

February 18, 2015

Over Presidents' Day weekend, the Federal Aviation Administration ("FAA") released its long-anticipated proposed rules for commercial use of small unmanned aerial systems ("UAS") or drones. The FAA is under an edict from Congress to integrate small UAS into the National Airspace System ("NAS") by this coming September, and the agency is highly unlikely to meet this deadline because the proposed rules will be subject to a lengthy comment period and then internal FAA and other agency review. The final version of the proposed rules is not expected until sometime in 2017.

Over the past six months, the FAA has been issuing operator- or company-specific exemptions to permit commercial use. To date, it has only issued 26 such authorizations, including eight to Cooley clients. These exemptions have included extensive operational limitations and restrictions, and, while the new rules would lessen many of these requirements, they also propose to retain a number of them.

The proposed rule defines small UAS as those weighing fewer than 55 pounds. One of the most significant proposed liberalizations is the FAA's suggestion that it eliminate the current requirement that an operator of a small UAS hold a private pilot certificate and a third-class airman medical certificate. In current exemptions, the private pilot must also be accompanied by a second individual, a visual observer.

Under the proposed rules, the FAA would no longer require operators to hold a private pilot license or a medical certificate. An operator would need to be at least 17 years of age and a "US citizen" under the Federal Aviation Act and possesses fluency in English. An operator would need only pass a written knowledge test at least once every two years to obtain an unmanned aircraft operator certificate with a small UAS rating. The test, which covers such subjects as applicable rules, sources of weather information and effects of weather on small UAS, emergency procedures, and radio communications procedures, would be administered by FAA-approved knowledge centers around the country. Flights would no longer require both an operator and a visual observer.

Despite this liberalization, the FAA retained several significant operational requirements directed at ensuring commercial operations of small UAS do not create a hazard to other users of the NAS or to the public. The FAA stated that it has two primary safety concerns associated with small UAS operations: (1) the craft's ability to "see and avoid" other aircraft since no pilot is on board; and (2) the operator's possible loss of positive control of the small UAS. To mitigate these safety concerns, the FAA proposed to retain its existing requirement that small UAS operations be conducted within the visual line-of-sight ("VLOS") of the operator, meaning the operator's vision aided by no more than glasses or corrective lenses. (Technologies, such as "First Person View," which replicate the view from the craft on a handheld screen, do not qualify.) The FAA also proposed to restrict small UAS to daylight-only operation and speeds of less than 87 knots (100 mph), to limit the operating altitude of commercial small UAS to below 500 feet above ground level in conditions that ensure three-mile visibility, and to prohibit operations over any person not directly participating in the operation. Unless these proposals, particularly the VLOS requirement, are modified in the comment and review period, they will effectively prohibit use of small UAS for delivery services.

The FAA did, however, also seek comment on possibly adopting a "micro" UAS classification for craft weighing fewer than 4.4 pounds. The FAA would allow these microcraft, given their smaller size, to be flown over individuals not directly involved in the operation. The FAA also sought comment on emerging technologies that might lessen the agency's concerns about eliminating the VLOS requirement, but the FAA reiterated its view that such technologies do not currently exist.

Under the new proposals, operators must continue to register their small UAS with the FAA, and registration numbers will need to be displayed on each aircraft. The FAA also made clear that operators will need to comply with all applicable airworthiness directives and may not fly their small UAS in a careless or reckless manner.

The proposed rules do not affect the Congressionally established exemption for small UAS flown for "hobby or recreational" purposes. Those craft remain unregulated if they weigh less than 55 pounds, are operated in accordance with a community-based set of safety guidelines issued by the Academy of Model Aeronautics, and give way to manned aircraft. If they are flown within five miles of an airport, the hobbyist must provide prior notice to the airport and the airport's traffic control tower.

In releasing the proposed rules, the FAA noted that privacy concerns are beyond the scope of the rulemaking but stated that, consistent with a Presidential Memorandum also released over the holiday weekend, the FAA and the Department of Transportation will participate in a multi-stakeholder engagement process conducted by the National Telecommunications and Information Administration to develop voluntary codes of conduct for the private sector regarding surveillance and privacy concerns.

Cooley attorneys are actively involved in representing UAS clients before the FAA and would be glad to provide more information and answer any questions. Please contact one of the attorneys listed here.

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