What Are the FAA Rules for Model Aircraft?

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By any measure, the popularity and notoriety of unmanned aircraft has mushroomed within the last few years. This is particularly true for aircraft that weigh less than 55 pounds, popularly referred to as "small drones," and are available to consumers and professionals at price points that rival DSLR cameras. Their use for operations such as search and rescue, fire detection, construction management, building inspection, real estate marketing, and other endless commercial uses are becoming evident every day. Because of their low price points they have also become popular for fun and recreation.

Since 1981, the Federal Aviation Administration has tried to keep pace with the proliferation of small drones, and until recently has tried to maintain a policy that was "based on whether the unmanned aircraft is used as a public aircraft, civil aircraft or as a model aircraft."[2] The FAA, and Congress, followed this trinity designation, and even adopted a statute giving substance to the definition of what is a model aircraft.

Upon reportedly lobbying by a special interest group, however, Congress included a section in the FAA Modernization and Reform Act of 2012[3] which

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[2] Policy Statement, Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (2007).

[3] Public Law 112-95.

removed authority[4] from the agency to promulgate any regulation which governed model aircraft "operations" itself defined in the statute as model aircraft "operated in accordance with a community-based set of safety guidelines **and within the programming of a nationwide community-based organization**." (emphasis added). This carve out of agency authority, known as the "Special Rule for Model Aircraft" understandably has occasioned complexity and misunderstanding in the regulatory landscape, especially because while taking away authority from the FAA with one hand, Congress provided on the other hand that the Special Rule did not limit the ability of the FAA to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system.[5]

Recently,[6] the FAA adopted a final rule contained in Part 107 of Title 14 of the Code of Federal Regulations. Relying upon the statement of purpose in the Notice of Proposed Rulemaking for Part 107 that this was to be a business rule, and widely anticipated as such, the FAA issued a surprise reinterpretation in an Advisory Circular asserting that **Part 107 also applied to hobby or recreation model aircraft that are not flown in accordance with the Special Rule**.[7] With this one sentence in an Advisory Circular, the FAA has thrown in question the entire scheme of regulation of small unmanned aircraft.

In short, what this means is that recreational flyers have only two options: they either have to join the special interest group that lobbied for the carve-out in the Special Rule and fly pursuant to its programming, or they have to comply with the more rigorous provisions of Part 107, including licensing, higher age requirements, testing, and TSA vetting. Indeed the FAA frequently asked questions webpage clearly identifies this Hobson's choice for recreational flyers. To make this point clear -- flying a model aircraft on your own for recreation, not within the

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[4] Sec. 336(a)(2), 49 U.S.C. §40101 (2012).
[5] Sec. 336(b), 49 U.S.C. §40101 (2012).
[6] June 21, 2016, to be effective August 29, 2016.
[7] FAA Small Unmanned Aircraft Systems Advisory Circular 107-2 (6/21/16), ¶ 3.1 ("In addition, part 107 also applies to sUAS used for hobby or recreation that are not flown in accordance with part 101 subpart E.")

programming of a "nationwide community-based organization," is no longer legal unless you are in compliance with Part 107.

Not wishing to cast aspersions against any particular nationwide community-based organization, it is evident that having a federal agency require anyone to join, and pay dues, to a private organization is a serious federal concern. Also of concern is the abdication of responsibility by Congress in favor of a special interest group, and adoption of a final rule by the FAA without making the intended purpose clear.

This article argues that the Special Rule for Model Aircraft is unconstitutional and should be abrogated. There should be one rule for all recreational flying, which is simply don't "endanger the safety of the national airspace system." The FAA should then issue its enforcement intention in a Policy Statement that it will not take enforcement action under that rule against anyone following the safety guidelines set forth and acknowledged as part of the FAA on-line small unmanned vehicle registration procedure.

The National Airspace Starts at the Ground

In popular culture[8] it is easy to find assumptions that if one owns property, then everything above or below it comes with it.[9] Frequent reference is made to an old authority:

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[8] Wall Street Journal, *Drones Boom Raises New Question: Who Owns Your Airspace?* accessed on-line Dec. 21, 2015.

