Guidance for Regulation of Dockless Micromobility

Local governments across the country are experiencing the increased integration of new technology platforms into their transportation systems. One area where this growth is moving at a fast pace is the deployment of dockless micromobility, such as bikes, including electric assist, and electric scooters. While dockless micromobility offers great opportunities to reduce congestion and help local governments meet goals around reduction in greenhouse gas emissions, these new technologies are challenging to regulate since they often do not fit neatly into existing ordinances and laws. They can also pose safety and privacy risks to users and thus it is important that local governments carefully consider if and how to regulate them. The goal of this guidance is to provide general risk mitigation considerations for the integration of dockless micromobility.

Technology in this area is changing rapidly and practitioners should bear that in mind as they review this guidance. ***This guidance is not intended to be legal advice and practitioners should always verify that existing laws and statutes in their jurisdiction do not require additional considerations.***

I. Approaches to Regulation

a. Municipalities across the country are taking the following approaches to regulate the deployment of dockless micromobility:

i. *Pilot Program*: Many communities are allowing the deployment of dockless micromobility under a temporary pilot program under regulations that will be updated at the conclusion of the pilot program. Some communities are using an agreement for the pilot project, and other communities have adopted ordinances. Upon conclusion of the pilot projects, communities will explore regulation through continued license agreements or permits. In some states, the license agreements will allow communities to charge more of a fair market value price to dockless micromobility companies where permits limit the amount charged to only those costs associated with running the program. An analysis should be done to determine whether licensing or permitting is appropriate for your community.

1. *Request for Proposals*: Some communities are moving forward with the deployment of dockless micromobility by releasing a request for proposals to determine which firms not only have the experience and qualifications to operate within a community, but also have operational goals that align with the stated vision for dockless micromobility in the request for proposals.

2. *Open Participation*: Some communities are allowing open participation by all dockless micromobility companies during pilot programs.

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3. *Competition Consideration*: The micromobility market is very competitive. If a local government decides to move forward with a Request for Proposals process, it should make sure it has a clear scope of work and evaluation process in place in the event that a protest is filed by a company or companies not selected for award. *Ex parte* communications with elected officials and staff not involved with the procurement should also be expressly prohibited.

ii. *Ordinances or Agreements for Permanent Program:* Some communities have implemented a permanent program based on thorough research or following the conclusion of a pilot program.

1. *Request for Proposals:* Similar to the request for proposals use outlined above for a pilot program, communities have used this process to select companies for its permanent program.

2. *Open Participation:* Also similar to the open participation outlined above, some communities have allowed a company to operate within its jurisdiction so long as it meets the established ordinance or agrees to the drafted agreements. Accordingly, it is important that counsel understand the legal issues that come with this new area combining both technology and mobility and that they are reviewing agreements being entered into.

3. *Practice Pointer:* Data around device use is an important consideration in the regulatory process. It is advisable to be flexible and have an efficient process for future ordinance or regulation updates that will be needed based on use by the public.

4. *Practice Pointer:* Public and private collaboration will be important in addressing safety issues around shared dockless device deployment. If possible, consider working in adequate time for approvals that allows for public comment on proposed regulations, including from private sector.

iii. *Prohibiting until Regulated*: Some communities have prohibited the deployment of dockless micromobility until regulations have been adopted by the city council. Taking this approach can reduce the risk of dockless bikes and scooters being "dropped" into a community overnight and expending of resources to issue cease and desist letters and dockless devices needing to be taken off streets.

iv. *Allowing Operation with No Regulation or Agreement in Place:* Some communities have allowed companies to operate with no regulation. Such local governments have seen an overwhelming amount of dockless micromobility within the communities in these situations, so caution is advised before proceeding with no regulation or agreement in place from a risk, safety and operational perspective.

b. The best choice for a jurisdiction will depend on a number of factors, including, but not limited to, staff resources, community interest and how dockless micromobility

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may or may not fit into existing transportation system or plan, direction from city council or a similar governing body, zoning considerations, whether existing state statutes govern municipal regulation of dockless micromobility, and companies' desire to operate within a particular community.

c. *Practice pointer*: It is important to consider exclusivity concerns for existing contracts with docked bikeshare providers.

