately 30-40 FAA drug and alcohol inspectors United States. This compares with over 2,000 Flight Standards inspectors who are responsible for overseeing essentially the same number of corporate entities, plus pilots, mechanics and other airmen. We do not believe it serves the best interests of the industry or the FAA to cover these additional non-certificated entities given the relatively small amount of inspector resources that the agency has decided to devote to this program.

### Summary

In 1989, the FAA wisely limited the scope of drug testing in the aviation maintenance industry to those contractors that take airworthiness responsibility for the work they perform. It recognized that these are the individuals who truly perform safety-sensitive maintenance functions. When Congress adopted OTETA in 1991 it warned the FAA not to view the legislation as an open invitation to extend this program to other **aviation industry** employees. In 1992, concerned that it may have included more employees than was prudent, the FAA asked the industry whether it should limit coverage to certificated maintenance employees that are authorized to take airworthiness responsibility for the work they perform.

Ten years later, and without any discernable reason, the FAA is now proposing to reverse its longstanding interpretation and, for the first time, expand the coverage of these programs to companies outside the aviation industry. In mischaracterizing the proposal as a "clarifying change," the agency ignored its previous interpretation, the nature of aviation maintenance activities and the substantial cost impact it would have on the industry.

For the foregoing reasons, the undersigned entities urge the FAA to limit the drug and alcohol rules only to those maintenance providers that have a direct contract with a U.S. air carrier and that take airworthiness responsibility for the work they perform. In the alternative, the FAA should retain the maintenance subcontractor interpretation and not require employees of non-certificated entities to be covered by a drug and alcohol testing program. We have provided two alternatives of proposed regulatory language in Appendix 1 to these comments.

Thank you for considering our views on this extremely important proposal. Please contact Marshall S. Filler, Counsel to the Aeronautical Repair Station Association, at 703-299-0784 if you have any questions or require additional information.

Sincerely,

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Appendix 1- Suggested Regulatory Language for Pertinent Portions of Appendix I

(**Note:** Identical language may be employed in Appendix J but is not set forth below.)

**Alternative 1:** Covers only those individuals who perform safety sensitive functions as (1) an employee for a Part 121 or Part 135 air carrier, or section 135.1(c) operator, or (2) under a direct contract with these entities.

II. Definitions

\* \* \* \* \*

Contractor means a person that has a direct contract with an employer to perform safety-sensitive functions.

Employee is a person who is hired directly by (1) an employer, or (2) a contractor, to perform a safety-sensitive function for an employer as defined below. An employee is also a person who transfers into a position to perform a safety-sensitive function for an employer.

Subcontractor is a person that does not have a direct contract with an employer to perform a safety-sensitive function.

\* \* \* \* \*

II. Employees Who Must be Tested

Each individual who performs a function listed in this section for an employer as (1) an employee of a Part 121 or Part 135 air carrier, or an operator defined in section 135.1(c) of this chapter, or (2) a contractor, must be subject to drug testing under an anti-drug program implemented in accordance with this appendix. This not only includes full-time and part-time employees, but temporary and intermittent employees regardless of the degree of supervision. Also, employees in a training status and performing safety-sensitive functions must be subject to drug testing in accordance with this appendix. However, it does not include subcontractors or their employees.

III. Responsibility for Compliance

Each employer is responsible only for the compliance of its own employees. Each contractor is responsible for its own compliance, including that of its employees.

Note: Succeeding paragraphs should be renumbered to reflect the addition of new section III, above.

**Alternative 2:** Covers the individuals specified in Alternative 1, above plus any person (including maintenance subcontractors at any tier) that (1) takes airworthiness responsibility for the work they perform under Part 43 and/or Part 145 of the Federal Aviation Regulations, and (2) has actual knowledge, at the time the work is performed, that it is being accomplished for a Part 121 or Part 135 air carrier, or a section 135.1(c) operator.

## II. Definitions

\* \* \* \* \*

Contractor means (a) a person that has a direct contract with an employer to perform safety-sensitive functions, or (b) a subcontractor at any tier of the maintenance process that performs aircraft maintenance or preventive maintenance for an employer, provided (1) the subcontractor takes airworthiness responsibility for the work it performs, and (2) has actual knowledge, at the time the work is accomplished, that it is being performed for an employer.

Employee is a person who is hired directly by (1) an employer, or (2) a contractor, to perform a safety-sensitive function for an employer as defined below. An employee is also a person who transfers into a position to perform a safety-sensitive function for an employer.

\* \* \* \* \*

## II. Employees Who Must be Tested

Each individual who performs a function listed in this section for an employer as (1) an employee of a Part 121 or Part 135 air carrier, or an operator defined in section 135.1(c) of this chapter, or (2) a contractor, must be subject to drug testing under an anti-drug program implemented in accordance with this appendix. This not only includes full-time and part-time employees, but temporary and intermittent employees regardless of the degree of supervision. Also, employees in a training status and performing safety-sensitive functions must be subject to drug testing in accordance with this appendix.

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Note: Succeeding paragraphs should be renumbered to reflect the addition of new section III, above.