

Client Alert

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Drones: Why You Should Start Thinking Now About the Anticipated UAS Regulations

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With drone technology rapidly advancing and the FAA recently starting to open the door to commercial drone use,¹ companies across industries should begin evaluating how drones can add value to their businesses, if they have not already done so.

Drones can benefit a wide range of industries and activities, including (to name only a few): industrial-scale agriculture; energy generation, transmission, production, and pipeline facilities; other conveyances and linear projects (such as water and flood control); 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); insurance and accident inspection; and resource assessment, monitoring, and compliance. But without input from leaders in these industries, their use of drones may not be realized in the foreseeable future. Industry leaders need to demand that the FAA's much-anticipated Notice of Proposed Rulemaking (NPRM) for small UAS—now expected to be issued in the first half of December—is reasonable and practical for the wide range of industries and activities, and fosters drone use and innovation while responsibly ensuring public safety.

BACKGROUND OF THE NOTICE OF PROPOSED RULEMAKING FOR SMALL UAS

FAA rulemaking for drones was mandated by Congress as part of the FAA Modernization and Reform Act of 2012. The law requires the FAA to “provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015.”

The NPRM for small UAS (meaning UAS that weigh less than 55 pounds) was expected sooner—with Congress requiring the FAA to issue a final rule by August 2014. But the agency is notably behind this schedule. According to the latest publicly available information regarding the rulemaking, the NPRM for small UAS will issue in November 2014. We believe, however, that the FAA is more likely to issue the NPRM in mid-December. Moreover, in fall 2013, the DOT declared a deadline of May 2014 for issuing the small UAS NPRM, which it extended. That could happen again. The NPRM will initiate what is expected to be a decade of rulemaking to establish the regulatory regime for drones, large and small.

WHAT WILL THE PROPOSED REGULATIONS SAY?

More important than the timing of the NPRM, however, is its expected content. This rulemaking is going to be

¹ On September 5, 2014, the FAA granted six aerial film companies exemptions to begin commercial use of UAS for the purposes of closed-set filming for the motion picture industry. For more information, please read our client alert, available at <http://www.mofo.com/-/media/Files/ClientAlert/2014/09/140926drones.pdf>.

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comprehensive, designed to adopt specific rules for the operation of small UAS in the national airspace. The proposed regulations are likely to address classification of small UAS, certification and training of pilots and visual observers, registration, approval of operations, and operational limitations. Additionally, there will likely be provisions requiring the FAA to collect safety data from the user community.

Operational limitations and certification requirements that the FAA may require can be gleaned from the exemption requests that the FAA granted for the commercial use of small UAS in film production late last month. These exemptions—while allowing limited commercial use—remain highly restrictive. They permit the use of specific drone models that must fly at speeds below 50 knots and be equipped with advanced GPS systems. The flights must be conducted below 400 feet and within the visual line of sight of the pilot in command, who must possess at least a private pilot's certificate. Flight plans of activities are required to be submitted to the local Flight Standards District Offices three days in advance of the operations, and the operators must obtain specific waivers from the relevant air traffic organizations.

If the FAA attempts to impose these types of restrictions on small UAS operations across the board, the utility of drone operations for many industries may be severely limited, if not extinguished. For example, using drones to inspect pipelines and power lines over long distances would prove impossible if the FAA imposes a visual line of sight requirement. Similarly, requiring a private pilot's certificate for all operations may hinder the ability of farmers to use drones for precision agriculture, or realtors to use drones to obtain aerial footage of properties. Simply put, a one-size-fits-all approach will not work for the small UAS regulations. Given the FAA's historical concerns and agency culture, there is reason for concern.

WHAT CAN BE DONE NOW?

Companies and trade associations interested in obtaining the benefits of small UAS should start formulating plans now to help shape the NPRM and the regulations that will come out of it. They need not wait for the NPRM to issue.

The FAA can be petitioned in advance of the NPRM with broad requests to include or exclude certain provisions. Moreover, comments can be submitted on pending Section 333 exemption requests. These comments can be narrow and limited to why the specific exemption request should or should not be granted; or they can be broad, sweeping commentary on the current status of the FAA's position on small UAS operations. Several well-known associations have already begun commenting on the exemption requests, including the Aerospace Industries Association, the National Agricultural Aviation Association, the Association for Unmanned Vehicle Systems International, and the Air Line Pilots Association International.

Industry leaders should also plan to comment on the NPRM once it is issued. This will require careful consideration of the current operating environment, as well as a keen eye toward potential future uses for UAS. Industry should seek to ensure that small UAS operations are not unduly restricted, while taking into account the risks associated with, and potential unintended consequences of, expanding UAS operations.

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