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Commerce Prioritizes Earth Selfies as It Seeks to Improve Remote Sensing Licensing

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On June 25, 2018, the Department of Commerce (“Commerce”) released an advance notice of rulemaking through the National Oceanic and Atmospheric Administration (“NOAA”). As an initial step before Commerce drafts proposed regulations and issues a Notice of Proposed Rulemaking, the notice seeks input from stakeholders on key issues relating to potential revisions to the regulations currently governing how NOAA^[1] administers licensing for commercial remote sensing space systems. The last update to the relevant regulations was in 2006 and significant technological developments, new business models, and increased foreign competition require regulatory updates in order to facilitate continued growth and U.S. leadership in this industry.

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Article By [Aaron Shourie](#)
[Brian D. Weimer](#)[Douglas A. Svor](#)
[Eamon S. Tierney](#)
[Sheppard, Mullin, Richter & Hampton LLP](#)
[FCC Law Blog](#)[Communications, Media &](#)
[Internet](#)
[All Federal](#)

Title 51 of the United States Code authorizes the Secretary of Commerce to license “private sector parties to operate private remote sensing space systems” and prohibits a “person that is subject to the jurisdiction or control of the United States” from “operat[ing] any private remote sensing space system” without a license.^[2] The justification for this statute was to provide for and preserve an industrial base that could manufacture these systems, but under strict regulatory oversight in order to ensure they do not pose a national security risk or pose foreign policy concerns. The basis for these concerns is that remote sensing space systems traditionally provide images of the Earth. However, the applications for these systems are expanding and there are significantly increased methods and platforms for deploying remote sensing space systems on a cost-effective basis in a highly competitive global market. These developments have resulted in regulatory challenges for U.S. companies seeking to innovate and compete with companies from countries with lighter regulatory burdens. The current notice from Commerce seeks to understand how best to remove unnecessary regulatory burdens and create an environment where companies in the remote sensing industry are encouraged to grow, innovate and do business in the U.S.

An example of recent developments in this market is the proliferation of “cubesats,” which make available Earth imaging and other remote sensing applications at a much lower cost and quicker deployment pace than was ever imaginable in the past. Other examples include satellite servicing and non-earth imaging, which were not commercially feasible less than a decade ago. These developments expose ambiguities and gaps in the current regulatory regime since they often do not fit neatly into the current regulatory framework. Therefore, Commerce’s advance notice of rulemaking seeks public input on the best path forward, including input in five areas relating to the licensing of remote sensing space systems:

- **Requirement to Obtain a License** – Commerce seeks input on how (and with what level of specificity) to define certain terms of the current statute, such as “private sector party” or “person subject to the jurisdiction of the United States” and “private remote sensing space system.” More specificity would provide greater certainty to the industry, but being too specific might make some definitions obsolete with technological advancement and otherwise prove burdensome.
- **License Application and Review Process** – As technological innovations are made, the risk of some remote sensing space systems to national security will be less than other systems. Commerce seeks comments on how to categorize systems according to their national security risk so that those systems presenting less risk can enjoy a more streamlined application and review process. Topics that Commerce wishes to consider in this area include:

- whether the licensing review processes should differ based on the capabilities of the particular remote sensing system;
 - the types of information collected in the license applications;
 - the possibility of pre-application consultations in certain cases; and
 - a presumption of approval for certain categories of applicants.
- **License Conditions** – Due to the national security and foreign policy implications of remote sensing, the Secretaries of Defense and State can apply additional individual conditions to those license conditions already required by statute or regulation. Commerce seeks to standardize license conditions in order to provide applicants certainty, but retain some degree of flexibility to tailor conditions in order to avoid unnecessary cost burdens and harm to U.S. industry. Commerce seeks input on:
 - what conditions should be added, removed, or modified to the default conditions in 15 C.F.R. 960.11 in light of technological changes in the industry;
 - whether there should be different default conditions for the different categories of systems which may be created as part of the current streamlining process;
 - whether NOAA should perform a cost/benefit analysis in imposing conditions;
 - whether insurance requirements should be a part of the conditions;
 - and the best ways to respond to emerging national security and foreign policy issues for existing licensed systems.
 - **Compliance and Enforcement** – To ensure compliance with regulations and licenses, NOAA must collect information about a licensee’s remote sensing systems after the application process, but seeks to minimize the burden on licensees. Topics for input include:
 - whether there are more appropriate mechanisms for ensuring compliance besides those already used (site visits, virtual inspections, audits, no-notice inspections);
 - should licensees be mandated to use certain technical standards or software for compliance purposes; and
 - if different categories of licenses are used to streamline the application process, should compliance policies differ based on the license category.
 - **Integration with Other Licensing and Regulatory Regimes** – Some NOAA-licensed systems require licenses from other U.S. Government agencies and/or agencies from other countries. In seeking to reduce the overall regulatory burden on industry as much as possible, Commerce seeks input on how it can best avoid redundancies and inconsistencies between domestic regulatory regimes, as well as between domestic and foreign regulatory regimes.

This advance notice of rulemaking presents an opportunity for interested parties to help shape the discussion and direction of future regulations governing commercial remote sensing space systems. If you have any questions about this process or seek advice and assistance in the submitting of comments, please do not hesitate to contact us. Comments must be submitted by August 28, 2018.

[1] These regulations are found in 15 C.F.R. Part 960.

[2] 51 U.S.C. §§ 60121-60122.

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