

Client Alert

November 3, 2015

The FAA (Re)Acts: Drone Registration, a Federal Task Force, and Hefty Fines

By William O'Connor, Christopher Carr, William Goodwin, and Nikita Tuckett

On October 19, 2015, U.S. Transportation Secretary Anthony Foxx and Federal Aviation Administration (FAA) Administrator Michael Huerta announced a plan to require unmanned aircraft vehicle (UAV or “drone”) users to register their UAVs with the FAA. While commercial users were already subject to registration requirements, the new scheme would extend to recreational users, a group expected to swell by millions in the coming holiday season. Coming close on the heels of the FAA’s unprecedented \$1.9 million proposed penalty against SkyPan International, Inc. (“SkyPan”), the announcement suggests that the FAA is under pressure to respond to popular concerns around soaring drone use and increasing reports of unsafe drone operation.

THE FAA’S REGISTRATION PLAN

Secretary Foxx noted that the registration scheme will further at least two key goals of the FAA. First, it provides the agency with an opportunity to engage and educate new users regarding safe drone operations before these new users start flying. Second, and perhaps more importantly, “Registration of all aircraft, including, unmanned aircraft, is an important part of ensuring accountability,” said Foxx. Where drone operators do break the rules, a registration requirement ensures investigators can identify an operator—or at least an owner—from a drone involved in an incident.

While the shape and scope of the registration program remains undetermined, the FAA is aiming to have a system in place prior to the holiday season. This accelerated timeline is in stark contrast to the typical FAA process where the proposal and comment process can stretch a year or more, as well as the FAA’s repeated inability to meet deadlines for issuing regulations for drones. The FAA has assembled a task force, including representatives from industry groups, government officials, and experts from leading drone companies, to explore how to create a registration program that ensures appropriate registration of drones without becoming overly burdensome. The task force’s recommendations are due by November 20, 2015.

The FAA’s initial announcement was light on details about how the registration scheme would be implemented. Given the incredible diversity of vehicles that could be considered a “drone,” there was immediate concern about the scope of the registration requirement. Some commentators noted that the registration scheme for commercial drones requires actual carbon copy forms to complete, a process that would be near-impossible to scale to meet the demands of the exploding consumer drone market. On Thursday, October 22, 2015, however, the agency published a “[Clarification and Request for Information](#)” regarding the announcement, inviting public comment on the registration plan and demonstrating that the agency is aware of the difficult questions the plan raises.

Client Alert

The FAA specifically requested “information and recommendations regarding what information and registration platform would be appropriate for [UAV] registration and ways to minimize the burden to the regulated community.” In addition, the agency asked for feedback regarding “which [UAVs], based on their weight or performance capabilities, warrant a continued exercise of discretion with respect to requiring registration because of the negligible risk they pose to the national airspace system.” The window for public comment closes November 6, 2015.

While the FAA’s request for comment is an encouraging sign that it recognizes the issues and challenges of requiring registration, how the FAA will address those remains to be seen. Among these are: who should bear the burden of creating and administering the program; how should costs be allocated among the government, industry, and users; what drones should be subject to the registration requirement; and how should the FAA address the millions of existing drones in the marketplace.

EFFICACY QUESTIONS AND LEGAL HURDLES

Both Foxx and FAA Administrator Michael Huerta cited the safety concerns posed increasing drone use as driving the registration requirement. Not surprisingly, the FAA is likely to rely on the public safety issue to justify bypassing normal rulemaking procedures. Yet how the registration program itself will address those issues is unclear. For instance, the FAA recently released a report in August titled “Pilot Reports of Close Calls with Drones Soar in 2015,” documenting reports of drone sightings. Overwhelmingly, the cases involved pilots seeing drones at a distance and even in the ten cases where pilots took evasive action, the drone involved was not recovered. It’s unclear how the registration requirement would address the safety issues in such cases or increase accountability.

Also left unspecified was how the agency intends to deal with existing drones. The agency appears to be assuming the requirement will apply retroactively. “One of the things the task force will look at is what sorts of provisions will be made for people who already own drones. We would expect retroactive registration. There may be a grace period, the task force will make a recommendation,” Foxx said.

In addition, whether the FAA is limited in its ability to require registration by existing legislation governing the FAA’s authority over recreational drone users remains uncertain. The FAA Modernization and Reform Act of 2012 included limits on the FAA’s ability to make rules or regulations for model aircraft under 55 pounds flown strictly for recreational or hobby use. We expect the FAA will face legal challenges to its authority to make registration a requirement for recreational drone use.

Finally, some industry observers are extremely skeptical of the FAA’s ability to create a registration system on the timeline the agency has proposed. Jim Williams, the former top drone official at the FAA, told the *Wall Street Journal* that the timeline was “unprecedented” and if the FAA managed to hit its goals, “[i]t would be the most amazing feat of governance I’ve seen in my 33 years in the federal government.”

THE SKYPAN FINE: FACTS OF THE INCIDENT

The FAA’s recent registration announcement follows the announcement of a nearly \$2 million proposed civil penalty against an urban drone operator—SkyPan International—for “endangering the safety of our airspace.”

