BEFORE THE
FEDERAL AVIATION ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

In the Matter of:	)	
Drug and Alcohol Testing of Certified Repair Station Employees Located Outside of the United States	)	Docket No.: FAA-2012-1058

COMMENTS OF AIRLINES FOR AMERICA

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Airlines for America ("A4A"), on behalf of its members,[1] submits these comments in response to the Federal Aviation Administration's ("FAA") notice of proposed rulemaking on *Drug and Alcohol Testing of Certified Repair Station Employees Located Outside of the United States* ("NPRM").[2] Safety is of paramount importance to A4A and its members. Safely and efficiently transporting passengers for decades has given A4A members a deep-rooted understanding of the importance of ensuring proper aircraft maintenance and, thus, they have a vested interest in mitigating the potential risk of employee drug or alcohol impairment during aircraft maintenance with scientifically-based and data-driven measures. We offer our comments to help the FAA achieve the Congressional mandate and its aviation safety goals pursuant to its limited authority and in a data-driven, justified, and efficient manner.

[1] A4A's members are Alaska Air Group, Inc.; American Airlines Group, Inc.; Atlas Air Worldwide Holdings, Inc.; Delta Air Lines, Inc.; FedEx Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

[2] 88 Fed. Reg. 85,137 (Dec. 7, 2023).

I. THE FAA'S RULES SHOULD BE SCIENTIFICALLY BASED AND DATA-DRIVEN TO CONTINUE SUPPORTING THE U.S. AIRLINE INDUSTRY'S SAFETY ACHIEVEMENTS

To maintain the unparalleled level of aviation safety that industry and regulators have achieved together, safety measures must be data-driven and risk-based to avoid diverting resources away from current and effective safety policies and practices that protect approximately 853 million passengers that fly on U.S. airlines each year.[3] In fact, by using data-driven and risk-based safety measures and policies, the U.S. airline industry, and A4A members especially, have unequaled safety cultures and successfully achieved the level of safety that is expected by the FAA, our customers, and the public. This includes aircraft maintenance performed outside of the United States by U.S. airlines, as well as their operations supported by overseas Part 145 repair stations.

The FAA fosters the industry's success with its scientifically-based and data-driven safety regulations and programs, such as Safety Management Systems, the Aviation Safety Action Program, the Voluntary Disclosure Reporting Program, and the Flight Operational Quality Assurance Program.[4] These safety regulations and programs are buttressed by U.S. airlines' internal programs that exceed the FAA's (and the U.S. Department of Transportation's ("DOT")) drug and alcohol abatement programs—*i.e.*, drug and alcohol testing beyond FAA and DOT mandates—that further mitigate the potential risk of drug and alcohol impairment. Some airlines provide employee assistance programs with counseling, career, or life-related support that further fosters a safe and supportive workplace. In fact, the FAA's NPRM best captures the industry's safety success through the current regulations, programs, and practices:

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[3] Bureau of Transportation Statistics, *Full Year 2022 U.S. Airline Traffic Data* (Mar. 16, 2023), available at https://www.bts.gov/newsroom/full-year-2022-us-airline-traffic-data.

[4] *See* 14 C.F.R. part 5; FAA Order No. 8000.369 ("Safety Management System") (2020), FAA Advisory Circular 120-66B ("Aviation Safety Action Program") (2020), FAA Advisory Circular 121-37B ("Voluntary Disclosure Reporting Program - Hazardous Materials") (2023), and FAA Advisory Circular 120-82 ("Flight Operational Quality Assurance") (2004).

> **"[T]here have been no accidents or incidents related to safety-sensitive maintenance personnel using drugs or alcohol."**
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> FAA, *Drug and Alcohol Testing of Certified Repair Station Employees Located Outside of the United States,* 88 Fed. Reg. 85,137, 85,147 (Dec. 7, 2023) (emphasis added).

Despite these safety programs, achievements, and data, *Congress* requires this NPRM, not the FAA's safety mandate. Although some may argue on the bases of logic and fairness that FAA should expand the proposal to overseas maintenance employees of U.S. airlines, this proposal is based on a Congressional political decision; FAA's data does not support an expansion of the rules. Moreover, the FAA has not adequately considered or analyzed the costs or benefits of such an expansion, which would make such expansion arbitrary and capricious.

