

FAA Regs Still Apply To 'Commercial' Drone Use

By **Tod Northman**

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For the past five years, the drone industry has clamored for the Federal Aviation Administration to issue rules to clarify the legal landscape. Drones have rich commercial potential, but development has been slowed by limited legal guidance. The current FAA budget reauthorization bills are proposing to address that, although the political climate makes adoption of any legislative changes uncertain.[1]

The FAA promulgated operational rules for the nation's first comprehensive regulation of the routine commercial use of small unmanned aircraft systems (sUAS). The new rules, codified as new part 107 to Title 14 of the Code of Federal Regulations, were intended to integrate sUAS aircraft into the nation's airspace. But because they applied to hobby and recreational use of drones, several legal challenges to the rules followed.

The recently-decided D.C. Circuit Court of Appeals case *Taylor v. Heurt*[2] struck down the rules as applied to recreational use. However, lost in much of the noise about the rules being struck down, they remain in force for commercial use. And that raises the thorny issue of what constitutes commercial use, in the eyes of the FAA.

Background

In 2012, the FAA Modernization and Reform Act mandated the integration of civil unmanned aircraft systems into the national airspace and granted the FAA rulemaking authority to develop a comprehensive plan towards that end.[3] Part 107 is the FAA's first attempt at a comprehensive regulatory scheme for sUAS aircraft and their operators.

Part 107 only applies to commercial uses of sUAS aircraft. Section 336 of the FAA Modernization and Reform Act explicitly prohibits the FAA from promulgating any rule or regulation regarding a model aircraft or an aircraft being developed as a model aircraft if the aircraft is flown strictly for hobby or recreational use.[4]

The act defines the term "model aircraft" as an unmanned aircraft that is:



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- Capable of sustained flight in the atmosphere
- Flown within visual line of sight of the person operating the aircraft; and
- Flown for hobby or recreational purposes.[5]

Taylor v. Heurt arose from the FAA’s “Registration and Marking Requirements for Small Unmanned Aircraft Interim Final Rule,” which was issued pursuant to emergency rulemaking authority on Dec. 14, 2015.[6]

The aptly nicknamed “Registration Rule” required all sUAS operators — including recreational users — to register their sUAS aircraft through a new web-based process.[7] This rule directly conflicted with Section 336 of the Modernization and Reform Act’s explicit prohibition on rulemaking regarding “model aircraft,” which includes in its definition sUAS aircraft.[8]

The agency took the position that the Registration Rule was rulemaking unrelated to the incorporation of sUAS into the national airspace and that the authority to create such a rule already existed in the current regulatory scheme: 49 U.S.C. § 44101(a).[9] The D.C. Circuit Court of Appeals disagreed, however, vacating the Registration Rule as it applied to model aircraft under Section 336.[10]

The FAA’s action in creating the Registration Rule appears to be a first step towards more stringent requirements for recreational drone users. However, as the regulatory landscape stands post-Taylor, recreational users are exempt from registration and the prohibition contained in Section 336 stands.

Commercial Use of sUAS Aircraft

Despite the ongoing challenge to FAA’s regulations with regard to recreational use of sUAS aircraft, the FAA’s authority to regulate the commercial use of sUAS still applies. But determining what constitutes a “commercial use” is difficult as the FAA takes a broad view of commercial activity.[11]

Generally, the FAA considers any use of a sUAS aircraft is in furtherance of a person or entity’s business to fail the hobby or recreation requirement contained in Section 336. Instead, it is a “commercial” activity for the purposes of Part 107. The FAA focuses on whether the owner uses the sUAS aircraft to generate revenue or any other form of compensation.[12]

It is the user’s intent at the time of the flight that is determinative.[13] For example, a sUAS aircraft operator who takes pictures or captures video would be considered a recreational user and free from regulation if the operator does not intend to sell them at the time of flight.[14] If the same operator sells a picture or video captured on the sUAS aircraft, doing so does not change the character of the operation as part of a hobby or recreational activity.[15]

Would-be hobbyist or recreational users must exercise caution, however. The FAA’s interpretation of “profit-generating” is extremely broad, even encompassing sUAS operators who record video and later upload it to a content-sharing website such as YouTube.[16] In the FAA’s view, this drone footage is generating profit for YouTube through advertisements to viewers of the captured video.