Client Alert

SkyPan is a Chicago-based aerial photography company. According to SkyPan's website, the company uses proprietary Remote Piloted Vehicles (RPVs) to shoot aerial and panoramic photographs for developers and construction and marketing companies. SkyPan is a Section 333 UAS Exemption Holder for flying its RPVs to conduct its commercial operations, but that exemption is subject to strict limitations.

The FAA alleged that SkyPan conducted 65 unauthorized commercial UAV flights over New York City and Chicago airspace between March 21, 2012 and December 15, 2014, including 43 flights that flew in the highly restricted New York Class B airspace without air traffic control clearance. The FAA alleges that the operations violated airspace regulations and various operating rules as the UAVs used in flights did not meet federal requirements. The UAVs in question were flown without the necessary air-traffic-control clearance and were not equipped with two-way radios, transponders, and altitude-reporting equipment. The drones also lacked airworthiness certificates and effective registrations, and SkyPan did not have a Certificate of Waiver or Authorization from the FAA for the operations.

In its press release, the FAA alleged that SkyPan operated the aircraft in a "careless or reckless manner so as to endanger lives or property." Huerta said, "Flying unmanned aircraft in violation of the Federal Aviation Regulations is illegal and can be dangerous. We have the safest airspace in the world, and everyone who uses it must understand and observe our comprehensive set of rules and regulations." The press release is available here: https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19555.

SkyPan has 30 days after receiving the FAA's enforcement letter to respond to the agency, and potentially appeal the proposed penalties.

THE FAA STIRS

The proposed penalty is almost a hundred times greater than any past fine for drone operations. According to the FAA's spokesperson, Les Dorr, the largest fine before the proposed action against SkyPan was lodged against Xizmo Media, a New York video production company, for \$18,700. Dorr indicated that most fines have ranged between \$1,100 to \$5,000.

The FAA stated that one reason for the size of the fine was that FAA inspectors had issued several warnings to SkyPan regarding the flights, but the company had continued with its activities. Huerta stated that "Clearly this was not inadvertent, someone making a mistake. What we saw here was a pattern of disregard for FAA rules." Huerta said SkyPan stopped violating the rules this year, and the FAA approved SkyPan to use drones commercially after it submitted a plan to mitigate risk.

Increasing concern on the part of legislators may help explain the FAA's new sense of urgency. On October 7, 2015, the House Subcommittee on Aviation convened a hearing on "Ensuring Aviation Safety in the Era of Unmanned Aircraft Systems," which focused on ensuring aviation safety in the era of UAVs. In the face of the increasing popularity of UAVs in the United States, the panel voiced concern about the FAA's lack of progress in curtailing the risk of the sheer number of UAVs in U.S. airspace.

More recently, on October 28, the Senate Subcommittee on Transportation, Housing & Urban Development questioned FAA chief Huerta on the agency's failure to meet deadlines for finalizing drone regulations and how

Client Alert

the agency planned to deal with safety concerns. Reading from a prepared statement, Huerta called out the SkyPan fine as “a clear message to others who might pose a safety risk: Operate within the law or we will take action.”

Even as the FAA sent a clear message on safety, however, Huerta’s comments raised additional questions about the scope of the proposed registration requirement. The FAA chief hedged on whether the registration requirement would extend to model aircraft, highlighting the ongoing uncertainty around the agency’s next steps.

QUESTIONS REMAINING

The proposed SkyPan fine indicates to drone operators that the FAA will pursue vigorous enforcement actions, on a scale not previously seen, against those operators flagrantly violating the rules. Yet the details of SkyPan’s flights have raised questions about how broadly the FAA intends to wield this authority. SkyPan itself received a Section 333 UAS Exemption from the FAA in April this year, having submitted its application on December 22, 2014, shortly before the process was set forth in the NPRM.

The FAA’s allegations encompass flights occurring as far back as 2012, when the regulatory framework, and the scope of the FAA’s authority, was less certain than it is today. The agency’s proposed fine has intensified concerns about the lack of a clear regulatory framework governing UAV operators, particularly as SkyPan’s case shows the risk of large penalties for noncompliance.

Similarly, while the FAA has stated that the details of the registration requirement have yet to be determined, an FAA spokesman told the *New York Times* that failure to register a drone would trigger civil fines of up to \$27,500, and “if warranted,” criminal penalties up to \$250,000 or up to three years in jail, or both. The threat of such dire penalties, coupled with the extension of the registration requirement to existing operators, only heightens the stakes for the program and the potential threat to the drone industry generally.

NEXT STEPS

Between the SkyPan proposed penalty and the plan for a registration program, the FAA has demonstrated that it is willing to act to protect airspace safety. It remains to be seen, however, whether the FAA’s new aggressive enforcement stance and registration plans will actually lead to safer, or more predictable, skies.

Contact:

Christopher Carr
(415) 268-7246
ccarr@mofo.com

William O’Connor
(858) 720-7932
woconnor@mofo.com

About Morrison & Foerster:

Client Alert

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.