

# THE FAA'S COMMERCIAL USE BAN

## Is it true, and do you have to wait to fly?

**M**OST OF US HAVE PROBABLY HEARD that the Federal Aviation Administration (FAA) has banned all commercial use Unmanned Aerial Systems. This is true for almost all commercial operations, at least until sometime in 2016 when the small Unmanned Aircraft Systems proposed rules, scheduled to come out later this year, become final. Earlier this year, BP and Aerovironment were approved by the FAA to fly the Puma AE unmanned aircraft commercially in Alaska, but this was done through a special section of the FAA Modernization and Reform Act of 2012 that specifically allowed flights in the Arctic. More recently, in September the FAA approved flights for six companies associated with the Motion Picture Association of America who had applied for exemptions under this law.



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With a legal background in corporate outside counsel, civil litigation, insurance defense, and intellectual property and drone/UAV law, Jeffrey began flying radio-controlled aircraft several years ago, which lead him to research new technologies, including first-person viewing (FPV) and drones.

What caused a firestorm in our community was on June 18, 2014, the FAA issued its Interpretation of the Special Rule for Model Aircraft, indicating that: a) all model aircraft are "unmanned aircraft" and thus "aircraft" subject to FAA regulation, and b) any use of model aircraft by a business or a farm was a "commercial use" even if no money changed hands and was thus banned. Many were upset, with some saying this was contrary to previous FAA statements, or more importantly that regulating model aircraft was against the plain Congressional intent stated in the 2012 FAA Reform Act. In response, the Academy of Model Aeronautics (AMA) spearheaded a national awareness campaign seeking public comments, and the AMA and others recently filed federal lawsuits against the FAA regarding this interpretive rule.

This article will present the FAA's view, theories published on the Internet as to why some people think the FAA is wrong, what the reality is, what you can do now if you really want to fly commercially.

### The FAA's view

Before the FAA's announcement in June of this year, a number of folks believed flying model aircraft for internal company or farm use was perfectly legal as long as the flights were on private property with the landowner's permission, payment was not being made from an outside source, and flight rules were followed such as staying below 400 feet and staying away from airports. Regardless of any statements the FAA may or may not have made in the past, its view today is crystal clear: the new interpretive rule provides that any use by a business or farm, including paid model aircraft demonstrations and

flight instruction, are banned commercial activities.

Moreover, before the FAA announced its interpretive rule, it published its FAA Busting Myths about the FAA and Unmanned Aircraft—Update, stating in part: "The FAA is responsible for air safety from the ground up... The FAA has broad authority to prescribe regulations to protect individuals and property on the ground and to prevent collisions between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

While the FAA's stance is controversial and being fought in court, if you fly unmanned aircraft commercially you should know you may be facing the Feds.

### Theories on the Internet

An Internet search reveals many theories about how the FAA's ban on commercial model aircraft flights is illegal, some by attorneys, some by bloggers, and some by operators. Some point to the FAA vs. Pirker decision this past March, where a National Traffic Safety Board administrative law judge found that the FAA's commercial use ban (prior to the 2012 FAA Modernization Act) was flawed, basically because the FAA failed to go through the proper administrative law procedures. FAA has appealed that decision, and the appeal remains pending as of the time this edition of *RotorDrone* goes to press.

Some make a constitutional case, stating that any supposed commercial use ban by the FAA for flights on their own land is unconstitutional as long as it is below 400 feet. They argue the ban deprives their right to use their own property and, if the government wishes to take that right away, it is a "taking" that requires compensation.



## IF YOU FLY COMMERCIALY NOW WITHOUT EXPRESSED WRITTEN PERMISSION FROM THE FAA, YOU ARE TAKING SERIOUS LEGAL AND FINANCIAL RISKS



Still others argue that flying above their own land, under 400 feet where airplanes aren't supposed to fly anyway, cannot be regulated at all because it isn't national airspace under any reasonable interpretation, as long as it is far away from an airport. Taking this thinking further, the FAA could not stop a farmer from erecting a silo, flying a kite or hitting pop flies in baseball.

### **What the reality is**

While nothing in this article constitutes legal advice, it's pretty clear that if you fly commercially now without expressed written permission from the FAA, you are taking serious legal and financial risks. While nearly everyone in the industry admires Raphael Pirker and his lawyer for challenging the FAA, almost no one can afford to do the same. And there is probably a greater risk today

of losing a challenge to the FAA if you are caught flying commercially without special FAA approval, you have a greater risk of losing than Mr. Pirker, since the 2012 FAA Reform Act was passed after the 2011 incident involving him. Moreover, according to enforcement guidelines issued in mid-October by the FAA, if you happen to be a certificated manned aircraft pilot and you run afoul of the FAA's commercial use ban on UAS or operate dangerously, you may face significantly enhanced penalties, possibly to include losing your pilot's license.

While theories on the Internet might possibly persuade a judge if the FAA comes after you, the consequences to you if a judge does not agree with you can be very serious. This could mean large monetary fines or worse, especially if you cause an accident involving personal injury, property damage, or fly in restricted airspace. Nobody disputes that

**FOR THOSE OF YOU WHO REALLY WANT TO FLY COMMERCIAL NOW, CONGRESS ALREADY PROVIDED AN OPTION FOR YOU: A SECTION 333 PETITION**

the FAA and other authorities have every right to go after you if your flight interferes with manned aircraft, puts people or property at risk, or if you fly in prohibited areas. And, as a practical matter, even if you beat the charges against you, the legal fees to defend yourself would probably be at least as large as a luxury automobile, if not as much as a house.

**I really want to fly commercially now, what can I do?**

I have spoken with many people this year in the industry including at conferences such as AUVSI, the Precision Aerial Agriculture Show, and Ohio UAS. It is abundantly clear that those wishing to manufacture and use unmanned aircraft commercially feel that if they aren't flying right now, by the time the FAA regulations allowing commercial unmanned flights are finally in place they will be hopelessly behind their competition. This might be true, especially from foreign competition where commercial UAS is already allowed.

For those who really want to fly commercially now, Congress has already provided an option for you: a Section 333 petition. Congress put Section 333 into the FAA Modernization and Reform Act of 2012 to force the FAA to determine "if certain unmanned aircraft systems may operate safely in the national airspace system before [the rules are released in final form allowing for commercial use of unmanned aircraft]." Basically, Section 333 allows companies to file a petition in a rulemaking process explaining what their unmanned aircraft is and the intended use.

If the petition is granted, explicit permission will be given from the FAA to fly commercially, perhaps with conditions mandated as part of the official permission. Filing a Section 333 petition as each is reviewed on a case by case basis. There is limited precedent yet for what will or will not pass muster, is complicated, requires real writing and analysis (there are no forms currently) and it is potentially somewhat expensive. Hiring a lawyer familiar with federal rulemaking can help considerably (in fact, my firm submitted to the FAA last month). However, it is the only way to hope to fly commercially right now in the U.S. outside of the Arctic if you don't have the patience, or your business plan does not allow you to wait until the final SUAS rules come out sometime in 2016.

**Conclusion**

There can be no doubt that the FAA believes it has the authority to, and has banned, all commercial unmanned flights, except for isolated cases in the Arctic and the six MPAA exemptions. If you fly commercially before the final rules come out, you are taking a great legal and financial risk. If you really want to fly commercially now, the FAA is accepting Section 333 petitions and you just might get ahead of your competition with the legal right to fly. And if you are not satisfied with these options, contact your Congressmen and Senators and tell them it isn't good enough. ✈

*Disclosure: Jeffrey Antonelli sometimes owns stock in Aerovironment.*

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