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WHITE PAPER

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Administration's Drone Pilot Program to Spur Innovative Drone Use

To promote the integration of drone technology, the White House's three-year Unmanned Aircraft Systems Integration Pilot Program partners the federal government with state, local, and tribal governments in the development, testing, and evaluation of drone regulations. The Pilot Program recognizes that nonfederal jurisdictions can and should provide meaningful input to the regulatory process. This Jones Day *White Paper* provides details of the Pilot Program and addresses probable questions relating to its implementation.

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On October 25, 2017, the White House announced a three-year Unmanned Aircraft Systems (“UAS”) Integration Pilot Program (“Pilot Program”) under which the federal government would partner with state, local, and tribal governments to promote the integration of drones in ways currently limited by Federal Aviation Administration (“FAA”) regulation. The program is designed to “test the further integration of UAS into” the National Airspace System in coordination with the private sector and with federal, state, and tribal governments.

This is a significant development because the federal government: (i) is putting down a marker in the oversight debate; (ii) sees an opportunity to relieve some of the pent-up demand to operate in ways not permitted, or requiring waiver, under FAA’s small drone rules; (iii) may get real-world data that it can use in rulemaking; and (iv) is formally recognizing that other levels of government have a legitimate interest in regulating certain segments of airspace traditionally reserved to federal oversight.

Proponents of increased local regulation argue that drones are flown at lower altitudes, can take off and land nearly anywhere, are relatively inexpensive and easy to fly, and are generally flown close to the pilot. These unique characteristics, therefore, raise local concerns such as privacy, public safety, and interference with firefighting and police activities. They also argue that the FAA is not structured to handle the volume of cases or issues arising from drone use that are better left to local law enforcement. Conversely, advocates of a stronger federal approach are concerned about compliance with a patchwork of laws and its impact on commerce—which the federal aviation system is designed to prevent.

State and local governments have been actively legislating drone operations. According to the National Conference of State Legislatures, 38 states considered drone legislation in 2017.¹ Bard College’s Center for the Study of the Drone reported in March 2017 that 133 localities in 31 states had enacted drone laws.² The Pilot Program’s call for state, local, and tribal involvement recognizes and validates that nonfederal jurisdictions have a role to play in drone regulation.

DETAILS OF THE PILOT PROGRAM

The Presidential Memorandum charges the Department of Transportation (“DOT”) with implementing a program that will:

(i) “test and evaluate various models of state, local, and tribal government involvement in the development and enforcement of Federal regulations for UAS operations”; (ii) encourage development and testing of “new and innovative UAS concepts of operations”; and (iii) inform future federal drone guidance and regulations. DOT must enter into agreements with at least five state, local, or tribal governments within 180 days of establishing the Program.

On November 8, 2017, the FAA and DOT published a *Federal Register* notice³ providing more details about the application process. They have called for applications from state, local, and tribal governments in partnership with private sector and other interested stakeholders through the FAA’s contracting process. Any state, local, or tribal government (broadly defined to include transit agencies, port authorities, planning organizations, law enforcement entities, and other political subdivisions) that is interested in participating (a lead applicant) must declare its intent to apply by November 28, 2017, via email to the FAA. Applications will be due January 4, 2018. Entities that do not provide notice to participate by November 28 will not receive access to the online application portal. Successful applicants will be required to enter into a Memorandum of Agreement with the FAA within five days of selection. Specific application information can be found [here](#).

Proposals are limited to testing operations up to 200 feet above ground level or up to 400 feet if the Secretary of Transportation determines it would be appropriate. Pilot Program selection criteria are structured to ensure diversity of jurisdictions and types of operations, location of critical infrastructure, involvement of commercial entities, and community involvement and support for the program. DOT must also consider the applicants’ commitment to innovation and economic development, transportation and workplace safety, improving use of drones in emergency response, and competitive and efficient use of radio spectrum. However, the DOT is clear that it is looking for “visionary participants” to meet the program objectives and is open to unique ideas.

