

Client Alert

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Drones: When, Why, and How Will the FAA Investigate Unauthorized UAS Use?

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On July 15, 2014, the Federal Aviation Administration (FAA) published its latest National Policy Notice concerning drones, titled "Education, Compliance, and Enforcement of Unauthorized Unmanned Aircraft Systems Operators."¹ The Notice provides guidance to aviation safety inspectors investigating individuals or entities who operate their Unmanned Aircraft Systems (UAS) in a "non-compliant" way. The FAA published the Notice in response to the "increasing number of UAS-incident reports," in order to ensure continued safe UAS operations.

What Will the Aviation Safety Investigators Do? The Notice directs that investigators' first priority should be educating non-compliant drone users, not charging them. It declares that the "FAA will use outreach and education to encourage voluntary compliance."

To this end, the Notice recommends using "counseling" or "informational" letters to advise operators about regulatory compliance, and even attaches a "template informational letter" that describes the processes available to ensure that an operator's use of UAS is compliant. These processes include (i) limiting the use to recreational purposes; (ii) obtaining a Certificate of Waiver or Authorization; (iii) obtaining a special airworthiness certificate; or (iv) obtaining a Section 333 exemption.² Notably, the FAA maintains that these informational letters are "strictly advisory," and therefore would not constitute agency action against an operator.

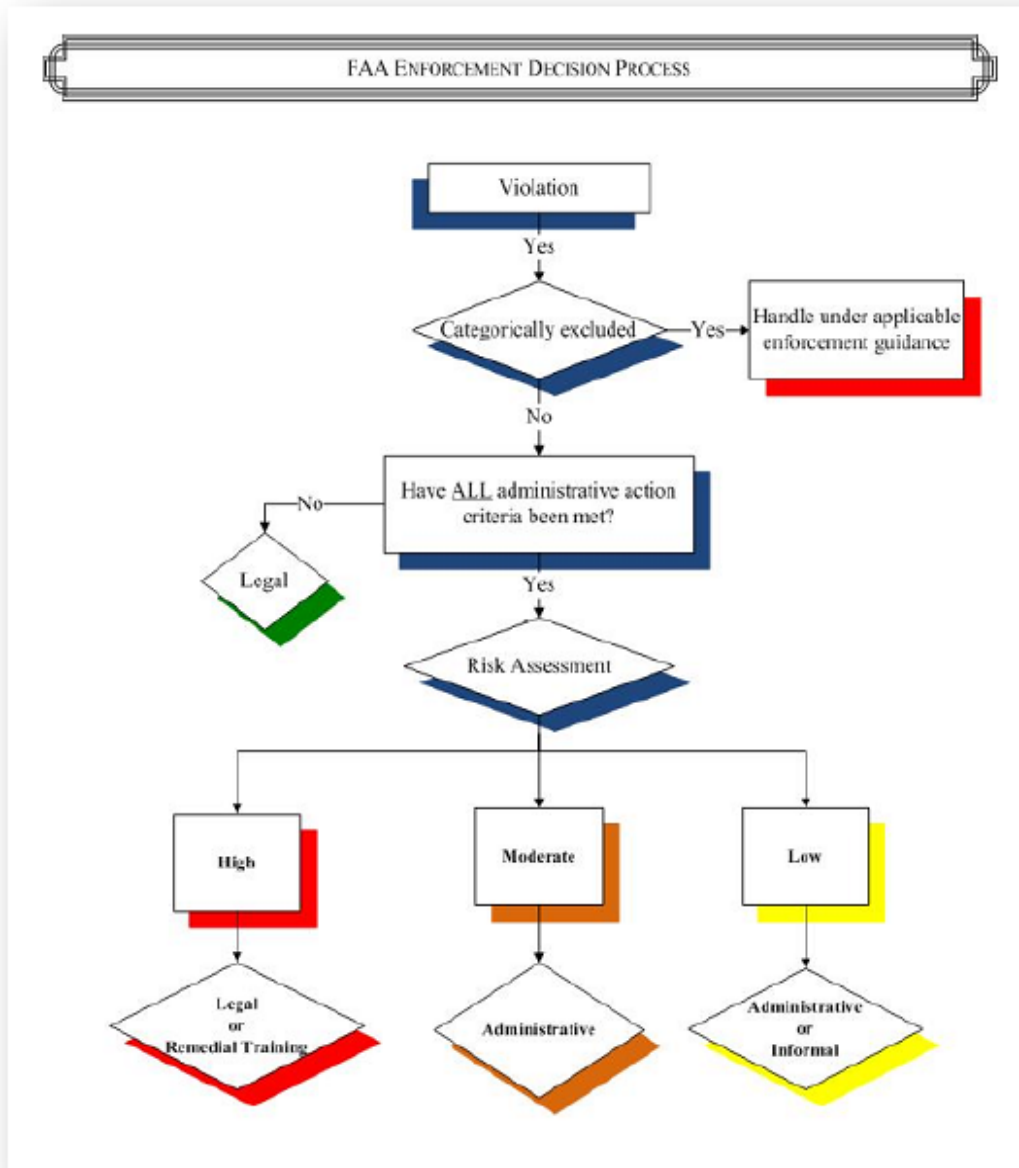
Only when informational counseling fails, or when the operator is "uncooperative or intentionally noncompliant," will administrative or legal enforcement action be appropriate. Even then, the Notice maintains that its focus is on "risk to safety," and thus such enforcement actions should be concentrating on UAS operations that pose "medium to high risk" to the National Airspace System. If it gets to the point of enforcement, the operator's name and a description of the circumstances will be entered into the FAA's Program Tracking and Reporting Subsystem database.