II. Definitions and Terms

a. One of the challenges with dockless micromobility is that it does not fit neatly into existing definitions found in many vehicle codes. For example:

   i. Use of the term "scooters" often implies traditional motorized scooters, including those used by individuals with disabilities. Accordingly, many jurisdictions have looked to define e-scooters separately as "shared electric scooters" or "shared mobility devices."

      1. When defining "scooters," a jurisdiction should consider where they will be allowed to operate (sidewalks, bike lanes, shared use paths, roadways).

   ii. Also, many ordinances and regulations being adopted around dockless micromobility are using the term "vehicles" or "motor vehicles," which can be problematic because dockless scooters may not be traditional vehicles or motor vehicles that require a license for operation. Based on some statutory definitions, some states may require a license to operate these types of dockless micromobility. Consideration should be given to the state licensing requirements for operations of dockless micromobility, in addition to speed and helmet requirements.

   iii. It is also advisable to define who is a lawful "operator" or "user" of the shared mobility devices. Here, it is important to review state statutes around minimum age requirements for the operation of "scooters" and to consider terms of use policies that normally require a minimum age of 18, unless a parent or guardian consents to use by operators or users to a lower age.

b. Consideration should also include whether definitions apply only to shared mobility devices or to all devices of the same type, whether used as shared mobility devices or privately owned. Similar consideration should include whether definitions are specific to docked or dockless micromobility.

c. To avoid confusion, a local government may also want to consider having separate definitions for the various types of dockless micromobility such as, bikes, e-bikes, and e-scooters. In this new technology and mobility space, it is important for local government attorneys to be coordinating with planning and policy staff to ensure transportation goals of a local government align with any new micromobility regulations being adopted. Because technology is moving quickly in this area, having separate definitions will also allow for a municipality to easily add a new

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definition into the ordinance it adopts, as opposed to trying to fit in new technology into a general definition for dockless micromobility that might not fit in neatly.

d. *Practice Pointer*: It is advisable to review the definitions used in other jurisdictions in coordination with the applicable state law in your jurisdiction when crafting defined terms for new regulation. **Also, it is highly recommended this issue be tracked at the state legislative level.** As jurisdictions develop regulations around dockless micromobility that meet specific needs, companies may turn to state legislatures to gain uniform regulation and preempt local control similar to regulations around transportation network companies and wireless and broadband deployment. To the extent that local governments coordinate their definitions within their state, they may be better able to stave off preemption efforts.

III. Use of Right-of-Way and Parking Restrictions

a. The use of public right-of-way by for-profit businesses has become an important issue with increased discussions around innovation in communities. Factors that need to be considered include the following:

   i. Whether the various types of dockless micromobility can legally use sidewalks or streets;

      1. Example: The legality of whether a scooter can be used on sidewalks is a broader subject that may be treated as a separate matter in your state traffic or vehicle laws;

   ii. Whether the various types of dockless micromobility should use sidewalks or streets;

   iii. Whether helmets are or should be required;

      1. Some states have laws that require the use of helmets when riding bikes or scooters. Consideration should be given to whether the existing laws are ignored or need amending before allowing operations without helmets;

      2. Other states only require riders that are under the age of 18 to use helmets.

   iv. Enacting regulations to best ensure ADA compliance, including ensuring the dockless micromobility devices do not impede ADA access along sidewalks;

   v. Enacting regulations to ensure the dockless micromobility devices do not create hazards for all users of the right-of-way;

      1. General requirements usually include parking devices upright, on hardscape, and without blocking pedestrian foot travel;
      2. Some communities have developed "parking areas" for dockless micromobility and riders are instructed by the private operators to

