

is certified this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Samaritan North Lincoln Hospital Heliport, Lincoln City, OR.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM OR E5 Lincoln City, OR [New]

Samaritan North Lincoln Hospital Heliport, OR

(Lat. 44°59'11" N., long. 123°59'39" W.)

That airspace extending upward from 700 feet above the surface within 3-mile radius of Samaritan North Lincoln Hospital Heliport.

Issued in Seattle, Washington, on June 30, 2011.

Christine Mellon,

Acting Manager, Operations Support Group, Western Service Center.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No.: FAA–2002–11301; Amendment No. 121–315]

RIN 2120–AH14

Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Final Regulatory Flexibility Determination

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: On January 10, 2006, the FAA issued a final rule to require that each person who performs a safety-sensitive aviation function directly for an employer, including contractors and subcontractors, is subject to drug and alcohol testing. This document announces the completion and availability of the final regulatory flexibility certification for this final rule. The rule will not have a significant economic impact on a substantial number of small entities.

DATES: Effective July 7, 2011.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

On February 28, 2002, the FAA issued a notice of proposed rulemaking seeking to revise the drug and alcohol testing regulations by amending the definition of employee (67 FR 9366, 9377, Feb. 28, 2002). The FAA action addressed those individuals performing safety-sensitive functions under contract who may not

have been subject to testing under the drug and alcohol testing regulations established in 1988 and 1994, respectively. Upon review of comments, the FAA, in 2004, issued a supplemental notice of proposed rulemaking to seek comment regarding how small entities would be impacted by this rule (69 FR 27980, May 17, 2004). From the comments received the FAA certified under 5 U.S.C. 605(b) that the rule would not have a significant impact on a substantial number of small entities.

On January 10, 2006, the FAA issued the final rule (71 FR 1666). This rule requires that each person who performs a safety-sensitive aviation function directly for an employer is subject to testing and that each person who performs a safety-sensitive function at any tier of a contract for that employer is also subject to testing. This requirement includes contractors and subcontractors. Contracting companies have two testing options: Option one is for the contracting company to obtain and implement its own FAA drug and alcohol (D&A) testing programs. Under this option, the company would subject the individuals to testing. The other option is for the regulated employer to maintain its own testing programs and subject the individual to testing under these programs. To establish a D&A program a company would need to develop and maintain testing, training, and annual reporting requirements.

To comply with the Regulatory Flexibility Analysis (RFA), and to evaluate the impact on small businesses, the FAA described and estimated the number of affected businesses and estimated the economic impact. In the certification for the final rule the FAA estimated that the costs were minimal, and that contractors would absorb some of these costs. In order to estimate the maximum impact of this regulation on regulated entities, the FAA assumed that all of the additional cost would be passed along to regulated employers. Since costs were minimal, the FAA again certified that the rule would not have a significant economic impact on a substantial number of small entities. 71 FR 1666, 1674 (Jan. 10, 2006)

The Aeronautical Repair Station Association, Inc., (ARSA) and other affected businesses challenged the final rule on several grounds, including the FAA's compliance with the Regulatory Flexibility Act. The entities argued that contractors and subcontractors were directly affected by the final rule, and in failing to consider them as part of the basis for the certification, the FAA failed to comply with the RFA. Upon review, the U.S. Court of Appeals for the

District of Columbia upheld “the substance of the 2006 final rule” and remanded “for the limited purpose of conducting the analysis required under the RFA, treating the contractors and subcontractors as regulated entities.” The Court found that contractors and subcontractors were directly affected by the final rule and that the FAA failed to comply with the RFA by not considering them in the analysis. To comply with the court’s order, the FAA extended the regulatory flexibility analysis to include contractors and subcontractors and published the analysis for comment on March 8, 2011 (76 FR 12559). The FAA again certified that although the rule would affect a substantial number of small entities, the economic impact on these entities would not be significant.

