

Advocacy Recommends That FAA Revise its Regulatory Flexibility Analysis for its Drug and Alcohol Testing Rule

On May 9, 2011, the U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submitted comments to the Federal Aviation Administration (FAA) on FAA's *Supplemental Regulatory Flexibility Act Certification for Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities Rule (Drug and Alcohol Testing Rule)*. [76 Fed. Reg. 12559 (March 8, 2011)].

The final rule which relates to the Supplemental Regulatory Flexibility Act (RFA) certification requires that each person who performs a safety-sensitive aviation function (which includes all maintenance activities) for a regulated employer, including by contract or subcontract at any tier, is subject to drug and alcohol testing. Because FAA did not include these contractors and subcontractors at any tier in its original RFA analysis, 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. The rule itself has become final.

FAA has certified under the RFA that the proposed rule will not have a significant economic impact on a substantial number of small entities. In order to evaluate this certification, Advocacy conducted outreach to small business representatives and hosted a teleconference on April 29, 2011 to discuss the FAA's RFA analysis.

A complete copy of Advocacy's letter to FAA is available at: www.sba.gov/advo/laws/comments/.

- Small business representatives believe that FAA's analysis has omitted many small entities that perform aviation contract work and that FAA's compliance cost estimates are too low.
- 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, determined how the rule will impact them, or substantiated its cost assumptions about the rule.
- Advocacy recommends that FAA revise its analysis to include the data and analysis necessary to certify the rule, or that the agency prepare and publish an Initial Regulatory Flexibility Analysis for public comment before proceeding.

For more information about rule, please visit Advocacy's Web page at www.sba.gov/advo or contact Bruce Lundegren, Assistant Chief Counsel, at (202) 205-6144 (or bruce.lundegren@sba.gov).