Client Alert

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Huerta v. Pirker—NTSB Says No More "Gray Area" for Drone Operations

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Unmanned aircraft systems (UAS) have operated within an uncertain legal framework while players across a rapidly growing range of commercial industries—from energy to rail transport to forestry to all types of infrastructure development to logistics—deploy UAS to conserve resources, improve safety and expand operations. This week, the National Transportation Safety Board (NTSB) issued a decision that directly speaks to the Federal Aviation Administration's (FAA) authority to regulate UAS and their operators. The decision provides insight into the regulatory framework currently applicable to UAS and foreshadows a surge of regulations the FAA is expected to promulgate in the coming months. Most importantly, the decision sends the strong message that UAS operators should proceed with caution. It makes clear that an operator's actions today may entail significant liability even before future regulations issue.

CAN THE FAA CURRENTLY SANCTION A UAS OPERATOR?

In March 2014 an administrative law judge (ALJ) issued an order vacating a $10,000 civil penalty assessed by the FAA against Raphael Pirker based on his UAS operations. The FAA alleged that Pirker carelessly or recklessly operated a Ritewing Zephyr unmanned aircraft in violation of 14 C.F.R. § 91.13(a), which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The ALJ found that Pirker's unmanned aircraft did not qualify as an "aircraft" subject to FAA regulation under the statute.

In an order issued November 18, the NTSB reversed the ALJ's decision in its entirety. The NTSB addressed two questions: (1) whether Pirker's drone qualifies as an "aircraft" that falls within the FAA's enabling statute and (2) whether Pirker's drone is subject to 14 C.F.R. § 91.13(a). The NTSB answered both questions in the affirmative.

First, the NTSB found that the plain statutory language defines an aircraft as '"any' 'device' that is 'used for flight.'" The FAA has refrained in the past from regulating model airplanes and other small aircraft. But, according to the NTSB, the FAA's previous forbearance from regulating these smaller aircraft does not affect its statutory authority to do so.

The NTSB also found that the Administrator's application of 14 C.F.R. § 91.13(a) to drones is a reasonable interpretation of the regulation. The NTSB rejected the contention that this interpretation was inconsistent with previous ones.

WHAT'S THE LAW NOW?

If you are operating a UAS for commercial purposes, it is plain that both the FAA and the NTSB believe the existing Federal Aviation Regulations (FARs) apply to you. The extent to which they apply and the likelihood of sanction, however, remain unclear. Several factors contributed to the FAA's enforcement action against Pirker, including that he (1) piloted his UAS at exceptionally high and exceptionally low altitudes, considering the nature of the aircraft; (2) operated the UAS amid a dense population on the University of Virginia's campus, causing one individual to take immediate evasive action to avoid injury; and (3) flew the craft within 100 feet of an active heliport.

It is likely that the FAA will choose its civil violations carefully, focusing on truly "reckless" operations, as opposed to more benign UAS flights. The FAA may have been trying to signal just this in its press release on the NTSB decision when it said: "the agency may take enforcement action against anyone who operates a UAS or model aircraft in a careless or reckless manner." However, it is also conceivable that the FAA could take a hard line, applying the existing FARs to all UAS operations within a populated area, or at certain altitudes, or when conducted by an individual without a pilot's license, for example, essentially treating such drone operations as presumptively careless or reckless.

Importantly, the NTSB decision *did not* say that flying a drone, as such, is prohibited; while flying a drone without an FAA authorization (such as described below) is, necessarily, "not permitted," the NTSB decision did not go so far as to declare such operations illegal (despite the FAA consistently taking the position UAS operations are illegal unless permitted). Flying a drone "in a careless or reckless manner," by contrast, is prohibited, and, therefore, illegal. This is a critical distinction for drone operators to bear in mind as they evaluate risks and options.

WILL THE LAW CHANGE OR BECOME CLEARER?

Hopefully, yes. The FAA Modernization and Reform Act of 2012 (the "2012 Act") requires the FAA to issue regulations that safely integrate UAS into the national airspace system. The FAA did not meet the initial timeline for publishing a UAS Notice of Proposed Rulemaking (NPRM), so the Department of Transportation extended the deadline. Despite the delays, the FAA must indicate its regulatory intent through an NPRM in the near future.[1]

Even aside from the upcoming rulemaking, other developments could affect the law in this area. It is possible that Pirker will appeal the NTSB's ruling to a federal court of appeals because of the decision's broad and immediate regulatory implications. (Given that the NTSB remanded the matter to the ALJ, however, there may be a question about whether the NTSB's order is sufficiently final for purposes of judicial review.) A reviewing court could consider the reasonableness of the NTSB's interpretation of the statute, and whether its purported "plain meaning" approach to "aircraft" can be reconciled with the overall statutory context and the intent of the Congress that inserted that word into the statute at a time when UAS had not even been imagined. A reviewing court could also consider whether the FAA's previous regulatory guidance provided adequate notice to Pirker. The outcome

[1] For more information concerning the upcoming NPRM, see our client alert available at: http://www.mofo.com/~/media/Files/ClientAlert/2014/10/141022DronesUASRegulations.pdf.

of an appeal may not be significant in the long term, however, because a court of appeals win for Pirker would likely shield UAS operators only until the FAA finalizes forthcoming regulations.

WHAT IT MEANS FOR OPERATORS AND MANUFACTURERS

The NTSB's decision should not be viewed as putting an end to legal drone operations in advance of the upcoming NPRM. There are currently processes in place that a UAS operator may pursue to ensure compliance and limit liability. Under Section 333 of the 2012 Act, the Secretary of Transportation considers petitions for specific UAS to determine if they can operate safely. The FAA has already granted exemptions to several Hollywood filming companies that demonstrated in their petition that they could safely operate UAS in the course of filming and that the UAS were a safer alternative to the current aircraft and methods used to obtain aerial footage. Several other Section 333 petitions are pending.

Companies that currently rely on UAS or are seeking to implement UAS operations should file a petition for an exemption under Section 333. The decision in *Huerta v. Pirker* demonstrates that the FAA will not hesitate to impose civil sanctions. Although it is not yet clear whether a Section 333 exemption granted today will remain valid when the FAA promulgates new regulations, it is likely that the types of restrictions contained in Section 333 exemptions will be reflected in the upcoming NPRM. Thus, petitioners who qualify for an exemption will be a step ahead when the NPRM ultimately issues.

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