

Legal Perspective

Commercial Drone Use and Changing Legal Landscapes

By Dean E. Griffith, Esq. and John D. Goetz, Esq., Jones Day

Introduction• Industries are finding increasing uses for unmanned aircraft systems (UAS) or drones. The Federal Aviation Administration (FAA) is taking an incremental approach to integrating drones safely into the National Airspace System. Although the FAA ultimately envisions drones of all sizes routinely operating alongside manned aircraft, its immediate focus is on enabling operations of small UAS, weighing less than 55 pounds, as a building block to more complex uses.

Commercial Operations Today• The FAA's baseline rule for small UAS operation, part 107, is now one year old. The rule is predicated on the concept that the risk of flying uncertificated drones is mitigated by placing boundaries on flights such as requiring the drone to stay within visual line of sight of the pilot, limiting altitude to 400 feet, and only allowing flights during the day. Pilots also are required to take a knowledge test to demonstrate they understand airspace and safety requirements. Although the rules are fairly narrowly crafted, many operations such as aerial photography, infrastructure inspection, agricultural monitoring, and others are facilitated by part 107. UAS operated under part 107 must be registered with the FAA.

Operators may seek waivers to certain of the rule's provisions including daylight operation, operations over people, operations within line of sight, and altitude restrictions. Petitions are submitted through the FAA's "waiver portal," and the FAA aims to have decisions made within 90 days of application. In general, waivers with fairly simple risk-mitigations, such as for night-time operations, are processed more quickly. More complex operations, most notably for Beyond Visual Line of Sight (BVLOS) operations and for flights over people, are likely to take longer. Section-by-section guidance when submitting a petition is available on the FAA's website: www.faa.gov/uas.

Regarding where drones may be flown, part 107 generally requires flights in controlled airspace to be authorized by FAA Air Traffic Control (ATC). Specifically, flights in Class B, C, D, and the surface areas of Class E airspace designated for an airport require ATC authorization. Airspace authorization requests are also submitted through the FAA's "waiver portal." Applicants may choose to apply for an "airspace waiver," which allows operations for up to two years for a bigger operating area, or an "airspace authorization" which is valid for up to six months and grants access to a more limited area. Longer-term waivers are taking longer to process, at least 90 days, whereas the FAA indicates shorter-term authorizations are processed more quickly.

The FAA is moving to automate ATC authorizations by creating a

"Low Altitude Automated Notification Capability" (LAANC) in partnership with industry stakeholders. It is also publishing facility maps that show FAA-vetted maximum altitudes near airports in controlled airspace. The initial phases of LAANC are expected to be the building blocks of an Unmanned Traffic Management (UTM) system which ultimately will enable management of widespread low-altitude UAS operations.

Finally, drone operations that cannot be conducted under the terms of part 107 (including by waiver) may be authorized by exemption. A "Section 333" exemption remains a viable option for entities intending to operate drones heavier than 55 pounds, that carry hazardous materials, or other cases to which part 107 does not apply. Exemption applications are submitted to the FAA through the Federal Register's website and take approximately 120 days to receive a decision.

Future Rules• In the future, the FAA must allow BVLOS and flights over people without waiver for the benefits of small UAS to be truly realized. Routine BVLOS flights will allow users to scale operations by increasing the distance a UAS may be flown from the operator allowing users collect more data per flight. This will particularly benefit agricultural applications and power line, pipeline, and railway inspection. Routine flights over people will enable newsgathering and other uses in more congested areas. The FAA is focusing on performance-based rules that set standards to meet, rather than dictating how to meet a standard.

The FAA is working on rules for small UAS operations over people and for "expanded operations." In its August 2017 Report on Significant Rulemakings, the Department of Transportation announced two rulemaking projects that move to this goal. First, an Operations of Small UAS Over People Notice of Proposed Rulemaking (NPRM) is projected to be published on February 28, 2018. Second, an "expanded operations" NPRM that "would enable expanded operations" of sUAS and "would increase the utility of sUAS for operations under 14 CFR part 107, and would advance technology by encouraging innovation."

Previously, in its monthly report, DOT had indicated that FAA planned to publish the small UAS Operations Over People Notice of Proposed Rulemaking for comment in December 2016. However, as described in FAA Administrator Michael Huerta's remarks before the 2017 UAS Symposium, concerns were raised about drones accessing sensitive sites or being used for ill-intent before publication of the NPRM. The FAA is working with industry and government stakeholders to address these concerns.

Other Issues Affecting Integration:

Role of State and Local Government in Drone Regulation• Congress has vested authority for aviation safety and the safe and efficient use of the airspace in the FAA. State and local governments have limited authority to regulate aviation safety and use of the airspace.

