Client Alert

December 18, 2015

FAA Announces Drone Registration, but Legal Challenges Loom

By Christopher Carr, William O'Connor, Joanna Simon, William Goodwin, and Andrew Barr

[Note: In light of the FAA's announcement of the drone registry, we've revisited our recent analysis of its authority to require registration.]

On December 14, 2015, the FAA issued the much-anticipated "Registration and Marking Requirements for Small Unmanned Aircraft Interim Final Rule" (the "Interim Final Rule"). The incongruously named rule requires all operators of small unmanned aerial systems (sUAS)—drones weighing between .55 and 55 pounds—to register their drones through the FAA's new web-based process.[1] The registration process will be available starting December 21, 2015, and will apply to new and existing drones.

While the FAA adopted many of the recommendations made by the Unmanned Aircraft Systems Registration Task Force Aviation Rulemaking Committee,[2] the Interim Final Rule is sure to generate controversy. From the FAA's use of "emergency" rulemaking, to the applicability to the model aircraft community, to the efficacy of registration in addressing safety concerns, it remains highly likely that the FAA's "interim final rule" will face legal challenges before it loses its "interim" label. In fact, the Academy of Model Aeronautics (AMA) is recommending members hold off on registering their drones for now to give the organization time to "fully consider all possible options."

THE FAA'S REGISTRATION RULES

Borrowing heavily from the Task Force's final report, which reflected a "general consensus" of major industry voices from Google X to DJI, the FAA's new Interim Final Rule includes the following:

1. Only individual or recreational users who are U.S. citizens and at least 13 years old may register their sUAS using the web-based registration process. All other operators, including business entities, must continue registering through the paper-based registration process set forth in part 47.
2. Owners who purchased the sUAS prior to December 21, 2015 will have 60 days to register.
3. Owners who purchase a sUAS on or after December 21, 2015 must register the sUAS prior to operating in the National Airspace System (NAS).

[1] www.faa.gov/uas/registration.

[2] http://www.faa.gov/uas/publications/media/RTFARCFinalReport_11-21-15.pdf.

4. Online registration requires submission of the owners name, physical address, mailing address, and email address. The make, model, and serial number does not necessarily have to be provided.

5. Registration will cost $5 per owner, but is free until January 21, 2015. This grace period is calculated to encourage speedy registration of sUAS.[3]

6. Registrations must be renewed at least as often as every three years.

7. The registration number, which is unique to the owner, must be marked on each sUAS in a readily accessible manner.

8. Failure to register a sUAS may result in civil and/or criminal penalties. On the civil side, an operator could face up to $27,500 in penalties. Not to be outdone, the criminal penalties range from fines of up to $250,000 to imprisonment for up to three years.

9. Drones that weigh 250 grams or less, including the aircraft, payload, and any other associated weight, are exempt from registration.

While few of the requirements come as a surprise, the Interim Final Rule leaves many questions unanswered. For example, how useful will a registration number be in the event a drone actually collides with, and is completely destroyed by, a manned aircraft? What good is the 250 gram exemption when nearly every drone, even toys, weighs more than that? What is the rationale that a "failure to register," by itself, should carry the risk of three years in prison, particularly for recreational operators who have been flying their sUAS for years? And how will the registration requirement help inform and educate new users when it will be implemented *after* most of the holiday season's drones have been purchased?

The FAA implicitly acknowledged some of these questions, and many more, in a FAQ it released along with the rule, but until the agency begins enforcement, it remains to be seen how effective and how onerous the requirements will truly be. More problematic, however, are the possible legal challenges associated with the process the FAA used to promulgate the Interim Final Rule.

THE FAA'S "EMERGENCY" RULEMAKING

According to the FAA, registration will serve the dual goals of promoting accountability in the event of an incident and educating operators on federal regulations pertaining to sUAS. While laudable aims, they are distinct from the justifications the agency has offered for its accelerated rulemaking process.

Under the APA, the FAA cannot make rules without giving the public a 30-day period to comment.[4] In limited circumstances, however, an agency can forgo the standard notice-and-comment requirements and directly issue

[3] Technically, all registrants will be charged $5, but this fee will be refunded if it occurs in the first 30 days of the Interim Final Rule being effective.

