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Pratt & Whitney
A United Technologies Company

July 18, 2002

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U.S. Department of Transportation
Room Plaza 401
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Washington, DC 20590-0001

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Subject: FAA-2002-11301 - 28
RIN 2120-AH14

**Notice of Proposed Rulemaking: Antidrug and Alcohol Misuse
Prevention Program for Personnel Engaged in Specified Aviation
Activities**

Greetings:

Thank you for the opportunity to respond to the subject Notice of Proposed Rulemaking: 14 CFR Part 121, Antidrug and Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities, published in the *Federal Register* (Docket No. FAA-2002-11301; Notice No. 02-04) on February 28, 2002. United Technologies Corporation (UTC) is pleased to respond on behalf of its Pratt & Whitney Division, Hamilton Sundstrand Division, Sikorsky Aircraft Division, and Pratt & Whitney Canada Corp. Currently, this corporate response includes 42 repair stations.

UTC believes the FAA Anti-Drug and Alcohol Misuse Prevention Program regulations are a valuable tool to the aviation industry in ensuring workplace and public safety. In 1990 and 1995, the corporation's interest in ensuring its divisions' compliance led us to seek the Drug Abatement Division's advice and guidance during implementation of the drug and alcohol regulations. During those times, regulators and industry representatives worked cooperatively to implement the rules. UTC made a considerable investment in management resources to establish mechanisms for compliance. Within the industry, there has been an overall positive outcome from the program as Drug Abatement Division inspections consistently find compliance with the regulations and also identify opportunities for program improvements.

UTC is disappointed in the proposed rule because it presented little helpful clarification of the existing rules and raised several issues that to our knowledge had not previously been identified as a problem, either by the FAA or industry. The proposed rule has not recognized the significant number of documents that have established precedence for the subcontractor's exception to the Anti-Drug and Alcohol Prevention Program, providing the certificated organization assumes all responsibility for work performed. The proposals do not, in our opinion, help

to enhance the common goal of product and process integrity in the interest of public safety.

Specific Responses

1. From the NPRM:

“III. Employees Who Must be Tested”

The disavowal of earlier FAA guidance in a stated attempt to “clarify” the rule creates serious problems for UTC and its several divisions that perform maintenance on air carrier equipment in the United States. In asserting that some of the previous guidance “was never officially published in an Advisory Circular or other official policy vehicle,” the NPRM attempts to minimize the documents that were, in fact, published and widely circulated by the FAA. These include the 1989 guidance called “Implementation Guidelines for the FAA Anti-drug Program,” and the 1990 document entitled “Most Frequently Asked Questions About the Aviation Industry Anti-Drug Program.” This statement also ignores the existence of AC 121-30 “Guidelines for Developing an Anti-Drug Plan for Aviation Personnel” published on March 16, 1989 by AAM-220. These documents helped establish the foundation for the development of the industry’s drug and alcohol programs, including that of UTC, and ensured compliance with the regulations.

This basis for continued compliance depends on the industry’s ability to control the processes and procedures under which its maintenance operations are conducted. In the early 1990’s, UTC sought and obtained explicit guidance from the Drug Abatement Division regarding the scope of its responsibility for oversight of subcontractor functions. That guidance is known as the “maintenance subcontractor exception.”

The FAA published the maintenance subcontractor exception on several different occasions between 1989 and 1995. Although the guidance was not expressed in identical terms each time it was presented, there can be no dispute that the FAA has consistently recognized the exception that it is now attempting to disavow.

The FAA issued its first statement on this subject in August 1989 with its publication of the Implementation Guidelines for the FAA Anti-Drug Program. The agency stated as follows:

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 June 1990, the FAA's Drug Abatement Branch published its Most Frequently Asked Questions, which reiterated the exception. The agency stated:

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 June 20, 1991, representatives of Pratt & Whitney met with FAA legal Michael Chase, and drug abatement staff, William McAndrew and James Olavarria to seek clarification about this particular subject. The meeting was prompted by Pratt & Whitney's confusion over the FAA's statement in its Frequently Asked Questions document that stated maintenance subcontractors that took airworthiness responsibility for the work they performed should be covered by the drug rules. (Alcohol rules did not exist at that time.) There was concurrence by those in attendance at the June 20th meeting that the drug rules did not apply to subcontractors to the primary repair station when the maintenance performed by the subcontractors was incorporated into a larger workscope being performed by the primary repair station.

