

Expecting A Pizza Delivered By Drone? It May Take A While

By **Mary-Caitlin Ray** (August 29, 2019, 4:08 PM EDT)

Recent headlines announcing developments for drone delivery operators have many in the industry feeling cautiously optimistic about the rollout of food and product delivery by drone in the U.S. In March of this year, a team comprised of the North Carolina Department of Transportation, United Parcel Service Inc. and Matternet received Federal Aviation Administration approval to deliver medical products by drone as part of the UAS Integration Pilot Program.

On April 2, the FAA also issued regulatory exemptions for drone delivery operations by Project Wing, the drone delivery company of Google's parent company Alphabet. Project Wing received the first air carrier certificate for operating a drone airline in late April. Project Wing also recently announced that it is already delivering food and other items to customers in Australia.



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Project Wing's exemption and certification process will be a valuable study on how the FAA plans to fit these "revenue flights" into a regulatory framework designed for manned aircraft. Since Wing received its certification and exemptions, several other companies have petitioned the FAA for similar authority, including an Uber subsidiary on May 13, and a UPS subsidiary on Aug. 1. Companies eyeing commercial drone delivery operations can be encouraged by these developments — but they should maintain some skepticism, given the regulatory barriers that remain to be resolved before they begin planning to zip hot pizza through American skies.

The FAA and the U.S. Department of Transportation previously announced that complex commercial drone delivery operations will need to obtain two types of certification: safety authority from the FAA in the form of a Part 135 air carrier certificate, and economic authority from the DOT for certain interstate deliveries. This requirement applies to drone operations beyond visual line of sight, and to delivering property or people, for which the operator receives compensation. To hold a Part 135 certificate, operators must meet complex technical requirements, and they must be U.S. citizens.

Because Part 135 was developed for manned aviation, compliance with many of the technical requirements is simply impossible for drone operations. For example, drone delivery operators would need to obtain exemptions from provisions requiring the use of seat belts, passenger deplaning plans and on-board operations manuals, among a host of other requirements that do not fit most small drones delivering packages. It is encouraging that Project Wing is successfully navigating the exemption and certification process, but other operators may find it time- and cost-prohibitive.

The citizenship requirement adds another barrier for foreign drone delivery operators. Corporations must be organized under the laws of the U.S., a state, the District of Columbia or a U.S. possession or territory. The corporation's president must be a U.S. citizen, and at least two-thirds of the board of directors and other managing officers must be U.S. citizens. Finally, at least 75% of the voting interest must be owned and controlled by U.S. citizens.

In general terms, partnerships are U.S. citizens if all of their partners are U.S. citizens. Yet because of the language in the citizenship statute, the citizenship status of partnerships often requires a deeper analysis. The definition applies to each layer of ownership, up the chain, to determine citizenship status, and it is used by both the FAA and the DOT. While the FAA has not historically conducted a thorough, independent citizenship analysis, an operator must be a U.S. citizen to receive a certificate. As a result, it is imperative that drone delivery operators determine their own citizenship status, so that they can accurately certify compliance with statutory citizenship requirements.

Companies planning to use drones to deliver goods for compensation are engaged in "air transportation," and must obtain a certificate of economic authority — or an exemption — from the DOT. In order to hold DOT economic authority, drone delivery operators must be U.S. citizens. In general, operations delivering property wholly within one state would not require DOT economic authority.

However, there are two types of intrastate operations that do require operators to obtain DOT economic authority. The first type is flights carrying more than a de minimis amount of property across state lines at any point in a continuous journey, even if takeoff and landing occur within the same state. The second type of intrastate operation that requires DOT economic authority is flights that transport property as part of an inter- or multi-state network.

There is little guidance on what constitutes more than a "de minimis" amount of property, or on how the DOT will interpret interstate transport as part of a continuous journey within the drone context. So, while not all drone delivery operations will require DOT economic authority, companies planning to conduct operations for compensation or hire will need to carefully consider how they will obtain the correct authority, and whether they meet the U.S. citizenship requirements.

Obtaining a certificate of economic authority from the DOT is a detailed, lengthy process, during which the DOT conducts a "fitness review" — a searching analysis of the applicant's managerial competence, operating and financial plans, and compliance record. This thorough assessment also includes an independent examination of the applicant's citizenship.

The DOT has determined that the exemption for air taxi operators is the appropriate form of economic authority for drone delivery operators, so applicants will be spared the onerous fitness review. Instead, applicants must submit a two-page registration form showing the type of service operated, the FAA certificate number and the number and type of aircraft they will operate. Applicants must also certify that they maintain the requisite liability insurance and that they are U.S. citizens.

Like the Part 135 certificate citizenship certification, the air taxi exemption has not historically triggered an in-depth citizenship analysis. But applicants should understand the complex citizenship framework, so that they can accurately self-certify their compliance; applicants should also be prepared for DOT to be more proactive about citizenship investigations of drone delivery operators than it has previously been for traditional air taxi applicants.

In practice, both the technical and citizenship requirements of the Part 135 certificate and the air taxi exemption are significant obstacles for commercial drone delivery programs. While the technical requirements of the Part 135 certificate are burdensome and time-consuming to address, the citizenship requirements could be difficult, if not impossible, for many companies to meet.

In the FAA Reauthorization Act of 2018, Congress mandated that the FAA update requirements to allow for commercial operation of small drones to deliver packages or other commercial products for hire. However, there is no indication so far that the FAA and the DOT will waive citizenship requirements for such operations. Companies considering commercial drone delivery programs should begin planning how they will meet the technical and citizenship requirements of Part 135, and determine whether their operations require economic authority from the DOT through the air taxi exemption.

With the FAA's recent approvals, we are inching toward the Jetson age, but until there is a clear path to certification specific to drone operators, on-demand, flying pizza is just a pie in the sky.

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