[4] *See* 5 U.S.C. § 553(b).

a final rule.[5] When an "agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," the notice-and-comment period can be bypassed.[6]

Such "emergency rulemaking" usually follows situations that require immediate action (such as a natural disaster), minor technical amendments that do not affect the substantive law, or instances where Congress has directed the action in legislation. Here, the FAA has considered the absence of rules regarding public registration of drones to be an "emergency," and has determined that "[g]ood cause exists for making this regulation effective less than 30 days from the date of publication because it relieves a significant number of owners from the burden of complying with the paper-based, time-consuming part 47 registration process."

In other words, the FAA promulgated the Interim Final Rule without allowing for the traditional notice-and-comment period. Under the "good cause" exemption, the FAA itself has determined that it was justified in invoking emergency rulemaking, and as a result, any challenge to its decision may only be filed after the rules are promulgated. Despite courts' cautioning they will "narrowly construe" agency actions utilizing the emergency rulemaking exception, in reality the agency's action is often left untouched.

As evidence supporting its "good cause" finding, the FAA has noted the significant increase in sUAS expected to enter the NAS in the coming weeks and months. Citing reports of dangerous and/or unauthorized operation of sUAS during 2015, including expressly referencing the $1.9 million enforcement action against Skypan, the FAA determined "that it is *impracticable* and contrary to the public interest in ensuring the safety of the NAS and people and property on the ground to proceed with further notice and comment on aircraft registration requirements for small unmanned aircraft before implementing the streamlined registry system established by this rule."[7]

In this context, "impracticable" generally refers to a situation in which the required execution of agency functions would be unavoidably prevented by public rulemaking proceedings. However, "time constraints" and the "imminence of a deadline" are considered "inadequate justifications to invoke the good-cause exemption, *especially when it would have been possible to comply with [a] statutory deadline*."[8] The FAA cannot create its own "emergency" (intentionally or otherwise) by delaying announcement of proposed rules or setting an arbitrarily imminent deadline.

After the FAA announced its intention to create a registration requirement, numerous organizations expressed concerns over the FAA's fast-track approach, prior to the release of the Interim Final Rule. To its credit, the FAA documented these concerns, but the agency failed to advance any new justification for dispensing with the required rulemaking proceedings. Rather, the FAA supported promulgation of the Interim Final Rule with evidence regarding increasing sUAS incidents.

---

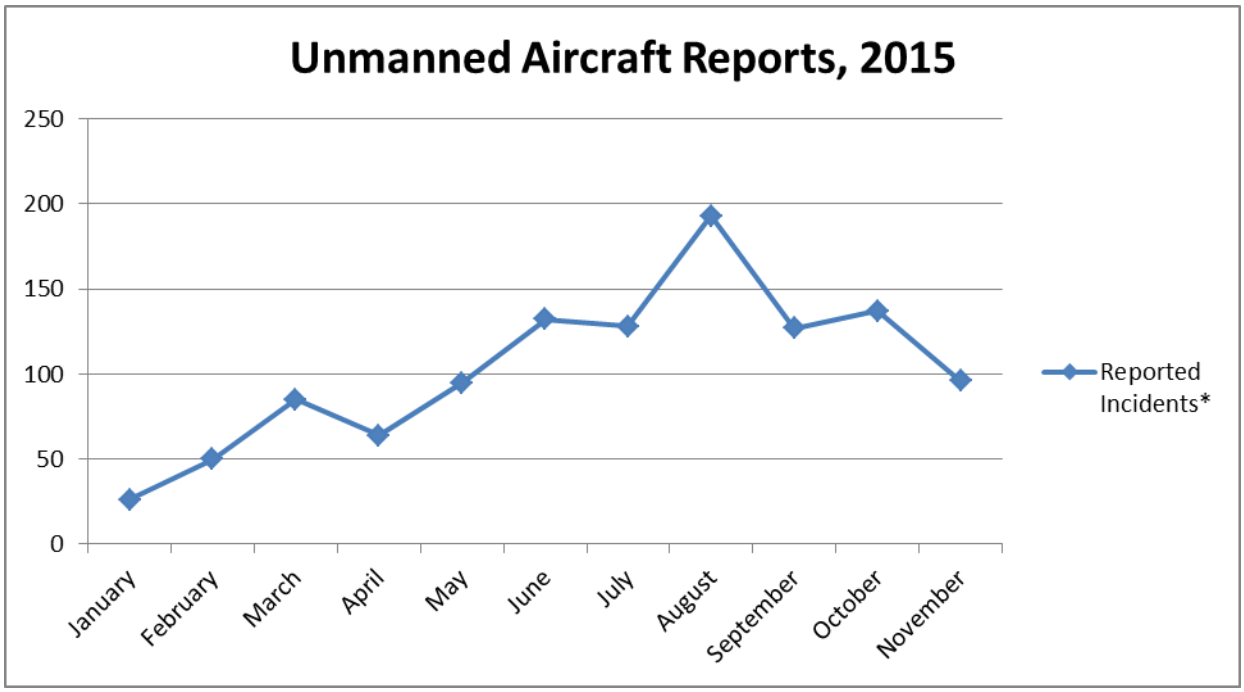
[5] Ibid.