The views expressed by the FAA at that meeting were based on the fact that Pratt & Whitney was taking airworthiness responsibility for the entire workscope being performed for the air carrier. **The FAA did not believe the issues presented were different when a Pratt & Whitney repair station subcontracted a job function to a Pratt & Whitney production facility.** This is because under the FAR a production approval holder is a separate entity with different privileges and responsibilities from those of a repair station.

The meeting concluded with a mutual understanding that Pratt & Whitney, when it incorporates the repair of a subcontractor or in-house vendor into a higher assembly, is responsible to its customer for the airworthiness of the product as repaired. Under these circumstances, all three FAA representatives agreed that when Pratt & Whitney contracts repairs to in-house vendors (Pratt & Whitney production facility) and subcontractors, the subcontractor/in-house vendor employees **are not subject to the drug test rules.**

The FAA's Manager of the Drug Abatement Program for the New England Region also acknowledged this fact in a May 1, 1995 letter to the Hamilton Standard (now Hamilton Sundstrand) Division of UTC (Exhibit 1). In that letter, the FAA addressed a situation involving two certificated repair stations, both of which were part of Hamilton Standard. One of the facilities was a domestic repair station while the other was a manufacturer's maintenance facility (MMF). Even though both were part of Hamilton Standard, the FAA stated that "[I]n essence, the certified Hamilton Standard MMF is a separate entity from the Hamilton Support Systems (HSS)" In response to a question about

subcontractor coverage, the New England Region Drug Abatement Program Manager also stated:

... coverage under the rule applies to those certified repair stations that sign off ... approval for return to service only for the work they performed under 14 CFR section 43.9(a)(4). However, it does not apply to a subcontractor that only makes a maintenance record entry under 14 CFR section 43.9(a) stating that the work was performed according to specifications. In the latter instance, the document is returned with the component part to the certified repair station who (sic) signs the approval for return to service.

Once again, on September 6, 1995, the FAA's Associate Administrator for Regulation and Certification (AVR-1) confirmed the existence of the maintenance subcontractor exception (Exhibit 2). 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.)

The NPRM's assertion that subcontractors' compliance is the responsibility of repair stations is a clear reversal of all previous guidance. It makes no assertion, in any way, how gains in safety would be realized by the proposed changes while creating responsibility without authority for every tier of maintenance contracting.

2. From the NPRM:
"Executive Order 12866 and DOT Regulatory Policies and Procedures"

In the NPRM's attempt to identify cost benefits for its proposals, the FAA has shown a disturbing lack of understanding of the ramifications of requiring subcontractor Anti-Drug and Alcohol Misuse Prevention program oversight by repair organizations. The NPRM does not acknowledge the existence and importance of noncertificated entities that provide essential services in the repair process. Under applicable regulations, including 14 CFR Part 145 uncertificated entities have performed many subcontracted maintenance functions for repair stations prior to an article's final inspection and approval for return to service.

An "uncertificated maintenance subcontractor", for purposes of compliance with Parts 43 and 145, is an entity that is neither authorized to perform maintenance under section 43.3 nor approve articles for return to service under section 43.7. Since a production approval holder (PAH) does not have these privileges, a PAH is considered an uncertificated source when it assists in performing maintenance.

Maintenance performed by an uncertificated maintenance source must be returned to, and pass through, the quality system of the repair station for acceptance of the work performed. This is because, under section 145.47(b), a certificated repair station is required to take airworthiness responsibility for the work performed by an uncertificated source. In view of previously issued agency guidance on this subject (see discussion below), these employees are not currently included in an FAA drug and alcohol program.

