

Client Alert

October 2015

Mission Impossible? UAS Registration Recommendations in 30 Days

On Monday, October 19, US Transportation Secretary Anthony R. Foxx and FAA Administrator Michael P. Huerta [announced the formation of a task force](#) charged with developing recommendations for a registration system for Unmanned Aircraft Systems (the “Task Force”). The Task Force will be directed to deliver its report by November 20. In connection with the announcement, the secretary and the administrator also issued a [Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems \(UAS\) and Request for Information Regarding Electronic Registration for UAS](#) (the “CRFI”), which was published in the Federal Register on Thursday, October 22.¹ Through the CRFI, the agencies seek, for the first time, to impose the aircraft registration requirement on “model aircraft,” including recreational UAS, effective immediately, while also soliciting comments from industry and the public on the nature and parameters of the UAS registration process. Comments must be submitted by [November 6](#) in order to be considered by the Task Force.

The aggressive timeline is driven by concern over the increasing frequency of potentially dangerous UAS operations and by the anticipated explosion in drone sales during the upcoming holiday season. The CRFI’s formulation as a “clarification” of existing requirements, rather than as the promulgation of a new regulation, is intended to avoid the restriction imposed on the FAA’s rulemaking authority with respect to model aircraft under Section 336 of the FAA Modernization and Reform Act of 2012 (the “2012 Act”).² Notwithstanding concerns about the wisdom of such an accelerated process, or the soundness of the FAA’s basis for suddenly imposing the registration requirement on model aircraft, some industry participants will welcome the opportunity to update or replace the antiquated registration process currently used for commercial UAS operations, while others will be alarmed by the burdens, liabilities, and other transaction costs that will be imposed on the market by this extension of the registration requirement.

Growing Concerns

The Task Force announcement came less than two weeks after the House Transportation & Infrastructure Committee’s Subcommittee on Aviation held a hearing entitled “[Ensuring Aviation Safety in the Era of Unmanned Aircraft Systems](#).” That hearing, which included the testimony of representatives from the FAA, United States Forest Service, Air Line Pilots Association, and others, featured considerable discussion of recent high-profile instances of drones [interfering with firefighting operations in California](#) and [FAA-published reports of pilot UAS sightings](#).

Unauthorized operation of drones in the airspace near fire-suppression activities poses a dual threat. One is the risk of collision with the manned aircraft engaged in the firefighting operations. Because those manned aircraft are often forced to suspend their activities when an unauthorized drone is spotted in the

¹ Fed. Reg. Vol. 80, No. 204

² [Pub. L. 112-95](#).

active airspace, the secondary threat is the increased danger to people and property on the ground caused by the delays to the firefighting efforts.

The FAA claims that the rate of pilot sightings of UAS during 2015 is double the rate during 2014. This trend would suggest that the past year has also seen a significant increase in the number of “near miss” incidents between UAS and manned aircraft. Many members of the public, and several Aviation Subcommittee members, are concerned about this trend. Others, however, have expressed skepticism that the sightings data is an accurate reflection of the risk posed to manned aviation by UAS in the national airspace (“NAS”).

Expedited Process

The CRFI cites the upcoming holiday season as a principal driver for both the FAA’s immediate extension of the registration requirement to model aircraft and the expedited timeline for the development of an updated registration process. “The risk of unsafe operations will only increase as more UAS enter the NAS. Some retailers have projected huge holiday sales.”³ An FAA official has even claimed that there could be “[a million drones under people’s Christmas trees this year.](#)” While actual industry estimates of UAS sales during this holiday season are harder to come by, it is clear that at least [one major US retailer is expecting robust sales.](#)

The agency sees the registration process as a mechanism to engage in education and outreach. “Registration will help make sure that operators know the rules and remain accountable....”⁴ The FAA has already been engaged in educational and outreach efforts, such as its participation in the “[Know Before You Fly](#)” campaign and its own “[No Drone Zone](#)” initiative, which are designed to increase safety by providing UAS operators with information necessary to conduct safe and legal flights. But the anticipated explosion in holiday sales of drones may present a unique opportunity for the FAA to expand the reach of its educational efforts, should they be successful both in imposing the registration requirement immediately and in obtaining the participation of UAS manufacturers and/or retailers in providing information about the registration requirement within the product packaging or otherwise at the point of sale.

