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Drones Regulation

The much-anticipated proposed rules for small—and micro—UAS that the FAA finally issued, essentially would create a blanket exemption for certain categories of operations that the FAA has deemed to be safe, authors William O'Connor, Christopher Carr, Joseph Palmore and Joanna Simon of Morrison & Foerster write.

Still to come, then, is a comprehensive set of rules to address more advanced, higher-risk operations. Stakeholders will welcome—and should comment on—the step forward that the FAA has taken, but they should keep the pressure on for a comprehensive proposal.

The Small Drones Rule: FAA Takes a Step in the Right Direction

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Over the weekend of Feb. 14, the FAA issued a much-anticipated Notice of Proposed Rulemaking (NPRM) for small Unmanned Aircraft Systems (UAS)—i.e., drones weighing less than 55 pounds. The oft-delayed NPRM comes three years after Congress—through the FAA Modernization and Reform Act of 2012 (the “2012 Act”)—directed the FAA to develop and implement “comprehensive” regulations to safely integrate drones into the national airspace. The NPRM ini-

tiates what is expected to be a years-long process of rulemaking to establish the regulatory regime for drones of all shapes and sizes.

By and large, the NPRM represents a practical approach to allowing low-risk UAS operations during the day in uncongested airspace within the visual line of sight of the operator and subject to speed, altitude and weight restrictions. The NPRM also creates a new class of UAS pilot qualifications, recognizing that the FAA's current process for pilot certification is not a good fit for UAS.

No Big Surprises. For the most part, the restrictions proposed by the NPRM are a somewhat more relaxed version of those the FAA has been imposing on operators who sought early permission to operate through the Section 333 Exemption process. Additionally, the NPRM also contemplates the possibility of adopting much less stringent restrictions for UAS weighing less than 4.4 pounds, recognizing the reduced risk profile associated with these “Micro UAS.” It's likely that, on balance, the NPRM will be viewed by many with an interest in commercial and other uses of drones as a step in the right direction.

Practical as it may be, it's worth noting that *this* NPRM is not the “comprehensive” set of regulations that Congress mandated the FAA issue in Section 332 of the 2012 Act. In fact, the NPRM uses Section 333 of the 2012 Act as the basis for its authority to issue the present NPRM, not Section 332(b), which mandates the “comprehensive” rulemaking. Section 333 merely per-

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mits the FAA to allow some UAS operations in the national airspace *before* the comprehensive rulemaking required by Section 332(b) takes place. In view of this, it makes sense that the restrictions proposed by the NPRM in some respects mirror those in recent Section 333 Exemption grants. Essentially, this NPRM creates a blanket Section 333 Exemption for certain categories of operations that the FAA has deemed to be safe. The NPRM is the FAA's way of incrementally permitting limited UAS operations in advance of its comprehensive effort to fully integrate UAS into the national airspace.

What is notable about this approach is the FAA's signaling that a comprehensive set of rules to address what the FAA views as more advanced, higher-risk operations is still to come. This future "comprehensive" rulemaking will likely address UAS operations that would not be authorized by the rules proposed in the current NPRM, including autonomous operations beyond the visual line of the sight of the operator and those that require sense and avoid technology.

The FAA's incremental approach is likely to please operators with low-risk profiles. It permits limited UAS operations, buying the FAA time to understand the state of advanced UAS technology, create a plan to incorporate UAS into its NextGen implementation and oversee development (likely in partnership with NASA) of "highways in the sky" for advanced UAS operations in more crowded airspace. It also shows, however, just how far behind the industry the FAA actually is, in not authorizing – at least for now – the use of advanced UAS technology that could revolutionize how business is done.

How We Got Here.