[6] 5 U.S.C. § 553(b)(3)(B).

[7] Interim Final Rule, § III. The FAA states that it "will consider additional comments received following publication of this IFR and make any necessary adjustments in the final rule," but in all likelihood the Interim Final Rule will not be changed in any material way.

[8] 2 AM. JUR. 2D *Administrative Law* § 185 (2012) (emphasis added).

Curiously, however, the FAA's own evidence is far from unambiguous. The rule states "[s]ince February 2015, reports of potentially unsafe UAS operations have more than doubled[.]" Yet the FAA's own information paints a murkier picture. Far from the hockey stick line one might expect, a graph of the sUAS reports cited by the FAA shows an overall increase, but not the volume or growth one would expect from a crisis.



* The FAA defined these incidents as "reports of unauthorized and potentially unsafe UAS operations."

As a result, it will be difficult for the FAA to stop critics from raising the question: Is the Interim Final Rule valid?

On February 14, 2012, in the FAA Modernization and Reform Act of 2012 (the "2012 Act"), Congress instructed the FAA to issue rules for the "safe integration" of UAS by September 30, 2015. Although the FAA issued a Notice of Proposed Rulemaking, and the comment period has closed, the FAA has yet to finalize these rules, despite nearly *four years* lapsing between Congress's mandate and today. Because the holiday shopping "deadline" is the impetus for the FAA's "emergency" rulemaking, it seems that the FAA is the cause of its own crisis, and its action may be vulnerable if challenged.

In an analogous situation, the FAA claimed that "good cause" was present, and it bypassed the notice-and-comment requirements, when promulgating Penalty Rules for violations of FAA regulations.[9] There, a private

[9] *Air Transport Assoc. of Am. v. Dep't of Trans.*, 900 F.2d 369 (D.C. Cir. 1990) ("[T]he FAA is foreclosed from relying on the good cause exception [from the APA,] by its own delay in promulgating the Penalty Rules. The agency waited almost nine months before taking action to implement its authority under section 1475. At oral argument, counsel for the FAA conceded that the delay was largely a product of the agency's decision to attend to other obligations. We are hardly in a position to second guess the FAA's choices in determining institutional priorities. But insofar as the FAA's own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke

petitioner challenged the FAA's action and a federal appellate court held that the FAA was required to follow the APA's notice-and-comment requirements because the rule substantially affected the petitioner's (and others' similarly situated) substantive rights. The Court further pointed out that the "good cause" exception should be used for "housekeeping" matters, which are traditionally thought of as purely procedural rules. Notably, in that case, the FAA waited only nine months to begin promulgating the rules. Here, it has waited years.

If an agency can create its own emergency to bypass the APA's notice-and-comment requirements, public comment will effectively be optional for agencies. This not only creates perverse incentives for agencies directed to make rules for hotly debated topics (like drones) to do so through emergency rulemaking in the hopes of avoiding extensive and controversial public comment, but it also, ironically, threatens to *slow down* the entire rulemaking process, as lawsuits will inevitably follow such actions.[10]

HOBBLING THE HOBBYISTS?

In addition to the FAA's procedural shortcuts, the issues of both who and what the registry would encompass present legal challenges. Under the Interim Final Rule, registration applies to commercial and hobbyist users alike.

