

Client Alert

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Drones: FAA Announces Pathfinder Program to Explore BVLOS and Urban Drone Operations

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The FAA's regulatory actions on unmanned aircraft systems ("UAS") are accelerating, making it more important than ever for those in the industry—and those looking to use this technology in their own sectors—to keep their eyes on Washington.

At a drone industry conference earlier this month, the FAA announced a new partnership to explore the future of UAS operations, beyond the limited range of operations permitted by the draft rules the agency released in February. The focus of the FAA program, called "Pathfinder," is on three areas that have been the subject of much discussion after the release of the draft rules: visual line-of-sight operations in urban and populated areas, extended line-of-sight operations in rural areas, and beyond visual line-of-sight operations.

The Pathfinder program bodes well for the future of drone regulation. In the wake of the Notice of Proposed Rulemaking (NPRM) for small UAS, many drone operators struggled to see how the FAA's rulemaking process could keep up with the pace of innovation, and permit the most promising technologies to take flight. Last week's announcement is a significant step by the FAA to formalize its efforts to understand the risks and rewards of increasingly sophisticated drone operations.

ACCELERATING AGENCY ACTION

The recent announcement is the latest example of the FAA's evolution in drone regulation. The process leading to release of the NPRM in February was slow, even by federal regulatory standards, as the agency struggled to meet its own deadlines to come up with rules for the sky. The NPRM was generally seen as a step in the right direction, but many in the drone industry and among potential users argued that the NPRM's proposed prohibition on drone operations beyond the user's line of sight limited some of the most significant potential applications of drones.

Since the NPRM's release, there have been several encouraging signs that the agency is taking a more flexible approach:

First, in late March, the agency relaxed the application process for Certificates of Authorization ("COAs"). Essentially, the FAA created a blanket COA for drone users who had already received an exemption from certain regulations (known as a "Section 333 exemption"). Previously, COAs covered relatively limited areas, requiring drone operators to apply for a new COA any time they wished to fly in another region, a process that could entail months before an FAA decision. Under the new COA, existing exemption holders can fly effectively anywhere nationwide under 200 feet, subject to a handful of safety restrictions (such as avoiding airports).

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Second, in April, the FAA acted quickly after Amazon said the agency had taken so long to approve its request to test delivery drones that its drones were obsolete by the time the FAA made its decision. Responding in a matter of weeks, the agency approved Amazon delivery test flights using its newer drones. Those flights could take place up to 400 feet high at up to 100 miles an hour over private property and within sight of the remote-control pilot or a designated observer.

Third, the FAA in April announced a summary grant process for Section 333 exemptions. Under this process, the FAA will continue to review each individual application, but will issue a summary grant where it finds that it has already granted a previous exemption similar to the request. The FAA also relaxed the requirement that the individual operator hold a commercial or private pilot certificate and at least a third-class airman's medical certificate. Going forward, the FAA will allow exemptions for individuals holding a sport or recreational pilot certificate, and a driver's license in place of a medical certificate. The lower standard is significantly easier to meet and reduces the burden (and especially costs) on drone operators.

Fourth, non-regulatory FAA actions in the drone world are coming at a faster clip as well. The FAA announced, in addition to the Pathfinder program, a new smartphone app, B4UFly, to help operators determine restrictions that may apply to their flight paths. The app announcement follows close on the heels of the release of AirMap.io, a free iOS and Android app created by Pepperdine School of Law professor Greg McNeal and Ben Marcus that shows users where it is safe to fly. A little over a week ago, the FAA announced that Mississippi State University will lead a team of 13 universities in running a new national center to research unmanned aerial vehicles. The Alliance for System Safety of UAS through Research Excellence (ASSURE) will help the FAA research technologies and systems to safely integrate drones and manned aircraft in the same airspace.

INDUSTRY ENGAGEMENT

The Pathfinder program signals an increasing effort to engage with the drone industry, even when the agency cannot accelerate the rule making process. To that end, the agency is using industry partnerships to understand the risks and opportunities associated with different types of drone operations.