The road to the NPRM has been long and winding, starting with FAA's 2007 Policy Statement, "Unmanned Aircraft Operations in the National Airspace System." There, the FAA laid out a blanket prohibition on UAS operations: "No person may operate a UAS in the National Airspace System without specific authority[.]" According to the FAA, there was only one way to obtain that authority: "apply directly to the FAA for permission to fly."¹ The 2007 Policy Statement recognized that "[r]egulatory standards need to be developed to enable current technology for unmanned aircraft to comply with Title 14 Code of Federal Regulations[.]"

In 2012, Congress formalized the FAA's regulatory mission: "provide for the safe integration of civil unmanned aircraft systems into the national airspace system[.]" But the FAA lagged (and continues to lag) behind the ambitious schedule that Congress set for it. Indeed, the present NPRM is merely a first step toward integration in a "phased" approach that is likely to take the FAA years to complete. As noted above, the proposed rule does not purport to implement Congress's mandate in the 2012 Act to issue comprehensive regulations.

Operational Limitations and Operator Qualifications.

The NPRM's key provisions affecting operations for UAS weighing up to 55 pounds can be placed into two

categories: those concerning the operation of the UAS and those concerning the operator of the UAS.

With regard to the first category—operational limitations—the FAA essentially stuck to the existing Section 333 exemption script, with a few minor adjustments. Operations must be conducted during the daytime, and the operator must have the UAS in his visual line of sight (if operating the UAS alone), or be capable of having the UAS in his visual line of sight (if operating with the aid of a visual observer). Operations cannot be conducted over people who are not involved in the operations, and must be done at less than 100 MPH (87 knots) and no more than 500 feet above the ground. These parameters should allow for many rural and contained uses of UAS, including applications for industrial-scale agriculture; energy generation, transmission, production and pipeline facilities; transportation infrastructure, including railways, roads, ports and waterways, and the rolling stock, vehicles and vessels that use them; private and public emergency response (e.g., fire, flooding); and resource assessment, monitoring and compliance.

The FAA opted to create a new category of airman certificate for small UAS operators.

With regard to the second category—operator qualifications—the FAA departed from its past Section 333 Exemptions (and what many expected) by not requiring that a UAS operator have a private pilot's license. Recognizing that requiring a private or commercial license would pose an "undue burden" on UAS operators and would have "limited relevance to the nature of small UAS operations," the FAA instead opted to create a new category of airman certificate for small UAS operators. In order to be certified, an operator would have to (i) be at least 17 years old; (ii) pass an initial knowledge test; (iii) be vetted by the TSA; (iv) obtain an unmanned aircraft operator certificate with a small UAS rating; (v) pass recurrent testing; and (vi) make the UAS available to FAA for inspections, as well as report accidents to the FAA and conduct certain pre-flight inspections.

Different Standards for Micro UAS.

The FAA is also seeking comment on whether it should adopt a different set of rules for Micro UAS—i.e., drones weighing up to 4.4 pounds that are made out of frangible materials that break or yield on impact, so as to present a minimal hazard to persons or structures with which the Micro UAS may collide. The key proposed operational limitations for Micro UAS would be: (i) a maximum airspeed of 30 knots; (ii) a maximum altitude of 400 feet above ground level; (iii) a maximum distance from the operator of 1,500 feet within the unaided visual line of sight of the operator; and (iv) operations conducted in Class G (unrestricted) airspace only. These limitations are, in large part, based on the rules already adopted by Transport Canada.

Most importantly, the NPRM contemplates that Micro UAS operations may be conducted "directly over people not involved in the operation." Authorizing such operations directly over uninvolved individuals may

¹ The 2007 Policy Statement was not itself legally binding. To this day, it remains an open question whether drone flights for commercial purposes are ipso facto prohibited by federal law. See <http://tinyurl.com/p7vtfkn>.

have significant implications for many urban operations, which—simply put—would not be permitted under the proposed rules applicable to UAS weighing between 4.5 and 55 pounds. The Micro UAS rules are also likely to raise additional privacy concerns not present when operations are not permitted over uninvolved people.