Accordingly, we respectfully submit that:

1. The existing safety and aircraft maintenance environment, including adherence to FAA's drug and alcohol abatement programs and additional internal airline programs, already achieves the essential level of safety with respect to the potential risks posed by drug or alcohol impairment of maintenance personnel;

2. The FAA should implement this rulemaking within the explicit confines of the Congressional mandate; and

3. An expansion of the rules beyond the Congressional mandate, especially in consideration of the FAA's own acknowledgement that it lacks safety data to support any such expansion, would be arbitrary and capricious.[5]

[5] *See Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) ("In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"); *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S., 281, 285 (1974) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring the agency to "provide reasoned explanation for its action.").

II. THE FAA MUST ADHERE TO CONGRESSIONAL MANDATES AND EXECUTIVE CHARGES REGARDING FOREIGN LAWS AND INTERNATIONAL STANDARDS AND COOPERATION

Congress imposed two explicit obligations charging the FAA with this rulemaking:

1. As the NPRM repeatedly acknowledges, the FAA must propose regulations to impose an alcohol and substances testing program that is "*consistent with* the applicable laws of the country in which the repair station is located;"[6] and

2. Paired with this limitation, the FAA must "request the governments of foreign countries that are members of the International Civil Aviation Organization ("ICAO") to establish international standards for alcohol and controlled substances testing of persons that perform safety-sensitive maintenance functions on commercial air carrier aircraft."[7]

Concurrently, the FAA must also fully recognize Executive Order 13609, *Promoting International Regulatory Cooperation*, which states:

> In meeting shared challenges involving health, *safety*, . . . international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.[8]

However, contrary to Congress' express charge, the U.S. Government's clear respect of foreign laws, and the U.S. Government's recognized need for international cooperation, the FAA knowingly proposes regulations that would impose a program that is inconsistent with foreign laws.[9] In other words, the FAA effectively ignored the express statutory limitation; it claimed such dereliction may be overcome by shifting the burden of avoiding inconsistencies with foreign laws to the Part 145 repair stations that will have to seek waivers from inconsistent FAA rules and/or exemptions from inconsistent DOT rules.

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[6] 49 U.S.C. § 44733(d) (emphasis added).
[7] *Id*.
[8] Exec. Order No.13,609 (2012) (emphasis added).
[9] *Cf.* A4A, Comments of Airlines for America 4-5 (July 17, 2014) (Docket No. FAA-2012-1058) (hereinafter "A4A ANPRM Comments") (providing comments to FAA's advanced notice of proposed rulemaking noting conflicts with laws in Austria, Germany, and China.)

Congress did not envision this scheme—it is backwards. In fact and at the outset, Congress envisioned the opposite scenario, explicitly putting the onus on the FAA to promulgate a program that is consistent with the applicable laws in the country in which the repair station is located. In other words, Congress never called for or anticipated rules that implemented a program that would be inconsistent with foreign laws that could thereafter be corrected through the efforts of regulated parties via waiver or exemptions. The FAA's proposed program simply turns Congress' express intent on its head.

The FAA must also recognize that language in the statute is clear and unambiguous—the program must be both, but separately determined "acceptable by the Administration *and* consistent with the applicable laws of the country in which the repair station is located."[10] In other words, the program's consistency with foreign laws is distinct from a determination of acceptability by the Administrator; the Administrator cannot determine that the program's inconsistency is acceptable through a system of waivers and exemptions, it must be determined to be consistent with foreign laws for the FAA to promulgate the proposed rules. In fact, the waiver and exemption regime inherently implies that the FAA has determined the program to *not* be consistent with the applicable laws of the country in which the repair station is located. If it were already determined to be consistent, waivers and exemptions would not be needed. In sum, we continue to submit that waivers and exemptions fail to meet the explicit statutory instruction that the FAA must limit its program to be consistent with foreign laws.[11]

Moreover, the FAA has no authority over the DOT's testing regulations or its exemption standards or process.[12] Therefore, the FAA's defiance of the statutory mandate to limit its

[10] 49 U.S.C. § 44733(d) (emphasis added)
[11] *See supra* note 9, A4A ANPRM Comments at 3.
[12] *See* 49 C.F.R. § 40.7 (establishing that DOT's Office of the Secretary of Transportation grants exemptions).

program to be consistent with foreign laws raises greater concerns because Congress did not confer authority to the FAA to impose a program over which it does not control. Simple logic poses the following questions: How can the Administrator determine the program to be acceptable if it cannot control the program nor have the authority to address inconsistencies with foreign law? Also, Congress did not invoke the authority of the DOT to grant exemptions for purposes of inconsistencies with foreign laws. Because Congress was not silent and clearly laid out the limitations on FAA's rulemaking authority, FAA cannot invoke the DOT's authority by fiat of its own power, simply because implementing regulations are allowed. In sum, this approach runs far afoul of the Administrative Procedures Act ("APA"), because it is a clear abuse of discretion, otherwise not in accordance with the explicit statutory mandate, and exceeds FAA's statutory authority and limitations.[13]

To the extent that the FAA continues to incorrectly interpret its authority and circumvents the statutory limitation through FAA waivers and DOT exemptions when adopting the final rules, we respectfully submit the following comments and recommendations for the FAA to meet its Congressional obligations.