[9] It is meant here only with reference to rights of way. This article does not deal with the issue of invasion of privacy, which is quite separate. A moment's consideration reveals that issue is not dependent upon a "columnar" approach to land ownership, and a peeping Tom with a telephoto lens shooting from a distant hilltop is no less a tortfeasor than one using a camera on a drone flying over owned property. *See*, Takahashi, *Drones and Privacy*, 14 COL. SCI. & TECH. L. REV. 72 (2012) SSRN-id2035575; Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 Cal. L. Rev. 57 (2013), SSRN-id2257080; Claeys, *On The Use And Abuse Of Overflight Column Doctrine*, 2 PROP. RTS. CONF. J. ___ (2013), SSRN-id2302900.

"He who owns the soil, or surface of the ground, owns to an infinite height."[10]

But, however appealing, that simplistic formula (more impressive in its Latin form: *cuius est solum, eius usque ad coelom et ad inferos*) is certainly not the law in the United States. A otherwise prosaic case involving chickens harassed by military overflights following the Second World War established:

"The air is a public highway, as Congress has declared."[11]

This is the basis for the FAA's current regulation that:

"Class G airspace extends from the surface."[12]

To understand where we are today in 2016, we have to rewind to 1981. By that time the FAA had promulgated a short simple set of voluntary operating standards for model aircraft operators to follow to mitigate safety risks[13] clearly demonstrating that it considered model aircraft to be aircraft that fall within the statutory and regulatory definitions of an aircraft and as such subject to FAA oversight and enforcement. The 1981 standards were followed by a Policy Statement published in the Federal Register[14] explaining that the FAA policy toward UA was: "based on whether the unmanned aircraft is used as a public aircraft, civil aircraft or as a model aircraft"[15] and discussed each in turn.

Then things began to get complicated. Congress passed the FAA

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[10] 1 Coke, *Institutes* (19th Ed., 1832), c. 1, § 1(4)(a). This is also known as the Overflight Column Doctrine.
[11] *United States v. Causby*, 328 U.S., 256, 261 (1946)
[12] *See Aeronautical Information Manual*, § 3-3-1.
[13] *See* Advisory Circular 91-57, Model Aircraft Operating Standards (June 9, 1981). By its terms, it encouraged voluntary compliance. These early standards included restrictions on operations over populated areas; limited use of the devices around spectators; restricted operations to 400 feet above the surface; required notification to an airport operator when flying within three miles of an airport, required that the devices give right of way to, and avoid flying near manned aircraft; and encouraged using visual observers to assist in operations. *See also,* 49 USC 40102 and 14 CFR 1.1.
[14] 72 Fed. Reg. 6689 (2007)
[15] *Id.*

Modernization and Reform Act of 2012.[16] After much lobbying, the 2012 Act contained a "special rule for model aircraft."[17] Paragraph (c) defines "model aircraft" as an unmanned aircraft[18] that is—

> (1) capable of sustained flight in the atmosphere;
>
> (2) flown within visual line of sight of the person operating the aircraft; and
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> (3) flown for hobby or recreational purposes.

Paragraphs (a) and (b) state the Special Rule:

> (a) IN GENERAL.—Notwithstanding any other provision of law relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies, including this subtitle, 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, if—
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> (1) the aircraft is flown strictly for hobby or recreational use;
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> **(2) the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization**;[19]

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[16] (PL 112-95), 49 U.S.C. §40101, *et. seq.* (2012). This was signed into law on February 14, 2012.

[17] Section 336, 126 Stat. 77-78 (2012).

[18] An unmanned aircraft is defined in Section 331(8), 126 Stat. 72 (2012) as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft."