The FAA will collaborate with CNN to explore drone use by journalists in populated areas, while keeping the drones in sight. The FAA and PrecisionHawk, a leading manufacturer and service provider for agricultural applications, will examine extended line-of-sight drone use in precision agricultural operations. And BNSF Railroad and the agency will explore command-and-control challenges when operating beyond visual contact, such as inspecting rail system infrastructure.

"What we're trying to do here is push the envelope," FAA Administrator Michael Huerta told reporters at the Association for Unmanned Vehicle Systems International (AUVSI) conference in Atlanta, according to *The Wall Street Journal*. "The rule-making process is deliberative so we're actively looking for other things we can do and ways we can expand use of unmanned aircraft in the meantime."

The agency indicated that the companies had reached out to the FAA to explore potential partnerships, and Huerta told attendees at the conference, "You can interpret that as an invitation." This presents an intriguing opportunity for drone operators to help the FAA understand the potential benefits of drone technology.

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Huerta also said the results of the research the FAA will conduct with the program's three partners will "help us determine if and how we can safely expand unmanned-aircraft operations in the United States," according to *The National Journal*. The agency tweeted that the program "could result in FAA-approved operations in the next few years."

MEDIA USE OF UAS

Less celebrated was the FAA's release of a legal memo from the Chief Counsel's Office titled *Media Use of UAS*. The memo addresses under what circumstances photography captured by drones can be legally sold—an area blurred by the widespread commercial availability of drones that can capture professional-quality images.

According to the memo, absent FAA permission, news organizations cannot use drones to take news photos because those operations do not qualify for the hobbyist exemption. "Because the use of an unmanned aircraft by a media entity to gather news would be in furtherance of that entity's business, the operations would fail the 'hobby or recreation' test of [the FAA Modernization Act of 2012]," the agency said.

Similarly, professional photographers cannot sell their photos to news organizations with FAA approval if the photos were captured by drone. The FAA allows for some wiggle room where a hobbyist has captured newsworthy images: "If the individual[] takes the pictures or videos or gathers other information as part of a hobby or recreational activity, then a later decision to sell some or all of those pictures, videos or other information" does not necessarily require FAA permission. The ambiguity in determining when someone goes from a hobbyist occasionally selling pictures to a professional drone photographer is reflected in the memo's final sentence: "The FAA would have to consider each case on its own merits."

The memo fails to address the potential free-speech concern with limiting drone journalism. In 2014, a group of 15 media companies filed an amicus brief in *Huerta v. Pirker*, arguing that the media's use of drones was protected by the Constitution. The brief, whose co-authors included *The New York Times*, *Associated Press*, and *Washington Post*, claimed that the "FAA's position is untenable as it rests on a fundamental misunderstanding about journalism. News gathering is not a 'business purpose': It is a First Amendment right."

This most recent FAA memo, which only spans two pages, highlights the challenges faced by an agency attempting to make decisions on the fly. While the FAA continues to review the comments submitted on the NPRM, it remains unclear what form final drone regulations for small UAS will take, much less the later comprehensive regulations addressing larger drones. In the interim, the FAA's piecemeal efforts to address the commercial uses of drones run the risk of regulatory uncertainty and contradiction. For instance, last week's FAA memo comes after a March brouhaha precipitated by the FAA's sending letters to YouTube users who had posted drone footage. YouTube users have the option of allowing ads to run before their footage. According to the letters from the FAA, this meant that hobbyists were commercial operators and in violation of the FAA's drone rules. A few weeks later, John Duncan, director of the FAA's Flight Standard Service, told FAA inspectors to cease sending the letters. The memo noted that a video "is ordinarily not sufficient evidence alone to determine" a violation of drone rules.

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These speed bumps notwithstanding, the FAA's accelerated pace of action is a welcome change. The Pathfinder program and the FAA's new dynamism suggest the drone industry may soon face less of a regulatory headwind as it takes flight.

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