A. *The Waiver and Exemption Proposal Violates the APA*

The FAA proposes that Part 145 repair stations outside of the United States may request a waiver from any requirements under subparts E or F of part 120 of title 14 of the U.S. Code of Federal Regulations ("14 C.F.R. Part 120"), if the specific requirements of the subpart are inconsistent with the laws of the country where the repair station is located.[14] First and most importantly, the FAA's NPRM is arbitrary and capricious because provides no standard against

[13] 5 U.S.C. §§ 551–559 ("Administrative Procedures Act") and 706 ("Scope of Review").
[14] *See supra* note 2 at 85,153.

which it will grant a waiver—in other words, Part 145 repair stations will be held to a standard that is overly ambiguous and vague. Although the FAA proposes that a Part 145 must submit certain information when seeking a waiver, as discussed below, the FAA does not state or explain how it will adjudicate that information and determine whether a waiver shall be granted. To satisfy the requirements of the APA, the FAA should explain its standard, limit that standard to the limits imposed by Congress, and give the public a reasonable opportunity to comment on that standard.[15] Following the same procedures, the DOT must also amend its rules to provide an exemption based on any inconsistency with foreign laws, without imposing any higher standard than that explicitly imposed by Congress on the FAA's authority. In sum, the FAA must explain the authorized standards for both FAA waivers and DOT exemptions and give the public an opportunity to comment as to the legality and other implications of such standard.

Second, to obtain a waiver, the FAA requires submission of specific information and it appears that the FAA will evaluate and consider factors beyond the FAA's statutory limitation to keep its program consistent with foreign laws. Specifically, the FAA proposes that a Part 145 repair station must submit "reasons why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees."[16] Even if a waiver does adversely affect the prevention of accidents and injuries, the FAA must grant the waiver because it cannot impose a program that is inconsistent with the applicable laws of the country in which the repair station is located. Therefore, this information is irrelevant. The FAA also requires "a description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver, or, if

[15]

[16] *Id.*

applicable a justification of why it would be impossible to achieve the objectives of the provision in any way."[17] This information is also irrelevant as to whether a waiver is necessary to avoid inconsistency with the applicable law of the country in which the repair station is located. Additionally, the FAA cannot require the imposition of an alternative standard without giving potentially regulated entities notice and the opportunity to comment.

Again, like the imposition of a waiver and exemption scheme itself, the imposition of additional requirements in its testing program that exceed the Congressional limitation requiring the program be consistent with foreign laws violates the APA.[18] In other words, the FAA has arranged a scheme whereby it could deny waivers despite the clear Congressional mandate to avoid inconsistencies with foreign laws simply because the FAA deems that the waiver would adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees. Or, based on the information required by an applicant, the FAA could deny the waiver because the repair station has not provided an alternative means or justification of impossibility that satisfies the FAA's unstated standard. These extra standards are beyond the limitations that Congress imposed on the FAA to ensure consistency in its program—if the FAA's program is inconsistent with the foreign law, the FAA cannot apply that program. The solution to this problem is obvious: the FAA must adopt a standard that automatically grants a waiver when there is an inconsistency, without imposing additional requirements. The DOT must do the same.

The FAA's proposed reliance on DOT's exemptions far exceeds the Congressional limitations imposed on the FAA. Specifically, the DOT grants exemptions under the standards

[17] *Id.*
[18] 5 U.S.C. §§ 551–559; *see supra* note 2 at 85,153; 49 U.S.C. 40101.

of part 5 of title 49 of the U.S. Code of Federal Regulations ("49 C.F.R.") *and then* for its drug and alcohol regulations:

> [O]nly if the request documents *special or exceptional circumstances*, not likely to be generally applicable and not contemplated in connection with the rulemaking that established [49 C.F.R. part 40], that make [ ] compliance with a specific provision of [49 C.F.R. part 40] impracticable.[19]

In sum, the DOT will impose the following standards for an overseas Part 145 repair station to get an exemption to avoid an inconsistency with a foreign law, which far exceed the Congressional limitation on FAA's authority—the inconsistency must:

