

Client Alert

International Trade and Business Litigation Practice Groups

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Unmanned Aerial Systems (UAS) Legal Update *Proposed North Carolina drone legislation addresses economic benefits and civil liberties as FAA delays continue*

Unmanned Aerial Systems (UAS)—also commonly referred to as drones and the systems used to operate them—are ubiquitous in the American consciousness today, even though for most of us our experiences with UAS may be limited to news reports. Times are changing, however, and UAS will soon be a regular part of everyday life in the United States. The U.S. Federal Aviation Administration (FAA) estimates that 7,500 UAS will be operating in the United States in five years, with more than \$89 billion invested in UAS over the next decade globally.

Congress, Delayed Agency Rules, And Regulating The National Airspace

FAA has struggled with a congressional mandate to integrate UAS into the National Airspace by 2015. A recent report by FAA's Office of Inspector General (FAA OIG) explained that FAA will not meet the August 2014 milestone for issuance of a final rule on the operations of small UAS (defined as under 55 pounds). FAA OIG explained that the "delays are due to unresolved technical, regulatory, and privacy issues[.]" In fact, FAA OIG indicates that "privacy concerns have been the primary contributor" to the significant delays in issuance of regulations for small UAS because this important consideration is not central to "FAA's primary mission" to ensure the safety of the National Airspace. Nevertheless, Congress has also instructed the agency to conduct a study of the impact of UAS integration on individual privacy and submit a report on its findings. How FAA ultimately resolves these competing demands and the degree to which states will play a role in their resolution remains an open question. As a result, FAA OIG concludes "while it is certain that FAA will accommodate UAS operations at limited locations, it is uncertain when and if full integration of UAS into" the National Airspace will occur.

Reports also indicate that President Obama will soon issue an Executive Order that will task another Federal agency, the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA), to coordinate with industry and other stakeholders on voluntary privacy guidelines for commercial UAS in the National Airspace. Whether this development will resolve the challenges faced by

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FAA to date in addressing UAS privacy issues through future regulation remains to be seen.

At the same time, FAA has acknowledged that states and local governments have enacted and will continue to pursue UAS legislation. FAA has also restated its mandate to ensure “the safe and efficient use of U.S. airspace” and that its “authority generally preempts any state or local government from enacting a statute or regulation concerning matters—such as airspace regulation—that are reserved exclusively to the U.S. Government.” In particular, FAA explained that “a state law or regulation that prohibits or limits the operation of an aircraft, sets standards for airworthiness, or establishes pilot requirements generally would be preempted,” but “it would be within state or local government power to restrict the use of certain aircraft, including a UAS, by the state or local police or by a state department or university.”

In addition, UAS-related litigation continues around the country. For example, the National Transportation Safety Board (NTSB) will hear an appeal of a decision by an NTSB Administrative Law Judge (ALJ) in *Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker*, 2014 NTSB LEXIS 22 (Mar. 6, 2014) (*FAA v. Pirker*). In the underlying proceeding, the NTSB ALJ vacated a \$10,000 penalty that FAA assessed to Pirker in connection with a commercial UAS flight during October 2011 in Charlottesville, Virginia. The NTSB ALJ concluded that “at the time of [Pirker’s] model aircraft operation . . . there was no enforceable FAA rule or FAR Regulation applicable to model aircraft or for classifying model aircraft as an UAS.” FAA appealed the decision to the full NTSB, and the decision will be stayed until the full NTSB rules. FAA explained its concern “that this decision could impact the safe operation of the national airspace system and the safety of people and property on the ground.” This case is therefore an important challenge to FAA’s authority to regulate UAS under the current FAA regulatory framework. Absent such authority, and should the significant delays in its ongoing small-UAS rulemaking process continue, there will be a serious gap in FAA’s ability to restrict commercial UAS use.