In evaluating the drug and alcohol rules' application to maintenance subcontractors, it is important to understand subcontracting practices in the maintenance industry generally. Subcontracting may be limited to a particular maintenance function, such as coating or heat-treating a part. In some cases, it might involve the maintenance of an entire component, such as an overhaul of a fuel control. Another form of a repair station subcontracting to an uncertificated source may also include a requirement to produce detail parts, which are to be consumed in the repair process and documented in accordance with 14 CFR Part 43.

Most maintenance subcontracting occurs between certificated repair stations. Indeed, the vast majority of maintenance subcontractors are certificated repair stations with FAA-approved drug and alcohol programs. Many of these certificated subcontractors also have direct contracts with Part 121 or Part 135 air carriers. In a typical subcontracting situation, the certificated subcontractor assumes airworthiness responsibility for the work it performs by approving that work for return to service under Parts 43 and 145. When a UTC repair station takes airworthiness responsibility for "overhauling" a complete engine or engine module (such as a compressor), it also takes responsibility for the integrity of the entire product or article being maintained even though some of the work was accomplished by other entities. This is a common industry practice and is governed by Parts 43 and 145.

The amount and type of subcontracting at any particular repair station is influenced, in part, by the regulatory requirements of Part 145. Under section 145.47(a) and (b), a repair station must have the equipment and materials required for the rating it possesses on its premises and under its full control, **unless it is authorized to obtain that function by contract.**

Many items of equipment and tools are used in both the manufacturing and repair environments. However, it is usually not practical or cost effective for a company to purchase separate pieces of expensive equipment for use at each type of facility. Therefore, the equipment may be shared. When this occurs, the equipment can either be considered part of both the repair station and the production facility, or placed under the sole control of the production facility.

When equipment under the sole control of a production facility is used to perform a maintenance function, that function is considered to be subcontracted out by the repair station to an uncertificated source under Part 145. This is because the equipment used to perform the work is neither located on the premises, nor is it under the full control, of the repair station as required by section 145.47. In

addition, the personnel performing the work are also working under the control of the Part 21 production facility. In accordance with section 145.47(b), after the maintenance function is performed by the Part 21 production facility, the component must be routed through the repair station's quality system before it is approved for return to service by the repair station under Parts 43 and 145.

***The Application of the Drug and Alcohol Rules to Subcontractors
The Pertinent Definitions and the General Rule:***

The drug and alcohol rules define "employer" to include Part 121 and Part 135 certificate holders. The term "employee" means someone who performs, **either directly or by contract**, a safety-sensitive function for an employer. The term "contractor company" means a company that has employees who perform safety-sensitive functions **by contract** for an employer. (See Part 121, Appendix I and Appendix J).

In order to perform a function "by contract", UTC believes that an actual contract between the employer (the airline) and another company is required. However, the FAA has taken a contrary view (Exhibit 2). The agency's longstanding position is that **any person** who performs a safety-sensitive function in the United States is covered by the drug and alcohol rules, regardless whether the employee works for a company that has a **direct** contract with the air carrier. If the direct contractor has, in turn, contracted with other companies (i.e., subcontractors) to assist them, the safety-sensitive employees of the subcontractor are also required to be included in an approved program.

Notwithstanding the agency's expansive reading of the term "contract" to include subcontractor employees with whom no direct contractual agreement exists with the air carrier, the FAA has consistently recognized one exception to the drug and alcohol regulations. This exception applies in the maintenance area.

Economic Impact

Major cost impacts are present throughout the Proposed Rule. We estimate that the issues raised below will cost one of UTC's divisions **alone** an approximate aggregate initial cost of more than \$900,000.00. For the entire corporation, cost estimates based on **known** factors alone approach \$6,000,000.00 for the first year. There are implied additional costs for the responsibility and oversight of all sub-tier contractors that could not be quantified, but will have a considerable financial impact on the corporation.

