

*If you have any questions
about this Advisory,
please contact:*

DAVID HALL
215.988.8325
dhall@wiggin.com

BENJAMIN DANIELS
203.498.4350
bdaniels@wiggin.com

DAVID LINCOLN
203.498.4390
dlincoln@wiggin.com

Winds of Change: A Flurry of UAS Regulatory Proposals

On February 15, 2015, during a hastily organized press conference, the FAA announced its proposed rules for domestic unmanned aerial systems (UAS). But that wasn't the only UAS news coming out of the administration that weekend. The President also issued a memorandum to federal agencies regarding privacy and civil rights policy relating to UAS operations, and the Department of State announced guidance on UAS export policies.

PROPOSED DOMESTIC UAS RULES

The FAA has imposed a general ban on UAS operations for commercial use – subject to FAA-granted exemptions. Following intense criticism by the UAS industry, on February 23, 2015 the FAA released a Notice of Proposed Rulemaking (“NPRM”), which would reduce restrictions on UAS use. Some of the more pertinent aspects of the NPRM are as follows:

- The proposal applies to unmanned aircraft under 55 pounds (25 kg).
- Operations must be within visual line-of-sight (VLOS) and during daylight hours only. Importantly, the increasingly popular first-person view (“FPV”) cameras do not meet this requirement but can be used if VLOS is otherwise satisfied.
- The aircraft may not operate over any persons not directly involved in the operation.
- A visual observer (VO) may be used but is not required.

- The maximum airspeed allowed is 100 mph (87 knots).
- The maximum flight altitude is 500 feet above ground level.
- A minimum weather visibility of 3 miles from the control station is required.
- Operations in Class G airspace are allowed without ATC permission, and operations in Class B, C, D and E airspace are allowed with ATC permission.
- No person may act as an operator or VO for more than one unmanned aircraft operation at one time.
- No careless or reckless operations are allowed.
- A preflight inspection by the operator is required.

The proposed rule sets forth certification requirements for operators and aircraft:

- Operators of small UAS would be considered “operators,” not “pilots.”
- Operators would be required to:
 - Pass an initial aeronautical knowledge test at an FAA-approved knowledge testing center (and pass a re-test every 24 months).
 - Be vetted by the Transportation Security Administration.

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- Obtain an unmanned aircraft operator certificate with a small UAS rating.
- FAA airworthiness certification are not required for the aircraft, but:
 - The operator must maintain the UAS in a condition for safe operation, and must inspect the UAS to ensure that it is in a condition for safe operation prior to each flight.
 - Aircraft registration is required – the same requirement that applies to all other aircraft.
- Aircraft markings are required:
 - This is also the same requirement that applies to all other aircraft.
 - If the aircraft is too small to display markings in the standard size, then the aircraft simply needs to display markings in the largest manner practicable.

The new rule would not apply to model aircraft that satisfy all of the criteria specified in Section 336 of Public Law 112-95, so hobbyists could still fly if they otherwise comply with legal requirements. Specifically, a hobbyist is permitted to fly strictly for recreational (as opposed to commercial) use, the aircraft must be operated “in accordance with a community-based set of safety guidelines,” and the aircraft must not be flown within 5 miles of an airport without permission from Air Traffic Control.

The FAA is also seeking comments regarding potential regulations for “micro

UAS” under 4 pounds in Class G airspace.

It is important to note that the NPRM is only a proposed rule, so the current regulatory structure is still in place. During a 60-day open comment period, interested parties may comment on the NPRM, after which the FAA will consider the public comments. While the entire process can take less than six months, few expect the final rules to be released before 2017.