The FAA received comments from the U.S. Small Business Administration’s Office of Advocacy (SBA), Aeronautical Repair Station Association, Inc. (ARSA), Aviation Suppliers Association (ASA), Modification and Replacement Parts Association (MARPA), National Air Transportation Association (NATA), and four individuals. SBA noted that the March 2011 certification relied too heavily on the ARSA survey that was submitted in response to the analysis published for comment on August 24, 2005, as well as the SBA analysis of which entities may be impacted by this rule. ARSA, ASA, MARPA, and NATA also questioned the use of the ARSA survey and whether the FAA had attempted to verify, through other data sources, the information provided by ARSA and SBA to identify the subcontractors that would be impacted by this rule. ARSA asserted that there was no factual basis for the FAA’s assumption that these entities employed, on average, 25 individuals, considering that 43% of the entities ARSA surveyed employed 11–50 individuals. SBA stated that the FAA needed to identify all regulated small entities that would be covered by this final rule and provide additional analysis on the size and revenue characteristics of these entities. The FAA has addressed these issues below.

SBA, ARSA, ASA, MARPA, and NATA also raised concerns that the source information for the projected wage, training, education, program development, and annual documentation costs was not provided. ASA and MARPA asserted that the cost estimates failed to account for travel costs for the employee to take the tests, as well as increased rates charged by contract companies for administering these programs, and testing that occurs after an accident. ARSA noted that the

FAA should also consider the costs to change existing processes, conduct alcohol and drug testing background checks, as well as the revenue lost when the employee has to undergo testing. MARPA stated that the FAA underestimated the administrative costs of managing the program by assessing this cost based on the assumption that an administrative person on staff would oversee the program, rather than the costs of either outsourcing the administration of the program or assuming that a management employee would be assigned to administer the program.

Finally, ARSA, ASA, and MARPA assert that this final rule does have a significant economic impact. MARPA and ASA noted that the FAA’s use of a 2% threshold of annual revenues exceeds SBA’s 1% of annual revenues threshold for determining significant impact. ARSA asserts that if the FAA considers the profit margins of these entities, the impact is significant. The FAA has addressed these issues below.

Upon review of the comments and further analysis provided below, the FAA certifies under 5 U.S.C. 605(b) that this rule will not have a significant impact on a substantial number of small entities.

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.” To achieve this principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and

the reasoning should be clear. Based on the analysis below, the FAA certifies that this rule does not have a significant economic impact on a substantial number of small entities. While there are a substantial number of affected small entities, the compliance cost is not a significant economic cost. A full discussion follows.

I. Basis for the Final Rule

This final rule amends the FAA regulations governing drug and alcohol testing to clarify that each person who performs a safety-sensitive function for a regulated employer by contract, including by subcontract at any tier, is subject to testing. These amendments are necessary because in the 1990s, the FAA issued conflicting guidance about which contractors were subject to drug and alcohol testing. The FAA did not consider any alternatives to this rule because the rule was designed to clarify that the FAA intended that each person who performs a safety-sensitive function for a regulated employer by contract, including by subcontract at any tier, is subject to testing. The FAA specifically addressed this issue in the final rule 71 FR 1666 (January 10, 2006). The applicability of the drug and alcohol requirements to sub-contractors, including those not certificated by the FAA is the sole purpose of the rule. Accordingly, the agency determined in 2006 that no other alternative was available, a decision upheld by the court in the subsequent lawsuit. These matters were addressed by the FAA when publishing the final rule when we said:

[T]he level of the contractual relationship should not limit the requirement for all safety-sensitive work to be performed by drug-free and alcohol-free employees. If individuals are performing safety-sensitive functions for a regulated employer, the individuals must be subject to testing, regardless of the tier of contract under which they are performing.

It would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing.”

71 FR 1670.

Additionally, the FAA expressly discussed comments that subcontractors that are not primarily aviation-related businesses should not be subject to testing. In the preamble to the final rule, the FAA rejected this premise, noting that “[w]hen subcontractors choose to perform safety-sensitive functions for regulated employers, they are choosing

to comply with the FAA drug and alcohol testing regulations. The impact these subcontractors have on aviation safety is not related to whether they hold a repair station certificate. Instead, they have an impact because they actually perform safety-sensitive functions.” 71 FR 1673. The FAA went on to note that the commenters provided no data to support the premise that non-certificated subcontractors would cease providing service to the aviation industry. Indeed, in the final regulatory evaluation, the data provided by the commenters showed the majority of such contractors would continue doing business with the aviation industry after the final rule became effective. *Id.*

For safety reasons, the FAA wanted to ensure that all persons performing safety-sensitive functions were tested. This remains the case today and as such, there are no alternatives to the final rule that could have been considered and implemented.