Drones, although aircraft, are operated generally at lower altitudes, they can take off and land nearly anywhere, they are smaller and potentially more invasive than manned aircraft, and they are much less expensive and easier to fly than manned aircraft. State and local governments have increasingly noticed these differences and many have sought to regulate drones out of concern of protecting privacy and maintaining public safety. The National Conference of State Legislatures maintains information about states' actions on its website. (www.ncsl.org).

The FAA has taken action in this area as well. In December 2015, it published a Fact Sheet on State and Local Regulation of UAS outlining the Agency's traditional authorities, providing examples of laws that would be appropriate for state and local governments to enact, and offering to provide assistance to lawmakers. However, recognizing the unique nature of drones, FAA also tasked its Drone Advisory Committee to make recommendations to the Agency about potential rebalancing of the Federal and state roles.

Finally, legislation providing more authority to state governments to regulate drones has been introduced into both chambers of Congress. The Senate's reauthorization proposal charges the Comptroller General of the United States to study and recommend to Congress potential ways to structure the federal and state role in regulating UAS. See S. 1405, § 2151 (115th Congress) (Thune Substitute). Likewise, the House of Representative's legislation would similarly direct the DOT Inspector General to conduct a similar report. H.R. 2997, § 438 (115th Congress) (as reported by House Transportation and Infrastructure Committee).

Advisory Committees• The FAA has established a number of committees to help guide its UAS integration work. Currently, two committees are advising the FAA. First, the Drone Advisory Committee (DAC) is helping prioritize the Agency's work and will provide recommendations on major drone integration issues. Members are drawn from the UAS industry, traditional aviation, academia, and state and local government. The DAC has been tasked to review and provide recommendations on three topics: (1) the roles and responsibilities of state and local government in regulating low-altitude small UAS operations; (2) requirements to access the NAS; and (3) funding mechanisms for the FAA's integration work. The DAC first met in September 2016 and continues to meet periodically. Information on the DAC can be found at www.rtca.org.

The FAA also chartered the UAS Identification and Tracking Aviation Rulemaking Committee to, according to its charter, "provide a forum

to discuss and provide recommendations . . . regarding technologies available for the remote identification and tracking of UAS." This ARC, again comprised of UAS industry and other stakeholders, has three objectives: (1) "identify, categorize and recommend available and emerging technology for remote identification and tracking of UAS;" (2) identify the remote ID and tracking needs of law enforcement, homeland defense, and national security agencies; and (3) evaluate how the technologies identified would meet law enforcement, homeland defense, and national security needs focusing on the "feasibility and affordability" of the available technologies. The ARC's recommendations are due by September 30, 2017. (www.faa.gov/news/updates/media/UAS_ID_and_Tracking_ARC_Charter.pdf).

Conclusion• The FAA continues to integrate drones incrementally into the National Airspace System. Importantly, the Agency is committed to performance-based standards and working with government and industry stakeholders to understand the issues. The FAA and stakeholders understand that increased utility and effectiveness of drones depends on the next steps, particularly BVLOS and ability to operate over people. However, many factors will affect the Agency's ability to achieve its goals promptly, including security concerns, Congressional direction, and the length of the rulemaking process.

About Dean E. Griffith, Of Counsel, Jones Day

Dean E. Griffith is a recognized authority in the field of unmanned aircraft systems regulation. He was formerly a Senior Attorney and the Unmanned Aircraft Systems Regulatory Policy Team Lead in the FAA's Office of the Chief Counsel. In that role, he advised the FAA's UAS Integration Office and other lines of business on rulemaking, exemptions, and policy development related to unmanned aircraft. Additionally, during his more than 9-year career at the FAA, he counselled the Agency on a wide-range of aviation regulatory matters and served as Senior Advisor and Acting Deputy Assistant Administrator in FAA's Office of Government and Industry Affairs.

About John D. Goetz, Partner, Jones Day

John Goetz has nearly 30 years of experience defending companies in business and tort litigation. He is a recognized authority in aviation and transportation litigation and has defended multinational companies in trial and appellate courts across the U.S. and in Canada. A licensed pilot, John leads Jones Day's airlines and aviation industry practice. John also counsels clients in NTSB investigations and in FAA proceedings. He has taught aviation law and deposition skills at Duquesne University School of Law. John has been board president for Catholic Charities of Pittsburgh and its Free Health Care Center. John serves on boards for Franciscan University of Steubenville and Pittsburgh Mercy Health System. He is active with the Leukemia & Lymphoma Society.



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