1. Be an "adequate justification" for the exemption;[20] and
2. Be a "special or exceptional circumstance" that is:
    a. "Not likely to be generally applicable"; and
    b. "Not contemplated in connection with the rulemaking" that established the DOT's drug and alcohol testing rules; and
3. Make compliance with a specific provision of the DOT's drug and alcohol testing rules "impracticable."[21]

Although the DOT may find an inconsistency between the foreign laws and its drug and alcohol testing rules meets such standards, Congress did not establish such thresholds and the FAA cannot force the DOT to agree that an inconsistency meets such thresholds.[22]

We also note that the FAA is silent on the requirements of the Department of Health and Human Services ("HHS") that may apply to the testing program and how subject repair stations can get relief from HHS's requirements that are inconsistent with the foreign laws.[23]

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[19] 49 C.F.R. § 40.7 (emphasis added).
[20] 49 C.F.R. 5.3(d)(3).
[21] 49 C.F.R. 40.7(b)
[22] *See supra* note 2 at 85,153; 49 U.S.C. 40101.
[23] *See* DOT, Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Oral Fluid Specimen Testing for Drugs, 88 Fed. Reg. 27,596 (May 2, 2023) (explaining in final rules that Congress requires that the DOT incorporate HHS mandatory guidelines into the DOT's regulations for testing and laboratory requirements for aviation).

B. *The FAA Should Not Use Part 120 to Avoid Bilateral Aviation Safety Agreements*

In the NPRM, the FAA dismisses concerns about applicability of bilateral aviation safety agreements ("BASAs").[24] By doing so, the FAA effectively ignores the underlying purpose and importance of the BASAs—*i.e.*, reciprocal recognition of Part 145 certificates and approvals by the foreign agency and a bilateral processes to address requirements that are not common to both systems and are significant enough that they must be addressed ("Special Conditions"). If the repair station overseas is certificated by the foreign jurisdiction that has a BASA with the United States, the FAA trusts such certification and approvals—and the resulting level of safety achieved by such certification and approvals—and must issue the appropriate FAA certificate and operations specifications. By placing the requirements for the testing of Part 145 maintenance employees outside of the United States in 14 C.F.R. Part 120, it appears that the FAA attempts an end-around of BASAs, undermining the long-established trust between the FAA and foreign regulators and the BASA process itself. On the other hand, we submit that the program requirements will clearly trigger the resolution procedures of some BASA and related procedures.[25] The FAA's approach to ignore or avoid these important agreements materially increases the risk that domestic Part 145 repair stations may be subject to retaliatory requirements or other requirements by foreign jurisdictions that are imposed outside of the Part 145 certification and approval regimes.

We strongly recommend that the triggering applicability of FAA's drug and alcohol testing program be applied in Part 145. This will clearly and effectively rely on the BASAs and

[24] *See supra* note 2 at 85,141 and 85,146.
[25] *See e.g.,* Maintenance Implementation Procedures Under the Agreement Between the Government of the United States of America and The Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion of Aviation Safety (Jan. 1, 2023).

the long-standing reliance on sophisticated safety regulatory regimes of and relationships with foreign oversight agencies, and avoids inconsistencies with foreign laws. Accordingly, any potential program compliance issues would be triggered through a Special Condition under the BASAs and through the important bilateral process that ensures comity and reciprocity. Thus, only in foreign jurisdictions without BASAs and reciprocal recognition of the foreign repair station certificate would the FAA's drug and alcohol testing program be automatically applied with heavy reliance on FAA's proposed inefficient (and illegal) waiver/exemption regime.

C. *The FAA's Testing Framework Should Have Greater Reliance on International Cooperation and Standardization*

Considering the U.S. Government's recognition of the need for international cooperation, the FAA should establish a process through which a Part 145 repair station may request that the U.S. Government and the respective foreign government of the Part 145 repair station cooperate and come to agreement to ensure subject Part 145 repair stations in those countries be compliant with all laws, both U.S. and foreign. This process should allow for bilateral discussions and negotiations, and conclude with a formal agreement that expressly recognizes the laws of each country and appropriately addresses any inconsistencies at the country-level, rather than at the individual Part 145 repair station level.

Most importantly, it would allow the foreign government of the Part 145 repair station to provide a single and unified position on its laws that may be inconsistent with the FAA or DOT regulations, thereby avoiding a circumstance in which the FAA or DOT must rely on inconsistent or contrary readings of the laws by Part 145 repair stations, which would result in inconsistent or contrary determinations of waivers and exemptions for individual Part 145 repair stations. It also allows the FAA to adjudicate inconsistencies more efficiently, including laws

that apply across multiple foreign countries, such as the European Union's General Data Protection Regulation ("GDPR"), while preventing the FAA or the DOT from relying on an incorrect interpretation of a foreign law by a Part 145 repair station in denying petitions of other Part 145 repair stations. Such cooperation would foster safety, the respective rights of individuals, consistency, and operational, administrative, and implementation efficiency with regard to maintenance operations and employees, especially in foreign countries that have five (5) or more Part 145 repair stations, including some with dozens of Part 145 repair stations.