Traditionally, model aircraft flown for hobby or recreational purposes have not been subject to any registration requirements. This understanding was codified under Section 336 of the 2012 Act, which provides that "notwithstanding any other provision of law relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies . . . the Administrator of the Federal Aviation Administration may not promulgate any rule or regulation regarding a model aircraft," so long the aircraft meet certain criteria. Congress defined "model aircraft" under Section 336 as "an unmanned aircraft that is capable of sustained flight in the atmosphere, flown within visual line of sight of the person operating the aircraft, and flown for hobby or recreational purposes."

According to the FAA, the 2012 Act does not affect its ability to require registration of drones flown for hobby or recreational purposes. The agency's stance is that registration has been exempted for model aircraft only through the use of its own discretion, and that prior law unrelated to the incorporation of UAS into FAA plans and policies, specifically 49 U.S.C. 44101(a), gives it the authority to require registration of model aircraft.

In fact, the FAA uses this assumption to offer another justification for ignoring the rulemaking procedures. The Interim Final Rule notes that the burden on model aircraft and drone flyers would be enormous if they were required to register their craft using the current paper-based registration system. To avoid that "emergency," the FAA is justified in proceeding without the required notice-and-comment rules to relieve the burden that would otherwise fall on sUAS operators.

---

the need for expeditious action as 'good cause' to avoid the obligations of section 553(b).").

[10] Another potential problem for the FAA is Executive Order 12866, which requires agencies to complete a cost-benefit analysis for rules that, among other things, raise novel legal or policy issues. Given that drone registration will likely raise both novel legal and policy issues, such an analysis may be required.

As noted above, the FAA is facing another crisis of its own manufacture. Model aircraft operators have never had to register their aircraft. Absent the FAA's decision to require registration, there would be no burden on operators. Thus, the decision to require registration creates a burden so great that the FAA is justified in shortcutting the rulemaking process, a circular argument for the "streamlined" registration requirement.

The FAA's position is the latest move away from its hands-off attitude towards model aircraft, dating back at least to mid-2014. In June of last year, the FAA issued its "Interpretation of the Special Rule for Model Aircraft." There, the FAA claimed that model aircraft are "subject to all existing FAA regulations." More recently, the rules proposed in the Notice of Proposed Rulemaking for sUAS exempt various types of aircraft or flying vehicles from their ambit, such as moored balloons, kits, and amateur rockets, among others, but *not* model aircraft.

Taken together, the FAA's actions suggest that model aircraft are likely to be subject to increasing regulation. However, it is unclear how to reconcile the plain text of Section 336 of the 2012 Act with the FAA's registration scheme or with the FAA's own interpretation of Section 336, for that matter. In the Interpretation of the Special Rule for Model Aircraft, the FAA noted that "a model aircraft operated pursuant to the terms of section 336 would potentially be excepted from a UAS aircraft certification rule[.]" It is difficult to see how a registration requirement is different.

THE AMA RESPONDS

On Thursday, December 17, the AMA emailed its members in response to the Interim Final Rule and asked them to refrain from registering their aircraft with the FAA. The AMA has previously taken issue with the FAA's interpretation of the "Special Rule for Model Aircraft." Last August, the group filed a petition with the United States Court of Appeals for the D.C. Circuit challenging the FAA's interpretation, a challenge that is still pending.

In its email on Thursday, the AMA noted that the central issue is "whether the FAA has the authority to expand the definition of aircraft to include model aircraft; thus, allowing the agency to establish new standards and operating criteria to which model aircraft operators have never been subject to in the past." How the court rules on that question will determine whether model aircraft are aircraft, as the FAA views them.

The AMA already instructs its members to use a variety of precautions to address the same safety and accountability objectives of the FAA's drone registry, which puts it in a unique position of arguing against registration while explicitly recognizing some of registration's benefits. As the organization argued, however, "we also strongly believe our members are not the problem and should not have to bear the burden of additional regulations."

The AMA's recommendation to refrain from registration, its pending legal challenge, and the ongoing negotiations with the FAA all highlight the uncertainty that remains (the FAA's pronouncements notwithstanding).

CONCLUSION

The drone registry appears simple enough, and the FAA's desire to ensure the safety of the skies is a praiseworthy and reasonable goal. But lurking beneath the surface are complicated issues of agency process and the FAA's authority that threaten the registry's launch.

Client Alert

Contact:

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

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

About Morrison & Foerster:

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.