Client Alert

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Task Force Makes Drone Registration Recommendations Expected to Be Adopted by the FAA, But on What Authority?

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On November 21, 2015, the Unmanned Aircraft Systems Registration Task Force Aviation Rulemaking Committee, chartered by the FAA, issued its Final Report to the FAA containing the Task Force's recommendations for how the FAA should implement a national drone registry system. With the dueling goals of maintaining safety in the National Airspace System (NAS) while also encouraging the emergence of the nascent UAS industry, the Task Force was given a difficult job: "develop recommendations for the creation of a registration process" for sUAS. The Final Report is particularly timely, as somewhere between 500,000 to 1 million drones (nearly all of which will be sUAS) are expected to be sold in the United States over the upcoming holiday season.

THE TASK FORCE'S RECOMMENDATIONS

Although the final report contains ample evidence of disagreement amongst the Task Force's 25 members (which ranged from Google to DJI to Walmart), a "general consensus" was ultimately reached on the following recommendations:

1. Users must fill out "an electronic registration form through the web or through an application, which would immediately provide the user with an electronic certificate of registration and a personal universal registration number for use on all sUAS owned by that person."

2. The registration number must be marked on the sUAS before operations in the NAS in a way that is "readily accessible." A user could also opt to identify the drone using the unique serial number provided by the manufacturer in lieu of using the FAA-generated registration number.

3. The registrant must be at least 13 years old and provide his or her name and physical address to the FAA.

4. Registration should encompass an "education component," similar to *Know Before You Fly*.[1]

5. Drones that weigh 250 grams or less, including the aircraft, payload, and any other associated weight, would be exempted from the registration requirement.

According to the Task Force, these recommendations will serve the goals of: (i) educating users on the safe operating rules for sUAS; (ii) linking a sUAS to the operator in the event of an incident or accident; and (iii) taking a risk-based approach to registration.

Although the recommendations appear straightforward, they leave some unanswered questions. 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? And what good is the 250 gram exemption when nearly every drone, even toys, weighs more than that? The

[1] http://knowbeforeyoufly.org/.

Task Force implicitly acknowledged these questions, but did not answer them, citing the "time-limited tasking" they were given by the FAA.

Despite these questions, it is anticipated that the FAA will adopt, in large part, the Task Force's recommendations and issue a "direct final rule" requiring registration through its "emergency" rulemaking power under the Administrative Procedure Act (APA). In doing so, the FAA will ignore outstanding legal questions about the process by which it will issue the registration rule, as well as whether it even possesses the underlying authority to adopt the rule.

THE FAA'S "EMERGENCY" RULEMAKING

Generally speaking, under the APA, an agency like the FAA cannot make rules without giving the public notice and an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b). In limited circumstances, however, an agency can forgo the standard notice-and-comment requirements and directly issue a final rule. 5 U.S.C. § 553(b)(3). Pertinent here, 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. 5 U.S.C. § 553(b)(3)(B).

"Emergency rulemaking" usually follows situations that require immediate action (such as a national disaster), minor technical amendments that do not affect the substantive law, or instances where Congress has directed the action in legislation. Nonetheless, the FAA is apparently considering the absence of rules regarding public registration of drones to be an "emergency," and it appears ready to issue a final rule *without* allowing for public comment.

Under the "good cause" exemption, the FAA itself determines whether to invoke emergency rulemaking, and challenges to the final rules can only be filed after the rules are promulgated. Moreover, despite courts' cautioning they will "narrowly construe" agency actions utilizing the emergency rulemaking exception, in reality the agency's action is often left untouched.

It is unlikely the FAA will try to justify emergency rulemaking by stating that the public interest is not involved (in fact, the Task Force's Report proves the opposite). Moreover, because the notice-and-comment requirements are presumptively applicable to all substantive rulemaking, the FAA likely will not attempt to assert that the traditional rulemaking process is "unnecessary." Thus, the FAA will likely try to justify this "emergency" treatment on the ground that the notice-and-comment period is "impracticable."

"Impracticable" has generally been defined to refer 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*."[2] Put another way, an agency cannot create its own "emergency" (intentionally or otherwise) by delaying announcement of proposed rules.

That begs the question: is the FAA's emergency rulemaking for drone registration 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 has issued its Notice of

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

Proposed Rulemaking, and comment period has closed, the FAA has yet to finalize these rules, despite nearly *four years* lapsing between Congress's mandate and today.

With that background, the FAA now intends to issue the Registration Rules directly within the next month, presumably before the massive influx of sUAS enters the NAS this holiday season. *If* 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 bypassed the notice-and-comment requirements, when promulgating Penalty Rules for violations of FAA regulations.[3] There, a private 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 9 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.[4]

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 Task Force's model, registration would apply to commercial and hobbyist users alike. In addition, users wouldn't be registering their drones with the FAA; they would be registering themselves.

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."

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[3] *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 the need for expeditious action as "good cause" to avoid the obligations of section 553(b).").

[4] 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.

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. Notably, the Task Force recognized that, despite the FAA's assertions, the agency may actually lack authority to require registration of drones used for hobby or recreational purposes. Nonetheless, the Task Force did not address that issue because it was "outside the scope of the Task Force's objectives[.]"

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, 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.

A second and distinct question concerns whether the FAA has the authority to register people, as opposed to planes, as the Task Force recommends through its one-unique-number-per-person plan. The FAA has stated that it has the authority to require the registration of any "aircraft" that flies in the NAS, but if a user has many unique aircraft all with the same number, it is the person, not the aircraft, that is being tracked.

Other conflicts abound. Under current law, in order to register an aircraft, the aircraft must be owned by a citizen of the United States, a lawful permanent resident, or a corporation doing business under the laws of the United States or a state. 49 U.S.C. § 44102. Yet, the Task Force recommends a rule that would not require citizenship or lawful permanent resident status. If "aircraft" is the registration hook for the FAA, these other statutory requirements might apply to sUAS users.

CONCLUSION

The Task Force's recommendations appear simple enough. But lurking beneath the surface are complicated issues of agency process and the FAA's authority that may be primed for takeoff.

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