

## DRONE OPERATORS BEWARE: FAA DRONE REGULATIONS CONTINUE TO APPLY TO “COMMERCIAL” USES

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In May 2017, in an important aviation case, the D.C. Circuit Court of Appeals struck the FAA’s “Registration Rule<sup>1</sup>,” which requires all drone users to register online with the FAA their small unmanned aircraft systems (“sUAS” or “Drones”); however, the holding in the case, *Taylor v. Huerta*<sup>2</sup>, is narrow. The Circuit Court ruled the Registration Rule invalid only as it applies to recreational or hobbyist users, finding that an existing statute<sup>3</sup> contained an explicit prohibition on the creation of new regulations directed at “model aircraft.” Since the court found that drones operated for recreational purposes are “model aircraft” under the statute, the FAA’s Registration Rule was illegal as it applied to the recreational use of those aircraft. Nevertheless, the Registration Rule continues to apply to “commercial” uses of sUAS aircraft.

Given the FAA’s expansive interpretation of “commercial” use, both the Registration Rule and the newly promulgated operational rules for the commercial use of sUAS aircraft (Part 107 Rules)<sup>4</sup> are applicable to a wide range of sUAS uses. Operators who currently use or are considering using sUAS aircraft in their business should use caution.

Generally, the FAA considers any use of a sUAS aircraft to further a person or entity’s business to fail the hobby or recreation requirement; instead this type of use is considered a “commercial” activity for the purposes of Part 107. The FAA’s interpretation focuses on whether the owner uses the sUAS aircraft to generate revenue or any other form of compensation; however, the FAA has made clear that it is the user’s intent during flight that is determinative. For example, an individual who takes pictures or captures video using a sUAS aircraft would be considered a recreational user and free from regulation so long as the individual does not intend to sell the images at the time of flight. If, at a later point in time, the same individual sells a picture or video captured on the sUAS aircraft, the action would not change the character of the operation as part of a hobby or recreational activity.

### SMALL UNMANNED AIRCRAFT RULE (PART 107)

Part 107 regulates only the commercial uses of drones that weigh less than 55 pounds. The rule contains various operational limits, remote pilot certifications and responsibilities, and an application process for waiving certain regulations. For example, sUAS aircraft must remain within the visual line of sight of the person manipulating the flight controls of the aircraft, and if the pilot is using a first-person viewer, a visual observer must also watch the aircraft without the use of any visual aid other than corrective lenses. Additionally, the rule imposes a maximum groundspeed of 100 mph and a maximum altitude of 400 feet above ground level.

The sUAS operator (or “remote pilot in command”) must either hold a remote pilot airman certificate or be under the direct supervision of a person holding such a certificate. To obtain a certificate, a person must demonstrate aeronautical knowledge, which is accomplished by: (1) passing an initial aeronautical knowledge test at an FAA-approved testing center; or (2) holding a Part 61 pilot certificate other than one issued for a student pilot, completing a flight review within the past 24 months, and completing a sUAS online training course provided by the FAA; however, any

<sup>1</sup> 14 C.F.R. § 48 (2017).

<sup>2</sup> *Taylor v. Huerta*, No. 15-1495 (D.C. Cir. May 19, 2017). A PDF of the slip opinion may be found at [https://www.cadc.uscourts.gov/internet/opinions.nsf/FA6F27FFAA83E20585258125004FBC13/\\$file/15-1495-1675918.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA6F27FFAA83E20585258125004FBC13/$file/15-1495-1675918.pdf).

<sup>3</sup> Section 336 of the FAA Modernization and Reform Act. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 (2012).

<sup>4</sup> Codified in Part 107 to Title 14 of the Code of Federal Regulations. 14 C.F.R. § 107 (2017).

prospective pilot must be at least 16 years old and will be vetted by the Transportation Security Administration before a certificate will be administered.

For the time being, clients wishing to use sUAS aircraft in their businesses should be cognizant of these new requirements, even if the proposed use is far removed from the money-making enterprise. The FAA holds expansive authority to oversee these new regulations, and the cost of a violation will surely outweigh the cost of intelligent, preemptive compliance. Even recreational sUAS users should be wary. Not only is the FAA's interpretation of "commercial use" broad, the FAA's recent action suggests the administration will continue to evaluate regulations for all drones, irrespective of their intended use.

President Trump's recent commentary on federal drone regulation should provide some solace to drone enthusiasts, however, as the president pledged to decrease drone regulation in the upcoming months. While the president believes that this "excessive" government regulation is hurting the country, drone manufacturers disagree, instead finding that increased regulation helps their businesses by explicitly declaring what types of operation are and are not allowed. Despite the disagreement, attendees of President Trump's June 22 meeting on drone regulation left it feeling optimistic about the president's approach to sUAS aircraft in the national airspace.

#### **ADDITIONAL INFORMATION**

For more information, please contact:

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