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Client Alert: Drones – The Division Between Federal and State Law and What it Means to You

Underscoring the shifting regulatory landscape applicable to Unmanned Aircraft Systems (UAS or drones), the Federal Aviation Administration (FAA) on December 17, 2015 put state and local governments on notice that they cannot issue laws or regulations that conflict with those issued or planned by the FAA regarding the flight and safety of drones in the National Air Space (NAS).

According to the FAA, the line between federal and state jurisdiction over drone operations in the NAS is clear—no state or local government may attempt to regulate the operation or flight of aircraft, including drones. By taking this position, the FAA hopes to avoid the possibility of substantial air safety issues that would inevitably result from a “patchwork quilt” of inconsistent rules. This means that no state or local government can restrict drone flights anywhere in the NAS regardless of whether the flight occurs over private land, or over state or local government land, including stadiums, fields, parks, backyards, farms and the like. Taking this a step further, no municipality—without prior FAA approval can enact any ordinance that bans anyone from operating a drone within city limits or within specified distances of landmarks.^{1,2,3}

Unfortunately, the FAA notice comes long after numerous state and local governments have already

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passed—or are presently considering—a substantial number of laws and ordinances to fill the regulatory vacuum created by the FAA’s delay in issuing its commercial drone rules, which are finally expected to issue in 2016.⁴ Drone regulation will therefore likely exist in flux for quite some time as conflicts between the FAA’s upcoming commercial drone regulations and those already issued by state and local authorities play out in the legislative process or in the courts.

Federal preemption of all regulations on drone flight operations will eventually benefit large technology companies, such as Amazon, Google, Wal-Mart and others, as they are able to lobby at the federal level to influence the rules governing their nationwide package delivery services. Flying in their wake will be thousands of companies hoping to profit from the unique benefits of low-cost, portable, unmanned aircraft systems capable of carrying a number of different sensors, imaging and data relay devices on a moment’s notice. The range of services provided by these companies may include: (1) land and real estate imaging and surveying services needed by mining industries, gas and oil industries, public utilities, commercial land developers, hoteliers, and shopping mall operators; (2) the rapid capture and relay of audio, video and data over emergency or newsworthy scenes by news gathering networks, police and fire departments; (3) safety and surveillance services by law enforcement, security service providers, and by businesses seeking to protect employees and property; and (4) temporary or persistent network communication services via cellular, satellite, Wi-Fi, Bluetooth and the like in the aftermath of natural disasters, such as tornados, earthquakes or widespread flooding.

In the near term, drone operators who want to fly drones for commercial purposes should obtain an exemption under Section 333 of the FAA Modernization and Reform Act. If waiting is an option, the FAA’s upcoming commercial drone regulations may provide clarity on

how to proceed outside of the exemption process. Either way, operators must not fly any drone in a manner that violates any regulation traditionally left to state or local governments, including privacy, trespass, nuisance or weapon laws, to name a few.⁵

Accordingly, commercial drone technology companies, drone operators and their customers should seek legal assistance well in advance of any drone flights to carefully construct a plan to mitigate legal and financial risks and to comply with the rapidly developing regulatory landscape.

**** UPDATE: On June 21, 2016, the FAA announced federal commercial drone rules, scheduled to take effect August 2016. To read more about these rules, click here.**

¹ Any state or local regulation that restricts flight altitude, flight paths and the like requires FAA prior approval. Prior FAA approval would also be required to enact any state or local rule mandating the operator to have certain equipment or complete specified training.

² The FAA issued FDC NOTAM 4/3621 restricting the flight of aircraft within a 3 nautical mile radius of any sporting event in which a seating of 30,000 or more people exists.

³ Proposed ordinances like 10-36-400 by the City of Chicago may be called into question for attempting to restrict the conditions and manner in which drones are flown within city limits. <http://ward32.org/news/proposed-ordinance-regulating-small-unmanned-aircraftdrones-within-the-city-of-chicago/>

⁴ According to the National Conference of State Legislatures, in 2015, 45 states considered 168 bills related to drones, and 20 states passed 26 pieces of legislation: <https://www.ncsl.org/transportation/current->



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⁵ Federal preemption will not apply to state and local laws that traditionally relate to state and local police power, including land use, right to privacy, trespass, public nuisance or other law enforcement operations.