The final rule is promulgated under the authority described in 49 U.S.C. 45102, which charges the FAA with prescribing regulations to establish programs for drug and alcohol testing of employees performing safety-sensitive functions for air carriers and to take certificate or other action when an employee violates the testing regulations. The final rule does not duplicate or otherwise conflict with another provision of law. A description and an estimate of the number of small entities to which the rule will apply, as well as a description of the projected reporting, record keeping and other compliance costs, is provided below and forms the basis for the FAA’s certification under 5 U.S.C. 605(b).

II. Description of Small Entities Impacted by This Rule

The entities impacted by this rule are repair stations certificated under 14 CFR part 145, and their subcontractors. The size standards for determining whether these entities constitute small businesses vary and the FAA offers the following discussion to support the definition of a small business for this certification.

A. Size Standard

The Small Business Administration (SBA) has established small business size standards pursuant to the Small Business Act (Act) (Pub. L. 85–236, as amended) and related legislative guidelines. The SBA classifies “small” businesses based on their employment or annual revenue as set forth in the North American Industrial Classification System (NAICS)

classifications. See 13 CFR 121.201. Under NAICS 488190 “Other Support Activities for Air Transport”, repair stations, which constitute some of the entities affected by this final rule, are defined as small businesses if they have annual revenues of \$7 million or less. Subcontractors, conversely, overlap several industries and have multiple NAICS classifications. In attempting to identify all of the subcontractors impacted by this rule, the FAA examined the submitted list of 21 NAICS codes provided by SBA and ARSA. Using these NAICS codes, the definition of a small business for subcontractors could range, based on the number of employees alone, from 500 to 1,000 employees, or based on annual revenues of \$7 million or less. The FAA reviewed all of the NAICS codes and notes that the SBA defines the average industry as having the following standards for a small business: 500 employees for most manufacturing and mining industries, and \$7 million in average annual receipts for most non-manufacturing industries.¹ Given the variance in these NAICS codes, the FAA has determined that the appropriate definition for determining whether a subcontractor is a small business under this rule is to use the most conservative criteria set forth in NAICS classification. Thus, the FAA will classify a subcontractor as a small business if it employs 500 employees or fewer, or has annual revenues of \$7 million or less. The FAA uses both criteria to analyze the impact on subcontractors.

B. Repair Stations Impacted by This Rule

Certificate holders, such as part 121, 135 and 145 have operating certificates issued by the FAA, allowing the FAA to determine the number of certificate holders impacted by this rule. The FAA National Vital Information Subsystem (NVIS) Air Agency records indicate there are 4,105 part 145 certificated domestic repair stations. To determine how many of these repair stations would be classified as small business under NAICS 488180, the FAA reviewed a recent study completed by the U.S. Transportation Security Administration.²

¹ <http://www.sba.gov/content/summary-size-standards-industry>.

² Aircraft Repair Station Security (49 CFR Part 1520 and 1554). Regulatory and Economic Analysis: Transportation Security Administration Department of Homeland Security, October 15, 2009 [Docket No. TSA–2004–17131] <http://www.nbaa.org/ops/security/programs/repair-station/part-145-security-nprm-20091118.pdf>.

In this study, TSA compiled both revenue and employment records from Dun & Bradstreet for approximately 2,276 domestic repair stations. From this total, they identified 2,123 repair stations that meet the small business size standard reflected in NAICS 488190. This analysis indicates that most repair stations are small businesses. Accepting the TSA percentage of small entities for domestic repair stations, the FAA has estimated that out of 4,105 domestic U.S. certificated repair stations, 3,829 are small businesses with revenues of \$7 million or less. The FAA has determined that this rule would impact a substantial number of small business repair stations.