It is unclear how the FAA’s action in this area conforms to the operator’s intent requirement above, but the action suggests that the FAA intends to increase regulation of all sUAS aircraft regardless of their use in the upcoming years. Today, however, regulation of commercial drone use under Part 107 is not all encompassing. Part 107 does not apply to the following operations:

- International operations and foreign-owned aircraft;
- Public aircraft operations;
- Certain model aircraft; and
- Moored balloons, kites, amateur rockets and unmanned free balloons.[17]

Small Unmanned Aircraft Rule (Part 107)

The small unmanned aircraft rule only regulates 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 waiver of certain regulations.

Operating Requirements

Part 107[18] focuses on requiring a sUAS operator to avoid any manned aircraft or structures. The sUAS aircraft remain within the visual line of sight of the person manipulating the flight controls of the aircraft. While the rule allows for first-person viewing by the operator through a device such as a camera, the operator must still have a visual observer watch the aircraft without the use of any visual aid other than corrective lenses.

Additionally, a first-person camera cannot satisfy the FAA's "see-and-avoid" requirement, which requires that each person operating an aircraft maintain vigilance so as to see and avoid other aircraft, regardless of whether the operation is conducted under instrument flight rules or visual flight rules. A person acting as an operator or a visual observer may not be responsible for more than one unmanned aircraft at a time.

Part 107 sets the maximum groundspeed for sUAS devices at 100 mph and a maximum altitude of 400 feet above ground level (or if higher than 400 feet above ground level, within 400 feet of a structure). Operators may only fly sUAS devices during daylight and civil twilight hours, and must have the appropriate anti-collision lighting on their devices.

Additionally, Part 107 places various restrictions on specific uses of sUAS aircraft:

- sUAS aircraft may not operate over any persons not directly participating in the operation;
- sUAS aircraft may not operate under a covered structure or inside a covered stationary vehicle;
- No sUAS operations from a moving aircraft;
- No sUAS operations from a moving vehicle, unless the operation is over a sparsely populated area; and
- No careless or reckless sUAS operations.

Part 107 also permits a sUAS aircraft to operate in Class G or uncontrolled airspace without air traffic control permission. sUAS operations within controlled Class B, C, D and E airspace are allowed as well, so long as the operator receives the required air traffic control permission. However, sUAS aircraft must yield right of way to all other aircraft regardless of airspace designation.

Potential commercial users should also take note that Part 107 allows external load operations as long as the object being transported is securely attached to the sUAS and the object does not affect the aircraft's flight characteristics or controllability.

Transportation of property for compensation or hire, however, contains more stringent restrictions:

- The sUAS aircraft, including attached systems, payload and cargo, cannot weigh more than 55 pounds total;
- The flight is conducted within the visual line of sight and not from a moving vehicle or aircraft; and
- The flight occurs completely within the bounds of a state and does not involve transport between (a) Hawaii and another place in Hawaii through airspace outside Hawaii; (b) the District of Columbia and another place in the District of Columbia; or (c) a territory or possession of the United States and another place in the same territory or possession.

The FAA has the authority to waive most of the operational requirements if an applicant demonstrates that his or her sUAS operation can safely be conducted under the terms of a certificate of waiver. A sUAS operator can apply for a waiver at https://www.faa.gov/uas/request_waiver/.

Pilot Certification and Responsibilities

One of the most important aspects of Part 107 is the establishment of the “remote pilot in command” title for the operator of a sUAS aircraft. According to the rule, a person operating a sUAS must either hold a remote pilot airman certificate or be under the direct supervision of a person holding such a certificate during the course of operation.

To qualify for a remote pilot certificate, a person must first demonstrate aeronautical knowledge. This can be done by either: (1) passing an initial aeronautical knowledge test at an FAA-approved testing center;^[19] or (2) holding a Part 61 pilot certificate^[20] 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. Additionally, the prospective pilot must be at least 16 years old and will be vetted by the U.S. Transportation Security Administration before a certificate is administered. Once certified, the remote pilot in command of the sUAS aircraft must:

- Make the sUAS aircraft available to the FAA for inspection or testing upon request;
- Report any sUAS operation that results in serious injury, loss of consciousness or property damage of at least \$500 to the FAA within 10 days of the event occurring;
- Conduct a preflight inspection, including specific aircraft and control system checks, to make sure the sUAS aircraft is in a safe operating condition; and
- Confirm that the sUAS aircraft complies with the registration requirements for civil aircraft contained in 14 C.F.R. § 91.203.^[21]

In emergency situations, however, a remote pilot in command may deviate from the Part 107 requirements in response to an in-flight emergency.