[19] Legislative history indicates this is a "membership based association that represents the aeromodeling community within the Unites States; [and] provides its members a comprehensive set of safety guidelines that underscores safe aeromodeling operations within the National Airspace System and the protection and safety of the general public on the ground." U.S. House, FAA Modernization and Reform Act of 2012, Conference Report (to Accompany H.R. 658), 112 H. Rpt. 381 (Feb. 1, 2012). The FAA has acknowledged that it includes the Academy of Model Aeronautics, and other groups that meet the statutory definition. Fn.7, *FAA Interpretation of the Special Rule for Model Aircraft* (Docket No. FAA-2014-0396; 2014).), ¶ II(B).

(3) the aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;

(4) the aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; **and**

(5) when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually-agreed upon operating procedure with the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport)).(emphasis added)

(b) STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to limit the authority of the Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system.

To be clear about this, the "Special Rule" was actually a carve out, which on one hand recognized the authority of the FAA to regulate model aircraft,[20] but on the other hand prohibited the FAA from regulating any model aircraft (except as to operations which endanger the safety of the national airspace system), provided that the model aircraft was operated in in accord with all five criteria,[21] including most notably operation "in accordance with a community-based set of safety

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[20] See, e.g., Section 331(8), 126 Stat. 72 (2012), defining an unmanned aircraft as "an aircraft."

[21] "Operations that meet the section 336 definition of 'model aircraft' must also meet the five additional criteria for model aircraft established in section 336(a) to be exempt from future rulemaking regarding model aircraft. FAA *Interpretation of the Special Rule for Model Aircraft* (Docket No. FAA-2014-0396; 2014).), ¶ II(B).

guidelines and within the programming of a nationwide community-based organization."

The FAA has made it clear that in its view model aircraft that do not meet Special Rule carve out "are nonetheless unmanned aircraft, and as such, are subject to all existing FAA regulations, as well as future rulemaking action, and the FAA intends to apply its regulations to such unmanned aircraft."[22]

Advisory Circulars 91-57

On June 9, 1981, the FAA issued Advisory Circular 91-57[23], the first of a succession of advisory circulars[24] dealing with model aircraft. The 1981 AC91-57 recognized that hobbyists (then called by the more generic name "modelers"[25]) were concerned about safety, yet posed a hazard to "full-scale aircraft."[26] The FAA compiled a list of five recommended "operating standards" to reduce the potential for conflict "and create a good neighbor environment with affected communities and

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[22] *Ibid*. at ¶ II(A).

[23] AC 91-57 was cancelled Sept. 2, 2015, when superseding AC 91-57A was issued, which in turn was revised on Jan. 11, 2016, by Change 1. The change relates only to correction of a typographical error. AC 91-57A, Change 1(2016), ¶ 5.

[24] An Advisory Circular ("AC") is an advisory publication of the FAA, a form of informal rulemaking, providing guidance for compliance with regulations. They are meant to define acceptable means, but not the exclusive means, of accomplishing or showing compliance with airworthiness regulations. While they are neither binding nor adopted in compliance with the Administrative Procedure Act; it is not surprising that they have the effect of de facto standards since they are generally more readily understandable than the regulations themselves, which are collected in the tome like FAR. These ACs are organized by series and topic. So, for example, Series 90 relates to Air Traffic and General Operating Rules, sub-topic 91 in that series relates to General Operating and Flight Rules and sub-topic 107 in that series relates to Small Unmanned Aircraft Systems. They are cancelled or updated from time to time. They are all found on-line at http://www.faa.gov/regulations_policies/advisory_circulars/

[25] It is not until the passage of the 2012 FAA Reform Act that a distinction was made between "modelers" and "hobbyists", e.g., the former being those operating under the Special Rule carve-out.

[26] These would now be referred to as "manned" aircraft.

airspace users."[27] These five 1981 recommended standards were:

a. Select an operating site that is of sufficient distance from populated areas. The selected site should be away from noise sensitive areas such as parks, schools, hospitals, churches, etc.

b. Do not operate model aircraft in the presence of spectators until the aircraft is successfully flight tested and proven airworthy.

c. Do not fly model aircraft higher than 400 feet above the surface. When flying aircraft within 3 miles of an airport, notify the airport operator, or when an air traffic facility is located at the airport, notify the control tower, or flight service station.

d. Give right of way to, and avoid flying in the proximity of, full-scale aircraft. Use observers to help if possible.

e. Do not hesitate to ask for assistance from any airport traffic control tower or flight service station concerning compliance with these standards.