Chart A. Countries with Five or More Part 145 Repair Stations

Country	**Part 145 Repair Stations** *(12 or more in bold)*	**Country**	**Part 145 Repair Stations** *(12 or more in bold)*
Australia	**12**	**Malaysia**	**20**
Belgium	**12**	**Mexico**	**41**
Brazil	**18**	**Netherlands**	**31**
Chile	7	Philippines	11
China	**82**	Poland	5
Colombia	11	Saudi Arabia	10
Czechia	9	**Singapore**	**56**
Denmark	**12**	**Spain**	**14**
France	**121**	**Sweden**	**14**
Germany	**76**	**Switzerland**	**18**
Hong Kong	**13**	Taiwan	7
Indonesia	7	Thailand	9
Ireland	**16**	Turkey	8
Israel	**13**	**United Arab Emirates**	**16**
Italy	**32**	**United Kingdom**	**177**
Japan	**12**	**--**	**--**
		Total	*890*

To the extent that these 31 countries have laws that are potentially inconsistent with FAA regulations, the FAA should expect nearly 900 waivers requests from these repair stations, which could double for the U.S. Government if exemptions are also required because of inconsistencies

with the DOT's regulations. This number grows materially when also considering countries with four or fewer Part 145 repair stations.

We also submit that the effectiveness of the entirety of FAA's regulations should be held in abeyance in a country with a Part 145 repair station that has requested such intergovernmental process until a final agreement between the governments becomes effective.

First, this avoids placing Part 145 repair stations in the unfair position of having to comply with foreign laws, while violating U.S. law, or vice versa, while a pending request for a resolution on inconsistent laws remains outstanding.

Second, it avoids the likely and unfair circumstance with a repair station-by-repair station waiver/exemption process whereby some Part 145 repair stations must comply with the U.S. testing requirements, because the FAA and/or DOT have decided on their petition for exemption/waiver, while other repair stations wait for such determination on the same or similar inconsistency of law issues.

Third, it avoids requiring Part 145 repair stations from establishing costly processes and procedures that must thereafter be revised to comply with the ultimate agreement that de-conflicts the laws, resulting in further avoidable costs that the FAA has not considered.

Finally, a failure to hold the effectiveness in abeyance, which effectively forces non-compliance with at least one set of laws, also puts Part 145 repair stations into difficult contractual or insurance policy non-compliance situations; whereby, they cannot comply with all laws and regulations that is typically required by customers or insurance providers. Customers and insurance companies may need to cease the use or coverage of such repair stations until the legal inconsistencies are fully adjudicated, which is extremely inefficient on a repair station-by-

repair station basis and is much more efficiently addressed through an intergovernmental process that adjudicates the implications for all Part 145 repair stations in that jurisdiction.

We appreciate that "[t]he FAA supports the development of international standards and believes that they would help deter and detect drug and alcohol use that could compromise aviation safety."[26] However, we respectfully submit that such support should be realized in further action by the U.S. Government before the ICAO. A single request for countries to support ICAO action to establish alcohol and controlled substances testing requirements, while likely compliant with the statutory mandate, does not reflect the FAA's continued support for international standardization. Meanwhile, other countries have continued to push discussion regarding the introduction of minimum testing standards at ICAO.[27] We strongly encourage the FAA to continue its efforts at ICAO to establish an international standard.

We also strongly encourage the FAA to directly engage with foreign governments that have different methods of deterring drug and alcohol use and abuse (*e.g.*, total prohibitions of substances and strong criminal penalties) that may accomplish the FAA's objectives by other means. In fact, the imposition of testing obligations in some countries may run contrary to or be unnecessary in consideration of the country's cultural and civil rights environment or laws.

D. *Effectiveness Should be Held in Abeyance for Part 145 Repair Stations Seeking Waivers or Exemptions*

As discussed above, the uncertainty and legal ramifications of the potential inconsistency of laws between the FAA and DOT's rules and rules of foreign governments, both national and local, have serious implications. Not only are there non-compliance and civil penalty risks, but such inconsistencies likely put Part 145 repair station contracts and insurance policies into

[26] *See supra* note 2 at 85,142.
[27] ICAO, *Working Paper on Drug and Alcohol in Aviation Safety*, A40-WP/125 (Jul. 31, 2019).

question. We respectfully submit that the entirety of FAA's regulations should be held in abeyance for a Part 145 repair station while it has an outstanding petition for waiver or exemption from the FAA's or DOT's regulations, respectively.

