

[Latham & Watkins Aerospace, Defense & Government Services Industry Group](#)

May 7, 2018 | Number 2315

## House Passes Space Commerce Free Enterprise Bill to Increase US Support for Commercial Spaceflight

*Recent legislation and official statements show increasing US government support for commercial spaceflight, including emerging industries.*

### Key Points:

- The House of Representatives passed the American Space Commerce Free Enterprise Act of 2017<sup>1</sup> (H.R. 2809 or the Bill). If enacted, the Bill would streamline commercial space activity regulation and encourage development of new industries in space.
- The Bill's provisions are similar to recent recommendations from the National Space Council (the Space Council), whose members include Cabinet officials, regulators, and industry experts.
- US officials have consistently expressed their intention to ensure that the legal and regulatory regimes governing commercial spaceflight remain competitive with foreign markets.

In recent years, US legislation and regulation designed to encourage and facilitate space commerce, along with the well-publicized achievements of private space companies, have prompted a sharp growth in investment and employment throughout the space industry. The House's passage of H.R. 2809 and other US officials' complementary statements and actions indicate strong government support for commercial activity in orbit above the earth, in the vicinity of the moon, and in deep space.

### The American Space Commerce Free Enterprise Act of 2017

The House of Representatives passed the Bill on April 24, 2018 by a voice vote. Democrats and Republicans co-sponsored the Bill, which includes the following stated purposes:

- Providing greater transparency, greater efficiency, and less administrative burden for commercial spaceflight operations
- Addressing misperceptions of legal uncertainty regarding commercial spaceflight
- Ensuring that the US remains the world leader in commercial space activities

If the Bill passes the Senate and is enacted into law, the Bill would streamline regulations governing commercial spaceflight by granting authority over various spaceflight activities to a newly created Office of Space Commerce (OSC or the Office) within the Department of Commerce (DOC).

## **Certification of Commercial Spaceflight**

H.R. 2809 would grant the OSC authority to certify the activities of certain commercial craft operating in outer space. This authority would not apply to launch and reentry through US airspace, which the Federal Aviation Administration (FAA) controls. However, the Office's certification authority would extend to other emerging spaceflight industries, including companies that are developing technologies for satellite servicing, human spaceflight, and resource mining in space.

H.R. 2809's requirements are designed to simplify and encourage applications for commercial spaceflight certification. The Bill would require OSC to certify (*i.e.*, authorize) commercial spaceflight operations for any US entity that meets the limited requirements outlined in the Bill. The Office would not have discretion to deny spaceflight certification except for failure to meet specified legal requirements.

The Bill would also simplify the application process by requiring OSC to certify, to the extent possible, a single space object undertaking multiple operations, or multiple space objects conducting a single activity or similar operations. H.R. 2809 would also limit the information that OSC may require of applicants for spaceflight certification, and impose a 90-day deadline for the Office to either issue the requested certification or deny the application and promptly explain the denial. To encourage timely approval of spaceflights, the Bill provides that OSC's failure to approve or deny an application within 90 days would result in automatic certification of the proposed activity. H.R. 2809 would also allow commercial operators to transfer their certifications to other US entities, affording them greater flexibility.

## **Permitting of Space-Based Remote Sensing**

The Bill would likewise grant OSC authority over commercial remote sensing activities in space, and abolish the Commercial Remote Sensing Regulatory Affairs Office of the National Oceanic and Atmospheric Administration, which currently performs this function. Permitting authority, like the certification authority described above, would aim to reduce obstacles and delays to encourage the growth of the remote sensing industry in the US.

The Bill would require OSC to grant permits to commercial operators who satisfy H.R. 2809's limited requirements. Likewise, the Bill would require OSC to approve multiple sensing operations under a single permit to the extent possible. It would also require the Office to grant or deny (and promptly explain) permits within 90 days, and a similar automatic-approval provision would apply to encourage timely determinations. Remote sensing permits, like certifications, would be transferrable.

H.R. 2809 would also allow the Office discretion to waive permitting requirements for *de minimis* remote-sensing systems. This includes devices that are ancillary to a spacecraft's primary purpose, or devices that are too trivial to implicate national security.

## **Protection of Property Rights**

The Bill would require the US President to protect commercial spacecraft and their operations, including the exploitation of space resources, from foreign aggression and harmful interference. The President would be obligated to uphold the ownership rights of US entities and obtained space resources.

## Compliance with the Outer Space Treaty

The Bill recognizes that future commercial activity in outer space might arguably implicate the US' obligations under a 1967 treaty known as the "Outer Space Treaty" (OST or the Treaty). Therefore, the Bill would allow — but does not require — the Secretary of Commerce (the Secretary) to impose additional conditions or deny certification of proposed activity that violates the OST. However, the Secretary's discretion to impose conditions or deny certification on this basis is strictly limited, again indicating a legislative intent to support and encourage new forms of commercial spaceflight. The Secretary may only invoke the Treaty as a basis for limiting or denying certification if he identifies "clear and convincing evidence" that the proposed activity would violate the OST.