C. Subcontractors Impacted by This Rule

After estimating the number of small entity repair stations, we now focus on describing subcontractors impacted by this rule. Many of the subcontracting companies impacted by this rule are not certificated by the FAA. Their primary function is not aviation related, but rather a business outside of aviation. Because these businesses are based on NAICS codes from other industries, the FAA could not easily determine the appropriate codes. The FAA first reviewed the comments submitted by SBA and ARSA in response to the Antidrug and Alcohol Misuse Prevention Programs Regulatory Evaluation including a preliminary list of 21 NAICS codes for suppliers, parts fabricators and metal finishers, and others that may perform safety sensitive repairs and would be considered a subcontractor under the rule. The FAA examined the submitted list of 21 NAICS codes to determine which activities would be covered by this rule. There was some duplication in the codes, reducing the actual number of codes to be examined. The results of this analysis are presented in Table 1.

In addition to the list of NAICS codes, ARSA also provided information on a Non-Certificated Maintenance Subcontractor (NCMS) Survey it conducted. Some of the information from the survey proved to be useful in determining the small business impact on subcontractors, particularly the responses to questions 1 (number of employees), 2 (annual revenue), 3 (an existing contract with a US air carrier to perform maintenance), 4 (type of work). These responses are used, in this analysis, to determine the characteristics of these companies.

The FAA finds it appropriate to start with the responses to question 4, which deals with the work-related functions of

the respondents, as a snapshot of some of the types of companies that, would need to be included in this analysis. The FAA grouped the responses to question 4 into the NAICS codes that both ARSA

and the SBA provided and the FAA was able to correlate 98 of the 134 survey respondents with these codes; these 98 are shown in Table 1 below. While there are discrepancies with regard to the

count, we can validate 98 of the 134 responses. This shows the wide spectrum of businesses providing contracting support.

TABLE 1—SURVEY RESULTS—NAICS CODES AND WORK FUNCTIONS

Number of NCMS	NAICS code	Work functions	Require D&A program?
1	313311	Fireproofing of fabrics	Y
14	313320	Metallizing (including plating)	S
9	332322	Manufacturing airframe parts (mostly sheet metal)	N
		Manufacturing per approved drawing or data	N
		Manufacturing small parts; some of which are used by part 121 operators	N
23	332710	Chemical milling (reduction of weight)	S
		Machining	S
		Machining and welding of ground support parts for planes	N
		Machining of turbine engine components	S
		Machining; chrome plating; anodize; metal finishing; shot peening	S
3	332722	Manufacturer of miniature turned parts. Screws and like	N
2	332811	Heat treating	Y
1	332812	Painting	Y
8	332813	Chrome plating; nickel plating (metal finishing)	S
		Machining; chrome plating; anodize; metal finishing; shot peening	S
		Metal finishing (grinding) (zinc plating)	S
		Plating; precision grinding; non-destructive testing	S
3	332999	Die-cut parts—shims; washers; gaskets; etc	N
1	334511	Rebuild electro-mechanical switches for aviation use	N
1	336412	Overhauling of engine blocker doors	Y
22	488190	Minor maintenance	Y
		Maintenance on 135 charter aircraft line	Y
		Overhauling of engine blocker doors	Y
5	541380	Calibration and repair of test and measuring equipment	N
		Hydrostatic testing	N
		Inspection	N
		Machining & fabrication of test fixtures & equipment used in repair processes	N
		Non-destructive testing	N
1	561740	Cleaning seat covers	N
4	811310	Machining and welding of ground support parts for planes	N
		Manufacturing & precision grinding and testing of various fuel & hydraulic/pneumatic valve assemblies.	N

Table 1 also indicates whether a specific function would require a D&A program. The last column is either marked with “Y” meaning yes, “N” meaning no, and “S” meaning some in this grouping might need such a program, as this work function conceivably could mandate such a program. Companies that have work that is strictly manufacturing will not be required to comply with the D&A testing rules. Several companies mentioned in their survey responses that they do not perform maintenance, and would not be included among companies required to set up and implement D&A testing. For example, the 14 companies characterized as 313320, which involves metal finishing including plating, may need to conduct D&A testing if any of the work they perform is considered maintenance under 14 CFR part 43.

The responses to questions 1 and 2 address the number of employees and the annual revenue reported by the surveyed companies. These responses are helpful in establishing the type of

impact that this program will have on these companies. Question 1 asked “How many employees does your company have?” Table 2 summarizes the responses provided by the ARSA survey. All but two of the responses are in the category of 750 or below. The two responses for “1501+” are outliers and, for computational purposes, can be ignored. Approximately 75 of the respondents stated that they employed between 1 and 50 employees, indicating that the majority of subcontracting companies are small entities.

