

**Before the  
FEDERAL AVIATION ADMINISTRATION  
Washington, D.C. 20590**

In the Matter of )  
 )  
Request for Information Regarding ) Docket No. FAA-2015-4378  
Electronic Registration for UAS )  
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**COMMENTS OF  
THE COMPETITIVE ENTERPRISE INSTITUTE**

November 6, 2015

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## Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Federal Aviation Administration’s (“FAA”) Request for Information Regarding Electronic Registration for UAS.<sup>1</sup> CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.<sup>2</sup>

Our comments develop the following points:

1. FAA lacks jurisdiction to mandate registration for all unmanned aircraft systems (“UAS”);
2. Mere registration, whether point-of-sale or prior-to-operation, will do little to mitigate UAS safety risks; and
3. FAA cannot dispense with required notice and comment rulemaking requirements by way of the good cause exception to the Administrative Procedure Act (“APA”).

### I. FAA Lacks Jurisdiction to Mandate Registration for All UAS

In the FAA Modernization and Reform Act of 2012 (“FMRA”) Section 336, Congress clearly stated 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,” provided conditions such as UAS weight and strict hobbyist use are met.<sup>3</sup> Congress then defined “model aircraft” under Section 336 as “an unmanned aircraft that is 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.”<sup>4</sup>

FAA now attempts to establish its jurisdiction by citing other, broader definitions of “aircraft” contained in FMRA’s UAS subtitle, as well as the definition at 49 U.S.C. § 40102(a)(6).<sup>5</sup> However, Congress clearly stated in Section 336 that FAA is not permitted to promulgate rules targeting small UAS hobbyists.<sup>6</sup> FAA conceded in its interpretation of Section 336 that “a model aircraft operated pursuant to the terms of section 336 would potentially be excepted from a UAS aircraft certification rule,”<sup>7</sup> an interpretation that

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1. Electronic Registration for UAS, *Clarification and Request for Information*, FAA-2015-4378, 80 Fed. Reg. 63912 (Oct. 22, 2015) [hereinafter RFI].
  2. See About CEI, <https://cei.org/about-cei> (last visited Oct. 28, 2015).
  3. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(a), 126 Stat. 11, 77 [hereinafter FMRA].
  4. *Id.* § 336(c).
  5. RFI, *supra* note 1, at 63913.
  6. FMRA, *supra* note 3, § 336(a).
  7. Interpretation of the Special Rule for Model Aircraft, *Notice of Interpretation with Request for Comment*, FAA-2014-0396, 79 Fed. Reg. 36171, 36173 (June 25, 2014).

would logically lend itself to a UAS aircraft registration rule as well. Yet, FAA appears to ignore both the plain language of the statute and its own interpretation of it.<sup>8</sup>

We therefore ask that FAA explain how it has the jurisdiction to regulate small UAS operated by hobbyists given that Congress limited FAA's jurisdiction under FMRA Section 336. We take no issue with FAA's ongoing registration of commercial UAS under FMRA Section 333 and support efforts to streamline and modernize the paper registration process.

## II. Registration Will Do Little to Mitigate UAS Safety Risks

FAA explains that it wishes to reverse its practice of not requiring registration for all UAS because it “has determined that registration of all UAS is necessary to enforce personal accountability while operating an aircraft in our skies.”<sup>9</sup>

Although registration can support enforcement efforts for UAS that crash, mere registration will neither enable identification of a host of potential reckless or malicious UAS operators, nor will it prevent reckless and malicious operations. Registration would presumably require UAS to bear unique identifying numbers, but these registration numbers will be essentially invisible to those who observe—either from on the ground or in the cockpit—a reckless or malicious UAS operation and then seek to report it to authorities. This suggests that the purported enforcement benefits of a mandatory UAS registration regime will be extremely low.

As former FAA chief counsel Sandy Murdock recently noted:

If safer flying is the desired outcome, registration of the AIRCRAFT will not, in and of itself, compel the flier of the drone to adopt safer flying procedures. Maybe a few drone operators might be incentivized to fly more safely for fear that the N number would lead the FAA to investigate the owner of an N numbered drone which was identified post-crash. It is easy to predict that the owner of an UAS would assert that someone else was flying when an identified incident occurred. That scenario does not project much of an increase in the adhering to better flight procedures.<sup>10</sup>

Aviation attorney and UAS regulation expert Jonathan Rupprecht shares Murdock's skepticism of FAA's registration proposal, writing that reckless drone operators “can be countered with geo-fencing far better than registration.”<sup>11</sup>

FAA should explain to the public why it believes mandatory UAS registration will materially benefit aviation safety and its enforcement abilities.

