

CLIENT ALERT

Drinking and Droning: Safety, Privacy, and Security Take Center Stage as the Legal Landscape Evolves

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Despite the drunk droning accident that resulted in a crash landing on the White House lawn, Nevada—not the District of Columbia—appears to be one of the first jurisdictions to pass a law prohibiting operation of a recreational drone (*aka* an unmanned aircraft system or UAS) while under the influence of alcohol. But plenty of guidelines with regard to the safe and secure operation of recreational drones have been in place for some time now.

For nearly 25 years, the Federal Aviation Administration (FAA) has maintained specific guidance prohibiting the use of model aircraft higher than 400 feet in the air and near airports and other aircraft. Congress recently codified those requirements in the FAA Modernization and Reform Act of 2012, which largely exempts recreational drones from FAA regulation so long as they are operated pursuant to a set of community-based guidelines (such as those published by the Academy of Model Aeronautics (AMA), are not used for compensation or hire, and are flown within the visual line of sight of the operator. The AMA guidelines also require basic operator proficiencies and common sense avoidance of high winds, reduced visibility, people and crowds, and operating drones while impaired by drugs or alcohol.

Increasingly, various jurisdictions are enacting regulations to prohibit specific drone use such as surreptitious surveillance and flying near private property and critical infrastructure facilities, such as refineries and power plants. Senator Feinstein has introduced a federal bill directed at drones sold for consumer use that would mandate FAA to require certain design features targeted at safety and security, such as geo-fencing, to govern the altitude and location of flights, collision-avoidance software, precautions for the loss of a communications link, a method for pilots and air traffic control to detect and identify the drone, anti-tampering safeguards, and educational materials. Importantly, the Feinstein bill requires continuous upgrading of technology used in consumer drones through mechanisms such as automatic software updates.

State lawmakers have also been particularly active in protecting fish and wildlife from the encroachment of drones in the wilderness, with some states banning the use of UAS as an aid to hunting and fishing, and others outlawing "interference" by drones with lawful hunting and fishing activities. In addition, laws already on the books likely apply to UAS activities. For example, existing state laws prohibiting voyeurism likely apply to activities involving a drone, and any security breach involving data captured by drone is also subject to existing state-level data protection and security laws.

Significant activity by committees that are developing voluntary industry standards for recreational drones may eventually set the standard of care for manufacturers, although such a standard may be difficult to define without a clear understanding of whether the UAS will be operated for recreational or some specific commercial use. For example, ASTM committees are studying and issuing standards in a variety of areas, including design and construction, product identification, and command and control functionality of unmanned aircraft.

In addition to the emerging laws and FAA guidance discussed above, a variety of federal agencies have existing authority that would apply to manufacturers and retailers of recreational drone products. The Federal Trade Commission has general oversight

authority over advertising, including labels and environmental claims, and it would likely also assert jurisdiction over a UAS-related security breach or other compromise of data security. The Consumer Product Safety Commission has authority over safety issues, such as those posed by the lithium ion batteries used to power most recreational UAS. The Federal Communications Commission has testing and labeling requirements for UAS products using radio frequency emissions. In addition, state laws such as California's Proposition 65 might also require warnings depending on the chemical constituents of the UAS. UAS manufacturers should also consider what warnings and instructions should be added in anticipation of foreseeable use and misuse of recreational drones.

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