TABLE 2—SURVEY RESULTS—EMPLOYEES BY COMPANY

Response	Count	Percent
1 to 10	43	32.09
11 to 50	58	43.28
51 to 100	10	7.46
101 to 500	18	13.43
501 to 750	3	2.24
751 to 1000	0	0.00
1001 to 1500	0	0.00

TABLE 2—SURVEY RESULTS—EMPLOYEES BY COMPANY—Continued

Response	Count	Percent
1501+	2	1.49
Total	134	100.00

Question 2 of the survey asked about the company’s annual revenues; Table 3 summarizes the survey responses:

TABLE 3—SURVEY RESULTS—ANNUAL REVENUE BY COMPANY

Response	Count	Percent
Under \$750,000	43	32.09
\$750,000 to \$1 million ..	14	10.45
\$1 million to \$2 million ..	20	14.93
\$2 million to \$6 million ..	24	17.91
\$6 million to \$10.5 million ..	8	5.97
\$10.5 million to \$21.5 million ..	7	5.22
\$21.5 million to \$25 million ..	1	0.75

TABLE 3—SURVEY RESULTS—ANNUAL REVENUE BY COMPANY—Continued

Response	Count	Percent
\$25 million to \$30 million	4	2.99
More than \$30 million ...	13	9.70
Total	134	100.00

Most of these companies reported average annual revenue of \$7 million or less.

As noted above, given the fact that the contractors and subcontractors are not certificated entities and the variety of work that these contractors perform for repair stations, the FAA believes that this study represents only a fraction of the total number of NCMS that may be impacted by this rule. Given the SBA's average criteria for defining small business as an entity having either 500 employees or less, or having revenue of \$7 million or less, depending on the NAICS code, and that most of the businesses in the ARSA survey satisfy these criteria, the FAA has determined that a substantial number of subcontractors will be small entities impacted by this rule.

III. Economic Impact

Having determined that both a substantial number of small business repair stations and subcontractors will be impacted by this rule, the next step is to estimate the economic impact on these entities. The FAA rule requires small businesses to administer random drug tests to those employees who perform safety-sensitive functions. A subcontractor company can obtain coverage under another established program, lowering the cost compared to implementing its own program. In response to SBA's concerns that the program costs were underestimated for subcontractors in the March 2011 certification, the FAA based costs on subcontractors initiating and then implementing their own programs. It is important to note that these costs are much higher than when repair stations or contractors at higher tiers absorb some of the cost of D&A testing for the smaller firms. Moreover, most repair stations have drug and alcohol programs and therefore would not experience a cost burden based on the amendments to this rule. However, to estimate the maximum impact of this regulation on these employers, the FAA assumes that all of the additional cost for D&A testing is absorbed by each NCMS. The costs include: (1) Program development and maintenance, (2) training and education, (3) testing, and (4) annual

documentation. The assumptions and calculations are described below and represent the costs associated with a fully-approved DOT drug and alcohol testing program:

General Cost and Salary

Assumptions:

Maintenance supervisor salary ³—

\$39.35/hour

Maintenance employee salary ⁴—

\$34.38/hour

Blended Wage ⁵—\$34.96/hour

Instructor salary ⁶—\$26.68/hour

Administrative employee ⁷—\$21.41/hour

1 Supervisor for every 8 employees

1 Instructor for every 20 employees

Program Development and Maintenance

Each subcontractor will have to devote resources to developing an antidrug and alcohol misuse prevention testing program. In addition, each of these subcontractors will have to spend time to produce information required for their registration and submit it to the FAA. At the FAA, this information will have to be processed, and entered into the appropriate database. The FAA estimates that development and maintenance of a drug program would require a minimum of 16 additional administrative hours at \$21 per hour for a total of \$336 per company per year. Data provided by the Office of Aerospace Medicine shows that most companies have administrative support staff administering the program, however, in response to comments from MARPA and ARSA, the FAA also estimated costs using a supervisor (\$39.35/hour) as the responsible party. For a supervisor with a minimum of 16 hours, the FAA estimates that the development and maintenance of a drug program would be \$629 per year. The FAA believes that the administrative burden on subcontractors will be less

³ 49–1011 First-Line Supervisor/Managers of Mechanics, Installers, and Repairers; Bureau of Labor Statistics, <http://www.bls.gov>—In May 2009, the Employee Benefit Research Institute, using a Bureau of Labor Statistics Survey of employee benefits estimated the total 2009 benefit as a percentage of payroll at 30.2 percent; <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter2003.pdf>.