Authority to Regulate Hobbyists

A critical element of the FAA’s ability to impose the registration requirement on hobbyists is its formulation of the CRFI as a “clarification” of existing rules rather than the imposition of a new regulation. In the 2012 Act, Congress constrained the FAA’s authority to impose new restrictions on “model aircraft.” Section 336 of the 2012 Act provides, in relevant part, “the Administrator...may not promulgate any rule or regulation regarding a model aircraft” if (i) the aircraft is flown strictly for hobby or recreation; (ii) the aircraft is flown in accordance with the safety guidelines and programming of a community-based organization; (iii) the aircraft is 55 pounds or less; (iv) the aircraft does not interfere with and yields to manned aircraft; and (v) when flown within five miles of an airport is done so with prior notice.⁵ Paragraphs (b) and (c) of Section 336 go on to acknowledge the FAA’s authority to pursue enforcement actions against model aircraft that endanger the safety of the NAS and to explicitly define a “model aircraft.”

In the CFRI, the FAA took pains to lay out its basis for subjecting all UAS, model aircraft or otherwise, to the registration requirement. In short, the agency argues that: (i) 49 U.S.C. 44101(a) requires all aircraft

³ Fed. Reg. Vol. 80, No. 204 (October 22, 2015), at 63913

⁴ <http://www.transportation.gov/briefing-room/us-transportation-secretary-anthony-foxx-announces-unmanned-aircraft-registration>

⁵ [Pub. L. 112-95](#), §336(a).

being operated to be registered with the FAA; (ii) the definition of “aircraft” set forth in 49 U.S.C. 40102(a)(6) captures both traditional model aircraft and all UAS; (iii) the provisions of the 2012 Act that define “unmanned aircraft” and “model aircraft” confirm that both are types of “aircraft” within the meaning of 49 U.S.C. 44101(a); and, finally, (iv) the FAA’s history of not enforcing the statutory registration requirement in the context of model aircraft was merely an exercise of the agency’s discretion.

While these claims are essentially incontrovertible on their face, the fact that Congress expressly constrained the FAA’s rulemaking authority pertaining to model aircraft at a time when the FAA had been exercising its “discretion” by not requiring the registration of model aircraft could complicate the FAA’s decision to change course. Ordinarily, it is well understood that an administrative agency can effect a change in policy by engaging in a notice and comment period. The ability of agencies to change policy without engaging in a notice and comment process is less certain and often depends on the nature, context, and significance of the policy change. It is worth noting that the CRFI is not positioned as a notice of an intent to change a policy and a solicitation of comments on that proposed change. Rather, it announces the policy change, effective immediately upon issuance, and solicits comments on the nature and structure of the registration process to be applied to all small UAS, including model aircraft.

Industry Reactions

The [Academy of Model Aeronautics](#) (“AMA”), as the “world’s largest model aviation association, representing a membership of more than 175,000,”⁶ might be expected to lead a staunch opposition to the FAA’s proposed policy change. Instead, the AMA appears to be taking a more subtle approach, working to limit the scope of the change from within. Rich Hanson, Government and Regulatory Affairs Representative for the AMA, participated in the [Department of Transportation \(“DOT”\) and FAA press conference](#) at which the formation of the Task Force was announced and offered comments on behalf of the organization. The AMA [announced](#) that the organization would participate on the Task Force itself and then followed up with a [separate response](#) to the DOT’s and FAA’s announcement. The stance that the AMA articulated in its response is that it “agrees that registration may be appropriate at some level” but that “traditional model aircraft, as well as the ‘toy-type’ drones with minimal capability would fall below the threshold and not be subject to the registration process.”⁷

