Lawline

With the FAA's recent streamlining of its commercial Unmanned Aircraft Systems (UAS) exemption process, along with the February 2015 issuance of its Notice of Proposed Rulemaking on Small UAS, it probably won't be too long before Amazon and a host of other companies unleash UAS technology on our everyday lives.

If ever there was a time for lawyers to step up and really be lawyers, this is it. We're talking seriously unchartered territory here – Wild West. Hogan Lovells' UAS group offered Lawline the most up-to-date skinny on UAS regulatory and commercial development. Its suite of presentations leaves lawyers with the sense that this is not only an area in flux, but one of the most exciting practice areas to come down the pike in a great long while. Why?

Well for one, commercial UAS is unlawful unless the FAA grants an exemption to rules limiting UAS to hobbyists or recreational use. And yet, every week, the news is chock full of stories of this or that development in the UAS space. Clearly, the technology and commercialization are swiftly proceeding regardless of whether UAS can be used freely in the U.S. That's because companies are increasingly applying for and receiving these exemptions (issued under Section 333 of the FAA Modernization and Reform Act of 2012).

When Hogan Lovells' members discussed UAS this past March, the number of exemption applications was in the hundreds. But the number of waivers granted was in the mere dozens, with a growing waiting list of applications outstanding. One of the speakers, Nathaniel P. Gallon, wondered aloud whether the FAA would ultimately view its process like the SEC No-Action Letter, in which the agency blesses a certain course of action among specific parties, and then other parties rely on the letter in determining whether a similar type of behavior is acceptable.

Well, fast forward two or three weeks, and the earth had shifted. On April 9, 2015, the FAA announced a new, streamlined Section 333 exemption process, which made Gallon appear quite prescient indeed:

> "Although the FAA still reviews each Section 333 petition individually, the agency can issue a summary grant when it finds it has already granted a previous exemption similar to the new request."

Since that time, the FAA has rapidly approved dozens of UAS exemptions, even as the applications continue to stream in. Given the new speed with which the FAA is acting on exemptions, some of your clients may feel it's time to rev up mothballed UAS projects. Under the new FAA framework, even Amazon PrimeAir will bring some of its testing back stateside, as the FAA recently granted its request for a Section 333 exemption.

Of course, just because the FAA is granting more (and faster) Section 333 exemptions doesn't guarantee that your clients' projects will ever get off the ground, pun intended. Hogan Lovells' Randy Segal put it most aptly when she observed that UAS deals are "a multi-level chess game" where companies and lawyers are playing on a "developing and uncertain legal" board.

When crafting funding, development and deployment provisions for clients getting involved in development or financing of UAS deals, this means a couple principle things:

1. Boilerplate language in standard deals does not apply to UAS. Thus, you have to "follow all the possible threads…if A then B, if B then C" to determine all the contingencies. These agreements will heavily test your ability to conjure all the possible conditions precedent and subsequent that could possibly arise because the bottom line is that your client's project may eventually be deemed illegal.
2. Even if the project is lawful, considerations like data privacy protection, software upgrades, and communications problems may make the project untenable from a practical or funding perspective.
3. Court decisions may come down that render the liability landscape quite different from what we currently know, giving parties pause as to whether to continue a deal.

You have to plan in advance for all these contingencies, which may be reflected in the agreement as tranche funding, various insurance provisions, indemnification clauses, off-ramps and using joint ventures to protect parties financial interests. The agreement may even include the ultimate contingency: entering a deal, only to table action until such time as the regulatory framework becomes clearer, if it ever does. None of these has clear precedent at this time, "so [lawyers] have to provide for them in the contract," with specificity, and not by relying on the boilerplate provisions that may suffice in more established areas of dealmaking.

All that said, commercial UAS is coming and it's coming fast. Your clients don't want to be behind this "wave of the future," as Segal calls it and the regulators will catch up eventually. Somehow, with a lot of guile and omniscience, you have to help get your clients atop that wave and then, up in the air.