NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. RAPHAEL PIRKER, Respondent.	:	Docket No. CP-217 Unassigned

RESPONDENT'S MOTION TO DISMISS

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Respondent Raphael Pirker ("Pirker") respectfully submits this Memorandum of Law in Support of his Motion to Dismiss the Complaint of Michael P. Huerta, Administrator, Federal Aviation Administration (the "Administrator" or "Complainant") in its entirety, pursuant to 49 C.F.R. § 821.17(a).[1]

Preliminary Statement

This proceeding reflects an improper attempt by the Federal Aviation Administration ("FAA") to impose an unprecedented civil penalty upon the operator of a five-pound radio-controlled model airplane constructed of styrofoam. The FAA seeks a penalty for "careless or reckless" operation under 14 C.F.R. § 91.13 notwithstanding the fact that it has never promulgated any enforceable regulation concerning the operation of model airplanes, and on the contrary has for decades expressly avoided such regulation and enforcement. The motive for imposing this novel civil penalty is a change in sentiment among the general public, politicians, and the media, who in recent years have come to call certain types of model airplanes "drones" or "unmanned aircraft" because of overseas military operations involving armed attack vehicles. Having fallen far behind its own schedule, as well as the schedule mandated by Congress, for the promulgation of new regulations, the FAA has resorted to coercing certain model aircraft operators to halt operations by sending cease-and-desist letters, claiming for the first time ever in policy statements that model airplane use now is considered to be "operation of an unmanned aircraft system" and is illegal if undertaken for "business" purposes.

In this proceeding, the FAA uses those same policy statements as a pretext for applying federal aviation regulations to the operation of model airplanes. This approach violates the most basic tenets of regulatory law and the Administrative Procedures Act which require a valid notice-and-comment rulemaking process before legislative rules are issued. Both at the time of Mr. Pirker's model aircraft operation in 2011, and still today, there exist no enforceable federal aviation regulations

[1] The filing of a motion to dismiss suspends Respondent's time to answer the complaint until 10 days after service of the administrative law judge's order on the motion. 49 C.F.R. § 821.17(a).

concerning the operation of civilian "drones," whether that operation is for commercial purposes or otherwise. For the reasons set out below, the Administrator's civil penalty is improper as a matter of law and the Complaint must be dismissed in its entirety.

The Complaint

Although many of the factual allegations in the Administrator's Complaint are demonstrably false and subject to challenge, for purposes of this Motion to Dismiss only, the allegations are assumed to be true. We also refer to facts that are generally known, that are a matter of public record, and are not subject to reasonable dispute.[2]

The Complaint alleges that on or about October 17, 2011, Mr. Pirker (a Swiss citizen residing overseas) was the "pilot in command" of a "Ritewing Zephyr powered glider aircraft" in Charlottesville, Virginia. Compl. ¶ 1. It next asserts that "[t]he aircraft referenced above is an Unmanned Aircraft System (UAS)." *Id.* ¶ 2. As a matter of undisputed public record, a Ritewing Zephyr is in fact a popular type of radio-control model airplane made of a kind of styrofoam and weighs approximately four and a half pounds once equipped with batteries, radio, motor, and other components.[3]

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[2] This tribunal, which is guided by the Federal Rules of Civil Procedure, may on a motion to dismiss consider matters of which judicial notice may be taken. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). A Court may take judicial notice of a fact "not subject to reasonable dispute" in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540 (S.D.N.Y. 2000). *See also Thomas v. Westchester County Health Care Corp.*, 232 F. Supp. 2d 273, 276 (S.D.N.Y. 2002) ("A court may take judicial notice of records and reports of administrative bodies") (citation and quotation marks omitted); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("a district court may rely on matters of public record in deciding a motion to dismiss"). This motion refers to many undisputed matters of public record in order to provide full context, but does not rely on any of them to argue that the operation of model aircraft is not subject to any federal aviation regulation *as a matter of law*.

[3] *See* http://www.modelairplanenews.com/blog/2012/06/11/ritewingrc-zephyr-ii-review/ . The FAA has, perhaps intentionally, obscured this basic fact by referring to the model airplane as a "powered glider" and "unmanned aircraft system." The omission of this fact should not save the FAA from dismissal because it would readily emerge upon a § 821.18 motion for a more definite statement. *See, e.g., Bath Petroleum Storage, Inc. v. Market Hub Partners, LP*, 129 F. Supp. 2d 578, 581 (W.D.N.Y. 2000) ("[A] plaintiff should not be permitted to survive a motion to dismiss

The Administrator alleges that Mr. Pirker's Zephyr was equipped with a camera, that Mr. Pirker operated the model for the purpose of supplying aerial video and photographs of the University of Virginia campus to an advertising agency, and that he was compensated by that firm for the video and photographs. *Id.* ¶¶ 4-6. The Complaint notes that Mr. Pirker does not hold an FAA pilot's certificate. *Id.* ¶ 3.

The balance of the Complaint sets out a list of allegedly dangerous characteristics of Mr. Pirker's operation of his model airplane on October 17, 2011. It alleges that he "operated the above-described aircraft at extremely low altitudes over vehicles, buildings, people, streets, and structures." *Id.* ¶ 7. More specifically, it alleges, *inter alia*, that he operated the model airplane "through a UVA tunnel containing moving vehicles," "below tree top level over a tree lined walkway," "within approximately 15 feet of a UVA statue," "within approximately 50 feet of railway tracks," "within approximately 25 feet of numerous UVA buildings," and "directly towards a two story UVA building below rooftop level and made an abrupt climb in order to avoid hitting the building." *Id.* ¶ 9. There is no allegation that Mr. Pirker actually caused any property damage or injury, nor that any full-scale manned aircraft were in the vicinity.[4]

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and put a defendant to the trouble and expense of discovery simply by excluding highly relevant facts and documents from its complaint.") (citations omitted).

[4] The Complaint includes an allegation that Mr. Pirker operated his model "within approximately 100 feet of an active heliport." Compl. ¶ 9(l). Should this proceeding not be dismissed as a matter of law, the evidence will demonstrate that Mr. Pirker was in contact with the operator of the hospital heliport to ensure safety and to coordinate the operation of his model airplane, as per the model aircraft operating standards in Advisory Circular AC 91-57 ("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.") Moreover, Mr. Pirker took several other measures, such as the use of spotters, to ensure that no aircraft were in the area during his model operations. There is no allegation in the Complaint that any manned aircraft was actually in the area at the time. In any event, whether Mr. Pirker's operation could be considered dangerous, careless or reckless is not at issue in this motion, which seeks dismissal as a matter of law due to the absence of any enforceable regulation concerning model airplane operations.

The Complaint concludes that "by reason of the above, [Mr. Pirker] operated an aircraft in a careless or reckless manner so as to endanger the life or property of another" and claims the violation of a single provision of the Federal Aviation Rules ("FAR"): "Section 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." The Administrator seeks a civil penalty in the amount of $10,000.

Argument

I. THERE IS NO EXISTING FEDERAL AVIATION REGULATION GOVERNING THE OPERATION OF MODEL AIRCRAFT

A. Background: Model Aviation in the United States and the Creation of the FAA

Model airplanes have been operated in the United States for a century without any federal regulation. The first National Aeromodeling Championship was held 90 years ago in 1923. *See* Academy of Model Aeronautics (AMA) History, updated April 2012.[5] By 1936, the American Academy of Model Aeronautics had offices located at Rockefeller Center in New York City, later moved to Washington, D.C., is now located in Muncie, Indiana, and boasts over 170,000 members. *Id.*

The Civil Aeronautics Authority was established in 1938 pursuant to the Civil Aeronautics Act.[6] In 1958, Congress created the Federal Aviation Agency, motivated by the collision of two airliners over the Grand Canyon in 1956 that killed 128 people (the largest single-incident loss of life in aviation history at the time, and still the only midair collision of two commercial airliners in U.S. history). Subsequent midair collisions with military aircraft in April and May of 1958 increased the sense of urgency. Citing the "recent midair collisions of aircraft occasioning tragic losses of human life," President Eisenhower signed into law the new statute on August 23, 1958. Thus began the modern era of

[5] Available at https://www.modelaircraft.org/files/AMANMAMMAhistory.pdf

[6] *See* Federal Aviation Admin., A Brief History of the FAA, *available at* http://www.faa.gov/about/history/brief_history/ (last modified Feb. 1, 2010).

the FAA -- with a mandate to create a system to prevent the collision of passenger aircraft in the air and to ensure the safety of the people on board. In 1966, the Department of Transportation was created and the (renamed) Federal Aviation Authority became a component of that cabinet department. Notably, organized model aircraft operation in the United States predated the existence of the modern FAA by thirty years.