PRIVATE SECTOR PARTICIPATION

Any entity that is not eligible to be a lead applicant but wants to participate in the Pilot Program may partner with a governmental entity. Those companies should take a couple of steps

in preparation. First, they should consider the types of drone uses that would benefit their operations, where they would fly, and the data they could obtain. This will help them target governmental partners and provide them with information that they could use in their application. Remember that the Pilot Program is targeted toward facilitating uses that are not routinely permitted, such as beyond visual line of sight and operations over people. The DOT also has emphasized it is open to other unique proposals. In addition, flights may need waivers or exemptions, so identify if that information would need to be included in a proposal.

Second, interested parties should network with other private-sector and governmental entities. The FAA is facilitating partnerships by maintaining a list and encouraging social media interaction between entities that are interested in being part of a lead applicant's proposal. Those interested parties must email the FAA to be placed on the list and gain access to the social media site. Specific email formatting instructions are on the FAA's website. Companies should also reach out directly to governmental entities and other potential partners. Note that partners are not limited to being part of one proposal.

QUESTIONS RAISED BY THE PILOT PROGRAM

The launch of the Pilot Program raises several important questions for stakeholders and about the effect it will have on the regulatory landscape.

How Will Congress React to the Pilot Program?

The drone federalism debate in Congress is not a new one. Legislation affirming state and local governments' role in regulating drones was introduced in the 114th Congress, and bipartisan legislation was introduced again in both chambers this Congress, with increased support from state and local legislative groups. Drone industry stakeholders have fought these provisions. Reacting to the Pilot Program's focus on innovative use cases, both Senator Diane Feinstein (D-CA) and Congressman Jason Lewis (R-MN) have indicated they still see the need for increased local control, particularly to protect privacy.⁴ However, now that the Administration is formally exploring the idea of increasing local control over drone use, congressional leadership may be satisfied to wait for the results of the Pilot rather than implement a legislative solution,

thereby keeping this controversial topic out of the FAA's pending reauthorization.

How Will the Pilot Program Affect FAA's Rulemaking Initiatives?

Rules to allow operations over people and beyond visual line of sight of the operator are considered the keys to enabling widespread cost-efficient drone use. Through the Pilot, the FAA will be able to obtain real-world data about safe drone operations. With this data in hand, the FAA should be able to move from concept to drafting rules more quickly and, if reliable, insulate the rules from substantive legal challenges. It is also possible that the data obtained from this program could alleviate law enforcement agency concerns about increased drone operations. The FAA indicated that its rulemaking agenda is the main driver of agency action regarding drones and will continue as the Pilot Project moves forward.

How Will the Law Enforcement Community Respond?

Elements of the federal law enforcement community have been vocal about the need to remotely identify drones as a prerequisite to liberalizing their use. The FAA's notice of proposed rulemaking addressing UAS flights over people, originally scheduled to be published in December 2016,⁵ brought these issues to the fore.⁶ The FAA endeavored to find a consensus solution by bringing the stakeholders together at the Remote Identification and Tracking Aviation Rulemaking Committee.⁷ In a nod to these concerns, the Presidential Memorandum directs consultation between DOT, the Department of Defense, the Department of Homeland Security, and the Department of Justice regarding mitigating safety and security risks, enforcement, and counter UAS testing. What remains to be seen is whether these agencies will work to limit the scope of operations allowed under the Pilot and the resulting tension that would create with the entities seeking to expand operations.

Local law enforcement has expressed uncertainty about its role in enforcing drone rules largely caused by the uncertainty over which level of government is responsible for drone regulation and the validity of local ordinances. The FAA published guidance for law enforcement agencies ("LEAs") promoting that federal and local officials should partner in responding to drone use in their communities,⁸ but it is clear that the Agency is not structured or staffed to respond as the "cop on the beat." Likewise, LEAs face resource constraints. As noted, the

Presidential Memorandum affirms that state, local, and tribal governments participating in the Pilot Program have a role in supporting federal enforcement responsibilities; however, it is likely that LEAs in participating communities will be empowered only if the Pilot agreements establish clear parameters for drone use in that community and set clear enforcement roles.

To What Extent Will the DOT Permit Time, Place, or Manner Restrictions on Drone Operations Established under the Pilot Program?