UAS EXPORTS

The export of military UAS is controlled by the Directorate of Defense Trade Controls (“DDTC”) at the US Department of State through the International Traffic in Arms Regulations (“ITAR”). On February 17, 2015, the Department of State announced a new policy relating to export licenses for military UAS. According to DDTC, the implication of the policy is as follows:

The new U.S. UAS export policy provides a disciplined and rigorous framework within which the United States will exercise restraint in sales and transfers and advance its national security and foreign policy interests, which includes enhancing the operational capabilities and capacity of trusted partner nations, increasing U.S. interoperability with these partners for coalition operations, ensuring responsible use of these systems, and easing the stress on U.S. force structure for these capabilities. It also ensures appropriate participation for U.S. industry in the emerging commercial UAS market, which will contribute to the health of the U.S. industrial base, and thus to U.S. national security which includes economic security.

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In summary, the policy provides:

- DDTC may require that sensitive systems be sold through the government-to-government Foreign Military Sales program;
- The Department of Defense Technology Security and Foreign Disclosure processes may be required to review a proposed transfer;
- End-use monitoring and other conditions will be required;
- The United States will continue to adhere to its commitments under the Missile Technology Control Regime ("MTCR"); and
- Both the recipient nation and the U.S. applicant will be required to agree to end-use assurances and principles on the proper use of the UAS.

The MTCR is an informal political understanding entered into in the late 1980's to limit the proliferation of weapons of mass destruction and their delivery vehicles. While the MTCR is non-binding, the United States generally follows its guidelines. Under the MTCR, UAS that have a range of at least 300 kilometers with a payload of at least 500 kilograms are classified under Category I of the MTCR.[1] Category II covers UAS that have a range of at least 300 km but carry less than a 500 kg payload. Transfers of MTCR Category I UAS systems are subject to a "strong presumption of denial," but are allowed in rare circumstances; whereas MTCR partners have agreed to "exercise restraint, [but] have greater flexibility" regarding Category II UAS.

PRESIDENTIAL MEMORANDUM

On February 15, 2015, the President released a Memorandum to each of the Executive Departments and Agencies. Its purpose is to provide guidance and direction to government agencies that are using or intend to use UAS. The Memorandum recognizes the potential benefits of UAS, but seeks to ensure that agencies institute procedures to address privacy, civil rights, and civil liberty concerns.

The Memorandum makes it clear that information collected by UAS must be collected in accordance with the Privacy Act of 1974 (5 U.S.C. § 552a). This law restricts the dissemination of records containing Personally Identifiable Information, commonly referred to as "PII," and allows access by a person identified in such records. The President directed that PII obtained by UAS cannot be held more than 180 days unless required, and the data must be kept in accordance with the Privacy Act.

Images of a person collected by UAS can be PII. Federal agencies will thus be required to develop policies and procedures to appropriately collect, store, and disseminate such imagery. Federal agencies must, for example, put into place procedures that protect against First Amendment violations or discrimination against individuals. They must also ensure there are proper oversight and training programs in place prior to implementing a UAS program. Finally, they must provide public notification concerning UAS programs.

The Department of Commerce has been directed to institute a "multi-stakeholder engagement" within 90 days to "develop

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a framework regarding privacy, accountability, and transparency for commercial and private UAS use.” This process is intended to bring together the various agencies to share knowledge and develop common procedures.

CONCLUSION

The FAA’s NPRM, the President’s Memorandum, and the DDTC’s export policy together indicate that UAS have gained the attention of senior leaders in Washington. Where this will ultimately lead is unknown. The NPRM is only a proposed rule, so there is reason for would-be UAS operators to be optimistic, celebration would be premature. UAS operation is heavily regulated and will continue to be in the future.

[1] “Payload” is defined as “the total mass that can be carried or delivered by the specified rocket system or unmanned aerial vehicle (UAV) system that is not used to maintain flight.” Range is defined as the distance the aircraft can travel when fully loaded with fuel, independent of any external factors, with a trajectory that maximizes “range,” with no wind, and assuming a one-way trip with the most fuel-efficient flight profile. Range can be sacrificed for payload, so one should not rely solely on the manufacturer’s technical specifications.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.