The Federal Aviation Act of 1958 created the Federal Aviation Agency and also set out the scope of its duties and powers. It is clear from a perusal of the statute that the focus was on the safety of passenger transit in the air. One of its provisions established "a public right of freedom of transit through the navigable airspace." 49 U.S.C. § 104 (1958). No provision in the legislation addressed model airplanes. The intent at the time was to address passenger aircraft safety.

B. The FAA Expressly Declines to Regulate Model Airplanes

Regardless of whether or not FAA had the statutory authority to regulate the operation of model aircraft, decades ago it expressly made clear that their operation was not subject to its federal aviation regulations (FARs) and was instead governed only by "voluntary" guidelines. On June 9, 1981 the FAA released Advisory Circular 91-57 ("AC 91-57") which addressed the subject of "Model Aircraft Operating Standards." These standards are expressly stated to be voluntary: "This advisory circular outlines, and *encourages voluntary compliance with*, safety standards for model aircraft operators." (Emphasis added). AC 91-57 makes no distinction between model aircraft flown for commercial purposes and model aircraft flown for recreation purposes. Nor does it distinguish between public operators and civil operators. It applies to any "model aircraft operators." "Model aircraft" is not defined, but its ordinary meaning is obvious: though a "model" is a device that is powered, flies through the air, and is controlled by a remote operator or "pilot" (just like a real aircraft), it is *unmanned*.

With respect to the voluntary standards, the guidance in AC 91-57 is simple and very generalized. It first suggests operating model aircraft a "sufficient distance from populated areas." It next

suggests not to "operate model aircraft in the presence of spectators until the aircraft is sufficiently flight tested and proven airworthy." It does not specify any particular minimum distance between a spectator and a model aircraft, nor any parameters for the recommended flight testing or airworthiness. It also provides: "Do not fly model aircraft higher than 400 feet above the surface. When flying within 3 miles of an airport, notify the airport operator." This sets a voluntary suggested maximum altitude. Notably, there is no *minimum* altitude specified, nor any discussion of a required separation distance with respect to statues, railroad tracks, buildings, trees, walkways, vehicles or other objects that are cited in the FAA Complaint to have been placed in danger by Mr. Pirker's model airplane activity in Virginia.

The general guidance to fly a "sufficient distance from populated areas" is voluntary and has never been explained, nor has it been heeded. Various radio-control model airplane clubs have for decades safely flown model airplanes within densely populated areas, including within the five boroughs of New York City, and even on the grounds of active airports.[7]

For the three decades that followed, AC 91-57 has been the FAA's sole guidance on the operation of model aircraft. By its own terms, AC 91-57 is a "voluntary" standard. It does not carry the weight of law. It has never been enforced. It does not provide notice of any consequences for a violation (because there are none) and it does not suggest that model aircraft operation could, under any circumstances, instead fall subject to any of the FARs that apply to full-scale manned aircraft (because that would be absurd).[8]

Thus, in 1981, the FAA recognized "model aircraft" as devices subject only to voluntary

[7] *See, e.g.*, http://www.cloudclippers.org/ ("The Cloud Clippers [model airplane] flying site is located on the east side of the Paso Robles Airport.") In recent years, electric "park flyer" models are increasingly flown at local parks in close proximity to bystanders. Indeed, the AMA "park pilot" program contemplates only that the operator be "courteous and respectful of other users of your selected flight area." Available at http://www.modelaircraft.org/files/545.pdf

[8] Not even the AMA views AC 91-57 as binding. Its safety code permits operation of models above 400 feet AGL in any location that is at least three miles from an airport. *See* http://www.modelaircraft.org/files/105.PDF .

guidelines, and not subject to any of the federal aviation regulations. Since that time there has not been a single FAR issued that regulates the operation of "model aircraft" or "model airplanes."

C. The Public Record Confirms That Model Aircraft Operation Is Unregulated

The absence of any enforceable regulation concerning model aircraft operation is confirmed by the complete absence of FAA (or NTSB) enforcement action in those very rare instances where model aircraft operation has in fact caused property damage, injury, or even death. Notably, model aircraft operation has an extraordinary record of safety in this country and worldwide, and these incidents remain extremely rare.[9]

In April 2010, at a park adjacent to McDill Air Force Base in Tampa, Florida, a teenaged girl walking through the park was struck by a model helicopter and suffered multiple lacerations.[10] The operators left the scene. *Tampa Police* investigated the accident, not the FAA or NTSB. The operators eventually came forward and were identified, but no enforcement action was taken by any federal agency.

On August 14, 2010, in Brighton, Colorado, at an organized event that involved airborne demonstrations of both model airplanes and manned aircraft at an airport, a large model airplane flying over a runway collided with a manned biplane making a low pass.[11] The model airplane was destroyed and the manned biplane suffered damage to its wing but landed safely. The FAA and NTSB did investigate this incident, likely because it involved an *actual manned aircraft* in flight, directly over an

[9] There appear to be only two reported fatalities in United States history. For comparison, there are approximately 22 skydiving fatalities *each year*. *See* http://www.uspa.org/AboutSkydiving/SkydivingSafety/tabid/526/Default.aspx .

[10] "Girl Injured By Mini Helicopter," FOX13 News, April 21, 2010, available at http://www.youtube.com/watch?v=HNZwYHI9xS4 . She required 17 staples in her head to close the wound, and one of her fingers was nearly severed.

[11] A video of the collision is available at http://www.youtube.com/watch?v=rvcN-0PikEU

airport runway. In incident report CEN10LA487,[12] the NTSB did not cite any FAR. Instead, it referred to the AMA Safety Code provision that "model aircraft pilots should yield right of way to all man carrying aircraft, see and avoid all aircraft, and utilize a spotter when appropriate." It also cited AC 91-57, the voluntary standards circular, which states that "operators should give right of way to, and avoid flying in the proximity of, full-scale aircraft." The NTSB issued a probable cause determination on May 19, 2011: "The radio-controlled airplane operator's decision to maneuver his airplane outside of the designated operating area, resulting in a collision with a bi-plane. Contributing to the accident was the lack of a formally designated spotter."[13] Despite the NTSB's attribution of blame to the model aircraft operator, whose operations caused an actual collision with a manned aircraft, we have been unable to find any evidence that enforcement action was taken or that a civil penalty was ever imposed.

Most recently, on September 5, 2013, a young man tragically lost his life in Brooklyn, New York, when the model helicopter he was operating struck him in the head.[14] Among the 180 news articles reporting on the incident that are available on the Google News aggregation service, we could not find a single one mentioning any FAA or NTSB investigation. Instead, the New York Police Department was said to be investigating. *See, e.g.*, *Man killed by remote control helicopter in NYC park*, CBSNEWS, Sept. 5, 2013.[15] Some of the reports on this recent incident mention the only other reported occurrence of a fatal model airplane or model helicopter accident in United States history, which occurred in 2003 in

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[12] Available at: http://www.ntsb.gov/aviationquery/brief2.aspx?ev_id=20100819X52836&ntsbno=CEN10LA487&akey=1

[13] Available at: http://www.ntsb.gov/aviationquery/brief.aspx?ev_id=20100819X52836&key=1

[14] "Remote-Controlled Model Helicopter Fatally Strikes Its Operator," *The New York Times*, Sept. 6, 2013 at A19, available at http://www.nytimes.com/2013/09/06/nyregion/remote-controlled-copter-fatally-strikes-pilot-at-park.html .

[15] Available at http://www.cbsnews.com/8301-201_162-57601617/man-killed-by-remote-control-helicopter-in-nyc-park/ .

Texas when a newcomer operating his model helicopter lost control and struck the person standing next to him. *Id.* We were unable to find any report of an investigation of that incident by the FAA or NTSB.

