Client Alert

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Drones: A Bird's-Eye View of the (Non-Privacy) Legal Landscape for UAS

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A recent near midair collision between U.S. Airways Flight 4650, a CRJ-200 jet with a 50- passenger capacity, and a drone has (deservedly) sparked a flurry of commentary regarding safe drone operation. This near miss, which occurred on March 22, 2014, during a flight from Charlotte, North Carolina, to Tallahassee, Florida, highlights the significant airspace concerns – as well as the product and operator liability risks – associated with unmanned aircraft systems (UAS) operations. The incident also puts on full display a major flaw in the existing system: there are currently no UAS-specific regulations designed to prevent these "close calls."

What Is the FAA Doing? Currently, the FAA takes the position that it has authority over UAS operations in U.S. airspace. In reality, however, the FAA has been slow to promulgate regulations governing UAS operations. The closest the FAA has come is its 2007 Policy Statement, *Unmanned Aircraft Operations in the National Airspace System*. There, the FAA merely lays out a blanket prohibition: "[n]o person may operate a UAS in the National Airspace System without specific authority[.]" According to the FAA, there's only one way to get that authority: "apply directly to the FAA for permission to fly."

Notably, the 2007 Policy Statement is not a regulatory standard – a fact often acknowledged by the FAA. Indeed, the Policy Statement itself provides that "[r]egulatory standards need to be developed to enable current technology for unmanned aircraft to comply with Title 14 Code of Federal Regulations[.]"

Per the FAA Modernization and Reform Act of 2012 (the "Act"), the FAA is tasked with promulgating UAS-specific regulations starting this year, but it is seeming evermore unlikely that the FAA will actually do so.[1] Indeed, the FAA has not released a Notice of Proposed Rulemaking ("NPRM") for any UAS regulation. Given that drafting an NPRM and soliciting comments before formulating a final rule may take up to 18 months, the FAA is well behind in meeting the goal Congress set for it.

What Does That Mean for UAS Operators? As the FAA sees it, whether, when, and how an operator may use a UAS is based on whether that use is recreational, civil, or public:

- ***Modelers.*** Recreational UAS users can find guidance in FAA Advisory Circular 91-57, an informational guidance document addressing "Model Aircraft Operating Standards," which "encourages voluntary compliance with[] safety standards for model aircraft operators."
- ***Civil/Commercial Users.*** Operators who want to fly a UAS for civil and/or commercial use must apply for and obtain an FAA airworthiness certificate in the experimental category. Practically speaking, these

[1] The Act requires that the FAA publish "small" UAS regulations by August 2014 and all UAS-specific regulations by September 2015.

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are not available (unless, perhaps, you're applying to do a project based in the Arctic).

- ***Public Users*.** Operators who want to fly for public use must obtain a Certificate of Waiver or Authorization ("COA"). The COA application process is available online, and numerous COAs have been granted. Common public uses include law enforcement, firefighting, border patrol, disaster relief, search and rescue, and military training. Note, however, that COAs are restricted by their terms and not available to users seeking a profit.

Can the FAA Regulate Drone Operators? At present, there is limited case law discussing the FAA's position that it can prohibit UAS use despite the lack of UAS-specific regulations. Two recent cases, however, support the idea that the FAA may not have as much regulatory authority as it claims.

In *Huerta v. Pirker*, Docket CP-217 (Mar. 6, 2014), Raphael Pirker, a UAS operator, successfully challenged the FAA's power to regulate his UAS activity. There, an NTSB ALJ dismissed a $10,000 FAA-issued fine against Pirker, holding there was "no enforceable FAA rule or [Federal Aviation Regulation] applicable to model aircraft or for classifying models as an UAS." The ALJ also rejected the FAA's argument that Part 91 of the Code of Federal Regulations provided a regulatory framework over Pirker's activity.[2]

In a second case, a Texas nonprofit petitioned the D.C. Circuit challenging an FAA order that it stop using a model UAS in search-and-rescue efforts.[3] Texas EquuSearch argues the FAA has no legal basis for the cease and desist order because the FAA has not issued any UAS-specific regulations. And, even if the FAA's 2007 Policy Statement is binding, it does not apply to non-profit organizations.[4]

Despite the *Pirker* and *Texas Equusearch* cases, the FAA maintains that "[t]here are no shades of gray in FAA regulations" and "[a]nyone who wants to fly an aircraft – manned or unmanned – in U.S. airspace needs some level of FAA approval."[5]

What Does This All Mean? Because of the uncertainty surrounding the FAA's authority and the lack of regulations, UAS operators who fly as modelers, or who fly for civil or public use face an array of legal hurdles, including the risk of an FAA enforcement action. UAS operators should also be wary of even bigger risks, as shown by the recent near miss of U.S. Airways Flight 4650 – including the potential for accidents. Given the legal uncertainty in this burgeoning field, operators may find it difficult mitigate these risks through insurance.

Morrison & Foerster LLP is working hard to stay in front of the legal issues related to UAS and will continue to provide periodic "bird's-eye" updates.

[2] The FAA is currently appealing this decision.

[3] *Texas Equusearch Mounted Search and Recovery Team v. FAA*, No. 14-1061 (filed Apr. 21, 2014).

[4] This petition is pending.

[5] http://www.faa.gov/news/updates/?newsId=76240 (February 26, 2014)

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