Several other organizations, including the Association for Unmanned Vehicle Systems International (AUVSI), the American Association of Airport Executives, the Air Line Pilots Association, International, and UAS operators PrecisionHawk and Measure, issued [statements in support](#) of the DOT and FAA announcement. For commercial UAS operators, already subject to the registration requirement and who have anticipated being subject to the requirement even under the “small drone rule,” when finalized, this Task Force and the CRFI present an attractive opportunity to design a faster, more efficient registration process than the antiquated process currently employed by the FAA. For UAS manufacturers and retailers, who are likely to be on the front lines of the ultimate implementation of the expanded registration requirement, the policy change may be perceived as more of a burden and a potential source of liability. Since the contemplated registration process will inevitably require data collection, transmission, and maintenance, participants from the privacy and data security industries and advocacy groups no doubt also will look to shape the form of the registration requirement that emerges, whether through participation on the Task Force, providing comments in response to the CRFI, or other advocacy efforts.

Request for Information

In an effort to facilitate the work of the Task Force, the CRFI articulated ten sets of questions (reproduced below) on which comment is sought from industry and the public. As noted at the outset, in order to be

⁶ <http://www.modelaircraft.org/aboutama/whatisama.aspx>

⁷ <http://amablog.modelaircraft.org/amagov/2015/10/21/amas-response-to-the-u-s-dot-announcement/>

considered by the Task Force, the comments must be submitted by November 6. In addition to fax, mail, and hand delivery, comments may be submitted to docket FAA-2015-4378 via the Federal Rulemaking Portal at <http://www.regulations.gov>. Comments submitted after November 6 will be considered by the DOT along with the recommendations made by the Task Force.

Comments are sought specifically on the following areas:⁸

1. What methods are available for identifying individual products? Does every UAS sold have an individual serial number? Is there another method for identifying individual products sold without serial numbers or those built from kits?
2. At what point should registration occur (e.g. point-of-sale or prior-to-operation)? How should transfers of ownership be addressed in registration?
3. If registration occurs at point-of-sale, who should be responsible for submission of the data? What burdens would be placed on vendors of UAS if DOT required registration to occur at point-of-sale? What are the advantages of a point-of-sale approach relative to a prior-to-operation approach?
4. Consistent with past practice of discretion, should certain UAS be excluded from registration based on performance capabilities or other characteristics that could be associated with safety risk, such as weight, speed, altitude operating limitations, duration of flight? If so, please submit information or data to help support the suggestions, and whether any other criteria should be considered.
5. How should a registration process be designed to minimize burdens and best protect innovation and encourage growth in the UAS industry?
6. Should the registration be electronic or web-based? Are there existing tools that could support an electronic registration process?
7. What type of information should be collected during the registration process to positively identify the aircraft owner and aircraft?
8. How should the registration data be stored? Who should have access to the registration data? How should the data be used?
9. Should a registration fee be collected and if so, how will the registration fee be collected if registration occurs at point-of-sale? Are there payment services that can be leveraged to assist (e.g. PayPal)?
10. Are there additional means beyond aircraft registration to encourage accountability and responsible use of UAS?

⁸ Fed. Reg. Vol. 80, No. 204 (October 22, 2015), at 63914

Conclusion

The DOT's and FAA's issuance of the CFRI and announcement of the Task Force amount to the agencies' taking a firm stance on their authority to require registration of all aircraft, including all model aircraft and all forms of UAS, while also kicking off a highly accelerated policy-making process to define the nature and scope of the registration requirement they will seek to enforce through that authority. Whether or not the aggressive strategy is justified by the actual risk to manned aircraft posed by UAS or the expected boom in holiday sales, industry participants with a stake in the outcome need to move quickly. Hunton & Williams LLP's Unmanned Aircraft Systems group stands ready to advise and assist market-leading companies in developing and navigating the emerging UAS landscape.

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