The National Aeronautics and Space Administration (NASA) maintains an Aviation Safety Reporting System (ASRS) database consisting of voluntary reports of potential aviation safety incidents. Each report is read by a minimum of two analysts in the aviation field and their comments are incorporated into the report on the database.[16] The searchable database contains a small number of reports involving the sighting of model aircraft in close proximity to airborne manned aircraft. These reports confirm that there are no FARs applicable to model aircraft. For example, in January 1996 a helicopter crew in Palo Alto flying at 600 feet altitude spotted a model airplane flown from a hobby site pass within 100 horizontal feet. See ACN 326359.[17] The analysts responding to the report called back the operator and informed him: "THERE ARE NO FARS COVERING MODEL ACFT OP." *Id.* Similarly, in August 1998, the pilot of a Skyhawk 172 reported seeing model aircraft at 500-700 feet AGL near the approach to a privately owned public use airport situated next to a model airplane club that has been operating for 25 years. *See* ACN 411378.[18] The ASRS report indicates, "RPTR HAS BEEN TO THE FSDO [Flight Standards District Office] AND THE RESPONSE IS THAT THE FARS DO NOT ADDRESS THIS AREA OF CONCERN." Id. The reporter also "CONTACTED THE EASTERN REGION" and learned of a similar situation at Teterboro Airport. The suggestion from the Eastern Region (the same FAA office pursuing a penalty against Mr. Pirker) on the issue was to consider invoking FAR 77. (This approach is dubious; FAR 77 concerns obstructions to air navigation, such as tall buildings.) Tellingly, there was no suggestion by either FSDO or the Eastern Regional Office to

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[16] See http://asrs.arc.nasa.gov/overview/report.html

[17] Available at http://akama.arc.nasa.gov/ASRSDBOnline/QueryWizard_Display.aspx

[18] Available at http://akama.arc.nasa.gov/ASRSDBOnline/QueryWizard_Display.aspx

apply FAR 91.13 (concerning careless/reckless operation) to the operation of a model airplane. These reports confirm, in yet another way, that model aircraft operation has never been subject to any FAR and no enforcement action has ever been taken -- even when the underlying concern is possible near-misses with manned aircraft.

The FAA also lacks jurisdiction. At a minimum, partial dismissal of the Complaint is warranted as to all allegations concerning operation at very low altitudes, inside a tunnel, below tree top level, or underneath a pedestrian overpass because these locations are not "navigable airspace" subject to FAA jurisdiction. *See* 49 U.S.C. § 40102 ("navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft."). This alone compels the dismissal of nearly the entire complaint.

Moreover, Mr. Pirker, a citizen of Switzerland, should not be facing enforcement proceedings in the United States because FAA policy is to refrain from regulatory enforcement against foreign persons. Rather, subject to exceptions that do not apply here, "violations committed by foreign persons, except Canadian persons, are referred to the appropriate foreign aviation authority through the Department of State." National Policy: FAA Compliance and Enforcement Program, Order 2150.3B, Effective 10/01/07. This order "guides FAA enforcement personnel in the exercise of their discretion in handling compliance and enforcement matters." Although we do not argue that this policy mandates dismissal of this proceeding, the FAA ought to have followed its own policy here. The deviation demonstrates yet another way in which political and social pressures concerning the operation of civilian "drones" in the United States have led the FAA to cast aside law and order.

This is not to say that model aircraft operation is not subject to any duty of care or that operators such as Mr. Pirker are somehow "above the law." On the contrary, state tort law governs

negligent or reckless conduct of any kind that results in actual damages, and would hold an operator to account for his actions in the event of an incident. Nor do we argue that the FAA is powerless to promulgate regulations in the future that may govern certain aspects of UAS operation conducted within navigable airspace. The sole question presented here is whether there *currently* exists any valid regulation that would authorize the FAA to impose a monetary fine upon a model aircraft operator. The answer is plainly "no." Prior to this proceeding against Mr. Pirker, whose activity does not involve any actual injury or property damage, the FAA has never sought enforcement of safety-related or other aviation regulations upon the operators of model aircraft, notwithstanding several incidents involving injury, property damage, and even death. This confirms what is evident from AC 91-57 issued in 1981: model aircraft are subject only to voluntary operating guidelines, not any of the FARs.

II. THE FAA FACES PRESSURE DUE TO THE PUBLIC'S CONCERN ABOUT "DRONES" AND ITS DELAY IN PROPOSING NEW REGULATIONS

In recent years, the FAA has turned its attention toward the regulation of devices that have come to be called "drones" or "unmanned aircraft systems." This terminology, unfortunately, derives from overseas military operations where remotely-piloted vehicles have been used to launch deadly attacks, in some cases inflicting civilian casualties. The national political debate concerning military drone use has spilled over into perceptions of how civilian drones are or will be used in the United States for beneficial purposes such as search and rescue, agriculture, mapping, aerial photography, wildlife monitoring and research, and countless others. As a result, devices that for decades have been referred to as a model airplanes or model helicopters are increasingly referred to as "drones," and the media coverage has generally been negative or even alarmist, particularly with respect law enforcement use and privacy concerns.[19] The FAA, aware of this change in public perception, has made an effort to

[19] *See, e.g* "Rise of Domestic Drones Draws Questions About Privacy, Limiting Use," PBS NewsHour, April 18, 2013, available at http://www.pbs.org/newshour/bb/science/jan-june13/drones_04-18.html ; "Rise of Drones in U.S. Drives Effort to Limit Police Use", *New*

delay and curtail civilian "drone" activity by asserting in policy statements that "business" or "commercial" operations are prohibited and that some or all of the FARs apply. However, neither the commercial "ban" on drones nor the application of the FARs (such as § 91.13) is legally enforceable because the FAA has failed to undertake the requisite rulemaking procedures that would be required to put in place such new regulation.

A. The FAA's Unfulfilled Congressional Mandate

After years of inaction by the FAA, the subject of civil unmanned aircraft eventually came to the attention of Congress. The FAA Modernization Reauthorization and Reform Act of 2012 requires the FAA to promulgate regulations concerning the operation of "unmanned aircraft systems" by September 2015. Pub. L. 112-95 § 332(a), 126 Stat. 11 (2012) (the "2012 Act"). Although this statute post-dates Mr. Pirker's model aircraft activity in October 2011, and therefore has no authoritative effect with respect to his conduct, it is informative in several ways.

First, the 2012 FAA Reform Act requires the Secretary of Transportation to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system" which plan includes "the rulemaking to be conducted." 2012 Act at § 332(a). The 2012 Act required the Department of Transportation to delivery to Congress a plan that would include "rulemaking" within a year of enactment. The Department of Transportation has not delivered that overdue plan to Congress, let alone actually taken any public rulemaking steps.

Second, the 2012 Act contains a specific provision that prohibits any future FAA regulation of model aircraft that meet certain criteria. "[T]he 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 certain conditions are met including weight, location and the purpose of

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York Times, Feb. 15, 2013 at A1; "As Drone Use Grows, So Do Privacy, Safety Concerns," *Detroit Free Press*, March 7, 2013.

the operation. Pub. L. 112-95, § 226, 126 Stat. 11, 77 (2012). This provision was the result of lobbying by the AMA and protects hobbyists against future regulations. It confirms two key points: (1) a "model aircraft" is a distinct device distinguishable from other airborne devices; and (2) there are no existing regulations regarding the operation of a model aircraft; otherwise the statute would also have called upon the FAA to modify or repeal such regulations with respect to hobbyists.

The FAA is far behind schedule in issuing the notice of proposed rulemaking that it itself has contemplated for years, and also the deadlines mandated by Congress. For example, the FAA in 2010 had indicated that it would publish a notice of proposed rule-making (NPRM) for "small" UAS by mid- 2011.[20] That goal was delayed repeatedly, and the FAA has still not issued the NPRM. The FAA was required by the 2012 Act to select six test ranges for unmanned aircraft systems "not later than 180 days after the date of enactment" -- that is, by August 12, 2012. It has not done so. This inability by the agency to move forward with new proposed regulations in a timely manner accounts for why the FAA has resorted to delay tactics such as cease-and-desist letters and, here, the unprecedented pursuit of a civil penalty against a model airplane operator. But it has done so by issuing "policy statements," not by valid rulemaking. This approach runs afoul of administrative law doctrines and must be rejected.

III. THE FAA'S POLICY STATEMENTS CONCERNING THE OPERATION OF UNMANNED AIRCRAFT SYSTEMS ARE NOT BINDING OR ENFORCEABLE

The FAA alleges that Mr. Pirker's model airplane "is an Unmanned Aircraft System (UAS)", Compl. ¶ 2, in an attempt to re-characterize a model airplane as a device subject to its purported new regulatory guidance and therefore also subject to the FARs. However, the FAA's policy statements relating to UAS are invalid no matter how they are characterized for purposes of an administrative law

[20] *See* Tom Hoffman, "Eye in the Sky: Assuring the Safe Operation of Unmanned Aircraft Systems," FAA Safety Briefing 20, 23 (May/June 2010), *available at* http://www.faa.gov/news/safety_briefing/2010/media/MayJun2010EyeInTheSky.pdf ("The FAA expects to have a published Special Federal Aviation Regulation (SFAR) by mid-2011, with a final rule expected in late 2012.").

analysis. First, they most clearly are "legislative rules" intended to impose binding new restrictions and are therefore are invalid because of the absence of notice and comment rulemaking required by the Administrative Procedures Act. Second, and alternatively, to the extent they are viewed as "policy statements," they are not binding on the public as a matter of law. Finally, these statements cannot be considered so-called "interpretative rules" that are exempt from notice-and-comment rulemaking, but even if they were, the interpretations they appear to suggest are patently erroneous, unpersuasive and must be rejected. Thus, the FAA's attempt to impose a civil penalty upon Mr. Pirker must fail as a matter of law because there is currently no enforceable regulation concerning the operation of a model aircraft.

