The desire to use unmanned aircraft systems (UAS) in commercial operations is steadily building. A wide variety of businesses would like to use these devices to improve efficiency and safety, and reduce costs. One field that will likely see significant benefits from the use of unmanned aircraft is oil and gas operations. In the rapidly-developing landscape of unmanned aircraft used for commercial purposes, it is important to understand the salient issues and how they may affect your business. This alert provides a straightforward overview of some of the fundamental legal and regulatory topics related to the use of UAS in oil and gas operations.

What are unmanned aircraft systems?
UAS, as they are referred to by the Federal Aviation Administration (FAA), are also known as remotely piloted aircraft (RPA) or unmanned aerial vehicles (UAV). In the mainstream news and popular culture, these devices are often referred to as drones. They are aircraft—usually small planes or helicopters—that do not have an on-board pilot, but are instead operated remotely. These devices can range from very small (less than 5 lbs.) to very large (e.g., UAS used in military operations), and operate at different speeds and altitudes. They can be equipped with cameras, video transmission devices and a variety of sensor packages that can perform, for instance, air, biological, chemical, or radioactive sampling, or geophysical surveying.

How could UAS be used by oil and gas companies?
The potential uses of UAS include pipeline and/or right-of-way monitoring/investigation, surveying (including geophysical surveys), environmental monitoring, and drill site inspection. Unmanned aircraft can also help provide situational awareness for first responders, if needed. In fact, the only two commercial UAS operations currently approved by the FAA are being used for surveying and pipeline monitoring related to oil drilling operations in Alaska.

Are companies allowed to use UAS in their businesses?
The FAA has not adopted regulations on the use of commercial UAS, but it has issued policy statements specifying that unmanned aircraft may not be used for commercial or business purposes without FAA authorization. As mentioned above, only two commercial operations have been authorized to operate UAS. Several individuals and companies operating UAS for commercial purposes without FAA authority have received cease and desist letters from the FAA. The FAA has also sought penalties from unmanned aircraft operators in two instances. Therefore, the safest course is to seek some form of FAA authorization before conducting commercial UAS operations.
But can’t companies just use model aircraft used by hobbyists?

There’s no “yes or no” answer to this question. While the FAA and federal law generally authorize the use of model aircraft for hobby or recreational purposes (where the aircraft weighs less than 55 lbs. and is flown lower than 400 feet within the operator’s line of sight and in areas away from airports), FAA policy is that this exemption is not available when model aircraft are used for commercial or business purposes. In other words, according to FAA policy guidance, the exemption is limited to hobby or recreational use, and a business using what is otherwise a model aircraft for a commercial or business purpose, cannot take advantage of the exemption. That said, an administrative law judge with the National Transportation Safety Board (NTSB) recently dismissed an FAA enforcement action against a commercial videographer who was allegedly flying a model aircraft in an unsafe manner, on the grounds that the FAA has not adopted formal rules extending its various aircraft regulations to model aircraft used for commercial or business purposes, and only has sought to do so through informal policy statements and guidance. That decision is currently on appeal to the full NTSB.

How could a company obtain authorization from the FAA to conduct UAS operations?

Companies interested in employing UAS in their businesses can seek a “Section 333 exemption” from the FAA under the FAA Modernization and Reform Act of 2012 (the “Act”). Pursuant to this Act, the FAA was directed to publish a final rule on small UAS (i.e., unmanned aircraft weighing less than 55 lbs.) by August 2014. The FAA will not meet this deadline, and a proposed rulemaking will likely be initiated in fall of 2014. However, in the interim, Section 333 of the Act allows the FAA to grant exemptions and permit certain unmanned aircraft to be operated before a final rule is promulgated. The FAA recently announced for the first time that it will be considering several Section 333 exemption requests filed by companies and industry groups seeking FAA authorization to use UAS for commercial purposes. For instance, one pending exemption request seeks authority to employ unmanned aircraft for aerial surveys that can be used for agriculture and mining. While there is no formal Section 333 exemption process, exemption requests must demonstrate that the petitioner’s UAS operations are in the public interest and will not adversely affect safety. Because the Section 333 exemption requests will be focused on small UAS, we believe companies are more likely to gain clearance when their exemption requests correspond with the existing guidelines applicable to hobbyists. That said, given the fact that no Section 333 exemption requests have been ruled on yet and the FAA’s conservative stance on UAS operations generally, it is difficult to predict with certainty how quickly the FAA will act or likely outcomes for particular applications.

Are Section 333 exemptions time-sensitive?

Yes. The FAA has made unofficial statements that after it releases its proposed rule on small UAS, it will no longer consider Section 333 exemption requests. Instead, these requests will be construed as comments on the FAA’s proposed rule. Therefore, this only provides a small window of opportunity (about three to five months) to apply for a Section 333 exemption. On the other hand, if companies act soon, they may be able to get ahead of their competition in this area.
Unmanned Aircraft Systems and Oil and Gas Operations—Q and A

What if someone else tries to view our business operations using UAS—do we have any recourse?

Since the proliferation of UAS in society is so new, many of the issues related to the parameters of acceptable UAS usage have not been worked out. In fact, privacy concerns have been cited as a major roadblock slowing the FAA’s rulemaking process. FAA commentary indicates that privacy issues will likely be dealt with in the FAA’s final small UAS rules. Until those rules are promulgated, companies could consider the possibility of civil actions for trespass, nuisance, invasion of privacy, and illegal wiretapping. Some states and local governments have also passed specific restrictions on unmanned aircraft operations that may be applicable. If a public entity is operating the UAS, there could be additional statutory, regulatory, or constitutional protections at play. A company’s response to such an action by a third party would largely depend on the particular circumstances surrounding the intrusion.

 Authors:

Edward J. Fishman
edward.fishman@klgates.com
+1.202.778.9456

James B. Insco II
james.insco@klgates.com
+1.412.355.6744

Martin L. Stern
marty.stern@klgates.com
+1.202.661.3700

Thomas R. DeCesar
thomas.decesar@klgates.com
+1.717.231.4563