compelling national security and foreign policy interests of the United States.'' (Petition for Rulemaking filed by Radio Television News Directors Association, April 5, 1988)

In 1989, NOAA responded to this Petition for Rulemaking announcing that it would reopen its regulations and would incorporate the principle that ''conditions imposed in a license will be the least burdensome possible.'' 54 FR 1945. This rulemaking was interrupted by passage of the Act in 1992 and NOAA is now considering a number of provisions to implement the President's policy. These could include ensuring that limitations on imaging would be imposed only over the smallest area and for the shortest period of time possible and would not be imposed at all if comparable data is otherwise available.

Ultimately, any standard and process for making decisions concerning the need for restrictions on imaging must ensure that the Government has the ability to protect its national security and international obligation interests adequately while preserving First Amendment rights and other U.S. interests, including that of protecting industry's position in global competition. NOAA believes that it is now an appropriate time for a full discussion of this issue before systems become operational. Comments from previous rulemaking actions and other relevant material are contained in Discussion Package 2.

3. Review of Foreign Agreements

Section 202(b)(6) of the Act requires that licensees ''notify the Secretary [of Commerce] of any agreement the licensee intends to enter with a foreign nation, entity, or consortium involving foreign nations, or entities.'' To implement this section, NOAA's licenses now require licensees to provide notice of a significant or substantial foreign agreement at least 60 days before conclusion. This requirement reflects interagency consensus that sixty days is needed for meaningful notification but that, consistent with the President's policy, this burden is justified only if agreements are significant or substantial. As required by the President's policy, NOAA anticipates defining such agreements in these regulations and solicits comments on this issue (as well as the appropriateness of the 60 day review period).

This provision of the Act is subject to differing legal opinions. One view of the Act is that it requires that licensees notify the Secretary of *every* agreement. The Department of Commerce disagrees with this interpretation. Legislation has been introduced on this subject; however, to date no subsequent legislative action has occurred.

Should NOAA's legal interpretation not be upheld and no legislation be passed, comments might want to address whether NOAA should consider defining different classes of agreements with corresponding notification requirements. For example, the regulations could retain a 60 day notice requirement for significant or substantial agreements while requiring that notice of other agreements be provided only prior to their effective date.

A. What agreements must be submitted for review?

The threshold question with respect to the notification requirement of section 202(b)(6) of the Act is what agreements are covered. The purpose of such notification is to ensure continued preservation of U.S. national security and foreign policy interests. Existing licenses require notification of those types of agreements that could have particular national security or foreign policy implications such as: those that give a foreign party control over the operation of the system, e.g., the ability to operate the spacecraft, task the sensors, or exercise managerial control; and those that provide for a significant role in distributing the data from the system, e.g., by operating a foreign ground station.

Routine data sales have traditionally been excluded from the definition of significant agreement because an advance notice requirement would put U.S. companies at a competitive disadvantage. Furthermore, scrutinizing all direct sales to foreign customers would not effectively preserve U.S. interests inasmuch as a determined buyer could purchase any scene or scenes desired through a variety of legal channels.

More specifically, existing licenses require notice of the following types of foreign agreements:

(1) cooperation in the launch and/or operation of the spacecraft;

(2) Tasking of the satellite sensors, modifying satellite tasking commands, revising the priority of tasking requests, or otherwise providing an opportunity to exercise managerial control over the system's operation;

(3) Real-time direct access to unenhanced data; or

(4) Distributorship arrangements involving the receipt of high volumes of unenhanced data;

(5) An equity interest in the Licensee. (A license amendment is required if the aggregate equity interest in the Licensee by foreign nations and/or persons exceeds or will exceed 25 percent.)

These licenses exclude agreements that provide only for the sale of data or value added products, or for the establishment of marketing outlets in foreign countries established in the ordinary course of business if described in the plan for sale and distribution contained in the license application.

NOAA seeks comment on whether the above criteria are adequate to define ''significant or substantial'' agreements. In particular, NOAA is searching for appropriate criteria to determine when review is necessary for agreements providing solely for foreign investment in a licensee. Every sale of stock to a foreign investor cannot be subject to review. On the other hand, a threshold for review is necessary to ensure that the technology remains secure and that the operator remains sufficiently under U.S. ownership or control that it must respond appropriately when necessary to preserve national security. Furthermore, in accordance with the President's policy, aggregate foreign investment in excess of a particular amount would not only be subject to notification but to approval, i.e., by amendment to the license. NOAA is particularly interested in industry views about what criteria should trigger a review of a foreign investment agreement.

B. What process should be in place to inform applicants when the Government has identified a concern with a potential foreign agreement? When the Government raises a concern and issues negative advice, what rights of appeal should be available to an applicant or licensee?

To promote more timely and transparent decisions on the review of significant foreign agreements NOAA is considering a process that would be similar to the review of an initial license application in that the Government would institute more formal administrative time limits and more detailed record keeping requirements. However, this process would recognize that, unlike the case of an initial application, the Secretary does not have the legal authority to approve or disapprove these agreements. Therefore, if the Secretary does not advise a licensee of any conflicts within sixty days of notification, the licensee is free to enter into the agreement.

A possible process to be considered and on which NOAA seeks comments is as follows: If the Secretary does advise a licensee of a conflict, i.e., that the proposed agreement will compromise national security or foreign policy interests, the licensee may at that point