A. APA Informal Rulemaking

Section 553 of the Administrative Procedures Act sets out the process for federal agency rulemaking. It requires that a notice of proposed rule-making (NPRM) be published in the Federal Register, with an indication of the time and place for rulemaking proceedings, reference to the legal authority under which the rule is proposed, and that an opportunity be given for interested persons to submit data, views or arguments relating to the new proposed rule. 5 U.S.C. § 553. This so-called "informal rulemaking" process is required for any new rule that will bind the public. Notice-and-comment process is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). However, such interpretative rules and statements of policy have limited or no binding effect on the public and are not enforceable as legislative rules.

The FAA expressly acknowledges this rulemaking process in its FARs. 14 C.F.R. § 11.25 asks the question, "How does FAA issue rules?" The answer: "The FAA uses APA rulemaking procedures to adopt, amend, or repeal regulations." 14 C.F.R. § 11.29 asks the question: "May FAA change its regulations without first issuing an ANPRM or NPRM?" and answers: "The FAA normally adds or changes a regulation by issuing a final rule after an NPRM." 14 C.F.R. § 11.29. There are only

two indicated exceptions: (a) "good cause" such as "in response to a safety emergency" and (b) if the NPRM would be "unnecessary" because the FAA "do[es] not expect to receive adverse comment." *Id.* Thus the FAA is quite clear that it does not issue or change regulations via policy memoranda.

B. Early FAA Internal Guidance: September 2005

On September 16, 2005, the FAA issued a Memorandum titled "AFS-400 UAS POLICY 05-01 - Unmanned Aircraft Systems Operations in the U. S. National Airspace System - Interim Operational Approval Guidance." The memo expressly confirms that "[t]his policy is not meant as a substitute for any regulatory process." For the first time that we have been able to identify, it provides an internal FAA definition for "unmanned aircraft" still absent today from the FARs: "a device that is used or intended to be used for flight in the air *that has no onboard pilot*" (emphasis added). It sets out criteria for a Certificate of Authorization or Waiver (COA) concerning unmanned aircraft. Most importantly, it provides:

> **Model Aircraft**. Advisory Circular (AC) 91-57, Model Aircraft Operating Standards, published in 1981, applies to model aircraft. UA that comply with the guidance in AC 91-57 are considered model aircraft and are not evaluated by the UA criteria in this policy.

Although this document is clearly an interim internal memorandum not intended to create any enforceable rule, it reflects two key points: (1) the voluntary Advisory Circular AC 91-57 issued 24 years earlier contain the only rules relating to model aircraft; and (2) there is no regulatory distinction between a model aircraft flown for business purposes and one flown for recreational purposes. The 2005 memorandum also speaks to safety standards:

> The UA pilot will be held accountable for controlling his aircraft to the same responsible standards as the pilot of a manned aircraft. The provisions of 14 CFR 91.13, Careless and Reckless Operation, apply to UA pilots.

By implication, 14 C.F.R. § 91.13 does not, on its own, apply to the operator of a model aircraft because a model aircraft is expressly stated as "not evaluated" by these new "UA criteria." Model aircraft are subject only to the voluntary safety standards set out in AC 91-57.

C. The FAA's 2007 UAS Policy Notice

In the February 13, 2007 edition of the Federal Register, the FAA published a "policy statement" that would -- for the next six years and continuing to the present -- improperly substitute for valid APA rulemaking. *See* "Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714; Notice No. 07-01, 72 Fed. Reg. 29 at 6689 (Feb. 13, 2007) (the "2007 Notice").

The 2007 Notice starts by defining "unmanned aircraft" as "a device that is used, or intended to be used, for flight in the air with no onboard pilot" and it includes "a remotely controlled model aircraft used for recreational purposes." *Id*. It acknowledges that the only FAA guidance with respect to model airplanes is AC 91-57, with the new limitation that AC 91-57 applies to model aircraft flown for "hobby or for recreational use." It then articulates a new rule, couched as a "policy":

> The current FAA policy for UAS operations is that *no person may operate* a UAS in the National Airspace System without specific authority. For UAS operating as public aircraft the authority is the COA, for UAS operating as civil aircraft the authority is special airworthiness certificates, and for model aircraft the authority is AC 91–57. The FAA recognizes that people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority of AC 91–57. AC 91–57 only applies to modelers, and thus *specifically excludes its use by persons or companies for business purposes*.

Id. (emphasis added)

The 2007 Notice, for the first time ever, articulates two new rules: (1) a model aircraft can no longer be operated for a "business" purpose; and (2) a model aircraft operated for a business purpose requires a COA or special airworthiness certificate and therefore is subject to the FARs. To be clear, the 2007 Notice announces a strict prohibition on model aircraft that the FAA in this notice reclassifies as "UAS": "no person may operate a UAS in the National Airspace System without specific authority." The framework requiring a model aircraft or UAS operator to obtain "specific authority" is found nowhere in the FARs.

Notably, the FAA does not provide a definition for "business" purpose. This phrase

could be viewed as more or less broad than the definition of "commercial operator" in 14 C.F.R. § 1.1.[21] That the new term "business purpose" is not found in the FARs further reflects that the 2007 Notice is a legislative rule, not merely interpretative.[22] The "business purpose" distinction has no basis in any regulation or in the voluntary AC 91-57 standards. It is a new legal prohibition issued by the FAA, and therefore either an invalidly issued legislative rule or no more than a non-binding policy statement.[23]

D. The FAA's 2007 Notice is an Invalid Legislative Rule Because it is Intended to Bind the Public in the Absence of Notice and Comment Rulemaking

Because the 2007 Notice sets out new substantive rules that are intended to bind the public, it is considered legislative rulemaking that is invalid due to the absence of the requisite notice-and-

[21] "Commercial operator means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this title. Where it is doubtful that an operation is for "compensation or hire," the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit." *Id*. However, 14 C.F.R. § 119.1 makes clear that a commercial certificate is not required for "[a]erial photography or survey," which is the activity Mr. Pirker is alleged to have performed for payment using his model airplane.

[22] Mr. Pirker's alleged conduct falls outside of the definition of "commercial operator." He is not alleged to have been engaged in the "carriage" of "persons or property." According to the complaint, his model aircraft was equipped with a device that could record digital video, and he sold that video to an advertising agency. This sale of what is essentially optical sensor data from the equipment on board a model airplane is distinguishable from operations in which a commercial photographer is carried on board a manned aircraft.

[23] This conclusion is also the case for subsequent FAA "policy" statements and notices that are to the same effect. *See, e.g.*, Unmanned Aircraft Program Office issued Interim Operational Approval Guidance 08-01, March 13, 2008 ("AC 91-57 shall not be used as a basis of approval for UAS operations and is applicable to recreational and hobbyists use only. . . . . In general, and as a minimum, [UAS] applicants must observe all applicable regulations of 14 C.F.R. parts 61 and 91."); "Fact Sheet - Unmanned Aircraft Systems (UAS)," Feb. 19, 2013, *available at* http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 ("In 2007, the FAA clarified that AC 91-57 only applies to modelers, and specifically excludes individuals or companies flying model aircraft for business purposes."); National Policy N 8900.207, at 3, Jan. 22, 2013 ("hobbyists and amateur model aircraft users . . . . should seek policy under the current edition of Advisory Circular (AC) 91-57. AC 91-57 is not to be used as a basis of approval for operation of any other aircraft, including by Federal, State, and local governments, commercial entities, or law enforcement.").

comment process.[24] To determine whether a regulatory action constitutes promulgation of a legislative rule, courts are guided by two lines of inquiry. "One line of analysis focuses on the effects of the agency action," namely whether the agency has "(1) 'impose[d] any rights and obligations,' or (2) 'genuinely [left] the agency and its decisionmakers free to exercise discretion.'" *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). The second line of analysis looks to three factors: "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register . . . .; and (3) whether the action has binding effects on private parties or on the agency." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (internal citation omitted). The D.C. Circuit identifies the third factor as the "ultimate focus" of the analysis. *Id.*

The 2007 Notice satisfies virtually all of these factors. It was published in the Federal Register and contains language clearly intended to bind private parties. It states in unequivocal terms that "no person may operate" the newly-defined "unmanned aircraft system" without a COA or airworthiness certificate, and imposes upon the public the obligation of obtaining "specific authority" for UAS operation. It leaves no discretion to agency decision makers. It warns that model aircraft operators who have "business" purposes are under the "mistaken understanding that they are legally operating." By implication, the 2007 Notice announces to the public that flying a model airplane for commercial purposes is *illegal* and that an unspecified number of FARs now apply to such operation. These plainly satisfy the tests articulated in *Croplife* and *Molycorp* for determination that the 2007 Notice constitutes legislative rulemaking.