While these operating standards were recommended, and neither promulgated as positive law by an Act of Congress, nor adopted by rulemaking pursuant to the Administrative Procedure Act, they did announce the enforcement intentions of the FAA as to operation of hobbyist craft so as to protect the National Airspace (the "NAS") In that sense it was much like a basic speed law. If there had been an enforcement action against a hobbyist for endangering the NAS, failure to follow these recommendations would have been relevant.

The 1981 Advisory Circular was clarified by an FAA Policy Statement in 2007,[28] which among other things reiterated that operation for hobby or recreation would be within the line of sight of the operator.[29]

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[27] AC 91-57 (1981).
[28] Unmanned Aircraft Operations in the National, Docket No. FAA-2006-25714, 72 Fed. Reg. 6689 (Feb. 13, 2007).
[29] *Id*. "The FAA expects that hobbyists will operate these recreational model aircraft within visual line-of- sight." *Id*. at 6690.

The 1981 circular was superceded by a recent revision[30] in 2015 which had view of the 2007 Policy Statement, the intervening 2012 FAA Reform Act, the tremendous growth of small unmanned craft usage in the United States, and the public perception of the use of large scale unmanned aircraft (also known as "drones") by the military in the global war on terrorism.

By its terms, new AC 91-57A cancelled the 1981 circular[31] which applied to all hobbyists, but limited its application to model aircraft **operations**.[32]

While it may appear as sophistry, the circular explicitly draws a distinction between "model aircraft" and "model aircraft operation." A model aircraft is:

> "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 only for hobby or recreational purposes."[33]

But, "model aircraft operations" are construed to be only those which meet the Special Rule carve-out,[34] specifically including operating "in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization."[35]

Reading the 2015 AC 91-57A as a whole, however, suggests that what it was directed toward are those members of nationwide community-based organizations who assume that compliance with their own safety guidelines are sufficient under all circumstances. Not so, the circular cautions, even operations under community-based guidelines must also comply with Temporary Flight Restrictions ("TFR") and Notices to Airmen ("NOTAMS"). So this means that whether operating under the

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[30] AC 91-57A (2015)
[31] Id., at ¶ 5.
[32] Id., at ¶ 1.
[33] This definition comes from Section 336 of Public Law 112-95, the FAA Modernization and Reform Act of 2012, 49 U.S.C. § 40101; P.L. 112-95 (126 Stat. 77 et seq.). An "unmanned aircraft" is defined again with reference to the 2012 Act as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft."
[34] Section 336.
[35] AC91-57A, *supra* n. 20, at ¶ 6(c)(3).

AMA carve-out or not, model aircraft must not operate in Prohibited Areas, Special Flight Rule Areas or, the Washington National Capital Region Flight Restricted Zone, without specific authorization. Additionally, model aircraft operators should be aware of other Notices to Airmen which address operations near locations such as military or other federal facilities, certain stadiums, power plants, electric substations, dams, oil refineries, national parks, emergency, services and other industrial complexes.

The circular states the position of the FAA that the requirement to not fly within TFRs, or other circumstances where prohibited, applies to operation of model aircraft that would otherwise comply with the AMA-carve-out, and further states the enforcement intention that "operations that endanger the safety of the National Airspace System, particularly careless or reckless operations or those that interfere with or fail to give way to any manned aircraft may be subject to FAA enforcement action."

***A fortiori*, this same warning applies to operation of hobbyists who do not meet the AMA-carve-out**. Indeed, that was the position of the FAA in the Draft Interpretation: "Model aircraft that do not meet these statutory requirements are nonetheless unmanned aircraft, and as such, are subject to all existing FAA regulations, as well as future rulemaking action, and the FAA intends to apply its regulations to such unmanned aircraft. "[36]

The Special Rule Carve-Out As Unlawful Delegation

Before proceeding we must consider whether the Special Rule carve-out presents a case of unlawful delegation of legislative power. In *A.L.A. Schechter*

[36] Interpretation, *supra* n. 19, at p. 7. See also Section 336(b) of the 2012 FAA Reform Act, *supra* n. 3 ("[n]othing in this section shall be construed to limit the authority of the Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system").