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ensure placement of devices in such areas with geofencing[1] technology;

vi. Whether dockless micromobility should require placement within designated areas;

vii. Whether to institute a "lock-to" requirement to existing infrastructure in consideration of commuters that may be using their own devices and will need infrastructure for safe parking; and

viii. Whether dockless micromobility should be allowed to be placed near transit stops, while also considering accessibility for non-users.

b. *Practice Pointer:* Use of right-of-way and parking considerations foreshadow more discussions around infrastructure for the future of mobility, including curb management. Further, new transportation technologies are also leading to changes in zoning and parking codes, especially related to new residential and commercial development.

c. Jurisdictions need to consider how to best incentivize companies to create a system that maximizes user behavior and how to assign enforcement responsibility.

i. Company requirements may include setting time limits for each company to relocate misplaced devices (i.e. within two hours of receiving a complaint or notification during business hours and ten hours otherwise).

ii. Jurisdictions may consider educating users to be informed, directed, and incentivized to return equipment to predesignated deployment locations or drop zones. To this end, some jurisdictions require companies to dedicate staff or contracted services to constantly rebalance distribution of devices.

d. Jurisdictions may consider requiring dockless micromobility to be equally distributed in the right-of-way into economically disadvantaged areas. Some jurisdictions require companies to adjust the cost to the user within certain economically disadvantaged areas based on income qualifications. As an incentive, local governments may consider as part of any permitting process, the placement of micromobility devices in underserved areas as a public benefit that may allow reduction of the costs to the companies associated with permitting, licensing, or other use of the right-of-way without running afoul of gift of public funds laws. (*See* additional discussion around Equity in Section VII below.)

e. It is also important to consider whether there are areas within a municipality where operation may be prohibited due to environmentally sensitive lands or federal law.

IV. Permit or Licensing Requirements

a. While jurisdictions may want to integrate new dockless micromobility for their residents, finding the right regulatory model is essential. Some communities are enacting permit requirements or requiring licensing for companies to operate in its

[1] Geofencing is the use of GPS or RFID technology to create a virtual geographic boundary, enabling software to trigger a response when a device enters or leaves a particular area. In this context, it can be used to create designated parking areas for dockless micromobility using this technology.

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jurisdiction. Finding the most appropriate regulatory model for a community is a critical first step in establishing a sustainable working relationship with the dockless micromobility companies. Many communities are working with the companies to establish the most appropriate framework for its residents. Collaboration at the outset is important, as is educating both sides around capabilities of technologies and laws that apply to municipalities.

b. Some considerations for a permit or licensing model include, but is not limited to:

   i. Permit or license timeframes (i.e. 3 months to 1 year);

   ii. How the program will end (i.e. either through a date certain or a sunset provision in the enabling ordinance);

   iii. Selection criteria if not open to all-companies;

   iv. Maximum and minimum number of dockless micromobility devices and/or companies;

   v. What approvals will be needed to approve the permit of license (i.e. department level or mayor/council) and any potential increase in established caps;

   vi. Whether it begins as a permanent program or a pilot program;

   vii. Administration of the program or a pilot program (i.e. which staff will accept applications, select companies, etc.)

   viii. Evaluation criteria for a pilot program to measure at the conclusion of the program and how to use information to create a permanent program if desired; and

   ix. Whether to involve third parties such as research institutions, universities, or other transportation-related non-profits and what agreements may be needed around roles and responsibilities (i.e. MOU).

c. *Practice Pointer:* Some state-delegated powers allow local governments to grant concessions and limit competition, but not every state may give its local government the power to limit competition.

d. *Capping:* Fleet size is a key consideration for jurisdictions and an issue that is keenly focused on by the dockess micromobiloity companies. This not only includes the total amount of dockless micromobility devices, but may also include the various types of dockless micromobility devices allowed (i.e. dockless e-bikes v. e-scooters).

e. *Dynamic Capping:* Some jurisdictions have placed a cap on the amount of dockless micromobility devices any company can have at any one time while at the same time allowing flexibility for companies to increase fleet size with demonstrated demand. Alternatively, some jurisdictions are allowed to require companies to decrease a company's fleet size based on underutilization.

   i. Jurisdictions will need to have access to user data and determine a specific "user rate" as the standard for measuring over and underutilization.