What Type of Enforcement Action Could an Operator Face? If an enforcement action is appropriate, the aviation safety inspector ("ASI") must evaluate whether to take administrative or legal action. In determining which to choose, the UAS Integration Office or Regional Counsel's Office will provide guidance, but inspectors should also be mindful of the "Enforcement Decision Process" set forth in Appendix F to FAA Order 2150.3B:

¹ The Notice is available at http://www.faa.gov/regulations_policies/orders_notices.

² For further discussion of these options, see the following Morrison & Foerster client alerts: Drones: A Bird's-Eye View of the (Non-Privacy) Legal Landscape for UAS, available at <http://www.mofo.com/~media/Files/ClientAlert/140520Drones.pdf>, and Drones: Hollywood's Requests for Regulatory Exemptions from the FAA Could Get UAS for Commercial Use Off the Ground, available at <http://www.mofo.com/~media/Files/ClientAlert/140604Drones.pdf>.

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It is clear that the type and severity of enforcement action a UAS operator may face for a violation will be highly dependent on the level of risk associated with the UAS operations. Formal administrative actions, which will be used to combat lower risk activities, may include warning notices, letters requesting corrective action, and letters of investigation. Legal enforcement sanctions, which will be used to address high risk operations, are more serious, ranging from remedial training to civil penalties, to indefinite operator certificate suspension or certificate revocation. Although certificate revocation would certainly act as a deterrent for a certified pilot, the level of deterrent for UAS operators (many of whom are currently operating without certification) is yet to be seen.

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What Does It Mean? Operators should be aware that inspectors now have some guidelines for investigating and pursuing non-compliant UAS use. At bottom, however, inspectors maintain wide discretion in how they conduct their investigations and pursue enforcement measures against alleged violators. There are also open legal questions as to whether the FAA has authority to pursue any enforcement proceedings related to UAS use in the first place. Perhaps the FAA's less aggressive approach to enforcement in the Notice is a reflection of the legal uncertainty regarding its authority.

We look forward to the FAA issuing its much-anticipated regulations related to small UAS operations. Hopefully then there will be some clarity for UAS users.

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