The operator qualifications for Micro UAS would also be different than those for other small UAS. The FAA is contemplating that no knowledge testing would be required in order to obtain a Micro UAS rating; instead, the operator would simply be required to submit a signed statement to the FAA stating that he has familiarized himself “with all the areas of knowledge that are tested on the initial aeronautical knowledge test” applicable for a small UAS rating.

Absent From the NPRM: An Express Preemption Provision.

Also important is what the NPRM lacks. For example, it does not propose an express preemption provision, despite significant lobbying, including a formal petition filed with the FAA, by certain groups for such a provision. This leaves open the possibility that state and local governments may attempt to regulate UAS operations differently from the manner proposed by FAA in the NPRM. Absent an express preemption provision in the final rules, such state and local regulation would not be foreclosed at the threshold, but would instead have to be analyzed under existing conflict preemption principles on a case-by-case basis.²

Participation in the Process.

Release of the NPRM commences a 60-day comment period. That period may be extended by the FAA to allow interested parties additional time to comment on the proposed rule. The FAA specifically requests comments on a number of important issues that seem to reflect the agency’s recognition that further regulation should take account of the rapid advances in UAS technology and be open to the burgeoning commercial uses of UAS. These include whether:

- Regulation should be performance-oriented;
- Operating restrictions should be relaxed based on new UAS technology;
- Package delivery for payment should be permitted;
- Special air carrier certification should be specified; and
- Micro UAS classification and provisions should be developed.

After the comments period closes, the FAA is expected to take additional time to analyze the comments

and implement necessary changes before issuing the final rules.

Issuance of final rules, however, will not be the end of the story. We expect to see at least some judicial challenges to the final rule. These challenges may come in two forms: (i) challenging enforcement actions taken pursuant to the regulations, and (ii) direct challenges to the rule itself. Challenges to the rule itself are likely to be heard faster, as they’ll be filed and heard directly in the courts of appeals. *See* 49 U.S.C. § 46110. Challenges to enforcement actions would necessitate a longer process, as administrative remedies will need to be exhausted before seeking judicial relief. *See* 14 C.F.R. § 406.179.

What’s Next?

Interested stakeholders should be cautiously optimistic with the approach suggested by the NPRM. Those supporting commercial and other uses of drones should plan to participate in this rulemaking, both to endorse the positive aspects of the FAA’s proposals and to critique those that are overly restrictive. Comments providing discussion of real-world, socially and economically beneficial uses of this technology, and how the proposed rules could encourage or hinder them, would be particularly powerful. Industry should also continue to put pressure on the FAA to issue the comprehensive regulations mandated by Congress, lest the FAA fall even further behind the technology, causing additional delay in the rulemaking process.

Companies should also continue to file individual Section 333 Exemption applications while the NPRM process continues. It is not known when the FAA will issue final rules, and it could take a considerable amount of time. So those with an immediate desire to use UAS in their operations should seek authority to do so before the rulemaking is complete.

Presidential Memo on Privacy. Finally, interested parties should be cognizant of privacy and other issues raised by the NPRM. In conjunction with the FAA issuing the NPRM, President Barack Obama issued a Presidential Memorandum to the executive departments and agencies of the federal government highlighting steps that the federal government should take to protect privacy, civil rights and civil liberties in operating UAS domestically. For example, the Presidential Memorandum requires that executive agencies that collect information through UAS have policies and procedures that limit such collection, as well as the retention and disclosure of any information that is collected.

The Presidential Memorandum also establishes a multi-stakeholder process to be led by the National Telecommunications and Information Administration to develop best practices for privacy, accountability and transparency in the commercial and private use of UAS. As a result, even though the FAA will not address privacy issues in its rulemaking, the President has put in place a process to address these issues in a non-regulatory manner, absent the Congress enacting legislation on the issue.

² *See* “May State and Local Governments Control Low Flying Drones?” available at <http://tinyurl.com/k94sfoz>.