⁴ 49–3011 Aircraft Mechanics and Service Technicians; Bureau of Labor Statistics, <http://www.bls.gov>.

⁵ Two of the costs described below, testing costs and employee training costs, involve all employees, both supervisors and non-supervisors. For these two sets of calculations, the FAA uses a weighted wage rate from the maintenance supervisor and maintenance employee salary that is applicable to all employees.

⁶ 25–3099 Teachers and Instructors, All Other; Bureau of Labor Statistics, <http://www.bls.gov>.

⁷ 43–0000 Office and Administrative Support Occupations; Bureau of Labor Statistics, <http://www.bls.gov>.

than or equal to those of small part 121- or 135-certificate holders. Moreover, to be conservative and not underestimate costs, the FAA used 16 hours of a supervisor's time for administering the program to compute startup program development costs.

Training and Education

Training costs are a combination of supervisor and employee training costs, plus the cost to establish and maintain a training program. For both the antidrug and alcohol misuse prevention programs, the employer will train supervisors to make reasonable cause/suspicion determinations. In addition, supervisors and employees will receive training on the effects and consequences of drug use on personal health, safety, and work environment, as well as the manifestations and behavioral cues that may indicate drug use and abuse. For supervisors, the FAA requires an initial two hours of training; an hour for the drug program and another hour for the alcohol program. For the initial training, adding the supervisor salary (\$39.35) for 2 hours to the instructor salary (\$26.68) for the same 2 hours of instruction sums to \$132 per supervisor. The FAA also requires recurring supervisory training for the drug program. Although there is no time requirement for this training; the FAA expects that the recurring training will be similar to the initial training. Therefore, the FAA estimates that companies will provide an annual hourly refresher course for supervisors. The recurring annual training would be half the cost of the initial training at \$66 per supervisor per year. However, the recurring training costs are weighted to include any additional initial supervisory training for an actual recurring cost of \$73 per supervisor per year. To include the cost of initial training and the recurring training the FAA averaged these costs over the 10 years analyzed in the Regulatory Evaluation for this rule. The average training costs per year per supervisor is \$84.

For employees, companies are only required to provide initial training explaining the program and expectations for employees; a refresher course is recommended but not required. Training for employees is an hour. Cost to train employees is approximately an hour of an employee's time at \$34.38 per hour and an hour of the instructor's time (\$26.68) for a total of \$61.06 per employee per year.

Companies must also establish an education program that includes informational material, videos, etc. Training materials are generally an expense incurred during the start-up

phase of a drug and alcohol testing program. Employers can buy a single package of materials, and/or a video, which will be used for both supervisors and employees. There is also an option to use the Internet and/or our Agency materials to provide this training. From information provided by the Office of Aerospace Medicine and the cost of training materials on several Web sites, the FAA estimates that companies could incur an upfront cost for training material of \$199 to \$400 per company.⁸ Since companies reuse these videos, the costs for materials are actually spread out over several years. Spreading the material cost over the same 10 year period as above, the FAA estimates that companies will spend approximately \$40 per company per year on training material.

Testing Cost

Drug and alcohol tests are required periodically for all employees performing safety sensitive functions. The test costs approximately \$45⁹ or \$35, respectively. Several commenters stated that testing costs range anywhere from \$60–\$95 because most businesses contract out the administration of the program, including the testing, which results in higher costs. Here the testing cost is smaller because it does not include outsourcing the administration of the program, rather the administration of the program is done internally and those costs are listed under program development, maintenance and annual documentation below. The test includes specimen collection, laboratory processing, and MRO (medical review officer) verification. Testing takes place during an employee's shift. This is time not worked but still paid by the company and is included as part of the testing cost. In the March 2011 certification the FAA estimated that the testing process would take approximately 2 hours. The FAA adopted this standard based on comments to the initial regulatory evaluation published for comment on August 24, 2005. Originally, the FAA estimated that it would only take 45 minutes to conduct these tests. The 45 minutes is composed of 30 minutes of total travel time, and 15 minutes for the drug test. Commenters asserted that this 45 minute timeframe failed to