For example, the FAA applies sanctions against covered employers for failure to comply with the drug and alcohol regulations. These employers (carriers and repair stations) are under the jurisdiction of the FAA. Non-certificated entities are not directly subject to FAA authority. Will the FAA then apply sanctions to those entities over which they *do* have authority when sub-tier contractors fail to comply? The cost implications of this scenario are incalculable.

Many of the cost impact analyses relate to administrative oversight and the addition of literally thousands of employees "at any tier" who were previously

PW IMPACT:	\$921,000.00
OTHER UTC (Non-PW) IMPACT:	<u>+\$205,000.00</u>
TOTAL UTC FIRST YEAR COST IMPACT	\$1,126,000.00

EXTENSION TO UTC SUBCONTRACTORS:

Estimated Initial UTC Administrative Costs for Subcontractors (Assumes costs charged back to UTC as direct expense or incorporated into pricing):
(Including program introduction, training, management systems development)

316 Subcontractors with Part 145 Certificates:	\$1,896,000.00
16 Subcontractors – Original Equipment Manufacturers:	\$192,000.00
34 Subcontractors – Non-certificated Entities:	<u>\$408,000.00</u>
TOTAL UTC COSTS FOR NON-UTC SUBCONTRACTORS	\$2,496,000.00

ESTIMATED RECURRING UTC ADMINISTRATIVE COSTS FOR 366 SUBCONTRACTORS:	\$2,196,000.00
(Including program coordination, audit, corrective action monitoring)	

Estimated Total Initial Cost:	\$2,496,000.00
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Estimated Total Recurring Cost:	<u>\$2,196,000.00</u>
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TOTAL SUBCONTRACTOR FIRST YEAR COSTS	\$4,692,000.00
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TOTAL ESTIMATED FIRST YEAR COSTS TO UTC FOR ALL THE ABOVE:

UTC IMPACT:	\$1,126,000.00
SUBCONTRACTORS:	<u>+\$4,692,000.00</u>
TOTAL	\$5,818,000.00

Recurring UTC Administrative Costs For All Sub-tier Contractors:

UTC has identified 366 subcontractors including certificated repair stations, original equipment manufacturers and non-certificated entities that currently serve its divisions' 42 certificated repair stations. There is no credible means of determining the number of entities that are under contract with these 366 entities. If faced with the responsibility for program oversight for every subcontractor's compliance, an overwhelming administrative expense would be implied for UTC. The corporation must have some means of projecting its costs, but the proposed rule provides no mechanism for such forecasting. This fact makes cost estimating impossible and leaves the corporation in an entirely untenable position.

Safety

UTC recognizes that maintenance is a safety-sensitive function when it is performed for a Part 121 or 135 air carrier in the U.S. The Anti-Drug and Alcohol Misuse Prevention rules were developed to ensure public safety. They have been very effective in preventing people from being hired to perform safety-sensitive work and others from continuing to do so while impaired by drug use or alcohol misuse. A consistent reduction in random test positive results demonstrates industry improvement.

A disturbing aspect of the NPRM is the lack of any reason for the proposed change. There is no assertion made that there would be any improvement in safety as a result of its implementation. If safety is the underlying reason for the rules' existence, any subsequent change to them should enhance safety.

To UTC's knowledge, over the past twelve years, the maintenance subcontractor exception has not resulted in any occurrences of drug use or alcohol misuse at the subtier supplier level. Overall, these uncertificated entities have provided quality workmanship and products and this assessment has been verified through inspections and tests of the work performed by certificated repair stations. To UTC's knowledge, no aircraft accidents or incidents have occurred due to maintenance being performed by impaired individuals at any uncertificated entity.

Proposed Solution

UTC opposes the NPRM as written, as the cost ramifications are enormous with no quantifiable benefit to safety.