[24] There is no dispute that the 2007 Notice was not promulgated by notice-and-comment rulemaking. It appears in the February 13, 2007 Federal Register but is said to have been "Issued in Washington, DC, on February 6, 2007." Although contact information is provided for "feedback," it fails the APA's required minimum 30-day period for notice and comment. 5 U.S.C. 553(d) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date.").

When a federal agency uses words like "should not be permitted," that is "the type of language we have viewed as binding because it 'speaks in mandatory terms.'" *Iowa League of Cities v. EPA*, 711 F.3d 844, 864, (8th Cir. 2013) (quoting *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003)). *See also Gen. Elec. Co.*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("[T]he mandatory language of a document alone can be sufficient to render it binding . . . ."). "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d at 383 (citations omitted).

The case of *Electronic Privacy Info. Ctr. v. United States Dep't of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011) is instructive. In *EPIC*, DHS argued that its implementation of AIT scanners at airports (including backscatter x-ray scanners) reflected only a "general statement of policy" advising the public of new technologies that would be used to fulfill existing legislation and regulation concerning airport security, and therefore did not require notice-and-comment rule making. The D.C. Circuit rejected the argument, finding that "It is enough for the agency's statement to purport to bind those subject to it, that is, to be cast in mandatory language so the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Id*. at 319 (citation and quotation marks omitted).

The mandatory intent of the 2007 Notice is also reflected in the FAA's very public correspondence and statements concerning its 2007 Notice, which have resulted in the actual shut-down of model aircraft business operations. Operators of model aircraft who have engaged in aerial photography for compensation have received cease-and-desist letters from the FAA, premised on the policies set out in the 2007 Notice. For example, a business in Minneapolis was shut down earlier this year by "the Minneapolis office of the Federal Aviation Administration. They were simply told to ground their commercial use of the aircraft. Turns out, current regulations don't allow unmanned aircraft for

commercial purposes." FAA Grounds Local Aerial Photo Business, *DIY Drones*, Mar. 15, 2013.[25] Similarly, the company MI6 Films received a letter from R. Lance Nuckolls of the Unmanned Aircraft Program Office that reads in pertinent part, "I would like to discuss the *existing prohibition of commercial operations* of unmanned aircraft systems (UAS) in the U.S. national airspace" (emphasis added).[26] The new policy of referring to model aircraft as "unmanned aircraft systems" and declaring a ban on business or commercial use is also reflected in countless news articles in which FAA representatives warn the public not to operate model aircraft for business purposes. *See, e.g.*, "Future of drone use appears to be wide-open," Providence Journal, Sept. 22, 2013 ("the Federal Aviation Administration has banned the commercial use of drones while it develops regulations for the industry. 'You can't use an unmanned aircraft for commercial operations,' said Les Dorr, a spokesman for the FAA.").[27]

The 2007 Notice has even been used to represent *to Congress* that model airplanes are now subject to the FARs concerning airworthiness and that there is a ban on "nonrecreational" operation. On October 30, 2009, FAA Director of Flight Standards Service John M. Allen wrote a letter to Congresswoman Doris O. Matsui in response to a citizen's inquiry concerning the "[a]pplicability of current regulations to RC [radio control model aircraft] and UAS operations."[28] Mr. Allen's letter first admits that, historically, the FARs have never applied:

> In 2004, the FAA began reevaluating its previous RC and UAS policies in response to the increasing number of operation and technical capabilities of these systems. *Prior to this*, most of these activities were recreational in nature and conducted in remote locations, while commercial activities were few in number and relatively obscure. Although *earlier policies sufficiently addressed safety concerns through voluntary compliance* with safety minimums, the FAA

[25] Available at http://diydrones.com/profiles/blogs/faa-grounds-local-aerial-photo-business .

[26] Available at http://mi6films.com/2011/rc-helicopter-mikrokopter-hexa-helicopter/faa-has-restricted-all-rc-helicopter-flight-in-the-usa-airspace/687/

[27] Available at http://www.providencejournal.com/breaking-news/content/20130922-ewave-future-of-drone-use-appears-to-be-wide-open.ece .

[28] A copy of this letter is attached hereto as Appendix A.

determined *a more stringent regulatory approach* was necessary.

Appendix A at p. 2 (emphasis added)

This "more stringent regulatory approach" has never been proposed or implemented by the FAA through notice-and-comment rulemaking. Rather, as the letter goes on to explain:

> In 2005, the FAA addressed the developing safety concerns by *providing internal guidance* to FAA personnel regarding the assessment of future operations. In early 2007, the FAA *published formal policy* on UAS and RC modeling outlining the issues and rationale, as well as general safety parameters and procedures for continued operations. . . . . These policies and procedures are consistent with broader aviation regulations in *requiring nonrecreational activities to comply with higher standards*. As such, *nonrecreational UASs must obtain appropriate airworthiness certification*.

Id. (emphasis added)

Thus in its communication with a sitting Member of Congress, the FAA has indicated that the 2007 "formal policy" published by the FAA is the source of a mandatory rule requiring compliance with "higher standards" and that the new policy subjects "nonrecreational" operation of model aircraft to the FARs for the very first time after decades of "*voluntary compliance* with safety minimums."

The FAA's public characterization of the 2007 Notice leaves little doubt that it was intended to bind members of the public to new substantive regulatory standards that were not previously applicable. That the 2007 Notice is labeled a "policy" is not determinative. "[T]he agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." Croplife, 329 F.3d at 883. In *Croplife*, the court ruled that an EPA Press Release banning the agency's consideration of human studies in evaluating pesticide safety constituted an invalid legislative rule for failure to engage in notice-and-comment rulemaking, notwithstanding the EPA's express indication that it was still considering the issues and anticipated crafting future rules. "Because the new rule effects a dramatic change in the agency's established regulatory regime, EPA was required to follow notice and comment procedures." *Id*. at 884.

E. The FAA's Policy Statements are Not Binding on the Public

Although the FAA's guidance concerning UAS and model aircraft are most appropriately analyzed as (invalid) legislative rules intended to have binding effect, in the alternative they might be viewed as "policy statements" not subject to the APA's notice-and-comment process. Indeed, the 2007 Notice is expressly labeled a "Notice of policy" and refers to "policy" throughout. However, it is well-established that agency policy statements have no binding effect on the public.

The nature of a policy statement was articulated in the *Pacific Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974):

> A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking or adjudications. . . . . A general statement of policy … does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

Id. at 38.

Many courts have reaffirmed the core concept that an agency policy statement is non-binding and non-enforceable. *See, e.g., Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) ("a statement of policy may not have a present effect: a general statement of policy is one that does not impose any rights and obligations"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("[P]olicy statements are binding on neither the public nor the agency.") (internal citation omitted).

F. The New UAS Policy is Not an Interpretative Rule Warranting Any Deference

Federal agencies are permitted to issue "interpretative rules" construing the meaning of existing statutes and regulations without engaging in notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b). It is clear, however, that the new FAA UAS rules that impose a commercial "ban" on model aircraft operations and that purport to subject Mr. Pirker to enforcement under FAR 91.13 cannot be considered "interpretative rules" and, even if they were, must be rejected.

1. The 2007 Notice Fails to Interpret Any Regulation or Statute

It is axiomatic that in order for an agency statement to be considered an "interpretative rule" for purposes of the APA exception to notice-and-comment rulemaking, it must actually interpret a provision in an existing statute or regulation. The 2007 Notice does no such thing. It is labeled a "Notice of policy." It indicates that "[r]egulatory standards need to be developed" – a statement of future rulemaking intent. It does not cite any statute or FAR for purposes of interpreting the meaning thereof. Indeed, it barely cites anything, referring only to Memorandum on UAS Policy 05-01 from 2005, a passing reference to the FARs concerning experimental airworthiness certificates, and AC 91-57 which it asserts without explanation "only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes." The purpose of the 2007 Notice is plainly to announce a new "FAA policy for UAS operations," a newly-defined technology, not to clarify any specific ambiguous regulation.

