U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

JUL 19 2010

Kent S. Jackson
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Dear Mr. Jackson:

This letter responds to the request for a legal interpretation that you mailed to this office on March 18, 2010. You have requested clarification regarding whether (1) people who supervise the performance of safety-sensitive functions and (2) employees of an air carrier operating under 14 C.F.R. part 135 who perform duties in relation to the release of flights are subject to drug and alcohol testing under 14 C.F.R. part 120. Without additional details regarding the specific functions being performed in relation to flight release under part 135, we provide a general discussion of part 120 testing requirements.

Sections 120.105 and 120.215 require that each employee who performs a safety-sensitive function for a part 121 certificate holder or a part 135 certificate holder must be subject to the certificate holder's drug and alcohol testing program. These "functions," which the FAA indicated involve "the greatest responsibility for safety," include flight crewmember duties, flight attendant duties, and aircraft dispatcher duties. In the 1988 antidrug final rule, the FAA rejected a commenter's recommendation that employees who perform functions in or around an aircraft, such as deicing, fueling, weight and balance computation, taxiing or towing aircraft, baggage handling, or cargo loading, be included in the testing pool. 53 FR 47024, 47049, Nov. 21, 1988. In a 2004 revision of the antidrug and alcohol misuse prevention rules, however, we stated that "a reservations clerk could be trained in the safety sensitive duties of weight and balance calculations" but would be subject to testing only "if the employer identifies this person as someone who could be called upon to perform safety-sensitive duties on an as-needed basis." 69 FR 1840, 1845 Jan. 12, 2004. Although this statement appears to suggest that the 2004 revision expanded the scope of the original rule to include those employees who perform weight and balance calculations, the FAA emphasized at that time that the changes to the rules did not expand the categories of safety sensitive employees. As such, the performance of weight and balance calculations alone does not constitute "aircraft dispatcher duties" and cannot be the basis for including an employee in the drug and alcohol testing pool. Rather, it is necessary to distinguish the essential functions of "aircraft dispatcher duties" that require the inclusion of an employee in the certificate holder's drug and alcohol testing program.

Under part 121, the pilot in command and aircraft dispatcher share operational control. "Operational control, with respect to a flight, means the exercise of authority over initiating, conducting, or terminating a flight." 14 C.F.R. § 1.1. Ultimately, this authority involves a determination that the flight can be conducted safely based on an assessment of numerous factors, including weather, route planning, fuel requirements, and weight and balance calculations. See Advisory Circular 120-101. It is the exercise of operational control and the determination that a flight can be conducted safely that the FAA considers the true safety sensitive function of an aircraft dispatcher. Because part 135 does not require operators to employ aircraft dispatchers or even prepare a formal release authorizing a specific flight, the question of whether employees are subject to drug and alcohol testing depends on an analysis of the duties being performed. Section 135.21 requires operators to prepare and keep current a manual setting forth their procedures and policies and designating those persons who are authorized to exercise operational control over a flight. Prior to conducting a part 135 flight, the persons designated to exercise operational control must determine that the flight can be initiated, conducted, and terminated safely. As with aircraft dispatchers under part 121, this determination involves an analysis of the same factors reviewed by aircraft dispatchers in part 121 operations. FAA Order 8900.1, Vol. 3, Ch. 25, Sec. 5. Often, part 135 operators delegate authority for initiating a flight to the pilot in command, who already is subject to the antidrug and alcohol prevention rules. In larger operations, however, operational control may be shared by other employees. These employees perform a safety sensitive function and are subject to the operator's drug and alcohol testing program.

With regard to the issue of whether employees who supervise safety-sensitive functions must be included in the testing pool, the FAA stated in the 1988 final rule that supervisory and managerial employees would not be subject to drug testing. We indicated, however, that "supervisory or managerial employees who perform safety- or security-related functions for an employer are not permitted to perform those functions, either on a permanent or temporary basis, unless those employees are subject to the requirements of the employer's anti-drug program." 53 FR 47024, 47049, Nov. 21, 1988. Thus, in your example, a Chief Pilot who deals solely with recordkeeping and management issues is not performing safety-sensitive functions and would not be subject to drug and alcohol testing.

This response was prepared by Anne Moore, an Attorney in the Regulations Division of the Office of the Chief Counsel and coordinated with the Drug Abatement Office and Part 135 Air Carrier Operations Branch of Flight Standards Service. We hope this response has been helpful to you. If you have additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations Division, AGC-200