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FAA Regs For Small Drones — A Step In The Right Direction

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On June 21, 2016, after a long wait and much anticipation, the Federal Aviation Administration announced that it had finalized the regulations that will govern the commercial use of small unmanned aircraft systems (UAS) in the United States. The new regulations will be effective in late August and will be codified at 14 CFR § 107 et seq., or Part 107.


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The FAA has long recognized the potential benefits of commercial UAS operations. Since 2008, it has been working to incorporate UAS operations into the national air space, but the process has been slow. In 2012, Congress passed the FAA Modernization and Reform Act, which created the process for commercial UAS operators to seek operation exemptions from the FAA under Section 333 pending promulgation of these final rules. Those who suffered through the Section 333 exemption application process know that it was cumbersome, lacked flexibility and often took many months. In a rapidly evolving industry spurred by quickly changing technology, this regulatory lag time presented an unnecessary roadblock to innovation.

The new regulations promise marked improvement over the old exemption process. Rather than needing a costly airman certification/pilot's license, aspiring UAS operators will now only need to pass a written test to obtain a "remote pilot certificate" with a small UAS rating. And airworthiness certificates, or an exemption from the requirement, are no longer necessary. At a minimum, these regulations should significantly reduce the cost of entry for new players looking to enter the market for UAS-related commercial services. According to FAA estimates, users may experience aggregate cost savings over the next five years ranging from $785 million to $9.3 billion. This certainly represents a step in the right direction.

But for those already in the industry and operating under a Section 333 exemption, the new regulations likely leave much to be desired. At first glance, the regulations do not appear to expand the scope of UAS operations for existing users, and may actually be more restrictive than the scope of existing exemptions that some users have obtained. However, the tradeoff for enactment of these regulations, whatever their shortfalls, appears to be a commitment by the FAA to a circumscribed regulatory construct that will require additional time and ongoing dialogue to perfect. Such an approach was advocated by many in the industry, including Google Inc.

Accordingly to Google, "[a]s the [small UAS] industry evolves, any length delay in the issuance of a final [small UAS] rule would substantially reduce the benefits of the final rule. It will be difficult, if not

impossible, for the FAA to adequately consider the many likely technological developments during a protracted rulemaking." Indeed, as the industry and UAS technology continue to develop, the FAA will need to be responsive and flexible to ensure that existing regulations do not impose unnecessary restrictions and needlessly stifle growth and innovation.

The FAA has indicated that this is exactly what it intends to do. The silver lining in the new regulations, at least for existing industry players, is subpart D, which provides a process by which applicants can request a certificate of waiver for many of the newly codified regulations. While the regulations continue to prohibit UAS flight at night, over people not involved in the operation of the UAS, above 400 feet, from moving vehicles, and beyond visual line of sight of the operator or visual observer, each of these restrictions may be waived by the FAA under the new regulatory construct providing users increased flexibility. A full list of the regulations for which a waiver may be obtained will be codified in 14 CFR §107.205. (It appears that weight restrictions, which limit UAS to less than 55 pounds on takeoff, including payload, are not currently waivable).

How exactly this new waiver process will differ from the old exemption process has yet to be seen. The waiver system is clearly intended to be flexible. Despite requests for a more structured waiver process and rules establishing standards for deviating from the UAS rules, the FAA declined to add specific requirements, explaining that "prescriptive requirements imposed on the waiver process as part of this rulemaking may limit the FAA's flexibility to consider new or unique operational circumstances and safety mitigations." Instead, the waiver process is intended to be case- and fact-specific. The applicant will be required to demonstrate that the proposed UAS operation can safely be conducted under the terms of the certificate of waiver. The request must be supported by sufficient data and documentation that is proportional to the requested relief. The FAA's treatment of early wavier requests should provide helpful insight into what the types and quantum of information will ultimately be needed for the FAA to justify issuing a certificate of waiver.

Will requests for a waiver be handled faster than exemption requests? The industry will certainly hope so. FAA Advisory Circular No. 107-2 encourages applicants to submit waiver applications "at least 90 days prior to the start of the proposed operation." While this is better than the six months or longer that was needed in some cases to obtain a Section 333 exemption, significant time savings will likely be realized. Hopefully the FAA's implementation of its new waiver process will function as a highly efficient safety valve that liberally permits reasonable deviations from the regulations and allows the industry to continue to grow. Time will tell. If the wavier process fails to provide the level of flexibility needed by the industry, and attempts to bridle the industry with ridged and unbending rules, litigation or other administrative action may be necessary to hasten meaningful regulatory reform.

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