- UTC believes the FAA framers of the Antidrug and Alcohol Rules fully understood the reasons underlying the maintenance subcontractor exception and chose to interpret the rules accordingly.
- Uncertificated maintenance subcontractors must be excepted from the drug and alcohol rules; just as they are not allowed to take responsibility for the maintenance they perform on behalf of a certificated entity under FAR 145.
- UTC believes the maintenance contractor exception must be retained, and made consistent with FAR 145.47 and new 14 CFR Part 145 which continues to allow maintenance to be performed by uncertificated subcontractors for repair stations.
- UTC believes the FAA needs to keep the anti-drug and alcohol program responsibility with the air carriers and not extend it to maintenance providers. The contractual relationship and the definitions of the parties involved must also remain clear.
 - The current drug and alcohol rules define "employer" to include Part 121 and Part 135 certificate holders. The term "employee" means

someone who performs, **either directly or by contract**, a safety-sensitive function for an employer. The term “contractor company” means a company that has employees who perform safety-sensitive functions **by contract** for an employer. (See Part 121, Appendix I and Appendix J.)

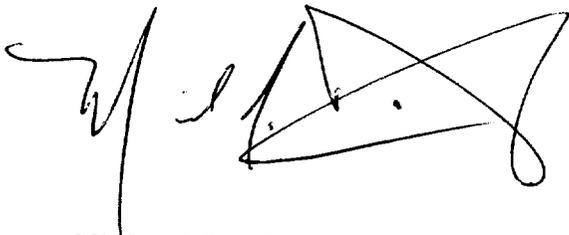
- UTC believes the FAA should limit the application of the drug and alcohol rules to those entities that have a direct contract with an air carrier in accordance with the plain language of the rule. As an option:
 - Each **certificated entity** within the repair process could flow down contractual drug and alcohol requirements to each of their prime certificated subcontractors to help ensure compliance with the drug and alcohol rules.

Summary

UTC wholeheartedly supports the FAA anti-drug and alcohol program, and has always worked to maintain strict compliance with it. We believe the maintenance subcontractor exception must remain in place. We respectfully request that the FAA address our concerns by aligning the NPRM with FAR 145 in allowing for the use of uncertificated maintenance subcontractors that are excepted from the drug and alcohol rules. Failure to do this will cost the industry millions of dollars with no quantifiable safety benefits.

UTC also believes that the proposed rule change may force maintenance providers to send more work overseas and across the borders where the antidrug and alcohol rules do not apply. This could jeopardize some domestic maintenance providers’ ability to remain in business.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Dreikorn', written over a faint rectangular stamp or grid.

**Michael Dreikorn
Vice President, Regulatory and Compliance Integrity
Pratt & Whitney**

LIST OF EXHIBITS

1. Letter of May 1, 1995 from the Manager, Drug Abatement Program, New England Region to Hamilton Standard Division of United Technologies Corporation
2. Letter of September 6, 1995 from FAA's Associate Administrator for Regulation and Certification (AVR-1) to Filler, Weller & Tello, P.C., Counsel to the Hamilton Standard Division of United Technologies Corporation



U.S. Department
of Transportation
Federal Aviation
Administration

Exhibit 1 (2 pages)

New England Region

12 New England Executive Park
Burlington, Massachusetts 01803

File Number: 94WA910572
Plan Identification No. D-NE-20004-S

May 1, 1995

CERTIFIED MAIL

Mr. Jeffry Odell, Esq.
Drug Program Manager
United Technologies-Hamilton Standard
Mail Stop 1-1 BC29R
One Hamilton Road
Windsor Locks, CT 06096-1010

Dear Mr. Odell:

Our purpose for writing is twofold: 1. To reply to the questions you posed at the meeting held in the New England Region on March 1, 1995, between personnel of Hamilton Standard and the Federal Aviation Administration (FAA). 2. To reaffirm FAA's position concerning the Hamilton Standard Manufacturers Maintenance Facility (MMF) coverage under the FAA antidrug and alcohol regulations. The two questions that you requested clarification on are as follows:

