



*A Voice for Small Business*

409 3<sup>rd</sup> Street, SW • MC 3114 • Washington, DC 20416 • 202/205-6533 ph. • 202/205-6928 fax •  
www.sba.gov/advo

August 16, 2004

SUBMITTED VIA E-DOCKET

The Honorable Marion C. Blakey  
Administrator  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, D.C. 20591

RE: Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities (FAA-2002-11301); 69 Fed. Reg. 27980 (May 17, 2004)

Dear Administrator Blakey:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits this comment in response to the above referenced supplemental notice of proposed rulemaking published by the Federal Aviation Administration (FAA). The supplemental notice clarifies that entities performing safety-sensitive functions for an FAA-certificated repair station, either directly or by contract, at any tier, would be required to establish drug and alcohol testing requirements under the proposed rule published February 28, 2002.<sup>1</sup> In addition, entities that contract for such work would be required to ensure that the lower tier contractor is in compliance with the drug and alcohol program requirement.

Advocacy's comment relays concerns expressed by small entities regarding the FAA's certification under section 605(b) of the Regulatory Flexibility Act (RFA) that the proposed rule will not have a significant economic impact on a substantial number of small entities, including small repair stations and contractors serving the aviation industry. After reviewing the proposed rule and supplemental notice, Advocacy concludes that FAA lacks a factual basis to support its decision to certify the proposed rule under the RFA. Absent information to support its certification, Advocacy recommends the FAA should publish an Initial Regulatory Flexibility Analysis for comment.

#### I. Background on the Office of Advocacy

The Office of Advocacy, created in 1976, monitors and reports on agency compliance with the Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory

---

<sup>1</sup> 67 Fed. Reg. 9366; February 28, 2002.

Enforcement Fairness Act of 1996 (SBREFA).<sup>2</sup> The RFA requires federal agencies to determine a rule's economic impact on small entities and consider significant regulatory alternatives that achieve the agency's objectives while minimizing the impact on small entities. Because it is an independent office within the SBA, the views expressed here by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring federal agencies to implement policies protecting small businesses when writing new rules and regulations. Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.<sup>3</sup> Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>4</sup>

## **II. The FAA lacks a factual basis to certify the proposed rule will not have a significant economic impact on a substantial number of small entities, and should have performed a full Initial Regulatory Flexibility Analysis.**

Under section 605(b) of the RFA, the head of an agency may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities; the certification must include a statement providing the factual basis for this determination. Advocacy advises federal agencies that the factual basis must include an estimate of the number of affected small entities and an estimate of the economic impacts stemming from the rule. See *A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act* (SBA Office of Advocacy, available for downloading at [www.sba.gov/advo/laws/rfaguide.pdf](http://www.sba.gov/advo/laws/rfaguide.pdf)), pp.10-11.

Although in the regulatory evaluation accompanying the supplemental notice the FAA provides a sound methodological basis for determination of regulatory impacts on small firms, the analysis lacks objective data on the actual number of small entities affected by the rule.<sup>5</sup> The FAA instead makes assumptions about the likely number of firms affected. If reliable data on the number of affected small entities does not exist, Advocacy advises agencies to state explicitly that it cannot determine from available data sources the number of affected entities and request further information from the public. The absence of such data, however, usually also prevents the agency from being able to determine with certainty if a rule is going to have a significant economic impact on a substantial number of small entities or not. The agency should then prepare an Initial Regulatory Flexibility Analysis in which a specific request is made to the public for data on the number of small entities. Advocacy recommends that the FAA carefully review the comments it has received in response to the proposed rule and the supplemental

---

<sup>2</sup> 5 U.S.C. § 612.

<sup>3</sup> Exec. Order No. 13,272 § 1, 67 *Fed. Reg.* 53461 (Aug. 16, 2002) ("E.O. 13272").

<sup>4</sup> E.O. 13272, at § 2(c), 67 *Fed. Reg.* at 53461.

