

# Daily Journal

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PERSPECTIVE

## Drone rules raise preemption questions

By Scott C. Hall

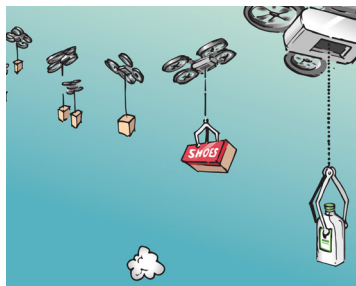
The Federal Aviation Administration's recently announced rules for commercial operation of small Unmanned Aircraft Systems (UAS or drones), set to take effect later this month, provide long-awaited guidance to drone operators and manufacturers and open the floodgates of opportunity to many businesses that hope to utilize drone technology in various ways in coming years. Indeed, with reports predicting that the expansion of commercial drones could generate more than \$82 billion for the U.S. economy and add 100,000 new U.S. jobs over the next decade, numerous companies are evaluating how they can capitalize on the greater availability of drones across many industries, including aerial photography and filmmaking, real estate, precision agriculture, infrastructure monitoring and surveillance and scientific research.

The FAA's new rules are expected to spark a significant expansion in the commercial use of drones primarily by removing the previously burdensome hurdles needed to obtain FAA approval for nonhobby/non-recreational drone use. Under the new rules, anyone can operate drones for commercial use as long as they do so in accordance with the FAA's stated rules and conditions. The rules, which restrict drone operation to daytime or twilight hours, impose weight and speed limits (drones must weigh less than 55 pounds and travel no faster than 100 miles per hour), and require that drones not fly over people and stay within the visual line of sight of the operator (who must have, or be supervised by someone having, a remote pilot's certification), are far less onerous than the previous requirements for obtaining specific FAA authorization for commercial drone use through airworthiness

certifications, exemptions or certificates of waiver or authorization.

While the new rules are certain to foster increased use of drones in many industries, they are also notable in terms of what they say (and do not say) about the ongoing struggle — between federal, state and local governments — over who has responsibility and enforcement power over drones. Interestingly, the FAA's new rules emphasize the necessity of compliance with certain state and local laws in addition to abiding by federal rules and regulations. For example, the rules explicitly inform drone operators that "state and local authorities may enact privacy-related laws specific to [drone] operations." Additionally, while the FAA's new rules permit operation of a drone from a moving land or water-borne vehicle in certain circumstances, the rules note that state and local laws, including laws prohibiting distracted driving, may prohibit or otherwise restrict such drone operation. The FAA's rules unequivocally instruct that drone operators "are responsible for complying with all applicable laws and not just the FAA's regulations." Such a statement is in stark contrast to proposed legislation passed by the Senate earlier this year, which would have preempted all state and local laws relating to the design, manufacture or operation of drones. Such preemption language was not included in the version of the FAA Reauthorization Act passed into law last month, but the precise division of federal or state responsibility over drones remains unclear.

Although the FAA asserts broad federal authority over drone operations, it appears to recognize that states have the power to enact — and may be in the best position to address — laws dealing with privacy, trespass, zoning and other areas consistent with a state's police powers, that involve drones. But such



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distinctions may not prove workable in the context of the countless anticipated uses of drones, including remote delivery and aerial photography or mapping, to name just a few.

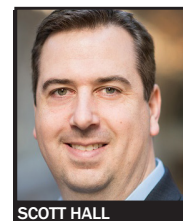
Numerous companies, for example, are currently developing businesses focused around the transportation or delivery of products or objects by drones. Certain states, however, such as Oregon, have passed laws prohibiting drone operation over private property. Such state laws will obviously prove problematic to any attempts by businesses to deliver products by drone, given that drones will almost certainly need to fly over private property to complete their deliveries. Other companies hope to use drones for aerial photography, mapping and other imaging and data collection purposes. But such use may conflict with state laws, including California's Assembly Bill 856, that prohibit the use of drones to capture images or other data associated with private property. Moreover, any number of other state or local laws restricting drone operation in some way — based on public safety, zoning, privacy or other areas typically within the power of state governments to regulate

— may hinder planned commercial drone businesses. Having to navigate through such a patchwork of inconsistent state laws may deter companies from investing in or expanding commercial drone operations.

Ultimately, where to draw the line in terms of federal and state responsibility over drones may not be as easy as carving out categories such as "privacy" or "public safety" since drone use is certain to raise questions as to the scope and applicability of traditional areas of law that have never been answered before. The FAA's new rules, while giving a nod to the validity of certain state and local drone laws in combination with federal rules and regulations, continue to leave open the questions that will ultimately need to be confronted regarding preemption. Thus, while the rules are sure to expand commercial drone use, some companies may hold back on fully pursuing drone ventures until more of these questions are answered.

Fortunately, the FAA's new rules maintain flexibility for dealing with drones going forward, which is essential to foster current and anticipated commercial use of drones, while also determining how to most effectively police such use. While the rules for small commercial drones are a positive development for the industry, they are clearly only the first step towards comprehensively regulating the expected rapid expansion of the commercial drone industry.

**Scott C. Hall** is a litigation partner at Coblenz Patch Duffy & Bass LLP in San Francisco.



SCOTT HALL