Practice Tips

To use drones in any business-related capacity, the following tips may help avoid an inadvertent violation of application rules related to small unmanned aircraft:

- The FAA will consider use of the sUAS aircraft in any profit-generating capacity, even a remote one, “commercial” and the requirements of Part 107 apply.
- A commercial user is still subject to registration under either Part 47 or Part 48, notwithstanding the Taylor v. Huerta holding, which only applies to recreational users.
- Depending on the frequency of sUAS use, consider hiring a third party operator who already holds a remote pilot certificate and thus is more familiar with the pertinent FAA requirements.
- Estimate a prospective flight operation in advance to ensure that the site and use meets applicable operational requirements.

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[1] See Linda Chiem, 3 Things To Watch In The Next FAA Reauthorization Bill (last visited Aug. 11, 2017), <https://www.law360.com/articles/926803/3-things-to-watch-in-the-next-faa-reauthorization-bill>.

[2] 14 C.F.R. § 107 (2017).

[3] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 (2012).

[4] *Id.*

[5] *Id.*

[6] 14 C.F.R. § 48 (2017).

[7] The process can be initiated at www.faa.gov/uas/registration.

[8] FAA Modernization and Reform Act of 2012, *supra* note 3.

[9] Taylor, *supra* note vi, at 7 (“[T]he FAA contends that the Registration Rule is authorized by pre-existing statutory provisions that are unaffected by the FAA Modernization and Reform Act.”).

[10] In its analysis, the D.C. Circuit Court of Appeals opined that “[s]tatutory interpretation does not get much simpler. The Registration Rule is unlawful as applied to model aircraft.” *Id.*

[11] See Faine Greenwood, Flight Pattern: The FAA is completely confused about what constitutes “commercial” drone use, *Slate*, http://www.slate.com/articles/technology/future_tense/2015/03/faa_is_confused_about_what_constitutes_commercial_drone_use.html (last visited Aug. 11, 2017) (quoting Brian D. Smith of Covington &

Burling LLP, who notes that “receiving anything of value is considered compensation” under the FAA’s interpretation of commercial).

[12] See Letter from Mark W. Bury, Assistant Chief Counsel for Regulations to Rebecca B. MacPherson, Jones Day (Aug. 13, 2014) (on file with author) (providing a legal interpretation of “commercial operations” in the context of whether a pilot in a peer-to-peer flight sharing company needs to obtain a part 119 commercial operators certificate).

[13] Memorandum from Mark W. Brury, Assistant Chief Counsel for Regulations, AGC-200, to James H. Williams, Manager of the Unmanned Aircraft Integration Office, AFS-80 (May 5, 2015) (on file with author).

[14] Id.

[15] Id.

[16] See Faine Greenwood, Flight Pattern: The FAA is completely confused about what constitutes “commercial” drone use, Slate, http://www.slate.com/articles/technology/future_tense/2015/03/faa_is_confused_about_what_constitutes_commercial_drone_use.html (last visited Aug. 11, 2017).

[17] FAA Modernization and Reform Act of 2012, *supra* note iii.

[18] Much of the information regarding the sUAS regulations under Part 107 has been summarized from Part 107 itself (14 C.F.R. § 107 (2017)), the FAA’s Part 107 Fact Sheet (which can be found at https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516) and the FAA’s Part 107 Summary (which can be found at https://www.faa.gov/uas/media/Part_107_Summary.pdf).

[19] After passing the test, the person must complete an FAA Airman Certificate or Rating Application to receive the remote pilot certificate, which can be found at <https://iacra.faa.gov/IACRA/Default.aspx>.

[20] A Part 61 pilot certification is issued under 14 C.F.R. § 61 and can be received by training with any FAA-approved flight instructor, regardless of whether he or she is associated with a flight school.

[21] 14 C.F.R. § 91.203 (2017). Section 91.203 requires that a civil aircraft: (1) have a FAA airworthiness certificate (Part 107 explicitly excludes sUAS from this requirement); and (2) be registered according to the new Registration Rule contained in 14 C.F.R. § 48 or the old registration framework in 15 C.F.R. § 47.