

## NEWSLETTER

By: Schnader Harrison Segal & Lewis LLP

### **THE FAA'S DRONE DILEMMA: THE NEED FOR REGULATION VS. LIBERAL LICENSING BY WILLIAM D. JANICKI AND LEE C. SCHMEER**

Perhaps no issue has drawn as much attention to the Federal Aviation Administration in recent months as its much anticipated final regulations for small *unmanned aircraft systems* (UAS), or drones, expected in the early part of 2017. The FAA is faced with a difficult road ahead in this arena: it must implement a workable regulatory system in the face of ever-increasing pressure from various industries eager to utilize this cutting edge technology without the inconveniences of complex government intervention or threat of an FAA enforcement action. This challenge is highlighted by the FAA's recent release of a number of pilot reports of UAS encounters with manned aircraft (approximately two sightings per day), many of which have required evasive action, and the FAA's update to guidance for hobby and recreational users of UAS.

Earlier this year, the FAA unveiled its framework to regulate commercial use of small (less than 55 pounds) UAS, and specified requirements for small UAS operators, in proposing Part 107 to the Federal Aviation Regulations. While the public waits for these rules to become final, the FAA is authorizing small UAS commercial operations on a case-by-case basis through a process known as a Section 333 Exemption, where the FAA waives certain aviation regulations for operations demonstrated to be safe. To date, the FAA has granted 1475 exemptions allowing commercial use of small UAS in a wide variety of industries. The rate of exemptions has only increased over the past several months.

Moreover, the proposed rules and Section 333 Exemptions do not apply to hobby or recreational users of UAS. Thus, no permission or authorization from the FAA is required to use UAS for recreational purposes. However, on September 2, in order to help reduce UAS incidents, the FAA published updated guidance for hobby or recreational users.<sup>1</sup> Under this guidance, hobbyists are encouraged to operate below 400 feet, within the line of sight of the operator, and at least 5 miles from an airport. This guidance is not mandatory and provides no real enforcement mechanism other than the threat of an FAA enforcement action for careless and reckless UAS operation.

<sup>1</sup> See *Advisory Circular (AC) 91-57A*.

In the short time since the release of the FAA's draft regulations for commercial use of small UAS, the efficacy of these proposed rules has become increasingly uncertain as demonstrated by a recent string of highly-publicized drone incidents at crowded events, and repeated near-misses (and one possible collision) between drones and manned aircraft. Also, the Department of Transportation recently announced that it will audit the FAA for the number of drone operation approvals under Section 333 over the last year.

The FAA's proposed regulations seem comprehensive at first blush. With regard to protecting manned aircraft, drones are not permitted to operate above 400 feet and within five miles of airports, and operators must maintain line-of-sight with their UAS. If followed, those guidelines alone would protect the vast majority of manned aircraft traffic, which do not typically operate below 400 feet except for segments of approaches and arrivals that are very close to airports.

It has become increasingly clear, however, that the FAA's draft regulations are not always followed, and appear to be difficult to enforce. On August 27, 2015, an apparent collision of a UAS and manned aircraft (the first such mid-air collision since 2011 in Afghanistan) occurred in Illinois at an altitude of 2,500 feet, more than 2,000 feet above the FAA's drone ceiling.<sup>2</sup> The Piper Apache involved sustained damage to a wing, but fortunately was able to land safely. The operator of the drone has not been located.

<sup>2</sup> *Mary Grady, Unconfirmed Drone-Airplane Collision Reported, available at <http://www.avweb.com/avwebflash/news/Unconfirmed-Drone-Airplane-Collision-Reported-224792-1.html>.*

While thankfully drone collisions have been extremely rare, near-misses and sightings have been occurring daily. In August 2015, two airliners reported narrowly missing UAS while on approach to airports in New York. In one incident, a JetBlue Airbus at approximately 900 feet on approach to JFK Airport reported a drone passing just below it.

These close calls have raised concerns over the potentially disastrous repercussions of drones operating illegally near airfields, including the possibility of using a drone in a terroristic attempt to bring down an airliner.

Pilots and passengers are not the only ones that recently have been exposed to near-misses with drones. UAS have made unwelcome appearances at two recent high-profile sporting events. A drone flew into a tennis match at the U.S. Open on September 3, crashing into an empty section of bleachers. The operator was located at a nearby marina, and will face criminal charges. At a football game at the University of Kentucky on September 5, a drone crashed in the stadium during pregame festivities, again narrowly missing people. The operator was a student flying the drone from the parking lot. These operators clearly did not follow the FAA's regulations, and it stands to reason that enforcement will continue to be an issue because drones do not require large areas to launch and are widely available to anyone that can afford them, and vendors are not yet required to ensure the purchaser has been properly certified by the FAA.

The movement toward allowing more UAS despite the murky regulatory and enforcement scheme reached new heights on September 1, when the FAA waived requirements to obtain airworthiness certificates for the Washington-based LLC Measures, allowing them to operate 324 types of UAS. Measures CEO Brandon Delet stressed the need to operate a diverse fleet of drones since they are "used for an ever-growing number of data collection applications."<sup>3</sup> Delet heralded the safety advantages of drones, since they carry no fuel and can get relatively small cargo loads to destinations with less difficulty than helicopters.

<sup>3</sup> *Jacob Fischler, FAA Approves Drone Company to Operate 300+ Commercial Fleet, available at [http://www.law360.com/aerospace/articles/697963?nl\\_pk=f94d9ef8-dc0e-4449-8128-24daf9a3f7ab&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=aerospace](http://www.law360.com/aerospace/articles/697963?nl_pk=f94d9ef8-dc0e-4449-8128-24daf9a3f7ab&utm_source=newsletter&utm_medium=email&utm_campaign=aerospace).*

The FAA must quickly figure out a way to balance the need for safety from a regulatory standpoint while dealing with enormous pressures from the commercial drone industry, which sits on the precipice of becoming a multibillion dollar enterprise.

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It remains clear that UAS will become more and more prevalent in the years to come, but the extent and scope of the insurance and legal issues that will accompany the assimilation of this industry remain somewhat speculative. It is therefore important that those in aviation follow developments carefully. After all, not so very long ago, commercial aviation was a “fledgling industry” as well.

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