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## FAA Explains Position on Drone Use

*ABA Section of Litigation Young Advocates Committee Newsletter*  
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On July 18, 2014, the D.C. Circuit dismissed a petition against the Federal Aviation Administration (FAA) filed by Texas Equusearch Mounted Search and Recovery Team. The petition challenged the FAA's authority to regulate unmanned aerial vehicles, or drones, which Texas Equusearch uses to conduct search-and-rescue operations. The D.C. Circuit based its dismissal on the conclusion that an FAA employee's email to Texas Equusearch describing the FAA's position was not appealable.

The D.C. Circuit's decision delays, for now, judicial review of the FAA's authority to regulate drone use. However, in response to the decision, the FAA published a press release on July 18 setting forth its position on the law concerning regulation of drones:

*Texas Equusearch [sic] and all UAS [Unmanned Aerial Systems] operators need to be aware that the FAA's safety mandate under 49 U.S.C. § 40103 requires it to regulate aircraft operations conducted in the National Airspace System (NAS) to protect persons and property on the ground and to prevent collisions between aircraft and other aircraft or objects.*

The press release goes on to explain the FAA's position in regards to its authority to regulate drones under the FAA Modernization and Reform Act of 2012, Public Law 112-95. In doing so, the FAA notes "[a]n important distinction for UAS operators to be aware of is whether the UAS is being operated for hobby or recreational purposes or for some other purpose."

Under section 336(c) of the act, a "Model Aircraft" is defined as "... an unmanned aircraft that is (1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes." "Under Section 336(a) of the Act the FAA is restricted from conducting further rulemaking specific to Model Aircraft as defined in section 336(c) so

long as the Model Aircraft operations are conducted in accordance with the requirement of section 336 (a).”

The FAA makes clear its position, however, that although model-aircraft operations in compliance with section 336(a) of the act are not subject to further rulemaking, under section 336(b) of the act,

*the FAA has the authority under its existing regulations to pursue legal enforcement action against persons operating Model Aircraft in accordance with section 336(a) and 336(c) when the operations endanger the safety of the NAS [National Airspace System]. Nothing in section 336 otherwise alters or restricts the FAA’s statutory authority to pursue enforcement action against any UAS operator, even those whose operations are conducted in accordance with sections 336(a) and (c) that endanger the safety of the NAS. So, for example, a Model Aircraft operation conducted in accordance with section 336(a) and (c) may be subject to an enforcement action for violation of 14 C.F.R. § 91.13 if the operation is conducted in a careless or reckless manner so as to endanger the life or property of another.*

As for drones that do not qualify as model aircraft, the FAA explains that they can only be operated “with specific authorization from the FAA.” Such drone operations are authorized “through one of two avenues: (1) the issuance of Certificates of Waiver or Authorization; and (2) the issuance of special airworthiness certificates. The FAA also has a third avenue with which to potentially authorize UAS operations through its exemption process when it determines that such operations are in the public interest.” The press release then discusses these authorization “avenues” in more detail. The FAA’s July press release follows a June 23, 2014, announcement of the publication of an informational “do’s and don’ts” for flying model aircraft.

It is important to note that the FAA’s position regarding its authority to regulate drones, and specifically model aircraft, has been rejected by at least one administrative-law judge. Earlier this year, in *Huerta v. Pirker*, an administrative-law judge dismissed a \$10,000 fine imposed by the FAA against an operator of a “glider aircraft” hired to take aerial photos in or around the University of Virginia. In a decision that was appealed by the FAA, the administrative-law judge held that where the FAA has only issued administrative guidance—but not promulgated any rules—concerning use of drones, the fine was invalid. It has been reported that the FAA will likely miss a September 2015 to promulgate such rules.

As the use of drones has increased—and the cost of acquiring drones has decreased—dramatically in recent years, their regulation has become a hot topic on federal, state, and local levels. Indeed, municipalities have begun considering steps to regulate the use of drones. For example, Santa Clarita, California, has banned the use of remote-controlled helicopters and planes, among other unmanned vehicles, in city parks. In addition, Iowa has enacted a rule of evidence providing that

*[i]nformation obtained as a result of the use of an unmanned aerial vehicle is not admissible as evidence in a criminal or civil proceeding, unless the information is obtained pursuant to the authority of a search warrant, or unless the information is otherwise obtained in a manner that is consistent with state and federal law.*

See IA ST § 808.15.

As drones become more widespread, expect drone-related legal issues to continue to pop up.

### **ATTORNEYS**

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