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8. FAA appears especially concerned by future UAS hobbyists, explaining that it reversed its position on UAS registration in part because “[s]ome retailers have projected huge holiday sales.” RFI, *supra* note 1, at 63913.

9. *Id.*

10. J.E. Murdock III, *The LoBiondo UAS Goals Are Good, But Registration Is Not The Best Means*, JDA JOURNAL (Oct. 26, 2015), <http://jdasolutions.aero/blog/lobiondo-uas-goals/>.

11. Jonathan Rupprecht, *The Problems with Mandatory Drone Registration*, DRONE LAW BLOG (Oct. 17, 2015), <http://jrupprechtlaw.com/the-problems-with-mandatory-drone-registration>.

### III. APA's Good Cause Exception Does Not Apply

Under the APA, substantive agency rulemakings are required to include a notice and comment period of at least 30 days unless “the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>12</sup> The good cause exception “is not an escape clause.”<sup>13</sup> Rather, “[i]t should be narrowly construed and only reluctantly countenanced,”<sup>14</sup> with “the agency bear[ing] the burden of demonstrating the grounds for good cause.”<sup>15</sup>

When Transportation Secretary Foxx announced the creation of the UAS Registration Task Force on October 19, he stated he would seek to impose the mandatory UAS registration rule by mid-December.<sup>16</sup> With the task force expected to deliver to FAA its report by November 20,<sup>17</sup> this suggests the current goal is to potentially impose a registration mandate less than 30 days after the task force presents its recommendations.

Notice and comment in this case cannot be said to be “impractical,” as “[i]mpracticality exists when the agency cannot both follow the notice-and-comment procedure and execute its statutory duty.”<sup>18</sup> FAA is arguably proceeding with a UAS registration mandate in direct *contradiction* of its statutory duty “not [to] promulgate any rule or regulation regarding a model aircraft.”<sup>19</sup> As a rule which mandates hobbyists to register their model aircraft creates a substantial new burden on the public, the notice and comment process cannot be said to be “unnecessary.”<sup>20</sup>

For FAA to meet Secretary Foxx’s ambitious goal of a mid-December publication of a rule mandating UAS registration, it will likely claim that notice and comment is “contrary to the public interest.” Presumably, FAA will argue that providing notice and comment would result in significant harm to the public interest by failing to immediately mitigate UAS safety risks that only mandatory registration can address. However, as noted above, there is little evidence that registration will, on its own, do much of anything to mitigate UAS safety risk, which itself is likely very low relative to other aircraft safety risks, such as birds.<sup>21</sup>

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12. 5 U.S.C. § 553(b)(3)(B).

13. 2 AM. JUR. 2d *Administrative Law* § 177.

14. *Id.*

15. *Id.*

16. Joan Lowy, *Registering drones: Worries about close calls prompt federal action on unmanned aircraft*, ASSOCIATED PRESS (Oct. 19, 2015), <http://www.usnews.com/news/business/articles/2015/10/19/ap-source-us-to-require-registration-of-drones-to-help-track-operators-who-flout-safety-rules>.

17. RFI, *supra* note 1, at 63914.

18. 2 AM. JUR. 2d *Administrative Law* § 178.

19. FMRA, *supra* note 3, § 336(a).

20. 2 AM. JUR. 2d *Administrative Law* § 179.

21. From 1990 to 2013, there were more than 138,000 reported bird strikes in the U.S. Richard A. Dolbeer et al., *Wildlife Strikes to Civil Aircraft in the United States: 1990–2013*, *National Wildlife Strike Database Serial Report Number 20*, Federal Aviation Administration (July 2014), <http://wildlife.faa.gov/downloads/Wildlife-Strike-Report-1990-2013-USDA-FAA.pdf>.

FAA should not attempt to circumvent APA rulemaking requirements by invoking the good cause exception. Hiding behind an interim final rule while promising to take into account public comments in the future does not serve the public interest.

### Conclusion

CEI is deeply concerned by FAA's approach to UAS registration. We request the agency to address our comments on: FAA's lack of jurisdiction to mandate registration for all UAS; the lack of evidence supporting registration as an effective safety risk mitigation method; and FAA's inability to expedite the rulemaking by invoking the good cause exception to APA notice and comment requirements. We look forward to further participation.

Respectfully Submitted,

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