



May 9, 2011

BY ELECTRONIC MAIL

The Honorable J. Randolph Babbitt  
Administrator, Federal Aviation Administration  
U.S. Department of Transportation  
800 Independence Avenue, SW  
Washington, DC 20591  
Electronic Address: <http://www.regulations.gov> (Docket No. FAA-2002-11301; Amendment No. 121-315A; RIN 2120-AH14)

***Re: Comments on FAA’s Supplemental Regulatory Flexibility Act Certification for Drug and Alcohol Testing Rule***

Dear Administrator Babbitt:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Aviation Administration’s (FAA’s) *Supplemental Regulatory Flexibility Act Certification for Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities Rule (herein Drug and Alcohol Testing Rule)*.<sup>1</sup> The final rule to which the Supplemental Regulatory Flexibility Act (RFA) certification relates<sup>2</sup> requires that each person who performs a safety-sensitive aviation function (which includes all maintenance activities) for a regulated employer by contract, including by subcontract at any tier, is subject to drug and alcohol testing.<sup>3</sup> Because FAA did not include these “contractors and subcontractors at any tier” in its RFA analysis,<sup>4</sup> the U.S. Court of Appeals for the District of Columbia remanded the RFA portion of the rule to FAA and ordered the agency to revise its RFA analysis to include these contractors and subcontractors as regulated entities.<sup>5</sup> The rule itself has become final. Further discussion of the rule and analysis is provided below.

**Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within

<sup>1</sup> 76 Fed. Reg. 12559 (March 8, 2011).

<sup>2</sup> See, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Final Rule, 71 Fed. Reg. 1674 (January 10, 2006)

<sup>3</sup> 76 Fed. Reg. 12559.

<sup>4</sup> See, 76 Fed. Reg. 12560.

<sup>5</sup> *Aeronautical Repair Station Association, et al. v. Federal Aviation Administration*, No. 06-1091, U.S. Court of Appeals for the District of Columbia Circuit, decided July 17, 2007 (available at <http://www.arsa.org/files/ARSA-DA-Final-Court-Opinion-07172007.pdf>)

the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>6</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>7</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>8</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>9</sup>

### **Background**

The RFA requires federal agencies to determine whether a proposed rule, if promulgated, will have a significant economic impact on a substantial number of small entities. If it will, the agency must prepare and publish an Initial Regulatory Flexibility Analysis (IRFA). However, if the head of the agency determines that a rule will not have a significant economic impact on a substantial number of small entities, the head of the agency may so certify and an IRFA is not required. The certification must include a statement providing the "factual basis" for this determination, and the reasoning should be clear.

As discussed in the Supplemental RFA certification, the FAA's final rule requires that each person who performs a safety-sensitive aviation function directly for an employer, or who performs a safety-sensitive aviation function at any tier of a contract for that employer, is subject to drug and alcohol testing. FAA's RFA analysis identifies some of the types of employers that fall under the regulation, but the agency relies largely on an unscientific survey submitted in public comments by the Aeronautical Repair Station Association (ARSA) to glean the size and revenue characteristics of some regulated entities. The agency does not attempt to identify all of the regulated small entities that are covered by the rule, nor does the agency provide any other analysis on their size and revenue characteristics.

FAA also provides an estimate of the costs of a drug and alcohol testing program that regulated entities are required to implement. These costs include program development and maintenance, training and education, drug and alcohol testing, and annual documentation. FAA concludes, based again on ARSA's limited survey, that the cost of compliance for an average firm with 25 employees would be \$12,981 per year. Based on

---

<sup>6</sup> 5 U.S.C. § 601 et seq.

<sup>7</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>8</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>9</sup> *Id.*

FAA's estimate that these firms have average annual revenues of between \$750,000 and \$2 million, and because these costs represent on average less than two percent of revenues, the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.

### **Discussion**

In order to evaluate FAA's RFA analysis, Advocacy conducted outreach to small business representatives and hosted a teleconference on April 29, 2011 to discuss the FAA's RFA certification. Small business representatives on the conference call represented aviation repair stations, airlines, aircraft and parts manufacturers, and others. Small business representatives were concerned that FAA had understated the cost and complexity of complying with the rule, and believed that FAA's cost estimates are low.

As currently presented, Advocacy is unable to determine whether FAA's RFA certification is valid because the analysis does not include sufficient information. Specifically, the agency has not identified all of the small entities that are subject to the rule, or determined how the rule will impact them. Furthermore, the agency provides no data or documentation to show that its wage, task time, and testing cost assumptions are accurate. While the agency did draw some analysis from ARSA's limited survey, the data is not adequate to form a factual basis to certify the rule under the RFA. As such, Advocacy recommends that FAA provide additional information and analysis to better describe who is covered by the rule and how much it will cost them to comply.

During Advocacy's teleconference, small business representatives stated that FAA's analysis has omitted many small entities that perform aviation contract work and are covered by the rule. Advocacy suggests that FAA develop a more complete and comprehensive list of regulated entities, and analyze their revenue structures. Small business representatives stated that FAA's cost estimates are too low. Specifically, representatives stated that FAA's testing costs are too low, that program development and maintenance and training costs do not include all of the time and tasks necessary to set up and administer these programs, and that in many small firms it will be the small business owner or senior person who will administer the program, not a junior administrative person (making \$21 per hour) that FAA assumes. Small business representatives also noted that many small businesses contract their drug and alcohol testing programs to outside consultants, but FAA has not assessed these costs. Finally, small business representatives stated that FAA should include all costs associated with complying with a DOT testing program necessary to comply with DOT requirements at 49 CFR Part 40 (including background checks, monitoring, reporting, and other costs).<sup>10</sup>

Based on the foregoing, Advocacy is concerned that FAA's current certification lacks a factual basis and is therefore improper. Advocacy recommends that FAA revise its analysis to include the data and analysis necessary to certify a rule, or that the agency prepare and publish an IRFA for public comment before proceeding. Advocacy notes that economic impacts exceeding one percent of revenue are often considered to be

---

<sup>10</sup> See, 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

significant under the RFA,<sup>11</sup> so if FAA cost estimates prove to be low the agency may not be able to certify the rule and will have to prepare and publish an IRFA.

## **Conclusion**

Thank you for the opportunity to comment on FAA's Supplemental RFA certification for its Drug and Alcohol Testing rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. In that regard, we hope these comments are both helpful and constructive to the agency's understanding of the industry. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or [bruce.lundegren@sba.gov](mailto:bruce.lundegren@sba.gov)) if you have any questions or require additional information.

Sincerely,

/s/

Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

/s/

Bruce E. Lundegren  
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

---

<sup>11</sup> See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, p. 18 (June 2010) (available at <http://archive.sba.gov/advo/laws/rfaguide.pdf>)