1. Q. What is meant by the direct/primary contractor?
 - A. The direct/primary contractor is the individual or company that entered into a contract with a part 121 or part 135 certificate holder.
2. Q. When the direct/primary contractor (repair station) sends work out to a subcontractor how many tiers down is the repair station responsible for ensuring that the subcontractor has a FAA-approved drug program?
 - A. As far as coverage for the direct/primary contractor's subcontractors are concerned, coverage under the rule applies to those certified repair stations that sign off (according to their Inspection Procedures Manual (IPM)) approval for return to service only for the work they performed under 14 CFR §43.9 (a)(4). However, it does not apply to a subcontractor that only makes a maintenance record entry under 14 CFR §43.9 (a) stating the work was performed according to specifications. In the latter instance, the document is returned with the component part to the certified repair station who signs the approval for return to service.

In essence, the certified Hamilton Standard MMF is a separate entity from the Hamilton Support Systems (HSS) and, in concurrence with part 145, Subpart D, is subject to performing its maintenance and preventive maintenance operations in accordance with its IPM and part 43, to include returning the work they performed to service. Because Hamilton Standard is listed as one of HSS's subcontractors, and they sign approval for return to service for their own work, they are subject to the FAA antidrug rule. The coverage would be the same as it is for the HSS facility in that all employees who are performing safety-sensitive functions are subject to drug testing, not just the repairmen who approve the work to return to service.

We would refer you to your FAA-approved antidrug program, D-NE-20004-S, specifically in reference to contractors, in which you state that "Hamilton Standard will ensure that all contractor employees performing covered functions are covered in an FAA-approved drug testing program by the required dates." Please note the enclosed copy of our letter to Hamilton Standard, dated July 15, 1992, in which we advised you to modify your training overheads to more accurately define who is and is not covered under the antidrug program. As you can see, at that time, we explicitly identified your MMF as meeting the criteria for coverage under the antidrug rule. In addition, our letter dated September 19, 1994, informed you that "subcontractors (in this case the MMF) who sign the maintenance release, which returns the product to service, accept the responsibility for the work they perform and are covered by the FAA's antidrug regulations."

Based on the above information, plus the numerous correspondence and communication between Hamilton Standard and the FAA, we reiterate the information that was given to you on November 14, 1994. In a telephone conversation with Elinor Rafferty, she informed you that FAA had determined that Hamilton Standard's MMF is covered under the antidrug plan and that you should immediately put those employees in the random selection pool. Please notify this office in writing within two weeks that you have complied with this requirement. If you need any further assistance, do not hesitate to call us.

Sincerely,


Charles C. Underwood
Manager, Drug Abatement Program
Office of Aviation Medicine

Enclosure

cc: Richard Gidius, MIDO-41
Jose Santos, FSDO-3
Paul Ingfis, ANE-200
Richard Giguere



U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

SEP - 6 1995

Marshall S. Filler
James W. Tello
Filler, Weller & Tello, P.C.
901 15th Street NW., Suite 901
Washington, DC 20005

Dear Mr. Filler and Mr. Tello:

This is in response to your questions concerning the responsibilities of your client, Hamilton Standards Division of United Technologies Corporation (Hamilton Standards), under the Federal Aviation Administration's (FAA) maintenance and substance abuse prevention regulations.

The basic responsibility for ensuring that maintenance is conducted, and is conducted properly, rests with the air carrier. This is true whether the carrier performs the maintenance itself or arranges for the performance of that work by another entity. 14 CFR 121.363. With respect to documentation, the air carrier's obligations are to ensure that it has the records necessary to prove that required maintenance was performed, that it was performed properly, and by whom the work was performed (see, e.g., 14 CFR 43.9, 43.11, 121.709). Of course, the air carrier could as a contractual matter impose upon the repair station with which it contracts the obligation to obtain the appropriate documentation from subcontractors when necessary.

The antidrug and alcohol misuse prevention program regulations incorporate concepts that are similar to those of the maintenance regulations. It is ultimately the obligation of the certificate holder (or other covered employer) to ensure that any person who performs safety-sensitive functions for it, directly or by contract, is subject to FAA-mandated substance abuse prevention programs.