Where an agency's statement does not purport to interpret a statute or regulation, it is not an interpretative rule. *See Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (agency notice deemed not to be an interpretative rule when "it does not purport to interpret a statute or regulation," "[i]t defines no ambiguous term," and "[i]t gives no officer's opinion about the meaning of the statute or regulations."). Thus, the 2007 Notice cannot be considered an interpretative rule and is not exempt from APA notice-and-comment rulemaking. Although the analysis ought to stop there, for the sake of completeness we analyze below the 2007 Notice pursuant to principles relating to interpretative rules.

2. The FAA's Implicit Interpretation Concerning Commercial Model Aircraft Operations is Clearly Erroneous

To the extent that the 2007 Notice may be viewed as an interpretative rule that, somehow, implicitly distinguishes recreational model aircraft operation from "commercial" or "business" operation,

such an interpretation is clearly erroneous and must be rejected. An interpretation advanced in a policy statement is entitled to respect only to the extent that it is actually persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576 (2000). Similarly, an interpretation advanced as a litigating position is considered under the same *Skidmore* standard, requiring that the court be *persuaded* that the interpretation is valid. *See Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000) (interpretation advanced by agency as a litigating position was entitled only to *Skidmore* deference). An agency's interpretation will be rejected when it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotations marks omitted).

The interpretation seemingly proposed in the 2007 Notice (if it even is an interpretation) is completely unpersuasive. No distinction between commercial and recreational model aircraft use has been drawn in AC 91-57, or in the FARs, nor has it ever been articulated in the 90 years that model aircraft have been flown in the United States. No regulatory text is identified in support of this distinction.

Moreover, it is beyond dispute that countless individuals and corporations have utilized model airplanes for "businesses" purposes in a variety of contexts without even a hint that the FAA regulations apply, thus refuting any such interpretation.

(a) *Cinema and Television*

There is extensive operation of model aircraft in for-profit motion picture and television production. For example:

- In 2004, makers of the film *The Aviator* (which grossed over $100 million in domestic ticket sales) utilized custom-made model airplanes to create the many aerial special effects shots. Joe Bock of Aero Telemetry recounted in an interview how his company created a 25-foot wingspan model of the Spruce Goose which the film crew "took off and flew and landed under its own power right out of the Long Beach Harbor in the exact

location where the real one did."[29]

- The crew of Discovery Channel's Storm Chasers has for years used radio-control model airplanes and, more recently, "quadcopter drones" equipped with cameras and GPS tracking to photograph and measure dangerous storms for the production of commercial television programs.[30]

- The 1982 film "Zapped" starring Scott Baio features an extended sequence of a model airplane flown in a park over the heads of the actors.[31] The airplane is flown low to the ground, over people, and is depicted as coming close to striking one of the actors.

- The 1998 film "Rushmore," filmed on location in Texas, utilizes the operation of a radio-control model airplane in a stadium parking lot.[32]

- The popular show Mythbusters makes frequent use of radio-controlled model aircraft, which are flown for the "commercial" purpose of creating a for-profit television program.

- The "Jackass" series of slapstick films makes use of radio-control aircraft, often with the intent of placing actors in harm's way for comedic effect. In one scene, for example, a radio-control helicopter equipped with a paintball gun is used by one of the actor to fire paintballs at other actors.

- In a 2012 episode of truTV's "Storage Hunters," the winners of an auction for the contents of an abandoned self-storage unit discover that they have purchased an expensive T-Rex 700 model helicopter with a camera gimbal designed for aerial photography. They proceed to fly it outdoors, and the episode ends with a video shot from the model helicopter itself.[33]

(b) *The Model Aircraft Industry*

Various companies involved in the model airplane industry not only operate model aircraft for "business" purposes, but they pay people to fly those models. The public record reflects

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[29] *See* http://www.youtube.com/watch?v=X1izBmi_D5U .

[30] *See* http://www.pcmag.com/slideshow_viewer/0,3253,l=309661&a=309658&po=3,00.asp . See also http://www.btemodels.com/sh-tvn.html . An example of Discovery Channel's commercial use of a model aircraft in 2009, including a mounted camera capturing video of a tornado, can be viewed at: http://youtu.be/LkKmUehtvCc

[31] The sequence can be viewed at http://www.youtube.com/watch?v=uXNxNFaUf4g

[32] The scene can be viewed at https://www.youtube.com/watch?v=VXtsyN4kapk

[33] Available at http://www.youtube.com/watch?v=_RYCZsepw0c

countless examples of model aircraft videotaped in flight, for advertising purposes. In some cases, those videos are taken not only from the ground, but from the airborne model aircraft itself.[34] Additionally, these companies conduct airborne testing and development of commercial products (just as military "drone" contractors do).

(c) *Model Airplane Operators Who Are "Sponsored" or Compensated at Competitions*

Companies in the industry also "sponsor" model airplane pilots who are paid to fly model aircraft at events so as to promote the brand and products the company sells.[35] Also, countless contests are held each year in which cash is paid to model aircraft operators who perform best at different types of radio-controlled flight, such as pattern flying and aerobatics.[36] Between corporate sponsorships and competitions, some model airplane operators appear to be earning substantial income because of their skillful operation of model aircraft.[37]

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[34] For example, a video posted by Blade Helis (a division of Horizon Hobby) promoting for sale the Blade 350 QX radio-controlled quadrotor helicopter consists of video footage taken from the model aircraft as it is flying over spectators at a race car track, above the cars themselves during a race, over a golf course, and other sites. *See* "Blade 350 QX Action Show Reel," available at http://www.youtube.com/watch?v=y87_PUc25pg .

[35] See, e.g., "Horizon Hobby's "The New Beastie Boys" Show Team at Joe Nall," Model Airplane News, May 15, 2011, available at http://www.modelairplanenews.com/blog/2011/05/15/horizon-hobbys-the-new-beastie-boys-show-team-at-joe-nall/ . This article describes "the formation airshow team 'The Beastie Boys' from Horizon Hobby" who fly the model airplanes sold by Horizon Hobby and wear shirts emblazoned with the company's logos.

[36] For example, the "Top Gun" competition has been held for 25 years in Florida and is heavily funded by corporate sponsors. *See* http://www.franktiano.com/TopGunFrameset.htm There are five days of competition and thousands of dollars in prizes to model aircraft pilots in a variety of categories. *See* http://www.franktiano.com/TopGun/Top%20Gun%20Rulebook%202013.pdf Other competitions award valuable equipment as prizes.

[37] For example, Desert Aircraft sponsors the "Tuscon Aerobatic Shootout" competition. Its website currently shows the 2012 First Place winner, Andrew Jesky, holding an enlarged $12,000 check. *See* http://www.desertaircraft.com/ A list maintained by an enthusiast indicates that an event in Las Vegas called "Radio Control Tournament of Champions" used to pay out prizes of up to $40,000 per pilot each year. *See* http://moleski.net/rc/toc.htm

(d) *Media Coverage and Entertainment*

Model aircraft are also flown for "business" purposes by persons who are paid to write reviews of products that will appear in magazines or on the internet. Similarly, there are revenue-generating television and internet programs dedicated to model aviation. Most recently, the YouTube show "Flite Test" has drawn an audience of over 85,000 subscribers, thanks to its professionally-produced, creative episodes concerning all aspects of model aircraft design and operation.[38] The show has at various times been sponsored by hobby companies, appears to receive YouTube advertising revenue, and is funded by viewers themselves (who buy products sold by the show).

If the FAA's implicit interpretation of model aircraft regulation were correct, none of these businesses would be legal. Today's sophisticated variety of model aircraft may bear little resemblance to the industry in 1981, but it is beyond dispute that model aircraft have for decades been operated for business and commercial purposes without any suggestion that an operator's "commercial" or "business" purpose would result in regulation under the FARs -- let alone an outright ban. Nor has the FAA provided any justification or explanation for such an "interpretation." The introduction of a recreational/commercial distinction represents a dramatic change in the FAA's policy with severe consequences for businesses and individuals. Such an interpretation is unpersuasive and erroneous.