adequately account for travel time. In consideration of these comments, the FAA estimated in the certification published for comment in March 2011 that the total cost of testing is calculated by adding the 2-hour blended wage paid to the employee to the cost of the test. Thus, the total cost of a drug test, which includes the 2-hour testing process with the employee's labor wage for this time as well as travel costs, sums to \$113 per employee and \$102 per employee for an alcohol testing. This is consistent with previous FAA methodology for determining labor costs attributable to a rule. In its comments to this certification, ARSA suggested that the FAA should not use the employee's wage but rather, should use the labor rate that the company would charge its customers to account for lost revenue while the test is being conducted. The difference between the wage rate and the labor rate is a transfer from the customer to the company and transfers are not to be included as compliance costs based on OMB guidance. Moreover, this is not included because companies are being compensated by their customers.

Annual Documentation

Each subcontractor has to periodically submit documentation. Subcontractors will be required to report or submit the following documents; training records, reasonable suspicion cases of drug and alcohol misuse, a positive drug or alcohol test, an employee's refusal to submit to a drug or alcohol test, post-accident alcohol tests, and if a post-accident alcohol test is not promptly administered documentation stating the reasoning behind the delay. The FAA estimates that it will cost ¹⁰ \$1.29 to report each training record, to document each reasonable suspicious case, or to submit every rationale behind tests not being promptly administered. Notification of a positive drug or alcohol test or an employee's refusal to be tested is estimated to take 0.25 administrative hours at an hourly rate of \$21 totaling roughly \$5 per notification. The FAA projects that these documents will be submitted annually, but each company on average only submits a certain number of reports. Using this average, documentation cost is estimated at \$50 per company for the first year and \$4.50 per company for subsequent years.

As stated above, for this rule the FAA defines a small business as a company

having 500 employees or fewer, or having revenue of \$7 million or less. To determine if there would be a significant economic impact on small businesses, the FAA estimated the cost for what is believed to be one of the smallest companies under this definition: A company with 2 employees and 1 supervisor. The FAA summed the cost information provided above for testing, training and education, program maintenance and development, and annual documentation for a total cost of \$2280 per year. Detailed information on how this number was calculated is provided below.

2 Employees and Annual Revenue Under \$750,000

Cost of Drug Testing Program

\$113 Testing Cost × 2 Employees = \$226
 \$84 Supervisor Training × 1 Supervisors = \$84
 \$61 Employee Training × 2 Employees = \$122
 \$40 per Company for Training Material
 \$629 Program Development per Company
 + \$50 for Annual Documentation per Company
 Total Cost = \$1,151 per Company

Cost of Alcohol Testing Program

\$102 Testing Cost × 2 Employees = \$204
 \$84 Supervisor Training × 1 Supervisors = \$84
 \$61 Employee Training × 2 Employees = \$122
 \$40 per Company for Training Material
 \$629 Program Development per Company
 + \$50 for Annual Documentation per Company
 Total Cost = \$1,129 per Company

Per SBA guidance, "in the absence of statutory specificity, what is significant or substantial will vary depending on the problem being addressed, the rule's requirements, and the preliminary assessment of the rule's impact. The agency is in the best position to gauge the small entity impacts of its regulations. Thus, Advocacy relies on legislative history of the RFA for general guidance in defining these terms."¹¹ Historically, the FAA uses costs equal to or exceeding 2 percent of annual revenue as a measure of a significant economic impact. For a \$2,280 cost to be a significant economic impact, a company would need to have annual revenues of less than \$103,000. Given the wages of a supervisor and two employees, these companies would need revenue substantially higher than

⁸ <https://secure2.airbase1.com/faadrug/results.asp>.

⁹ The source for the information on the drug and alcohol tests is the Office of Drug and Alcohol Policy and Compliance, in the Office of the Secretary of Transportation. This cost covers, among other things, collection of specimens, reporting, recordkeeping, and chain-of-custody procedures, as well as the cost of the technician.

