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# Shutter Control
## An Approach to Regulating Imagery from Privately-Operated RS Satellites

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No statements in this briefing should be construed to offer legal analysis nor should they be interpreted to reflect the administrative position of NOAA or any other U.S. Government agency.

# Caveats on Licensing and Regulatory Approaches
## *Impact of International, Constitutional and Statutory Law*

- **Outer Space is recognized as one of the Earth's "global commons"**
  - *Each State signatory to the Outer Space Treaty must "provide authorization and continuing supervision" over the activities of its private citizens in space*
    - This is the basis of and obligation for NOAA licensing activities
    - All States are guaranteed "freedom of access" to space "for peaceful purposes"
  - *Comparing the legal bases for the laws governing activities in space versus those for national airspace or terrestrial activities can be highly misleading*
- **U.S. Constitutional Law**
  - *1st Amendment, 4th Amendment, and 5th Amendment*
- **U.S. Statutory Law**
  - *Trading with the Enemies Act (TWEA); International Emergency Economic Powers Act (IEEPA), The Free Trade in Ideas Act, The 1988 Omnibus Trade and Competitiveness Act, etc.*
  - *The Kyl-Bingaman Amendment to '97 NDAA (wrt Israel)*
  - *National and Commercial Space Programs (P.L. 111-314): "Shutter Control"*

# What is "Shutter Control?"

- **Can take two basic forms**
  - *Prohibition against acquiring satellite imagery (global, regional, local)*
  - *Prohibition against disseminating acquired imagery (possibly by end-user- or end-use-specific rules)*
- **Applies to image quality approved for unrestricted dissemination\***
- **Seeks to protect U.S. national security, foreign policy and/or international obligations**
  - *Should be invoked for the "shortest time" and "smallest area" feasible*
- **Was a controversial topic during the 1990s/early 2000s**
- **Instantiated one time by USG: so-called "Checkbook Shutter Control"**
  - *Operation Enduring Freedom*

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\* Treasury's OFAC sanctions restrict release to some countries/entities/persons

# Public Law 111-314

*Title 51, National and Commercial Space Programs (2010)*

Subchapter III, 60121
(b) COMPLIANCE WITH LAW, REGULATIONS, INTERNATIONAL
OBLIGATIONS, AND NATIONAL SECURITY.—
(1) IN GENERAL.—No license shall be granted by the Secretary unless the
Secretary determines in writing that the applicant will comply with the requirements
of this chapter, any regulations issued pursuant to this chapter, and any applicable
international obligations and national security concerns of the United States.

Subchapter III, 60122
(b) LICENSING REQUIREMENTS.—Any license issued pursuant to this subchapter
shall specify that the licensee shall comply with all of the requirements of this chapter
and shall—
(1) operate the system in such manner as to preserve the national security of the
United States and to observe the international obligations of the United States in
accordance with section 60146 of this title;

# 15 CFR 960. Licensing of Private RS Systems

**960.1(c) In accordance with U.S. Policy, NOAA encourages U.S. companies to build and operate commercial remote sensing space systems whose operational capabilities, products, and services are superior to any current or planned foreign commercial systems. However, because of the potential value of its products to an adversary, the U.S. Government may restrict operations of the commercial systems in order to limit collection and/or dissemination of certain data and products to the U.S. Government or to U.S. Government-approved recipients.**

**960.6(f) No license shall be granted by the Secretary unless the Secretary determines, in writing, that the applicant will comply with the requirements of the Act, any regulations issued pursuant to the Act, and that the granting of such license and the operation of the license and system by the licensee would be consistent with the national security interest, foreign policy and international obligations of the United States.**

**960.11(b) The following conditions, as a minimum, shall be included in all licenses:**
**(1) The licensee shall operate its system in a manner that preserves the national security and observes the foreign policy and international obligations of the United States. Specific limitations on operational performance, including, but not limited to, limitations on data collection and dissemination, as appropriate, will be specified in each license.**

**(4) The licensee may be required by the Secretary to limit data collection and/or distribution by the system as determined to be necessary to meet significant national security or significant foreign policy concerns, or international obligations of the United States, in accordance with the procedures set forth in the Interagency MOU Fact Sheet found in Appendix 2 of this part. During such limitations, the licensee shall, on request, provide unenhanced restricted images on a commercial basis exclusively to the U.S. Government using U.S. government-approved rekeyable encryption on the down-link and shall use a data down-link format that allows the U.S. Government access to these data during such periods.**

# U.S. Constitutional Protections

- **First Amendment**
  - *"Congress shall make no law…abridging the freedom of speech, or of the press…"*
- **Fourth Amendment**
  - *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause…"*
- **Fifth Amendment**
  - *"…nor shall private property be taken for public use without just compensation."*

# The International Emergency Economic Powers Act*

*50 USC 1702 (b)(3): the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18;

**\* International Emergency Economic Powers Act: (b) Presidential Authorities (3) Exceptions to Authority**

# Implementation Issues: Shutter Control
*Finding the Art of the Possible*

> **Shutter Control seeks to restrict access to tasking ability or to acquired imagery based on scenes imaged or scene content.**

- **"Shutter Control" must invoke U.S. National Security, Foreign Policy, and/or International Obligations, e.g. …**

- **NOAA has sometimes issued "tiered" operational licenses**
  - *Data from "lower tier" largely unrestricted (absent OFAC rules)*
  - *Data from "upper tier" capability can be supplied, under contract, to the USG*

# Back-Up Slides

# 18 CFR 793 -797 and EO 10104
## *Chapter 37. Espionage and Censorship*

- **Code of Federal Regulations (18 CFR 793-797)**
  - *793: Gathering, transmitting or losing defense information*
  - *794: Gathering or delivering defense information to aid foreign government*
  - *795: Photographing and sketching defense installations*
  - *796: Use of aircraft for photographing defense installations*
  - *797 Publication and sale of photographs of defense installations*
- **EO 10104: Definitions of Vital Military and Naval Installations and Equipment**
  - *Issued by President Truman in 1950*