Although the FAA believes (without supporting data) that a year-long delay in effectiveness is adequate time to seek waivers and exemptions, the FAA has no basis to guarantee that the U.S. government can promptly adjudicate hundreds to thousands of requests. In fact, it has no control over whether the DOT has the resources or ability to adjudicate exemptions for inconsistencies with DOT's regulations. Additionally, in response to the final rulemaking (and its affront to the policies of foreign countries and their complete and exclusive sovereignty over their territories), foreign jurisdictions—including countries or local territories—may impose specific laws that are purposefully inconsistent with the FAA's testing program. However, these laws may come into effect during the year-long delay in effectiveness, shortening the time Part 145 repair stations may obtain waivers or exemptions.

In sum, we respectfully request that the FAA fully adhere to its statutory limitation through a waiver/exemption process that ensures all inconsistencies are addressed before it imposes its program on Part 145 repair stations in a foreign country. The failure to do so will simply run afoul of the FAA's statutory authority.

E. *The FAA and DOT Should Give Full Deference to Foreign Jurisdictions' Determinations of Law*

The complexity of ensuring that the FAA's program is consistent with foreign laws is apparent. In fact, previous efforts to apply the program extraterritorially took extended time and was ultimately resolved by excluding applicability to employees outside of the United States.[28]

[28] *See supra* note 2 at 85,139, note 7.

As previously raised with and acknowledged by the FAA, the inconsistencies with foreign laws may arise with foreign laws that do not directly address drug and alcohol testing, such as privacy, data security, and labor laws. We have serious concerns of whether the FAA (and the DOT) have the expertise and ability to fully adjudicate the impact of these laws and the inconsistency with the FAA's program. Therefore, we recommend that the FAA (and the DOT) recognize that it will give full deference to the determinations of foreign authorities regarding the inconsistency of laws for the purpose of compliance with FAA's program.

III. THE FAA PROGRAM MUST FULLY RECOGNIZE AND ADDRESS THE TECHNICAL AND OPERATIONAL LIMITATIONS OF TESTING PERSONNEL OVERSEAS

When finalizing its program, we strongly urge the FAA to fully recognize and address any technical and operational limitations of testing personnel overseas, especially in any consideration of an expansion of its program to other employees in the industry. Not only do these technical and operational limitations raise the risk of non-compliance and therefore legal liability, at no fault of the regulated entity, they present real burdens that are not equally borne by regulated entities that conduct testing in the United States. In fact, such obstacles may be so unreasonable to overcome or present such burdens that the cost of compliance far outweighs any measurable benefit, especially in consideration that the FAA already acknowledges that no aviation accident or incident has ever occurred because of alcohol or drug impairment by overseas maintenance personnel.[29] Accordingly, we submit these obstacles for consideration:

- There is only one HHS-certified laboratory outside of the United States and that laboratory is in Canada. Accordingly, except for North American Part 145 repair stations (*e.g.*, in Canada and Mexico), all overseas Part 145 repair stations will be required to use significant shipping chains to get drug testing samples to North America to complete the testing process. Additionally, some Part 145 repair

[29] *See supra* note 2 at 85,137.

stations and other maintenance operations may be in very remote locations, limiting access to timely resources and shipping options for samples to be tested by U.S.-based laboratories. Specimen validity may become an issue during an extended shipping period and samples may be exposed to extreme temperature variances, causing sample distortion.

- The U.S. Government restricts which devices can be used to conduct DOT-regulated alcohol and drug testing. However, it is unclear whether those products or devices are adequately available in overseas locations, whether from overseas manufacturing or through shipment from the United States, especially in remote locations.

- Depending on the size of the maintenance operation and its location, there may be a dearth of available individuals qualified to perform collections. For example, smaller Part 145 repair stations or maintenance operations may have an inadequate number of personnel or personnel with prohibited relationships to conduct the testing (*e.g.*, relative or a close personal friend), and trained medical professionals may not be readily available to conduct the testing.

- Compliance with the FAA's reporting requirements may be significantly impeded by data transfer and privacy restrictions that will effectively nullify the FAA's ability to adequately oversee such repair stations, putting some repair stations at a comparative disadvantage.

Part 145 repair stations outside of the United States should be given an opportunity to seek relief from the FAA's program when faced with obstacles that may result in validity issues, unfairly threaten the careers of qualified maintenance employees, or make compliance unreasonably burdensome for the repair station.