Likewise, in *Texas Equusearch Mounted Search and Recovery Team v. FAA*, 2014 U.S. App. LEXIS 13794 (D.C. Cir. July 18, 2014), the U.S. Court of Appeals for the District of Columbia Circuit dismissed litigation brought by UAS operator Texas Equusearch. The case considered email correspondence in which an FAA inspector instructed the company to cease and desist UAS-based search and rescue operations. The court found that the FAA email “is not a formal cease-and-desist letter representing the agency’s final conclusion” as manifested through the agency’s regulatory procedures. *Id.* at *2. In contrast, the court found an “absence of any identified legal consequences flowing from the challenged email” that only constituted an expression of the FAA’s opinion on the use of UAS. FAA responded to the decision by stating that it “has no bearing on the FAA’s authority to regulate UAS” and that FAA “remains legally responsible for the safety of the national airspace system” and “to protect users of the airspace as well as people and property on the ground.” FAA has also emphasized that Texas Equusearch lacked UAS authorization, either its own or as a contractor to another party’s existing emergency Certificate of Authorization for use of UAS in natural disaster relief, search and rescue operations, or other urgent circumstances. Thus, this case raises fundamental questions about the legal bases for current FAA UAS regulatory authority and the importance of the ongoing rulemaking process.

North Carolina Efforts Attempt To Balance Law Enforcement, Privacy Concerns, And Economic Opportunity With FAA Authority

Against this complex Federal backdrop, North Carolina is one of several states attempting to address the opportunities and challenges presented by UAS through state legislation. For example, the North Carolina General Assembly’s Legislative Research Committee authorized the creation of a Committee on Unmanned Aircraft Systems (the NC UAS Committee) “to study both the safety and privacy of its citizens, as well as the economic benefits of enabling” UAS, “to develop governmental needs and provide commercial growth in the private and academic sectors in” North Carolina. In particular, the NC UAS Committee has identified substantial economic

opportunities tied to use of UAS in a number of industries, including agriculture, real estate, broadcasting, and mining, among others.

Throughout 2014, the NC UAS Committee held several meetings and drafted proposed legislation which has since passed the North Carolina House of Representatives but remains pending before the state Senate. Known as House Bill (HB) 1099, the proposed legislation would regulate the use of UAS in North Carolina in several ways, including:

- Create a private right of action for “any person who is the subject of unwarranted surveillance, or whose photograph is” unlawfully taken by UAS in North Carolina;
- Impose limitations on the use of infrared or other thermal imaging technology by commercial UAS in North Carolina;
- Criminalize damage, disruption, or interference by UAS with manned aircraft that is taking off, landing, in flight, or otherwise in motion in North Carolina; and
- Criminalize harassment by UAS of persons lawfully taking wildlife resources in North Carolina.

Other provisions in the current version of HB 1099, however, offer examples of potential conflict between state and federal law. For example, HB 1099 also requires that the North Carolina Division of Aviation of the Department of Transportation develop a “knowledge and skills test for operating” a UAS in North Carolina. In addition, a license for operation of commercial UAS in North Carolina would be required, and the state-issued license would designate “the geographic area within which a licensee shall be authorized to operate[.]” These provisions generally mirror planned FAA certification requirements for UAS pilots and crew members, which also include medical requirements and training standards. This raises a potential question about whether the proposed North Carolina licensure requirements conflict with any future FAA requirements, or merely supplement them. This could affect the degree to which reviewing courts may determine that Congress intended the federal regulatory scheme to occupy the field of UAS regulation. Federal courts in North Carolina have previously considered preemption in the aviation context, albeit in a different factual and legal setting. For example, in *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721 (E.D. N.C. 2008), the U.S. District Court for the Eastern District of North Carolina permanently enjoined the North Carolina Department of Health and Human Services and related state agencies from enforcing state licensure and other air safety requirements upon an out-of-state air ambulance provider that conducted intra-state air ambulance activities within North Carolina.

If enacted in its current form, therefore, some provisions of HB 1099 could conflict with FAA’s position regarding federal preemption of state UAS operational or pilot requirements. We note, however, that HB 1099 also requires that the state licensing system must comply with FAA “guidelines on commercial operation, as those guidelines become available.” Thus, should HB 1099 be enacted into law in North Carolina, it is possible that this aspect of the state regulatory framework would simply defer to FAA rules, as they take effect in the future.

In sum, HB 1099 is an example of a state law response to the complex regulatory challenges posed by the anticipated increase of UAS activity in the United States. Whether and how HB 1099 conflicts with federal law is an issue that bears watching, and preemption claims involving UAS will undoubtedly be litigated intensely over the coming years.

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