

FAA Releases Final Rule, Opens Skies for Drone Journalism

New Rule Eliminates Requirement for Pilot's License

By Charles D. Tobin, Christine N. Walz, and Mickey H. Osterreicher

On June 21, 2016, the Federal Aviation Administration (FAA) announced its long-awaited final rule on commercial use of small unmanned aircraft systems (UAS, or drones) weighing less than 55 lbs. The rule, which will be effective in late August, will loosen many current restrictions and open up significant opportunities for newsgathering.

Currently, commercial drone use, which the FAA has said encompasses newsroom use, is banned in the United States absent a special exemption from the FAA. The exemptions have come with tight restrictions that have hampered development of drone journalism. The most difficult restriction for newsrooms has been the requirement that drone operators hold a license to pilot manned aircraft.



The new rule – released after more than a year of FAA review of comments to a notice of proposed rulemaking, reports from industry stakeholder committees, and testing programs conducted by news media companies – eliminates the pilot's license requirement and takes other positive steps for journalists. Under the new [rule](#):

- Anyone who wants to operate a drone commercially will need an FAA "remote pilot airman certificate." To get one, journalists will need to go to a center near them that the FAA will set up and take an aeronautical knowledge test. The FAA has set up a page of ["Activities, Courses, Seminars and Webinars"](#) to help operators prepare for the test.
- Operators will also have to be at least 16 years old; be able to read, speak, write, and understand English (with a few exceptions) and be in a physical and mental condition to safely operate a small UAS.
- Operators will need to be vetted by the Transportation Safety Administration.
- No visual observer is required in addition to the drone operator, although operators are permitted to work with a visual observer.
- Use of tethered drones affixed to grounded objects or buildings is permitted.

- Drones must be operated within the visual line of sight. At all times, either the "pilot in command" operating the drone, or the visual observer must observe the drone with unaided sight.
- Drone operations generally must be limited to flights under 400 feet. However, drone operations are permitted higher than the 400-foot ceiling for flights that remain within a 400-foot radius of a tall structure.
- Drones may be flown during daylight, or in twilight (30 minutes before official sunrise to 30 minutes after official sunset, local time) with appropriate anti-collision lighting. There also must be at least three miles of weather visibility from the control station.
- Flights are not permitted over people who are not directly participating in the operation, unless the people are located under a covered structure or stationary vehicle that would protect them from a falling drone. A separate rule allowing some operations over people is expected later this year.
- Drones may not be operated from a moving vehicle unless the operation is over a "sparsely populated area."

Most of the operational restrictions can be waived by the FAA, upon a showing that a proposed operation can be conducted safely under a waiver.

The final rule and waiver process will largely supplant the current exemption process under Section 333 of the FAA Modernization and Reform Act of 2012, the Obama Administration initiative that required the FAA to prepare regulations to integrate UAS into the National Airspace (NAS). However, operators currently holding Section 333 exemptions may continue to operate under them until the final rule goes into effect. At that point, operators can decide whether to operate under the final rule requirements or under the conditions set forth in their Section 333 exemption.

The final UAS rule reflects many of the comments submitted by a News Media Coalition of 24 news organizations following the FAA's notice of proposed rulemaking last year. A subgroup of News Media Coalition organizations also conducted testing on news drones last year in conjunction with an FAA-approved test site at Virginia Tech. CNN also has been conducting experimental operations in cooperation with the FAA under a program at Georgia Tech.

Notably, the new FAA rule does not address privacy issues. The FAA continues to stay away from that issue citing its lack of expertise on the subject and limited statutory authority. In its discussion, the FAA defers to the National Telecommunications and Information Administration (NTIA) process and current state law on privacy.

The NTIA recently concluded its series of multi-stakeholder meetings with representatives of manufacturing, data privacy and other stakeholder groups. Following often contentious exchanges with privacy groups seeking severe restrictions on drone photography in public places, the News Media Coalition secured a carve-out for newsgathering in the NTIA voluntary ["best practices" released](#) in May 2016. That carve-out preserves newsroom autonomy and provides clear language allowing journalists and news organizations to establish their own drone practices:

***BEST PRACTICES FOR NEWSGATHERERS
AND NEWS REPORTING ORGANIZATIONS***

Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.

For this reason, these Best Practices do not apply to newsgatherers and news reporting organizations. Newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces. Newsgatherers and news reporting organizations should operate under the ethics rules and standards of their organization, and according to existing federal and state laws.

In the explanation accompanying the final rule, the FAA devoted eight pages to whether the First Amendment limits its authority to restrict the use of drones for newsgathering. It responds to the some of the concerns expressed by the News Media Coalition in its public comments on the proposed rule.

Specifically, the FAA argues that:

- The rule is narrowly tailored to serve the significant governmental interest of aviation safety as well as "the safety of people on the ground."
- The rule's restrictions on speech are incidental, viewpoint neutral and non-content-based and therefore, they "need not be the least restrictive or least intrusive means of furthering that government interest."
- The NAS is a non-public forum, requiring a lower level of scrutiny.
- The rule does not burden First Amendment-protected activity because "attaching a camera to a small unmanned aircraft does not transform flying that aircraft into expressive conduct any more than attaching a camera to a car would transform driving that car into expressive conduct."

- The rule leaves open alternative avenues of communication because "anyone seeking to use a small UAS for photography or videography in a manner not permitted under this rule is free to utilize another method of photography or videography by, for example, using a manned aircraft, filming from a tall structure or landmark, filming from the ground, or using specialized equipment."

The FAA's inclusion of these arguments in its explanatory language appears aimed at forestalling a First Amendment challenge to the rule, rather than practically impacting how newsgathering drones may be operated. And they overstate the FAA's authority to restrict the use of drones for newsgathering, where there is no appreciable enhanced benefit to public safety.

Additionally, some of these arguments are inconsistent with other parts of the rule. For example, the government's justification that it is leaving open alternative avenues of communication by asserting that "anyone seeking to use a small UAS for photography or videography in a manner not permitted under this rule is free to utilize another method of photography or videography by, for example, using a manned aircraft, filming from a tall structure or landmark, filming from the ground, or using specialized equipment," flies in the face of the FAA's own language that "in addition to enabling this industry to develop, the FAA anticipates that this final rule will provide an opportunity to substitute small UAS operations for some risky manned flights, such as inspection of houses, towers, bridges, or parks, thereby averting potential fatalities and injuries."

Up next is the FAA's anticipated release of a proposed rule that will govern flights over people, and will open up even greater opportunity for breaking news use. That proposed rule is expected to come out at the end of this year.

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Holland & Knight represented the News Media Coalition, consisting of the following news organizations, in submitting comments to the FAA on the proposed small UAS rule: Advance Publications, Inc.; A.H. Belo Corp.; American Society of Media Photographers; The Associated Press; Cable News Network, Inc.; Capitol Broadcasting Co.; Cox Media Group, LLC; Fusion Media Network, LLC; Gannett Co., Inc.; Getty Images (US), Inc.; Gray Television Group, Inc.; Media Law Resource Center; MPA – the Association of Magazine Media; National Press Club; National Press Photographers Association; NBCUniversal Media, LLC; The New York Times Company; Reporters Committee for Freedom of the Press; The E.W. Scripps Company; Sinclair Broadcast Group, Inc.; Society of Professional Journalists; Reuters; TEGNA; and WP Company LLC.