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

In the Matter of	)	
	)	
Interim Final Rule Regarding	)	
Registration and Marking Requirements	)	Docket No. FAA-2015-7396
For Small Unmanned Aircraft	)	
	)	

COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE

January 15, 2016

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Introduction

On behalf of the Competitive Enterprise Institute ("CEI"), we respectfully submit these comments in response to the Federal Aviation Administration's ("FAA") Interim Final Rule Regarding Registration and Marking Requirements for Small Unmanned Aircraft ("IFR").[1] CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.[2] CEI previously filed comments in response to the FAA's Request for Information Regarding Electronic Registration for UAS ("RFI").[3]

Our comments develop the following points:

1. FAA lacks the statutory authority to mandate the registration of all unmanned aircraft systems ("UAS"); and

2. FAA fails to justify its invocation of the good cause exception to the Administrative Procedure Act ("APA") to dispense with public notice and comment.[4]

I. FAA's Mandated Registration for All UAS Is Unlawful

CEI and other commenters contend that Section 336 of the FAA Modernization and Reform Act of 2012 ("FMRA")[5] prohibits the agency from promulgating rules governing model aircraft. The FAA dismisses these claims, arguing that "[w]hile section 336 bars the FAA from promulgating new rules or regulations that apply only to model aircraft, the prohibition … does not exempt model aircraft from complying with existing statutory and regulatory requirements . … [FMRA] identifies model aircraft as aircraft and as such, the existing statutory aircraft registration requirements implemented by part 47 apply."[6] (Part 47 refers to the FAA's longstanding regulations regarding aircraft registration, codified at 14 C.F.R. §§ 47.1–47.71.)

FAA's claimed authority rests largely on three statutory definitions, as it explains in the background to the IFR.[7] First, 49 U.S.C. § 40102(a)(6) defines "aircraft" to be "any contrivance invented, used, or designed to navigate or fly in the air." Second, FMRA Section 331 defines an "unmanned aircraft" as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft."[8] Third, FMRA Section 336 defines a "model aircraft" as "an unmanned aircraft that is capable of

1. Registration and Marking Requirements for Small Unmanned Aircraft, *Interim Final Rule*, FAA-2015-7396, 80 Fed. Reg. 78593 (Dec. 16, 2015) [hereinafter IFR].
2. *See* About CEI, https://cei.org/about-cei (last visited Jan. 11, 2016).
3. Comments of the Competitive Enterprise Institute in the Matter of Electronic Registration for UAS, *Request for Information*, FAA-2015-4378, 80 Fed. Reg. 63912 (Oct. 22, 2015), *available at* http://www.regulations.gov/#!documentDetail;D=FAA-2015-4378-3997.
4. Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).
5. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(c), 126 Stat. 11, 72.
6. IFR, *supra* note 1, at 78634.
7. *Id.* at 78599.
8. FMRA § 331(8).

sustained flight in the atmosphere, flown within visual line of sight of the person operating the aircraft, and flown for hobby or recreational purposes."[9]

Congress long ago adopted a broad definition of what constitutes an "aircraft" for purposes of FAA authority,[10] as the agency has acknowledged. Indeed, in its public "UAS Registration Q&A," the FAA emphasizes that its current rule does not apply to Frisbees or paper airplanes, but only to "unmanned aircraft systems."[11] The agency explained that such systems entail "communication links and components that control the small unmanned aircraft along with all of the other elements needed to safely operate the drone,"[12] as opposed to "unmanned aircraft" in the broader sense, which might include "paper airplanes, toy balloons, Frisbees, and similar items [that] are not connected to such [a] control system."[13]

In light of FMRA Section 336's requirement that the FAA Administrator "may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft," FAA argues its IFR imposes no new obligations on model aircraft, as model aircraft owners "are not required to use the provisions of part 48. Owners of such aircraft have the option to comply with the existing requirements in part 47 that govern aircraft registration or may opt to use the new streamlined, web-based system in part 48."[14] (Part 48 refers to the new electronic registration process created by the FAA in the IFR, which certain UAS may use in lieu of Part 47's paper registration system.)

First, the IFR constitutes just the sort of regulation of UAS that Congress prohibited under FMRA Section 336, entitled "*Special Rule* for Model Aircraft."[15] Congress plainly intended to deny FAA the authority to regulate model aircraft "*[n]otwithstanding any other provision of law* relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies."[16] Yet the agency now seeks to regulate UAS on the basis of generic statutory provisions that long preceded the enactment of FMRA Section 336—and, for that matter, the introduction of UAS intended for use by hobbyists.