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ii. To ensure needed flexibility, rather than coordinating approvals at the city council levels, it is recommended that increases or decreases in fleet size be handled at the department director level, to which power should be delegated down as needed.

f. *Fees:* Fees will vary significantly by jurisdiction.

i. In some states, fee structures may be broken into an operator annual fee (i.e. $20,000), a daily fee (i.e. $200), and/or a per device annual fee (i.e. $50.00). Some jurisdictions have also imposed a per ride user fee per device.

ii. Analysis should be completed when determining the appropriate amount and type of fees for deployment of micromobility. In some states, a "fee" is limited to the administrative costs involved in overseeing the program, thus raising the issue of whether fees charges are a tax. Accordingly, whether a jurisdiction has the authority to levy a tax on these devices if a tax becomes necessary or desirable is an issue that should be considered carefully. A jurisdiction may also consider powers to charge a license fee for usage of the right-of-way and public infrastructure, similar to rent, if it is limited to charging only those costs associated with the administration of the program or placement of moneys collected into a fund dedicated to maintenance and improvement of infrastructure.

iii. A jurisdiction should consider costs associated with enforcement, administration of the program, staff time to monitor compliance, technology required to assess data, application processing costs, right-of-way value, necessity to install parking devices, etc. Some jurisdictions have fee structures tied to cover ongoing outreach and engagement efforts as well. Consideration of any additional costs for law enforcement should also be considered.

g. *Fines and Penalties*: There are two general approaches to fines – company fines or user fines.

i. Jurisdictions can consider company fines to assist with enforcement efforts and to ultimately offset enforcement costs. These may include charging companies to remove and/or store misplaced devices or for violations of permit/license requirements. Some jurisdictions have instituted a sliding scale whereby the greater number of fines causing the fine amount to increase accordingly. Any fines should always be reasonable and justifiable, and of course seeking to deter repeat offenses.

ii. Fines placed on users is another important enforcement tool to increase safety and offset costs without excessively burdening the dockless micromobility companies. User violations will be tied to jurisdiction specific rules and regulations. By way of example, users may be fined for violations related to age requirements, helmet requirements, and sidewalk or street riding requirements. Again, another example of why coordination with law enforcement is important early and often.

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iii. Any new enforcement efforts may require updates to applicable codes, including potential nuisance claims.

iv. *Practice Pointer:* Consult your law enforcement agency, code enforcement, parking enforcement, etc. to develop an enforcement strategy that considers available resources for enforcement. It is advisable to adjust the enforcement strategy based on available resources, which will also provide an estimate for the costs associated with enforcement against the companies or the users.

h. Other requirements that can be added to permitting or licensing:

i. Data sharing (*See below*);

ii. Partnership around outreach and education, not only for safety but also use by underserved areas of a locality;

iii. Equitable deployment based on data use and in coordination with public outreach;

iv. Whether advertising will be allowed on the devices or within the related technology used by a user of a device;

v. Coordination with local law enforcement;

vi. Requirement that company provide immediate written notice to the local government of any recalls of shared mobility devices, assist in outreach related to the recall and cover costs related to any necessary outreach related to a recall;

vii. Customer service requirements with jurisdictions considering having customer-facing and government-specific contact information requirements to ensure response to concerns, including improper parking, collisions, and broken equipment. (Note: good response can be considered an incentive around increasing fleet caps.)

V. Consumer Protection and Data Privacy

a. With technology comes concerns around privacy and the collection of data from users. It is important for local government attorneys to consider the need for policies that consider the incorporation of new innovations into communities. For dockless micromobility:

i. Each company seeking to deploy dockless micromobility in a community will have its own terms of use policies on its website. It is important for counsel to make sure it is familiar with such terms of use and data collection policies as companies are increasingly allowed to deploy in a community and to consider whether companies should be required to provide better explanations to citizens around such policies so that informed consent can be made by users.

ii. Jurisdictions should know whether users are required to share personal data to use any particular device and decide whether to allow such requirements.