Poultry Corp v United States,[37] the Supreme Court invalidated regulations of the poultry industry according to the non-delegation doctrine and as an invalid use of Congress' power under the commerce clause. The National Industrial Recovery Act allowed local codes for trade to be written by private trade and industrial groups, and then the codes could be enforced as law.

The community-based set of safety guidelines of the Special Rule seems strikingly similar to the federally enforced private codes of fair competition found unlawful in *Schechter*. Here, when it adopted the Special Rule, Congress abdicated its responsibility to determine what the airspace rules should be for model aircraft, in favor of a privately written set of guidelines. In the normal course of events, Congress is permitted to delegate authority to federal agencies to promulgate codes, rules, and such, and the judiciary is empowered to review such rules to be sure that the Administrative Procedure Act is being followed.

When Congress carves out an agency's authority and delegates it to a private entity, it puts the entire system of checks and balances in jeopardy. The Special Rule is unconstitutional.

The Safety Guidelines

Consistent with its approach since 1981, instead of regulations governing hobby flying, the FAA provides a list of safety guidelines that all owners of small UAVs must agree to abide by (including member of nationwide community-based organizations), at the time they register as owners:

I will fly below 400 feet
I will fly within visual line of sight
I will be aware of FAA airspace requirement
I will not fly directly over people
I will not fly over stadiums and sports events
I will not fly near emergency response efforts such as fires
I will not fly near aircraft, especially near airports

[37] 295 U.S. 495 (1935) This is known as the "sick chicken" case.

I will not fly under the influence.

Regrettably, while the safety guidelines are also printed on the certificate issued at the time of on-line registration, while similar they are not identical with the set shown on-screen:

Safety guidelines for flying your unmanned aircraft:
Fly below 400 feet
Never fly near other aircraft
Keep your UAS within visual line of sight
Keep away from emergency responders
Never fly over stadiums, sports events or groups of people
Never fly under the influence of drugs or alcohol
Never fly within 5 miles of an airport without first contacting air traffic control and airport authorities

Of note is the resemblance to the 1981 safety guidelines, and the fact that *all* persons registering must agree to follow these guidelines. This begs the question, why isn't this enough, and what then is the purpose of the Special Rule?[38]

Notice of Proposed Rulemaking – Part 107

On February 23, 2015, the FAA published a Notice of Proposed Rulemaking (the "2015 NPRM")[39] in the Federal Register, in compliance with the rulemaking procedures of the Administrative Procedure Act. The Administrative Procedure Act ("APA")[40] requires that all federal agencies comply with established procedure to promulgate rules which bind the public. In short, the process begins with a Notice of Proposed Rulemaking which acts as a public notice, and begins a period of public

[38] It is worth noting at this juncture that the safety guidelines of one community based organization, the Academy of Model Aeronautics ("AMA"), is in possible conflict with these FAA guidelines. The FAA requires a promise to "fly within visual line of sight" ("VLOS") while the AMA guidelines allow for use of first person view ("FPV") goggles when used in accord with AMA Document #550. Academy of Model Aeronautics National Model Aircraft Safety Code 9(b). The FAA has repeatedly taken the position that FPV goggles interfere with VLOS operation.
[39] Notice of Proposed Rulemaking, Operation and Certification of Small Unmanned Aircraft Systems, Docket No.: FAA-2015-0150, 80 Fed. Reg. 9544. Hereinafter "2015 NPRM."
[40] 5 U.S.C. § 551 *et. seq.*

comment. It almost goes without saying that a Notice which obfuscates the purpose of the proposed regulation does not comply with the APA. In order for the public to provide meaningful commentary, the agency must set forth the substance of the proposed rule or, alternatively, the subjects that the rule will address. Unfortunately, the FAA failed to do this.