Second, even if Congress had not prohibited the promulgation of "any rule or regulation regarding a model aircraft," the FAA has no authority to apply Part 48's requirements to model aircraft. FAA identifies the source of its authority to mandate the registration of all UAS as 49 U.S.C. §§ 44101–106, "which require aircraft to be registered as a condition of operation and establish the requirements for registration and registration

9. *Id.* § 336(c).
10. 49 U.S.C. § 40102(a)(6).
11. Federal Aviation Administration, *Q16. Do I Have to Register a Paper Airplane, or a Toy Balloon or Frisbee?*, UAS Registration Q&A, https://www.faa.gov/uas/registration/faqs/ (last visited Jan. 11, 2016).
12. *Id.*
13. *Id.*
14. IFR, *supra* note 1, at 78634.
15. FMRA § 336 (emphasis added).
16. *Id.* § 336(a) (emphasis added).

processes."[17] Specifically, 49 U.S.C. § 44101 provides that "a person may operate an aircraft only when the aircraft is registered." 49 U.S.C. § 44102 further states that "an aircraft may be registered under section 44103 of this title only when the aircraft" is "not registered under the laws of a foreign country" and meets one of five ownership requirements.

In Part 48, 14 C.F.R. § 48.100(a) applies to persons intending to use a UAS "as other than a model aircraft," while 14 C.F.R. § 48.100(b) applies to persons intending to operate UAS as model aircraft. Notably, however, Section 48.100(a) requires that applicants submit the "aircraft manufacturer and model name" and "aircraft serial number, if available,"[18]—Section 48.100(b) does not. As 14 C.F.R. § 48.115 explains, model aircraft owners' Part 48 registration "constitutes registration for all small unmanned aircraft used exclusively as model aircraft owned by the individual identified on the application."[19]

In other words, model aircraft owners need not register individual UAS, or even inform FAA of how many UAS they own and operate in the National Airspace System. Thus, Part 48 registration for model aircraft "is the registration of *persons* (which includes individuals, partnerships and corporations). Registering persons, as opposed to *aircraft*, has no basis whatsoever in law," notes aviation attorney Peter Sachs.[20] The traditional Part 47 paper registration process does not attempt to register persons as it does under 14 C.F.R. § 48.115, and FAA did not seek to amend Part 47 in an attempt to legitimize the registration of persons rather than aircraft. Whether a person owns a single UAS model aircraft, or 500 of them, the registration process under Part 48 is precisely the same. This rule is wholly unprecedented, marking a massive departure from the FAA's longstanding process whereby particular *aircraft* must be registered on an individuated basis. The agency has unlawfully "tailored" its statutory authority to require aircraft registration so as to effectively require the licensing of model aircraft owners themselves, rather than their aircraft.[21]

As noted above, the FAA states that model aircraft owners "are not required to use the provisions of part 48," but may instead use the traditional Part 47 process, noting that the former "simply provides a burden-relieving alternative that sUAS owners may use for aircraft registration."[22] Yet, because Congress never granted FAA the authority to register persons rather than aircraft under 49 U.S.C. §§ 44101–44103, the IFR is unlawful.

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17. *Id.* at 78599.
18. *Id.* at 78646.
19. *Id.* at 78647.
20. Peter Sachs, *Current U.S. Drone Law*, DRONE LAW JOURNAL, http://dronelawjournal.com/#ProblemswithDroneOperatorRegistration (last revised Dec. 25, 2015) (emphasis in original).
21. *Cf.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014) (invalidating EPA's "Tailoring Rule" and "reaffirm[ing] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate").
22. IFR, *supra* note 1, at 78634.

II. FAA Has Not Shown Good Cause under the APA to Dispense with Notice and Comment

Under the APA, substantive agency rulemakings must provide 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."[23]

The Senate Committee on the Judiciary's 1945 report on the passage of the APA described the purpose and limitation of the good cause exception to agency notice-and-comment requirements. It defined "impracticable" as "a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings."[24] It defined "unnecessary" as "unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved."[25] The "public interest" prong "requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."[26]

The 1945 Senate report noted that although agencies in certain limited circumstances must have the ability to dispense with normal rulemaking procedures, "[t]he exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or facts."[27]

In the IFR, FAA notes CEI's skepticism that merely requiring UAS registration will materially mitigate UAS safety risk.[28] Yet, in seeking to justify its invocation of the good cause exception to the APA's notice-and-comment requirements, FAA claims that "[a]ircraft registration provides an immediate and direct opportunity for the agency to engage and educate these new users prior to operating their unmanned aircraft and to hold them accountable for noncompliance with safe operating requirements, thereby mitigating the risk associated with the influx of operations."[29]

