Advisory

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Can I Fly My Drone? A Primer on the Regulation of Unmanned Aerial Vehicles

Insurers may wish to use drones, or Unmanned Aerial Vehicles (UAVs), for a number of purposes, including inspection of otherwise inaccessible loss sites. Can they do so in the U.S. without government approval? While the insurance regulators have not weighed in on the issue, the Federal Aviation Administration (FAA) is in the business of regulating the use of UAVs thanks to the National Transportation Safety Board's (NTSB) decision in *Huerta v. Pirker.*

Pirker arose after a UAV was used to take pictures of the University of Virginia's campus. According to the FAA, the pilot recklessly flew the UAV "directly towards an individual standing on a . . . sidewalk causing the individual to take immediate evasive maneuvers" and "through a . . . tunnel containing moving vehicles." The FAA fined the UAV pilot $10,000 for operating "an aircraft in a careless or reckless manner so as to endanger the life or property of another" under 14 C.F.R. § 91.13. The UAV pilot objected, arguing that the regulation did not apply because a UAV was a "model aircraft" and not an "aircraft," stripping the FAA of jurisdiction. In March, an administrative law judge accepted this reasoning and lifted the fine, causing some to question whether other FAA regulations governing "aircraft" applied to UAVs.

On appeal, however, the NTSB answered the question in favor of the FAA, finding that UAVs are, indeed, "aircraft" for the purposes of FAA regulations. The Board noted that neither the plain language of the enabling statute nor the applicable regulations exclude UAVs from the definition of "aircraft." Reasoning that Congress had given the FAA flexible authority to regulate the rapidly changing technology associated with aircraft, the NTSB concluded that the FAA had specifically excluded some aircraft – such as balloons, kites, rockets, and moored balloons – but not UAVs from § 91.13.

The rapid development of UAVs for civil use has led individuals and companies to explore many commercial uses. For example, UAVs can be useful to insurers to assess damage claims following natural disasters (such as hurricanes), giving access to areas cut off by downed power lines or washed-out roads. UAVs also open up countless new opportunities in photography and videography, oil and mining exploration, or for promotional or security purposes. (One Minnesota brewery even has used a UAV to deliver beer to ice fishermen.)

Recognizing the safety issues associated with the anticipated proliferation of unmanned aircraft in the National Airspace System, Congress passed the Federal Aviation Administration Modernization and Reform Act of 2012 ("Reform Act"). The goal of the Reform Act was to develop a comprehensive regulatory scheme to integrate commercial unmanned aircraft systems into the National Airspace System.

CONTINUED ON NEXT PAGE

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This task fell to the FAA to design a system for granting Special Airworthiness Certification; that is, an approval process that would require applicants to use certain UAV designs and safety equipment, demonstrate training and qualifications for UAV pilots, and comply with standards for commercial operation of UAVs.

The FAA has to establish these standards by 2015. However, if history is any indication, given that it has missed almost every prior deadline, the agency will in all likelihood not meet the deadline. As indicated by the *Pirker* case, the resulting regulatory ambiguity has not deterred the FAA from initiating enforcement proceedings for unauthorized use of UAVs. Indeed, the FAA also has issued 17 cease and desist letters to unauthorized UAV operators. The FAA generally permits recreational use (with certain limitations) while forbidding commercial use. So a hobbyist might be permitted to fly a UAV over his property for the fun of it. But the use of the same UAV over the same property to make a commercial video would be prohibited.

Many oppose this FAA policy, noting that the nearly complete prohibition on the commercial use of UAVs has hampered the industry. During Congressional hearings last summer, industry leaders and academics testified to the possibility that other countries will surpass the United States in commercial UAV use. For example, UAV operators in Mexico and Brazil face little or no regulation, and Canada recently permitted UAVs weighing less than 2 kg to bypass the country's permit system regardless of the intended use.

In response, the FAA has implemented an interim policy that allows commercial operators to apply for an exemption pursuant to Section 333 of the Reform Act. In making this determination, the FAA must assess whether the UAV will endanger the public or threaten national security. This requires the FAA to evaluate (1) the UAV's size, weight, speed, and operational capability; (2) whether the UAV will be operated in close proximity to airports and populated areas; and (3) whether the UAV will be operated within visual line of sight of the operator. See Section 333(a)(1). If it concludes that the UAV poses no hazard, the FAA can issue an exemption permitting specified commercial use without an airworthiness certificate.

The FAA granted the first exemptions in September 2014 to six aerial photo and video production companies associated with the Motion Picture Association of America. The companies promised that the UAV operators would hold private pilot certificates, keep the UAV within line of sight, and restrict flights to the "sterile area" on the film production set. The FAA additionally required the applicants to inspect the UAV before each flight and prohibited night operations.

This recent thawing of the commercial UAV operations freeze gives companies a promising option of pursuing an FAA exemption under Section 333. However, the process is not without cost. The Section 333 application process can take months and requires a detailed petition. A petitioner must describe the nature of exemption sought, explain why granting the exemption would be in the public interest, and supply a summary that the FAA will publish in the Federal Register. The FAA then allows public comment on the petition.

Although only six companies have benefited from this process thus far, the FAA has announced that it is currently considering 40 other petitions for Section 333 exemptions. Companies or institutions seeking to take advantage of this program should engage competent counsel to guide them through the process.