Overview
The United States is the global leader in the development and deployment of military and commercial Unmanned Aerial Systems (UAS), also known as drones. As the demand for drones grows, other countries are developing their own capabilities and competing in the global market for these systems.

US export control policies on transfers and subsequent use of drones have been driven by a desire to protect sensitive technologies and carefully manage use of force. As part of a broad UAS policy review conducted by the US government, the State Department issued a new policy governing the export and subsequent use of militarized systems. In the past, US policy permitted transfer of reconnaissance and surveillance drone systems to allies, but typically not a UAS with weapons capabilities. The new US Government policy could open opportunities for export of armed drones to US allies, as long as circumstances support approval and the end user agrees to abide by certain strict conditions of deployment. The policy also could support the export of expanded types of commercial UAS to foreign countries. Of course, any exports or transfers under the policy will need to be conducted in accordance with US laws and regulations as well as applicable multilateral commitments.

The United States currently maintains stringent export controls on military drones, as well as related components, systems, software, and technology, under the International Traffic in Arms Regulations (ITAR). Unmanned aerial systems that are not controlled by the ITAR, i.e., those designed and used for commercial or dual use reasons, are subject to the Export Administration Regulations (EAR). The new policy supplements and is consistent with these export controls. Manufacturers and exporters of military and dual-use drones should carefully monitor these developments in order to pursue new potential business opportunities while at the same time ensuring that their compliance programs are adequate.

New Policy
On February 17, 2015, the State Department released a “Fact Sheet” to announce a new policy governing the international sale, transfer and subsequent use of US-origin military drones. The full text of the new policy is classified, and therefore the standards that the United States uses to assess potential transfer remain largely out of the public domain. But the “Fact Sheet” provides some description of the factors applicable to export of US-origin military drones.
The United States will evaluate permanent export of a military UAS on a case-by-case basis. Under the policy, the United States government will require international sale or transfer of a military UAS to be made through the Foreign Military Sales (FMS) program. In other words, direct commercial sales (DCS) by US contractors to foreign governments or other end-users will not be permitted. The FMS program and related foreign disclosure processes are a form of government-to-government security assistance authorized under the Arms Export Control Act. US contractors sell to the US government, which in turn sells to the foreign government; there is no direct contract between the US supplier and foreign government customer.

The United States sells defense articles and services under the FMS program only when the President determines that to do so is in the US national and global security interest. This new policy supplements, builds upon, and is consistent with the US Conventional Arms Transfer Policy, last revised on January 15, 2014 through a Presidential Policy Directive. See our previous advisory for details.

Under the new policy, approved foreign end users will be required to provide certain end-use assurances and agree to end-use monitoring by the US government. The United States may also require additional security measures as a condition of sale or transfer of a military UAS. In particular, end-users must agree to use a military UAS in accordance with international law, including international humanitarian and human rights law as well as international law on the use of force and self-defense; not to use such systems for “unlawful surveillance” or “unlawful force” against domestic populations; and to provide UAS operators with appropriate training to limit collateral damage in the deployment of a UAS.

These end-use assurances must now be provided, pursuant to an announcement on March 24, 2015 from the Department of State’s Directorate of Defense Trade Controls (DDTC), in an addendum to paragraph five of DSP-83 (Non Transfer and Use Certificate). The addendum also (i) prohibits transfer or sale of any defense article, related training or other defense services associated with a US-origin military UAS “to anyone not an officer, employee, or agent of that country,” (ii) prohibits use of a US-origin military UAS for “purposes other than those for which furnished” unless approved in advance by the US government, and (iii) requires end-users to maintain the security of US-origin military UAS and related components, and to take “all reasonable efforts” to prevent security lapses.

While the amended DSP-83 provides an understandable framework of the export control commitments required for the sale of a military UAS, the exact scope of these commitments and what will be required operationally to satisfy them will no doubt need to be worked out and will evolve over time.

**Framework for US Export Controls on UAS**

DDTC has export control jurisdiction over any military UAS and certain related components, systems, and technology subject to the US Munitions List of the ITAR. The Department of Commerce’s Bureau of Industry and Security (BIS) has jurisdiction over any dual-use UAS and related items subject to the EAR and the Commerce Control List (CCL).

The United States participates in the Missile Technology Control Regime (MTCR), an association of thirty-four nations to prevent proliferation of missile technologies. The Bureau of International Security and Nonproliferation of the US Department of State serves a central interagency role on decisions made under MTCR. The US has adopted the MTCR framework of control for the export of any UAS and related items, and implements its commitments under the MTCR through the ITAR and the EAR. A license is required to export all items subject to Missile Technology (MT) controls.

Under this framework, two categories of UAS items are controlled. Category I items, which are subject to the most stringent controls, are preserved for items of greatest sensitivity. Category I includes the complete UAS (including cruise missile systems, target drones, and reconnaissance drones) capable of delivering at least 500 KG “payload” to a “range” of at least 300 KM. Certain subsystems such as individual rocket stages and rocket propulsion usable in such UASes are also Category I items. License applications to export or transfer a Category I UAS and related items are subject to a strong presumption of denial. Under the new policy, transfers of any Category I UAS may be authorized on rare occasions after assessing the nonproliferation and export control factors that are listed in the MTCR Guidelines, including the ability to “trade off” range and payload.

Certain other complete UAS vehicles, including those capable of a range equal to or greater than 300 KM (but cannot carry a payload of 500 KG or more) are controlled as Category II. Potential transfers of any such UAS and related items are generally not subject to a strong presumption of denial. However, if it is known that a Category II UAS or related item is intended for the delivery of weapons of mass destruction, then such transfers are subject to a strong presumption of denial and are permitted only on “rare occasions” after assessing the nonproliferation and export control factors that are listed in the MTCR Guidelines.

The United States also participates in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement). As in the case of the MTCR, the United States implements its commitments under the Wassenaar Arrangement for any UAS through the ITAR and the EAR. As part of Export Control Reform (ECR), items within the scope of the Munitions List of the Wassenaar Arrangement that are not specifically identified on the USML or the CCL but were subject to USML are now subject to “600 series” controls. See 79 FR 264 (Jan. 2, 2014).
As part of ECR, USML Category VIII, covering military aircraft and related articles, was also revised. See 78 FR 22659 (April 16, 2013); 78 FR 22740 (April 16, 2013). The Department of Defense-led review of USML Category VIII had found that technical capabilities for a UAS do not provide the flexibility to differentiate between critical and non-critical military systems. As a result, while revising Category VIII, DDTC rejected a proposal to move to the EAR any UAS that is specially designed for a military application but does not have any specially designed capability covered by USML.

Conclusion

The new policy governing the export and subsequent use of US-origin military UAS could clear the way for the export of military UAS vehicles and items to US allies under the FMS program. Additional opportunities may also be available for export of any UAS subject to the EAR. Nonetheless, keep in mind that the new policy supplements, but does not change the stringent export controls for military and dual-use UAS and related items that the United States currently maintains.

[1] UAS is typically defined as "an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system." E.g., Section 331(9), FAA Modernization and Reform Act of 2012 (Public Law 112-95).

Practices

Export Controls

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