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Government Astronauts & More: FAA Issues Regulations Under U.S. Commercial Space Launch Competitiveness Act of 2015

Go-To Guide:
• Government astronauts are not "third parties" and won't impact insurance coverage calculations
• Part 440 waiver of claims templates moving to Advisory Circular
• Experimental permitting expanded to reusable suborbital vehicles

On Sept. 19, 2024, the Federal Aviation Administration (FAA) issued a final rule updating title 14 of the Code of Federal Regulations (14 CFR) as mandated by the United States Commercial Space Launch Competitiveness Act of 2015 (CSLCA). The modernized regulations incorporate three CSLCA statutory innovations: (1) creation of a third category of persons, "government astronauts," onboard launch and reentry vehicles; (2) extension of the waiver of claims with operators to space flight participants; and (3) expansion of the applicability of experimental permitting.

Regulating 'Government Astronauts'

Prior to passage of the CSLCA in 2015, both the FAA and NASA recognized that the existing definitions of "crew" and "space flight participants" were inappropriate for NASA astronauts hitching rides on Commercial Crew Program-provided spacecraft. Various provisions of the definitions – from a requisite

employee relationship to required waivers of claims – were ill-fit, or wholly unacceptable, for government astronauts.

In 2015, the CSLCA addressed these issues by defining "government astronaut." While the FAA has applied the CSLCA definition of "government astronaut" since 2015, the present regulatory action formally adopts the statutory definition and enacts several changes to accommodate this new category of person.

First and foremost, and in accordance with the CSLCA, government astronauts are excluded from the definition of "third party." Excluding government astronauts from the pool of third parties – or those able to bring a claim for loss against a launch operator – means the presence of government astronauts during launch activities does *not* affect the amount of insurance coverage operators are required to obtain under FAA regulations (e.g., the "Maximum Probable Loss" (MPL)). And while the presence of government astronauts will not increase an operator's MPL, claims by government astronauts *are counted* in total claims when considering an operator's eligibility for government indemnification.[1] Overall, this is a win for operators – insurance costs for operations with government astronauts may remain stable or even decrease, while successful government astronaut claims are counted in total claims against an operator for government indemnification purposes.

In addition to excluding government astronauts from third parties and MPL calculations, the final rule adopts provisions on government astronaut training. While government astronauts may satisfy NASA training requirements, their ability to affect public safety during an FAA-authorized operation means the FAA must establish regulations to mitigate any public safety risk.[2] The final rule adopts a requirement that "an operator must ensure that each government astronaut is trained." The rule clarifies that while operators are responsible for ensuring that government astronauts receive the necessary training, operators themselves are not required to provide this training.

Third, the final rule declines to adopt a requirement for government astronauts to sign informed consent forms with operators. Despite some pushback on this decision, the FAA has determined that informed consent forms are unnecessary for several reasons:

- Government astronauts are deemed to fully understand the risks associated with spaceflight;
- Requiring such forms could interfere with rights under the Federal Employees' Compensation Act; and
- In some states, these consent forms could be interpreted as waivers of claims, which may not be appropriate for government astronauts.

The final rule touches on several other issues related to government astronauts. The FAA clarifies that government astronauts are not prohibited from being onboard during permitted operations (e.g., operations conducted under experimental permits). Further, and specific to government astronauts in safety-critical roles, operators must provide traceability of revisions or changes to training, and government astronauts with the capability for real-time control of a vehicle's flight path during a phase of flight must have aeronautical knowledge. The final rule also mandates that operators implement environmental controls for operations involving government astronauts with safety-critical roles. Specifically, the FAA requires life support systems and atmospheric controls to protect these astronauts

[1] The U.S. government remains responsible for compensating government astronauts who are its employees, as it is liable for personal injury, death, and property damage its personnel incurs.
[2] Unlike NASA, the FAA is statutorily obligated to protect public safety during launches and reentries. See 51 U.S.C. chapter 509.

during missions. The FAA emphasizes "humidity" as a key safety-critical metric, noting that fogging or condensation inside a vehicle could impair visibility and compromise public safety.

Space Flight Participants & Waiver of Claims

As the CSLCA requires, the final rule adds space flight participants to the list of parties protected as additional insureds under a licensee or permittee's liability insurance.[3] Similarly, the FAA adopts a requirement for licensees or permittees to enter into a reciprocal waiver of claims agreement with each space flight participant. However, space flight participants do not have to enter into waivers against one another.

Notably, the FAA also used this final rule as an opportunity to move waiver of claims templates out of the CFR and into an Advisory Circular. Previously, appendixes B through E of part 440 contained FAA-approved templates for meeting the waiver of claims requirements in 14 C.F.R. § 440.17. However, the templates are not regulatory, but exemplary, and relocation to agency guidance provides greater flexibility for the FAA to update or revise them as needed.

Significantly for industry, the relocation of part 440 waiver templates to agency guidance could herald an increase in negotiating waivers of claims. As the FAA states, the templates are a way to satisfy waiver of claims requirements, "but are not the only means by which an operator may meet those requirements."

Extending the Scope of Permitted Activities

The final rule additionally implements the FAA's expanded authority to issue experimental permits to reusable launch vehicles that will be launched into a suborbital trajectory or reentered under the permit. Previously, permitting was limited to a "reusable suborbital rocket," and expanding to the phrase "reusable suborbital vehicle" recognizes that not all launch vehicles use rocket propulsion. Simultaneously, the FAA also removed the restriction limiting experimental permits to only research and development of "new" concepts, equipment, or operating techniques. This regulatory expansion may allow atypical launch technologies, like mass accelerators, to develop with increased regulatory certainty, and support operators in continuing to refine their launch-related innovations.

Conclusion

The FAA's final rule introduces significant updates to the regulatory framework for commercial space operations by incorporating government astronauts into existing structures. By excluding government astronauts from the definition of third party and MPL calculations, clarifying operator responsibilities for astronaut training, and eliminating the need for informed consent forms, the FAA is aligning spaceflight regulations with industry advancements while maintaining strict safety standards. Additionally, the final rule supports continued U.S. innovation by expanding experimental permitting eligibility. Finally, the dual relocation of template waivers out of the CFR and inclusion of space flight participants in certain reciprocal waivers regulations may spur increased negotiation and consternation.

Companies involved in commercial space operations should carefully assess these changes, as they may impact insurance obligations, training protocols, and operational procedures.

[3] Notably, this provision will sunset Sept. 30, 2025, absent Congressional action. See 51 U.S.C. § 50914(a)(5).

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