The 2015 NPRM explicitly stated the **sole** purpose of new part 107:

> "This rulemaking proposes operating requirements to allow small unmanned aircraft systems (small UAS) to operate **for non-hobby or non-recreational purposes**."[41] [emphasis added]

Further down in the Notice[42] this is reiterated when applicability of new Part 107 is discussed:

> "This proposed rule would allow **non-recreational** small UAS to operate in the NAS. The operations enabled by this proposed rule would include business, academic, and research and development flights, which are hampered by the current regulatory framework."[43] [emphasis added]

In an astonishing sleight of hand, however, and despite explicit statements to the contrary as noted above, the Notice then states:

> "The FAA emphasizes that . . . model aircraft weighing less than 55 pounds that fail to meet all of the statutory criteria (i.e., the Special Rule carve-out) **would be subject to proposed part 107**."[44] [emphasis added]

In other words, buried within the tome of paper, and in contradiction to the stated sole purpose, was the revelation that Part 107 indeed would be applied to hobby and recreational flying that did not meet the Special Rule carve-out. What that means is that an owner of a sUAS can not fly unless he or she is either (a) participating in a community-based organization's programming, or (b) flying

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41 2015 NPRM, *supra* n. 38, §I(A).
42 The Notice spans 195 pages in PDF form and 45 pages of the Federal Register; 80 Fed. Reg. 9544-9589.
43 2015 NPRM, *supra* n. 38, §III(B).
44 2015 NPRM, *supra* n. 38, §III(B)(6).

pursuant to Part 107, which includes obtaining a remote pilot certificate with a small UAS rating under Section 107.12, passing pass an initial aeronautical knowledge test under Section 107.61(d), being at least 16 years old as required by Section 107.61(a) and be vetting by the TSA.

The FAA FAQs

Could this really be the intention of the FAA? If so, it has been hidden from the public, which widely assumes that Part 107 is for commercial operations, and will be news to owners and operators of recreational craft. In addition to the explicit statement in Advisory Circular 107[45] noted above, the FAQs at the FAA website also state:

> "There are two ways for recreational or hobby UAS fliers to operate in the national airspace system . . .
>
> "Option #1. Fly in accordance with the [Special Rule carve-out] . . .
>
> "Option #2. Fly in accordance with [Part 107]."[46]

Fly for Fun vs. Fly for Work/Business

On the other hand, the FAA currently has two web pages that are relevant here: Fly for Fun[47] and Fly for Work/Business.[48] The *Fly for Fun* page substantially follows the safety guidelines set out in the 1981 AC 91-57 and the current safety guidelines that are required to be acknowledged when registering online,[49] while

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[45] Text accompanying n.7.
[46] FAQ 2, http://www.faa.gov/uas/faqs/#ffr, accessed August 15, 2016. This, however, seems contrary to the advice on the FAA *Fly for Fun* page, http://www.faa.gov/uas/getting_started/fly_for_fun/, accessed August 15, 2016.
[47] *Fly for Fun*, *supra* n. 46,
[48] http://www.faa.gov/uas/getting_started/fly_for_work_business/, accessed August 15, 2016.
[49] https://registermyuas.faa.gov, accessed August 15, 2016. Despite being denominated as an "**aircraft** registration" it is not. Rather, it is facially an **operator**

the *Fly for Work/Business* page makes specific reference to Part 107. The pages are not reconcilable with the statement in AC 107-2 that Part 107 also applies to hobby or recreation model aircraft that are not flown in accordance with the Special Rule,

Conclusion

The Special Rule for Model Aircraft is unconstitutional and should be abrogated. There should be one rule for all recreational flying, which is simply don't "endanger the safety of the national airspace system." The FAA should issue its enforcement intention in a Policy Statement that it will not take enforcement action under that rule against anyone following the safety guidelines set forth and acknowledged as part of on-line registration.

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registration. Completion results in a single certificate number unique to the certificate holder, that is to be used on any sUAS. Identification (for example by serial number) of a particular sUAS is not required.