Moreover, all of these obstacles, which are not realized by entities performing maintenance operations in the United States, must be fully considered and adequately measured against the benefits of any program imposed for the testing of overseas maintenance employees. Specifically, we strongly recommend that the FAA undertake a full cost-benefit analysis of these burdens as recommended by the Office of Management and Budget's ("OMB") Circular No. A-4: "[A]nalysis should look beyond the obvious benefits and costs of your regulation and consider

any important additional benefits or costs, when feasible."[30] Upon gathering and considering data related to these obstacles, we recommend that the FAA issue a supplemental proposal to minimize these obstacles, as well as an updated regulatory impact analysis, allowing the public to better address these issues.

IV. THE FAA SHOULD CONSIDER THE INDIRECT IMPACTS ON AIRLINE COMPETITION

We respectfully submit that the FAA must consider the indirect competitive cost implications of the NPRM to the U.S. airline industry, which must be accounted for during the FAA's rulemaking process. As explained by the Congressional Research Service, the cost-benefit analysis is "the systematic identification of *all* the costs and benefits associated with a forthcoming regulation, including nonquantitative and *indirect costs* and benefits, and how those costs and benefits are distributed across different groups in society."[31] Moreover, instructions to agencies highlight the need for the FAA to undertake a broadly scoped cost-benefit analysis:

- Executive Order 12866, which established "Principles of Regulation," calls on agencies to assess "*all* costs and benefits," without distinction between direct and indirect impacts.[32] It also calls on agencies to "impose the least burden on society, including individuals, businesses of different sizes, and other entities."[33]

- The Office of Information and Regulatory Affairs' best practices guidance instructs agencies to "assess the instrumental costs and benefits of the proposed action" and states that "[t]he same standards of information and analysis that apply to direct benefits and costs *should be applied to ancillary benefits and countervailing risks*."

- OMB's Circular No. A-4 recommends that agencies "look beyond the obvious benefits and costs of [the] regulation and consider any

[30] OMB, *Circular No. A-4* 39 (Nov. 9, 2023).
[31] Congressional Research Service, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process 1* (Dec. 9, 2014) (emphasis added).
[32] Exec. Order 12866, *Regulatory Planning and Review*; 58 Fed. Reg. 51,735 (emphasis added).
[33] *Id.; see also* Exec. Order 13563, *Improving Regulations and Regulatory Review* (Jan. 21, 2011) (reiterating the necessary breadth of the cost-benefit analysis, requiring agencies to "seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.").

> important additional benefits or costs, when feasible. Notably, it also states:
>
> You should be attentive to the possibility that regulations directly addressing issues other than market power may have meaningful *indirect effects on market structure and competition*, and it is informative to discuss, and if feasible, to quantify the benefits and costs arising from such effects in your analysis. For example, licensing or permitting requirements intended to increase safety may act as a barrier to entry, allowing incumbent first to charge higher-than-competitive prices. In such cases, you should consider whether the regulation's safety benefits (along with the regulation's other benefits) outweigh any losses in consumer surplus caused by higher prices (along with the regulation's other costs), and whether there are alternatives that promote greater competition and would therefore have greater net benefit.[34]

Accordingly, we urge the FAA to assess the NPRM's indirect costs to U.S. airlines if Part 145 repair stations refuse to comply and forego their U.S. Part 145 certification, resulting in aircraft maintenance becoming unavailable to U.S. air carriers at particular stations or countries.

The implications are especially concerning in the 24 foreign countries that have very few FAA-certified Part 145 repair stations, especially those with significant U.S. airline markets.

Chart B. Countries with Three or Fewer Part 145 Repair Stations

Country	Part 145 Repair Stations	Country	Part 145 Repair Stations
Aruba	1	Kenya	1
Austria	3	Luxembourg	1
Azerbaijan	1	Morocco	1
Costa Rica	3	Norway	3
Ecuador	1	Panama	2
Egypt	3	Qatar	3
Estonia	1	Romania	3
Ethiopia	1	Russian Federation	1
Finland	1	Serbia	1
Guatemala	3	South Africa	2
Jordan	3	Trinidad and Tobago	1
Kazakhstan	1	Ukraine	1

[34] OMB, *Circular No. A-4,* 56 (emphasis added).

To the extent that maintenance becomes unavailable or inadequate in foreign stations, causing U.S. air carriers to exit the market (or take unreasonable measures to serve the market—*e.g.*, establishing an expensive overseas maintenance operation for very limited numbers of flights), this gives an unfair competitive advantage to foreign air carriers.