3. Interpreting the FARs to Apply Without Modification to Model Airplanes is Clearly Erroneous

To the extent that the 2007 Notice may be viewed as an interpretative rule that, somehow, treats FARs as directly applicable to model aircraft, that interpretation must be rejected as erroneous because it conflicts with so many of the regulations.[39]

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[38] See http://www.youtube.com/user/flitetest/videos .

[39] For example, the FAA may be tempted to argue that the general definition of "aircraft" is broad enough to include model airplanes. That approach is unavailing. 14 C.F.R. § 1.1 expressly provides at the outset that all of its definitions are as written "unless the context

The conflict is perhaps best highlighted by 14 C.F.R. § 91.1(c) which governs the applicability of Part 91 Subpart A regulations, including Section 91.13 which Mr. Pirker is alleged to have violated. It reads, in pertinent part, "This part applies to *each person on board an aircraft* being operated under this part, unless otherwise specified." 14 C.F.R. § 91.1 (emphasis added). This provision confirms that none of the regulations in Part 91 Subpart A apply at all to Mr. Pirker, who was never, nor could ever be, "on board" his model aircraft.

Indeed, 14 C.F.R. § 91.13(a) in its current form is properly understood to apply to manned aircraft. In *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3d Cir. 2010), the Third Circuit considered the meaning of the language in 14 C.F.R. § 91.13(a) concerning reckless or careless operation (the same FAR Mr. Pirker is alleged to have violated):

> [T]he statutory and regulatory definitions of "operate" state that a plane is only being operated, within the meaning of § 91.13(a), when it is being "use[d]" for "navigation," and the Aviation Act's definitions of "navigate aircraft" and "air navigation facility" demonstrate that the term "navigation" principally applies to the takeoff and landing of an aircraft, and the "piloting" that occurs during the flight. *These definitions contemplate a flight crew's interaction with an aircraft and with passengers who are on the aircraft*.

Elassadd, 613 F.3d at 130. *See also Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999) ("Congress's purpose in enacting the FAA was to promote safety in aviation and thereby protect the lives of *persons who travel on board aircraft*.") (citation and internal quotation marks omitted).

Other provisions reveal the contradictions inherent in applying FARs indiscriminately to model aircraft. 14 C.F.R. § 91.11 concerns the prohibition on interference with crewmembers: "No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated." Similarly, 14 C.F.R. § 91.107 concerns the use of safety belts. "No pilot may take off a U.S.-registered civil aircraft . . . . unless the pilot in command of

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requires otherwise." Thus, a general definition such as "aircraft" does not exist all-expansively in a vacuum and cannot capture for regulatory purposes devices that for decades expressly have been subject to *non-regulation* under AC 91-57.

that aircraft ensures that each person on board is briefed on how to fasten and unfasten that person's safety belt and, if installed, shoulder harness." It follows from these regulations that when an "aircraft" is "being operated" that there is at least one "crewmember" or "person" "on board."

Some of these conflicts are irreconcilable and would leave operators with no ability to comply. For example, under 14 C.F.R. § 91.119 concerning minimum safe altitudes, "no person may operate an aircraft below" certain altitudes except for takeoff or landing. Over non-congested areas, the minimum is 500 feet AGL. However, in Advisory Circular AC-91-57, which constitutes the only FAA guidance concerning the altitude of model aircraft flight, model aircraft operators are instructed: "Do not fly model aircraft higher than 400 feet above the surface." If "model aircraft" were interchangeable with "aircraft" for purposes of existing FARs, they could never be flown at all because they must, according to FAA guidance, fly *below* 400 feet while also flying *above* 500 feet.

49 C.F.R. Part 830 governs notification and reporting of aircraft accidents and demonstrates how a FAR is properly amended so as to account for unmanned aircraft. An "aircraft accident" is defined as "an occurrence associated with the operation of an aircraft which takes place *between the time any person boards the aircraft with the intention of flight and all such persons have disembarked*, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage." 49 C.F.R. § 830.2 (emphasis added). So entrenched in the regulations is the notion that the FARs apply to manned aircraft that this specific regulation (unlike the others) now includes a provision for unmanned devices: "For purposes of *this part*, the definition of "aircraft accident" includes "unmanned aircraft accident," as defined herein." *Id.* (emphasis added).[40]

[40] Later, the section provides "*Unmanned aircraft accident* means an occurrence associated with the operation of any public or civil unmanned aircraft system that takes place between the time that the system is activated with the purpose of flight and the time that the system is deactivated at the conclusion of its mission, in which: (1) Any person suffers death or serious injury; or (2) The aircraft has a maximum gross takeoff weight of 300 pounds or greater and sustains substantial damage." *Id*. This definition shows that it is doubtful that lightweight model

This is typical of the FARs that are intended to apply to devices other than manned aircraft -- they are consistently referred to in the regulations as "unmanned" or by a term that makes clear the type of device being regulated. For example, "unmanned rockets" are specifically regulated in 14 C.F.R. §§ 21-25. "Moored balloons" and "kites" are regulated in 14 C.F.R. §§ 11-19. "Unmanned free balloons" are addressed by 14 C.F.R. §§ 31-39. Section 91.1 specifically indicates that moored balloons, kites, unmanned rockets, and unmanned free balloons fall outside of the Part 91 regulations and are subject instead to Part 101 or Part 103 (wherein those devices are very specifically defined). If any FAR included within its contemplation a model airplane or other type of unmanned aircraft, it would say so expressly, just as these other specific FARs do. When there is a specific class of device that travels through the air, the FAA is quite capable of specifically identifying, defining and regulating that device.[41]

A recent FAA Legal Interpretation also supports this ubiquitous regulatory framework. In a July 20, 2012 Memorandum from the Assistant Chief Counsel for Regulations, the FAA considered whether Yves Rossy's "Jetman" wing (strapped to his body and powered by four small jet engines) is regulated as an "aircraft" under Title 49 of the United States Code. 2012 WL 3156532 (D.O.T. July 20, 2012).[42] The response makes clear that the device is regulated only because Mr. Rossy uses it to *place himself* in flight: "Mr. Yves Rossy's 'jetman' wing, *when worn and operated by its pilot*, is an 'aircraft'

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airplanes such as Mr. Pirker's 5-pound styrofoam Zephyr are considered "unmanned aircraft" for regulatory purposes. As set out above, serious or even fatal accidents involving model aircraft are not reported to, or investigated by, the NTSB.

[41] As a further example, NOTAMs containing temporary flight restrictions (TFRs) specifically make clear the devices being restricted. *Compare* NOTAM FDC 0/8326 (specifically prohibiting by name "model aircraft operations" and "unmanned aircraft systems" in the Washington D.C. area for security reasons) to NOTAM FDC 3/0459 (stating only that "[n]o pilots may operate an aircraft" over the east side of Vieques, Puerto Rico due to the hazard posed by ordinance disposal).

[42] A video of Mr. Rossy's extraordinary device is available at https://www.youtube.com/watch?v=x2sT9KoII_M .

as that term is defined in 49 U.S.C. § 40102(a)(6)." (Emphasis added.) Implicitly, if his wing were not strapped to his body, it would be an unmanned device subject to some other regulation (or none at all).[43]

Thus is it quite clear that any "interpretation" of the FARs that merely treats a model aircraft or unmanned aircraft system as already subject to regulation under the same standards as manned aircraft will conflict with the unambiguous meaning of countless regulations. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) ("if the text of a regulation is unambiguous, a conflicting agency interpretation … will necessarily be 'plainly erroneous or inconsistent with the regulation' in question."). Such an interpretation here would create new regulations, not interpret existing ones. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court reviewed the context of surrounding provisions to determine the meaning and application of "compensatory time" in a provision of the Fair Labor Standards Act. *Id*. at 582-86. The Court reached its own interpretation and refused to defer to the Department of Labor's interpretation issued in an opinion letter. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. at 588. As Congress and the FAA have recognized by defining a new category of device known as an "unmanned aircraft system" and establishing a timetable for new regulations, the existing regulations cannot be merely "interpreted" to apply to model airplanes.

Courts have frequently rejected agency interpretations when the interpretation is inconsistent with regulatory language or if the interpretation is unreasonable. *See, e.g., Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000), *CMC Electric, Inc. v. OSHA*, 221 F.3d 861 (6th Cir. 2000); *Albemarle Corp. v. Herman*, 221 F.3d 782 (5th Cir. 2000) (interpretation inconsistent with plain language); *Director, Office of Workers' Compensation Programs v. Eastern Coal Corp*., 54 F.3d 141 (3d

[43] Tellingly, the memorandum separately indicates that unmanned aircraft systems are now regulated "*by FAA per Policy*." It is the new "policy" as of 2012, not any of the actual FARs, that contemplate the regulation of a UAS for the first time. (As explained elsewhere, however, the policy statements are non-binding.)