The Pilot Program focuses is on expanding operations in ways that are currently restricted by the FAA. However, as shown by federal, state, and local legislation, and even by the FAA's charge to its Drone Advisory Committee,⁹ the question of state and local control of drones to date has largely focused on how those jurisdictions could limit drone use because of privacy or public safety concerns. The DOT contemplates that applicants may propose such limitations "to facilitate ... development and testing of new and innovative UAS concepts." The agency is signaling that an application strictly seeking to limit drone use is not likely to be successful. However, the exact parameters will be revealed as the selection process moves forward.

How Will Jurisdictions that Do Not Participate in the Pilot Program Respond?

Communities that are chosen for the Pilot will create a blueprint for what is acceptable to the federal government. This approach raises a number of additional questions. What will happen if nonparticipating jurisdictions implement rules limiting drone use that have been approved by DOT for Pilot participants? Will the federal government intervene to prevent those nonparticipating jurisdictions from implementing look-alike rules? Other than an FAA Fact Sheet providing guidance on the issue,¹⁰ the DOT, to date, has been reluctant to assert federal preemption over the many state and local government drone laws. Now that there is an established process for federal sanctioning of local drone rules, will they defend it, or do jurisdictions now have leeway to regulate drones, provided they mirror what the federal government has already agreed to in the Pilot?

Will the DOT Be Able to Keep Up with Demand?

Pent-up demand for commercial drone operations, and those requiring waiver, resulted in an overwhelming number of applications for "Section 333" exemptions and Part 107 waivers and

authorizations. The individualized review required for those processes are time- and resource-intensive. On the other hand, the FAA was able to efficiently solicit and select the UAS Test Sites and UAS Center of Excellence. The Pilot Program's requirements to first provide notice of intent to apply and for applications to come from state, local, or tribal governments allows the Agency to anticipate the volume of applications and limit the universe of potential applicants. This may be an effective strategy for ensuring timely and individualized review of applications.

CONCLUSION

The Pilot Program is unique in that it allows state, local, and tribal governments to play an increased role in drone regulation with the approval of the federal government, without the federal government engaging in cumbersome and time-consuming notice and comment rulemaking. Although there are open questions about the Pilot, it is clear that this initiative bears watching, as it will likely have long-lasting implications for drone regulation in the United States.

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ENDNOTES

- 1 See NCSL, "[Current Unmanned Aircraft State Law Landscape](#)" (July 25, 2017) (last visited Nov. 13, 2017).
- 2 Arthur Holland Michel, "[Drones at Home: Local and State Drone Laws](#)" (Mar. 2017) (last visited Nov. 13, 2017).
- 3 "Unmanned Aircraft Systems Integration Pilot Program—Announcement of Establishment of Program and Request for Applications," 82 Fed. Reg. 51903 (Nov. 8, 2017).
- 4 Michaela Ross & Sean Courtney, *Trump's Drone Move Won't Stop Legislative Push*, Bloomberg Law, Electronic Commerce & Law Report (Oct. 25, 2017).
- 5 See DOT, "[Significant Rulemaking Reports by Year](#)" (December 2016) (last visited Nov. 13, 2017).
- 6 See Michael Huerta, "[Unmanned Aircraft Systems Symposium Opening Remarks](#)" (Mar. 27, 2017) (last visited Nov. 13, 2017).
- 7 See FAA, "[UAS Identification and Tracking Aviation Rulemaking Committee Charter](#)" (May 4, 2017) (last visited Nov. 13, 2017).
- 8 See FAA, "[Law Enforcement Guidance for Suspected Unauthorized UAS Operations](#)" (June 5, 2017) (last visited Nov. 13, 2017).
- 9 See FAA, "[Drone Advisory Committee \(DAC\) – Task Group \(TG\) 1 Recommended Tasking on Roles and Responsibilities](#)" (Jan. 31, 2017) (last visited Nov. 13, 2017).
- 10 See FAA, "[State and Local Regulation of Unmanned Aircraft Systems \(UAS\) Fact Sheet](#)" (Dec. 17, 2015) (last visited Nov. 13, 2017).

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