<sup>5</sup> *Draft Regulatory Evaluation, Initial Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Determination*, FAA Docket No. 2002-11301, Exh. 10

notice, and if sufficient information is not provided to support the certification, the FAA should consider publishing an IRFA for comment before proceeding to a final rule.

A. The FAA should expand its analysis of the economic impacts to small entities outside the aviation industry.

The FAA's economic analysis is focused on a "small entity group" consisting of "Part 145 repair stations (SIC Code 4581, 7622, 7629, and 7699)," and that "the proposed rule would affect, on average, 306 companies."<sup>6</sup> Advocacy believes that the total population of small entities affected by this rule is greater, potentially encompassing 21 North American Industrial Classification System (NAICS) codes.<sup>7</sup> The requirement that lower tier contractors who perform safety sensitive repairs to components have alcohol and drug testing programs reaches well beyond repair stations and their contractors to include suppliers, parts refurbishers and parts brokers within the scope of the rule. Metal finishers, parts fabricators, interior restorers, machiners, metallurgical consultants, and rebuilders would be covered. Advocacy recommends that the FAA further explore the scope of these potential impacts on these industries and give careful consideration to performing an Initial Regulatory Flexibility Analysis to identify and analyze the full impact of the proposed rule.

B. The FAA analysis lacks the specificity required by the RFA.

Advocacy recommends that the FAA's analysis include a discussion of typical entities in each size category in each of the affected industries. Absent this information small entities cannot evaluate the accuracy of the FAA's conclusion that the rule would not have a significant economic impact on a substantial number of these small entities.<sup>8</sup>

In addition, the FAA uses aggregated data, citing an average of 19 employees per entity across all NAICS codes. This assumption may be inaccurate with respect to costs per firm among small entities, because it is unlikely that all firms across all of the covered NAICS codes have the same average employee size. In fact, the size per firm, even among small entities, is likely to vary considerably within the affected industries.

Advocacy also recommends that the FAA reconsider its determination that costs of less than one percent of the assumed-median revenues are not significant. The FAA should further explore data on profit margins among small entities in the affected industries and provide information in support of this determination. Profit margins vary greatly across industries, such that in many industries a cost impact of one percent of revenues would be significant considering that profit margins may be five percent of revenues or less.

C. FAA has not provided any criteria by which it can judge whether the number of businesses absorbing economic impacts in any given industry will be substantial.

---

<sup>6</sup> 69 Fed. Reg. at 27986.

<sup>7</sup> See attached document, "Maintenance Functions Performed by Contractors and Subcontractors, By NAICS Code," (from data supplied by Aeronautical Repair Station Association)

<sup>8</sup> 69 Fed. Reg. at 27986.

Because FAA did not break out the costs of the rule for each affected industry, it is not possible to determine if the rule will have a significant economic impact. FAA does call for comments on its assumptions and conclusions regarding its regulatory flexibility determinations. In fact, FAA received such comments from Aeronautical Repair Station Association, Regional Airlines Association, Pratt & Whitney/United Technologies, and others during the comment period on the NPRM. Advocacy commends the FAA for reopening the comment period in response to comments to the proposed rule that “indicated that the proposed clarification would impose an economic burden on the aviation industry...”<sup>9</sup> Advocacy recommends that these same comments suggest the need for preparing and publishing an IRFA to assess the rule’s impacts on small entities and to analyze and consider significant alternatives to minimize the impact while meeting the agency’s objectives.

Thank you for this opportunity to comment on the proposed rule. If you have any questions about this comment, please do not hesitate to contact Charles Maresca or Joe Johnson at (202) 205-6533.

Sincerely,

/ s /

Thomas M. Sullivan  
Chief Counsel for Advocacy

/ s /

Charles A. Maresca  
Assistant Chief Counsel for Advocacy

cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs

---

<sup>9</sup> 69 Fed. Reg. 27980.