¹⁰ The FAA and the other DOT modes are directed by DOT to price record creation at \$1.145, record filing at \$0.118, and record storage at \$0.0228 for all documents related to the alcohol misuse prevention program and the antidrug program.

¹¹ Report on the Regulatory Flexibility Act, FY 2010; <http://www.sba.gov/sites/default/files/files/10regflx.pdf>.

\$100,000 to stay in business. ARSA maintains that measuring the impact on small businesses based on annual revenues is not appropriate. ARSA asserts that the FAA should measure economic impact based on profits. The FAA has reviewed ARSA's suggestion and determined that it is not appropriate for this analysis. Use of annual revenues is consistent with the SBA's measure of the impact on small businesses. See 13 CFR 121.106; 121.201. Thus, based on the projected costs for the smallest of entities that could be affected by this final rule, the FAA concludes no firm would incur a significant economic impact. Accordingly, although a substantial number of small businesses are impacted by this rule, because the economic impact is not significant, under 5 U.S.C. 605(b), I certify, as the FAA Administrator, that this rule will not have a significant economic impact on a substantial number of small entities.

Issued in Washington, DC, on July 7, 2011.

J. Randolph Babbitt,

Administrator, Federal Aviation Administration.

[FR Doc. 2011-17472 Filed 7-7-11; 4:15 pm]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 110413240-1255-02]

RIN 0694-AF23

Technical Amendment to the Authorization Validated End-User Regulations of the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR), Supplement No. 7 to Part 748—Authorization Validated End-User (VEU): List of Validated End-Users, Respective Items Eligible for Export, Reexport and Transfer, and Eligible Destinations—to add a column that lists **Federal Register** citations for the respective entries. This rule does not make any substantive changes to Supplement No. 7 or elsewhere in the EAR.

DATES: This rule is effective July 12, 2011.

FOR FURTHER INFORMATION CONTACT:

Karen Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Washington, DC 20230; by *telephone*: (202) 482-5991, *fax*: (202) 482-3911, or *e-mail*: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU)

BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646), creating a new authorization for “validated end-users” (VEUs) located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license, in conformance with section 748.15 of the EAR.

VEUs may obtain eligible items that are on the Commerce Control List, set forth in Supplement No. 1 to Part 774 of the EAR, without having to wait for their suppliers to obtain export licenses from BIS. Eligible items may include commodities, software, and technology, except those controlled for missile technology or crime control reasons.

The VEUs listed in Supplement No. 7 to Part 748 of the EAR were reviewed and approved by the U.S. Government in accordance with the provisions of section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program. A unanimous vote by the ERC is required to authorize VEU status for a candidate or to add eligible items to an existing authorization. Majority vote of the ERC is required to remove VEU authorization or to remove eligible items from an existing authorization.

In addition to U.S. exporters, Authorization VEU may be used in accordance with the provisions of the EAR by foreign reexporters and by persons transferring in-country, and it does not have an expiration date. VEUs are subject to regular reviews, based on information available to the United States government, to ensure that items shipped under Authorization VEU are used for civilian purposes. In addition, VEUs are subject to on-site reviews as warranted.

As of the date of this rule, pursuant to section 748.15(b) of the EAR, VEUs are only located in the PRC and India.

Amendment to Supplement No.7 to Part 748 of the EAR

In this final rule, BIS amends the EAR, Supplement No.7 to Part 748 Authorization Validated End-User (VEU): List of Validated End-Users, Respective Items Eligible for Export, Reexport and Transfer, and Eligible Destinations to add a column that lists **Federal Register** citations for the respective entries. This rule does not make any substantive changes to Supplement No.7 or elsewhere in the EAR.

The **Federal Register** citation that appears first for each VEU in the new column added to Supplement No. 7 indicates the initial date on which the authorization for that listed VEU and its respective list of approved “Eligible Items” and “Eligible Destinations” were published in the **Federal Register** and became effective. Subsequent citations indicate the dates on which amendments to a VEU’s authorization were published in the **Federal Register** and became effective.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. p. 783 (2002)), as extended most recently by the Notice of August 16, 2010 (75 FR 50681, August 16, 2010), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), unless that collection of