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This may include required access to contacts, photos, files and other private data through the use of any mobile app.

iii. Jurisdictions should consider whether entities have a plan and adequate resources to address data breaches due to hacking and phishing operations. With any contracts, private companies should warrant compliance with specific industry accepted practices related to privacy and safe storage of consumer data. As noted below, contract considerations also include responsibility for costs related to a data breach, no matter how small, and notification to a municipality.

iv. Jurisdictions should consider ensuring they have up-to-date privacy policies addressing the approval of "smart" projects that involve the collection of citizen data.

v. Jurisdictions should be aware of any state laws that affect a local government's ability to protect information or requires the release of certain information. If companies are required to collect certain data, jurisdictions should evaluate whether such information may be considered public or may have intellectual property protection.

vi. All entities handling credit card data should be compliant with Payment Card Industry Data Security Standards (PCI DSS).

vii. Should data be requested from companies deploying dockless micromobility devices, it is important that only anonymized data is requested and not data containing personally identifiable information. A jurisdiction may subject itself to data breach notification laws if it holds data that is not anonymized. *See more under Data Sharing section below.*

VI. Data Sharing

a. The word "data" has become a part of everyday vocabulary as communities become "smarter." However, it is important for jurisdictions to understand what type of data they are requesting, why and how to manage.

b. Device Technology: For now, early adopters of dockless micromobility have come to realize the importance of data sharing. Device technology requirements are key considerations in obtaining rider data. Technology packages on devices should be able to track the device, determine utilization, provide customer service, and educate users about safe riding and rules of the road. At a minimum, jurisdictions should consider requirements that allow for (1) real-time tracking, and (2) recording of trip origin and destination.

i. *Practice Pointer:* Trip origin and destination data may have implications for marketing strategies. As such, a company might claim that the data is proprietary and cannot be shared. State sunshine laws may preclude the sharing of proprietary information. It is important to determine whether exceptions to open records laws may cover, or whether changes to add such exceptions may be advantageous.

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c. The storage and collection of data may not only trigger compliance with additional regulatory requirements, but it can also require resources to be spent for the storage and analysis of such data.

d. Jurisdictions should consider, along with their IT professionals, what internal resources are available for data management, including:

   i. Whether IT resources are available for development of an Application Programming Interface (API) for receiving real-time data;

   ii. Secure data storage availability;

   iii. Database administration resources; and

   iv. Ability to analyze and manage transportation data.

e. Consider what format shared data should be compiled. General Bikeshare Feed Specification (GBFS) is useful for real-time data, while Comma-Separated Value (CSV) is easily used for historical data on usage. Some data may also be available in report form on a periodic basis.

f. Consider also whether third parties, like universities or consultants, will be involved in evaluation of the shared data. Sharing data with third parties should be explicit in any agreement or permit/license regulation. Decisions must be made as to who is ultimately the custodian of such shared data for public disclosure request purposes. Often, an underlying data sharing agreement for the program covering all parties is useful for clarifying roles and responsibilities.

g. *Types of Data:* Some types of data that may be requested as part of a data-sharing provision include:

   i. Real time anonymized trip data – GPS, date/time, duration;

   ii. Parking compliance – where available and length of availability;

   iii. Survey data – administered to users for program evaluation;

   iv. Maintenance data – to ensure properly functioning devices; and

   v. Collisions – weekly reported collisions to ensure safe operation.

h. *Practice Pointer:* If completing a Request for Proposal or other type of procurement for deployment of dockless micromobility, it is recommended that goals and expectations around data sharing be included to promote dialogue early on with responders.

VII. Ancillary Programs

a. New transportation innovations offer the opportunity to enhance mobility in communities, and jurisdictions should ensure productive partnerships with new mobility companies, including the following considerations:

   i. *Equitable Distribution of Devices:* In order to better service certain economically disadvantaged neighborhoods, permit or licensing requirements may provide company incentives, including cap exceptions, in order to provide a more equitable distribution of mobility devices.