Accordingly, we strongly encourage the FAA to consider the likelihood of the loss of maintenance operations overseas for U.S. air carriers and the resulting economic and competitive impact for U.S. air carriers and the public that relies on their transportation. The possibility and likelihood are very real and will put further strain on airline operations that currently struggle to obtain the necessary volume of maintenance services on a global scale.

In fact, after the COVID-19 pandemic, demand for air transportation services outstripped supply, and that has extended to the aerospace and aviation supply chain. Demand for aircraft-new or used, engines, parts and maintenance/repair/overhaul (MRO) services have been unmet by providers. These providers have seen their supply chains disrupted by worker scarcity, workforce juniority, geopolitics, quality lapses and other factors. Equity analysts from Goldman Sachs recently noted: "So many parts of the ecosystem are seeing maximum tight supply/demand. Many market observers do not expect market equilibrium in new aircraft, engines and MRO until 2030."

Drilling down on one of these sectors, they added "MRO availability is highly limited, leaving open questions about time to fix current engine challenges. That said, the same shortage of engines, MRO and parts is creating unprecedented pricing power in the broad aftermarket that could last years." Analysts from Jefferies wrote: "The wait times for MRO, particularly in the engine market have extended to 3-9 months for 2025-26 with turn times extending from <100

days to 130 days in some cases. MRO capacity globally is a concern with little expectation of a near term improvement."

These issues have persisted for well over a year and show little sign of alleviating themselves any time soon—and they are global. Last March, Air Baltic CEO Martin Gauss told FlightGlobal that, under normal circumstances, an engine would go for maintenance and be ready 60-90 days later, "but that timescale can now be closer to one year." He explained that the delays were caused by "sufficient spare parts and insufficient labour" at the MRO provider.

MRO issues are severe enough that airlines and MROs have moved from a just-in-time approach to a just-in-case approach, holding on to inventories of aircraft, engines and parts much longer than financially optimal. To this end, for example, FedEx recently announced an agreement to purchase two MD-11s when their leases end in 2025. The sole purpose for doing so is to harvest the engines and parts to support the remaining MD-11s in the fleet.

While the primary concern here is timely access to MRO services, it is also the case that the supply-demand imbalance for such services has put upward pressure on the costs of running and airline and, in turn, on the price of air travel. At the ISTAT Americas conference in March, panelists indicated that: "A tight market means aircraft prices are up 20% vs. pre-pandemic, lease rates up 30% and MRO / spare parts up 40% (all directional with variability by exact product)." As principal at AeroDynamic Advisory, expert Mike Stengel wrote in InsideMRO: " . . . aftermarket material escalations are poised to remain elevated for the medium term. . . . [O]ne of the clearest recent lessons is that there are no quick fixes to today's whack-a-mole supply chain, especially in a less predictable geopolitical environment."

And, finally, we highlight that the removal of a U.S. air carrier in certain markets may has implications for shipping sensitive materials or transporting government resources overseas.

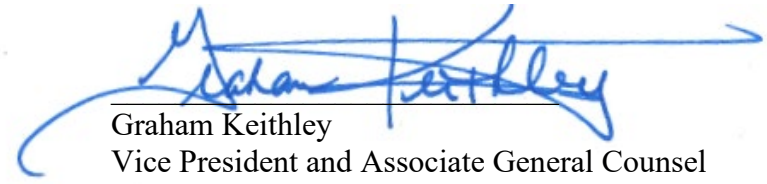
V. COST-BENEFIT ANALYSIS ISSUES

We support the comments of the Aeronautical Repair Station Association ("ARSA") regarding the FAA's cost-benefit analysis. As ARSA explains, the FAA failed to consider all impacted entities under the rulemaking, such as contractors and subcontractors that must undertake the same or most obligations and costs as the Part 145 repair stations. Also, the FAA has not analyzed the costs to determine the inconsistency of laws between the FAA, DOT, and HHS requirements and the laws of the country in which the repair station (or contractor or subcontractor) is located for the entities to seek waivers or exemptions, which will require significant legal expertise in international and regulatory law to accomplish. A failure to consider these costs in the final rulemaking will result in a decision that is not reasoned and lacks material information and, therefore, is arbitrary and capricious.

V. CONCLUSION

A4A and its members thank the FAA for considering our comments. We strongly recommend that the FAA strictly adhere to its Congressional mandate or, alternatively, incorporate our recommendations to address inconsistencies with foreign laws; measure, consider, and analyze testing obstacles; and complete the necessary cost-benefit analysis. If you have any questions, please contact Graham Keithley at gkeithley@airlines.org.

Respectfully submitted,



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