Cir. 1995). A Court will consider a wide range of factors in determining whether an agency's interpretation is permissible. For example, a court may look to "intent at the time of the regulation's promulgation," *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988), principles of statutory construction, *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (presumption that a specific meaning trumps general provisions), and related statutory or regulatory language and its purpose, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (considering structure and purposes of authorizing statute). As set out above, every one of these factors weighs in favor of treating unmanned aircraft differently from manned aircraft under the current regulations.

An agency's interpretation is also subject to challenge when "there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 984-85 (9th Cir. 2012) "Indicia of inadequate consideration include conflicts between the agency's current and previous interpretations; signs that the agency's interpretation amounts to no more than a convenient litigating position; or an appearance that the agency's interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 n.4 (9th Cir. 2012) (en banc) (internal quotation marks and citations omitted). *See also National Wildlife Federation v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997) ("'litigating positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations' for agency action."); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1998) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). As set out in detail above, there has been no considered judgment on these matters by the FAA, nor even an expression in writing of an actual interpretation of any regulation. Any interpretation that simply applies existing FARs to model airplanes and unmanned aircraft systems is *post hoc* rationalization for the

absence of the rulemaking progress that the FAA undertook years ago, and that Congress mandated last year. Such interpretations should be rejected.

An agency interpretation is also subject to challenge when deference to the interpretation "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (internal quotation marks and alteration omitted). Many courts have held that even a reasonable agency interpretation of a rule is not applicable in a penalty case (such as this one) where the respondent did not have notice of the interpretation at the time of the conduct. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25 (1st Cir. 2000); *Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (interpretation not "ascertainably certain" at time of conduct); *Upton v. SEC*, 75 F.3d 92 (2d Cir. 1996) (this principle applies in both civil and criminal cases).

It would come as a surprise to any observer of the FARs, AC 91-57, the FAA's hands-off treatment of model aircraft accidents and 30 years of non-regulation that anyone could face an FAA civil penalty in connection with the allegedly reckless operation of a model aircraft. Even the policy guidance issued by the FAA in 2007 concerning unmanned aircraft simply indicates that operation for business purposes is prohibited by new policy, not by an existing FAR. The FAA has never provided notice that a model aircraft operator will be subject to the FAR 91.13 standard of care and could therefore be subject to thousands of dollars in civil monetary penalties if the model is flown in close proximity to people, vehicles or buildings. For these reasons, any regulatory interpretation that has such an effect must be rejected. Indeed, all of these interpretative problems only underscore that the 2007 Notice is a legislative rule that is invalid for lack of notice-and-comment rulemaking.

4. Even if an Interpretative Rule Applies, the 2007 Notice is Invalid Because it Alters a Long-Standing Definitive Interpretation

Even when a statement issued by an agency is deemed to be an interpretative rather than a legislative rule, notice-and-comment rulemaking is required when the statement alters a long-standing and definitive prior agency interpretation.

The decision in *Alaska Professional Hunters Association, Inc., v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999) is remarkably on point. In *Alaska*, local FAA officials had for 30 years consistently advised hunting guide pilots in Alaska that they were not governed by commercial operator regulations. In 1992, the FAA issued a report expressing concern about the safety of such pilots operating pursuant to Part 91 rather than Part 135. Six years later, the FAA published a "Notice to Operators" in the Federal Register proclaiming that such operators "henceforth must comply with the [commercial operator] regulations." *Id*. at 1033. The United States Court of Appeals for the District of Columbia Circuit struck down the FAA's "Notice to Operators" because it had been published without the APA's required notice and comment. *Id*. at 1036. In reaching this conclusion, the Court noted the FAA's advice concerning the non-applicability of the FARs to hunting guide pilots and that "FAA officials gave that advice for almost thirty years." As the Court explained, "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Id*. at 1035. *See also Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (invalidating a new Department of the Interior policy because "the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) ("a modification of an interpretive rule construing a statute will likely require a notice and comment procedure.").

Model aircraft operators have, since 1981, been advised by the FAA in an official Advisory Circular that they are subject only to "voluntary" standards and not to any of the FARs. A change in this policy would have a dramatic impact on existing and emerging industries, constituencies which are entitled to participate in the APA notice-and-comment process and to be informed about exactly which FARs will actually apply to their operations. "Those regulated by an administrative agency are entitled to know the rules by which the game will be played." *Alaska*, 1777 F.3d at 1035.

Conclusion

For the foregoing reasons, Respondent Raphael Pirker respectfully requests that the Administrative Law Judge dismiss the Complaint in its entirety and with prejudice, and grant such other and further relief as the tribunal may deem just and proper.

Dated: New York, New York
September 27, 2013

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By: _____

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Attorneys for Respondent Raphael Pirker

I hereby certify that I have this day served the foregoing Motion to Dismiss on counsel for Complainant, Brendan A. Kelly, Esq., Supervisory Attorney, Federal Aviation Administration, U.S. Department of Transportation, 1 Aviation Plaza, Jamaica, New York, 11434, by Certified Mail Return Receipt Requested.
Dated September 27, 2013

_____
Brendan M. Schulman
Counsel for Respondent Raphael Pirker

Appendix A

U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., SW.
Washington, DC 20591

OCT 30 2009

The Honorable Doris O. Matsui
House of Representatives
Washington, DC 20515

Dear Congresswoman Matsui:

Thank you for your September 18 letter on behalf of Mr. Patrick Egan of the Remote Control Aerial Photography Association about rules effecting radio controlled (RC) and unmanned aircraft systems (UAS).

Mr. Egan has previously expressed his concerns on this subject directly with the Federal Aviation Administration (FAA) Unmanned Aircraft Program Office (UAPO). Additionally, as a member of the Small UAS Aviation Rulemaking Committee (ARC), he actively participated in developing recommendations for the FAA to consider as part of the current rulemaking effort, which is specifically focused on enabling the type of operations he represents. We recognize that Mr. Egan continues to have concerns, including those raised in his letter to you.

Mr. Egan's letter addresses the following general questions: Applicability of current regulations to RC and UAS operations and the aviation Safety Management System process used by the FAA to assess risks and develop safe mitigations.

In order to operate in the National Airspace System (NAS), current laws and regulations require all aircraft to be registered and airworthy. There are various types of airworthiness certification, each balancing operational needs with safety. Currently, all civil unmanned aircraft (UA) are only eligible to apply for and obtain special airworthiness certificates, experimental category, which specifically support the safe development of new or immature technology that has yet to pass successfully the rigors of higher levels of assessment. For reasons of safety, operations conducted under this certificate are limited to research and development, crew training, and product demonstration.

Recognizing that the traditional processes for safely integrating new technology may seem overly restrictive to the "small" UA community, the FAA initiated a rulemaking action focused on providing limited access to the NAS for these operations. As part of this rulemaking effort, the FAA created the Small UAS ARC to garner advice and recommendations from the affected community. Representatives were invited from across the community based on their experience in developing this new technology and past involvement with the FAA in integrating UASs into the NAS and included the Department of Defense, manufacturers (small, medium, and large), user associations, etc. Consideration was given to those familiar with traditional aviation processes, experienced in developing and operating small UASs under

FAA approval, or representative of a unique portion of the affected community, to which the later Mr. Egan's membership served. Input from this group resulted in the FAA's assessing its position on small UAs.

In 2004, the FAA began reevaluating its previous RC and UAS policies in response to the increasing number of operations and technical capabilities of these systems. Prior to this, most of these activities were recreational in nature and conducted in remote locations, while commercial activities were few in number and relatively obscure. Although earlier policies sufficiently addressed safety concerns through voluntary compliance with safety minimums, the FAA determined a more stringent regulatory approach was necessary.

In 2005, the FAA addressed the developing safety concerns by providing internal guidance to FAA personnel regarding the assessment of future operations. In early 2007, the FAA published formal policy on UAS and RC modeling outlining the issues and rationale, as well as general safety parameters and procedures for continued operations. We have enclosed a copy for your information. These policies and procedures are consistent with broader aviation regulations in requiring nonrecreational activities to comply with higher standards. As such, nonrecreational UASs must obtain appropriate airworthiness certification.

The specific responses to Mr. Egan's eight questions are enclosed.

If you or a member of your staff needs further assistance, please contact Roderick D. Hall, Assistant Administrator for Government and Industry Affairs, at (202) 267-3277.

Sincerely,

for John M. Allen
Director, Flight Standards Service

Enclosures
Transmitted Correspondence