At issue, therefore, is not a repair station's obligations at all. There is no independent regulatory requirement that necessitates the establishment of substance abuse prevention programs by repair stations. Rather, no air carrier or operator can use employees of a repair station to perform required maintenance or preventive maintenance unless these persons are subject to appropriate programs.

Certainly the Act did not intend these regulations to reach only direct employees of air carriers; to the contrary, the number of-affected employees cited by the legislative history (538,000) was taken from the FAA's own regulatory evaluation conducted during the promulgation of the original antidrug rule. That number reflected the FAA's estimate of the number of employees performing work both directly and indirectly for air carriers, and expressly included repair station employees (see 53 FR 47024, 47053; November 21, 1988).

This position is further supported by the Senate colloquy on S.676, in which Senator Holling's, one of the bill's sponsors, states:

The Senate language expressly was drafted to avoid upsetting the requirements that already are in place, whether or not they are addressed directly by the new mandates. DOT has done a great deal of work in the drug testing area, and the Senate language does not threaten the validity or the scope of the current regulations.

Emphasis added. 137 Cong. Rec. S14769 (daily ed., October 16, 1991).

As you note in your letter, the FAA has adhered to its position regarding subcontractor coverage throughout the implementation of its rules, as evidenced by the guidance material and letters cited in your letter. We see neither a regulatory nor statutory reason for which to change this position, nor do we believe the practical implications of this position are unduly burdensome.

The example cited in your letter in which the subcontractor would have to speculate regarding the end user of a repaired part is simply not applicable. The substance abuse prevention regulations are not implicated if maintenance is performed on a part independent of any request initiated by a covered employer. As previously stated, it is the employer's obligation to ensure that it only uses employees who are properly subject to FAA-mandated programs. And, just as in maintenance documentation, an air carrier may contractually require a repair station that chooses to subcontract to obtain for the air carrier the necessary documentation to demonstrate that the subcontractors meet the regulatory qualifications to perform the work.

In summary, the FAA requires that to the extent necessitated by the position articulated above, subcontractor employees, including those utilized by Hamilton Standards, are subject to FAA-mandated drug and alcohol testing.

The FAA has never stated that the substance abuse prevention regulations reach only those entities directly contracting with a certificate holder or other covered employer; to the contrary, the FAA's express goals were to create an aviation industry that is free from drug use and alcohol misuse. To permit employers to circumvent broadly these goals by using subcontractors would be inconsistent with the FAA's intent. Under a strict reading of the regulations, therefore, the regulations could reach any person who performs any safety-sensitive function if that work is done at the direction of an employer, no matter how many intervening parties may be involved between the covered employer and the person performing the work.

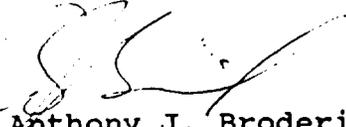
In general, the FAA has, in fact, adopted this extensive application. An air carrier might, for example, contract with an airport to provide dispatch services and the airport might then subcontract some of the dispatch functions to another service provider. Despite the lack of direct contractual relationship between the dispatcher and the air carrier, the dispatch functions are nevertheless clearly performed for the air carrier. There is neither a practical nor regulatory basis on which the airport could interject itself and assume responsibility for the completion of those duties. The individuals performing the dispatch functions would have to be subject to FAA-mandated substance abuse prevention programs.

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 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.

Your assertion that the Omnibus Transportation Employee Testing Act of 1991 (the Act) prohibits the Administrator from applying these regulations to subcontractor employees is incorrect. The cautionary language in the legislative history was clearly intended to warn the Administrator to use care in applying the requirements to other categories of employees (i.e., to employees performing functions other than those specified). As is apparent from the current rules, the FAA did not expand the categories of employees subject to drug and alcohol testing; in fact, the scope of the rules was narrowed by eliminating ground instructors.

Please let me know if you have any further questions regarding this matter.

Sincerely,



Anthony J. Broderick
Associate Administrator for
Regulation and Certification