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1. *Practice Pointer:* Consideration should also be given as to whether a citizen has access to a smartphone or a data plan, especially if any federal funding is being used for a micromobility program. Making sure there are also opportunities for micromobility devices to be used without smartphones, data plans and credit credits is an important access and equity consideration.

ii. *Outreach/Education Requirements:* To better educate the public, jurisdictions should consider requiring companies to provide users with information about safety rules and regulations. A requirement may include "pop-up" information at the time of user sign-up and before every ride. Information may include: helmet use, parking locations, and associated penalties for violations. This information should include local regulations related to device use, safety, and parking requirements.

iii. *Job and Education Connections:* Some jurisdictions may consider local employment requirements. Caution is recommended because the Privileges & Immunity clause may suggest that these regulations are unconstitutional. When courts have failed to uphold lawsuits filed under this provision, it is because the plaintiffs have not had standing. Nonetheless, local hiring provisions are legislated all the time because of political pressure. From a legal perspective, however, these laws and regulation may have a risk of running afoul of the Constitution. If federal funding is being used, it is also important to understand applicable prohibitions.

VIII. Insurance and Liability

a. New transportation options like dockless micromobility bring with them new liability considerations, especially since existing infrastructure has not been specifically designed with such technology in mind. Accordingly, counsel will want to:

i. Make sure to complete a risk analysis and determine adequate insurance amounts considering the increase in traffic-related deaths and accidents being reported. Each jurisdiction should complete its own analysis and consult with its insurance provider.

ii. While indemnification should be required in any contract with a dockless micromobility company, jurisdictions should request a copy of the insurance policy for review. In addition to confirming policies will cover accidents related to dockless micromobility technology, jurisdictions should consider whether secondary coverage is needed for an accident. Jurisdictions should consider requiring the local government to be listed as a third-party insured on any policy. Jurisdictions should also evaluate whether they will require indemnification for intellectual property infringement and whether associated insurance with specific coverage is necessary.

iii. Make sure appropriate insurance requirements are required to be passed down to subcontractors, include those subcontracted to charge devices, also

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known as "juicers," and those assisting with the maintenance of the devices. This may include appropriate vehicle insurance to cover any redistribution of devices by a company or subcontractor using motor vehicles.

iv. Performance bonds may also be considered to ensure compliance with parking regulations and other enforcement issues. Such bonds may also be used to cover the costs associated with removal of the devices if the companies go out of business.

IX. Additional Contractual Considerations

a. Some jurisdictions are entering into contracts to allow companies to operate. In some cases, the contracts are limited to a pilot program, and in other cases, the contracts have no specific end date. It is advisable that contracts be drafted to allow jurisdictions the flexibility to get out of the contract if/when necessary. Carefully crafted termination clauses should be used. The contracts should include clear guidelines on many of the items outlined in this guidance.

b. Agreements involving new technologies bring with them the need to carefully think through the need for new terms and conditions and to consider how to evaluate any procurements that may be completed.

c. Jurisdictions need to evaluate whether state laws require competitive procurement to enter into contracts to provide services. In some states, competitive procurement may not be required because no money is being paid by the governmental entity. However, in other states, competitive procurement may be required because the governmental entity will be receiving compensation from the selected company or companies. There are a number of private companies competing in the dockless micromobility space.

d. It is important to consider new issues that come with technology-focused transportation projects, including: (1) advertising; (2) indemnification for intellectual property infringement; (3) ownership of any joint intellectual property developed; (4) responsibilities around potential data breaches; (5) interoperability of software; and (6) compliance with privacy laws, regulations and industry recommended practices.

e. Counsel should carefully consider assignment clauses and potentially include the right to consent to any assignment related to a company being bought out in consideration of the consolidation expected in this space, especially if the contract was a result of a specific request for proposals or other procurement.

f. If any state or federal funding is used to support a dockless micromobility program, it is important to consider whether passing along any funding requirements via the contract is necessary.

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