

# Small Drone Users Assess Appellate Court's Decision to Bar FAA from Requiring Hobbyists to Register Drones

By Kristopher Kokotaylo

The Federal Aviation Administration (FAA) estimates that small unmanned aerial systems (UAS) in the U.S. will increase from 2.5 million in 2016 to 7 million in 2020, 4.3 million hobbyist and 2.7 million commercial. In response to concerns about the safety of the national airspace system and of people and property on the ground, the FAA issued a rule in December 2015 titled "Registration and Marking Requirements for Small Unmanned Aircraft," which requires web-based registration for small UAS, including model aircraft (Registration Rule). Congress limited FAA's authority to regulate model aircraft, which include small UAS used by hobbyists for recreational purposes. Failure to register small UAS under the Registration Rule could subject operators to civil and criminal penalties.

On May 19, 2017, the U.S. Court of Appeals for the District of Columbia Circuit struck down the FAA's authority to issue those registration requirements as to model aircraft. (*Taylor v. Huerta*, 15-1495, D.C. Cir. 2017.) The Court's ruling makes it unlikely that the FAA will attempt to further regulate hobbyist small UAS use absent new Congressional authority. However, hobbyist drone operators could ultimately face attempts by state or local agencies that seek to develop



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and administer new rules and regulations on model drone use. The ruling has no impact on businesses that seek to use small UAS for commercial purposes; such operators are still subject to the Registration Rule. However, if hobbyists attempt to monetize their use of small UAS (and associated photography and surveillance videos), they must understand what activities could transform them into a commercial user subject to the Registration Rule.

## Appellate Court's Ruling

Section 336 of the FAA Modernization and Reform Act of 2012 (Act)

states that "the Administrator of the Federal Aviation Administration may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft." The Petitioner in *Taylor* challenged the application of the Registration Rule to model aircraft as unlawful under the Act. The FAA argued that pre-existing statutory provisions requiring that aircrafts register prior to operation were unaffected by the Act and thus authorized the Registration Rule. However, the Court of Appeals for the District of Columbia Circuit rejected the FAA's arguments and ruled that "the FAA's

2015 Registration Rule is a ‘rule or regulation regarding a model aircraft.’ Statutory interpretation does not get much simpler. The Registration Rule is unlawful as applied to model aircraft.”

The decision in *Taylor* does not impact the Registration Rule to the extent that it requires non-model aircraft operators to register their UAS. However, if the FAA believes that its goals of ensuring the safe operation of the nation’s airspace require some regulation of model aircraft, it will likely require legislation amending the Act to grant the FAA authority to promulgate rules and regulations regarding model aircraft.

### **What’s Next for Regulating Public Safety and Privacy Concerns?**

The FAA’s inability to impose the Registration Rule requirements on model aircraft may increase efforts by state and local agencies to address safety and privacy concerns raised by citizens regarding model aircraft use. Some local agencies are considering restrictions on model aircraft use. It is important to note that the FAA is tasked with ensuring that drones are operated safely within navigable airspace, but the FAA has declined to address the privacy rights of citizens on the ground. Instead, state and local governments are responsible for addressing privacy concerns raised by members of the public.

The Registration Rule required that model aircraft operators display a unique identifier on their small UAS. In the event of an incident or accident, this would allow the FAA, state or local agencies to identify model aircraft operated in a dangerous or impermissible manner and trace that model aircraft back to the owner based on the identifier. Registration

also provided an opportunity for the FAA to educate model aircraft owners on safety practices before they begin operating. Prior to *Taylor*, state and local agencies could have utilized a combination of minimal state or local regulations and more detailed regulations found in the Registration Rule to help ensure that model aircraft were appropriately operated.

Unless Congress amends the Act to permit the FAA to impose regulations and rules on model aircraft use, hobbyists should note that state and local agencies might now attempt to establish their own more comprehensive rules and regulations to address citizen concerns regarding model aircraft UAS use. Hobbyists could find themselves navigating different rules and regulations in different jurisdictions, such as when bringing a small UAS on a vacation or outdoor activity away from home.

### **Impact on Hobbyist and Commercial Small UAS Operators**

*Taylor* has no impact on drone operators that seek to utilize small UAS for commercial or non-hobbyist purposes. Business operators must comply with the Registration Rule. Similarly, drone operators that initially obtain a small UAS with the intent to utilize it for hobbyist purposes, but subsequently decide to utilize it for commercial or non-recreational purposes, should comply with the Registration Rule before using the small UAS. There are instances where a small UAS operator could shift from hobbyist use to accidental or unintended commercial use. For example, a hobbyist small UAS operator could take aerial photographs of a neighborhood and place them on a personal social media page. A realtor could

determine that the photographs are useful to assist with advertising a home and offer to purchase the photographs for that use. Selling those photographs would result in commercial operations and the drone photographer would be in violation of the Registration Rule and various other rules applicable to small UAS operations.

Additionally, although small UAS operators that utilize drones as only model aircraft and for hobbyist purposes are no longer required to comply with the Registration Rule under *Taylor*, the removal of this requirement does not absolve hobbyist drone operators from liability associated with irresponsible small UAS operations. Hobbyist drone operators can still be held liable for damage or personal injury caused by negligent operations. Thus, while small UAS owners that seek to only engage in hobbyist use no longer face liability for failure to comply with the Registration Rule under *Taylor*, hobbyist drone operators should continue to operate their small UAS in a responsible manner as they are liable for damage caused by negligent drone operation.

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