FAA further argues that in attempting to address purported UAS safety risks by requiring all UAS to be registered, the traditional Part 47 aircraft registry would be overwhelmed. Therefore, the agency maintains that it "must implement a registration system that allows the agency greater flexibility in accommodating this expected growth."[30]

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23. 5 U.S.C. § 553(b)(3)(B).
24. S. REP. NO. 79-752 (1945), *as reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 185, 200 (1946), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf.
25. *Id.*
26. *Id.*
27. *Id.*
28. IFR, *supra* note 1, at 78634.
29. *Id.* at 78598.
30. *Id.*

As the congressional architects of the APA made clear in 1945, however, an agency is not entitled to "disregard its terms or facts" in seeking a rulemaking exception for good cause. Here, FAA fails to demonstrate that unregistered UAS pose such a threat that complying with APA's notice-and-comment requirements would prevent FAA from carrying out its statutory mission to "prescribe[e] regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security."[31]

In the IFR, FAA points to a growing number of "potentially unsafe" reported UAS operations, which increased from 238 in 2014 to 1,133 in 2015.[32] However, a September 2015 analysis of FAA's UAS reports conducted by the Academy of Model Aeronautics found that just 3.5 percent of such incidents entailed a "near miss" or "near collision."[33] To date, not a single reported UAS-aircraft collision has occurred. In comparison, more than 10,000 bird strikes occur annually in the United States, and 158 turtle strikes were reported between 1990 and 2013[34]—yet a mere 3 percent of such wildlife strikes resulted in a precautionary or emergency landing.[35] Even if UAS strikes were to occasionally occur, therefore, longstanding experience with other types of collisions between aircraft and small foreign objects indicates that most UAS-aircraft collisions would not result in a precautionary or emergency landing—let alone a catastrophic loss of property or life.

FAA's claim that UAS present a significant immediate safety risk is highly implausible.[36] FAA also fails to demonstrate how mandating registration by itself, particularly with respect to model aircraft, will mitigate UAS safety risk. A registered model aircraft is just as capable as an unregistered one of colliding with another aircraft. At most, registration might help FAA exercise its enforcement authority after a collision occurred—yet the agency never explains how it would identify the registrant of a UAS after a high-speed collision, which would almost certainly decimate any lightweight model aircraft and render identifying marks unreadable. For these reasons, FAA has no conceivable claim that completing a notice-and-comment rulemaking would run contrary to the public interest.

As for the impracticability prong of the good cause exception invoked by FAA, in which it argues that "it would be impracticable to require all small unmanned aircraft owners to use [the Part 47] system and that a stream-lined, web-based alternative is

31. 49 U.S.C. § 44701(a)(5).

32. *Id.* at 78597.

33. Academy of Model Aeronautics, *A Closer Look at the FAA's Drone Data*, 3 (Sept. 14, 2015), https://www.modelaircraft.org/gov/docs/AMAAnalysis-Closer-Look-at-FAA-Drone-Data_091415.pdf.

34. *See, e.g.,* Eli Dourado, *Everything You Need to Know About Aircraft Colliding with Drones in One Chart*, MEDIUM.COM (Dec. 17, 2015), https://medium.com/@elidourado/everything-you-need-to-know-about-aircraft-colliding-with-drones-in-one-chart-58c8e3de0290.

35. Richard A. Dolbeer et al., *Wildlife Strikes to Civil Aircraft in the United States: 1990–2013*, *National Wildlife Strike Database Serial Report Number 20*, at 8, Federal Aviation Administration (July 2014), *available at* http://wildlife.faa.gov/downloads/Wildlife-Strike-Report-1990-2013-USDA-FAA.pdf.

36. *See generally id.*

necessary to accommodate this population and ensure operations may commence in a safe and timely manner,"[37] FAA also fails to meet the high bar required to justify emergency rulemaking. FAA essentially claims that because it suddenly decided to require the registration of all UAS by rushing the promulgation of these rules, which would overwhelm the traditional Part 47 paper registration process, it must immediately establish the Part 48 electronic registration process to accommodate UAS. This alleged impracticability exists only because FAA decided to recklessly promulgate this unlawful IFR in the first place, long after the growth of the model aircraft market was reasonably foreseeable (and indeed foreseen by Congress and the agency).

Conclusion

In issuing the IFR, FAA violated Congress's mandate in FMRA Section 336, unlawfully required the registration of persons in an aircraft registry, and failed to establish good cause for dispensing with the APA's notice-and-comment rulemaking requirements. For these reasons, FAA should forgo the final rule stage and rescind this IFR.

Respectfully Submitted,

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37. IFR, *supra* note 1, at 78598.