Further, H.R. 2809 limits the Secretary's discretion by specifying how the US government should interpret and implement the OST. The Bill would require the government to apply the broadly worded Treaty in a manner that:

- Minimizes limits on freedom of exploration
- Promotes free enterprise
- Does *not* presume that all obligations of the US apply to private entities
- Does *not* consider certain international guidelines for the protection of extraterrestrial bodies to be binding on the US

The Bill would decree that outer space shall not be considered a "global commons," a term that certain commentators have used to argue in favor of placing commercial spaceflight activities under the jurisdiction of an international authority such as the United Nations.

In the same vein, the Bill would require the Secretary to presume that spaceflight applicants' own statements regarding compliance with the Treaty, along with reasonable commercial efforts to comply, are sufficient to meet the US' obligations under the OST. The Secretary's authority to interpret the US' international obligations when considering a certification application would be exclusive under H.R. 2809. No other agency would be allowed to impose any requirement on commercial space activity in order to ensure that the activity complies with the US' obligations, nor could any other agency make any findings as to the proposed activity's compliance with those obligations.

## National Security Requirements

The Bill also recognizes that certain commercial space activities, especially remote sensing, might have national security implications. Therefore, the Bill would allow but not require the Secretary to impose additional conditions or deny permits for national security reasons. Again, the Secretary's discretion would be limited. Conditions or denials would only be imposed based on "clear and convincing" evidence of a "significant" threat to national security. The Bill defines "significant" threats as those that are "imminent," and further places the onus on the US government to change its own activities and operations, if practicable, to mitigate such threats. The Bill also instructs the Secretary to refrain, to the extent possible, from imposing national security-related conditions that are not commercially reasonable.

## Support for Spaceflight Reform

The reforms articulated in H.R. 2809 are consistent with recent recommendations and initiatives of various executive branch officials. These include the Space Council, its members and advisors, and other regulatory authorities. These officials have endorsed the Bill's expressed purposes and methods, and

have recommended additional reforms to encourage the growth and development of US spaceflight industries. However, notably, the US Senate continues to work on proposed legislation in this area, which may differ in content and scope from the US government support discussed below.

## **National Space Council**

At its most recent meeting on February 21, 2018, the Space Council issued a series of formal recommendations, two of which are substantially similar to provisions of H.R. 2809. These recommendations appeared on the same date in a White House press release, and are as follows:

- Simplify licensing requirements for space launch and reentry
- Consolidate supervision of commercial spaceflight
- Increase available radio frequency spectrum for commercial use in space
- Review export licensing regulations affecting space commerce

The first and second recommendations clearly correlate with the provisions of H.R. 2809 that would simplify requests for certification of commercial space activity and permitting for remote sensing, as well as the provisions consolidating certification and permitting authority under OSC.

## **Space Council Chair**

Vice President Mike Pence, who chairs the Space Council, announced during the February 21 meeting that the Space Council's policy recommendations were designed to break down bureaucratic hurdles affecting "emerging businesses." The Vice President applied this label to on-orbit satellite servicing, commercial human spaceflight, and asteroid mining. He also stated that the Council's recommendations would transform the licensing regimes that oversee launch, reentry, and new commercial space operations in order to empower these businesses to create jobs, attract new investment, and unlock new opportunities.

## **Department of Commerce**

Secretary Wilbur Ross, Space Council member, opined at the February 21 Space Council meeting that the US needs an "adaptive and relatively permissive" regulatory system for space commerce. Secretary Ross listed the following steps the DOC is taking to promote this objective:

- OSC will be elevated to the highest level of seniority within the DOC, reporting directly to the Secretary. Perhaps anticipating the passage of H.R. 2809, the Secretary announced that the Office will coordinate all space-related functions of the DOC, with authority over commercial remote sensing, as well as the DOC's portion of radio spectrum policy, export controls, and business and trade promotion. Secretary Ross also stated that the OSC would develop and propose, by July 1 of this year, regulations and legislation for a new mission authorization framework for commercial spaceflight.
- Regarding traditional space commerce, Secretary Ross recommended simplifying the existing commercial remote sensing licensing regime and developing radio spectrum policies to serve the needs of commercial industry. The Secretary also endorsed the Space Council's fourth recommendation, which would direct the Executive Secretary of the Space Council to review export licensing regulations regarding space vehicles. If adopted, these proposals would further advance a series of reforms to the International Traffic in Arms Regulations (ITAR) regime, which began in 2013

with the transfer of supervisory responsibilities for certain space technology from the State Department to the Department of Commerce. These reforms continued in the last days of the Obama administration, in January 2017, with a series of amendments clarifying and relaxing ITAR regulations on satellite exports.

- Secretary Ross added that the DOC intends to increase funding of the Bureau of Industry and Security and the National Telecommunications and Information Administration in support of their space-focused activities. The DOC also plans to recruit foreign space businesses to the US via its foreign commercial service teams, and will feature space commerce prominently in its “Select USA” conference in June 2018.
- Like the Vice President, Secretary Ross described commercial human spaceflight and asteroid mining as “more than science fiction,” declaring that these industries need a future-oriented space commerce agenda and a supportive regulatory regime.

### **Department of Transportation**

At the February 21 Space Council meeting, the DOT committed to streamlining and modernizing its own commercial space regulatory framework. The DOT’s initiatives included:

- In accordance with the Space Council’s first recommendation, DOT will establish a new spaceflight licensing framework, with new regulatory approaches to establish, as quickly as possible, a “file-and-fly” licensing process that is more responsive and easier for applicants to navigate.
- The DOT will implement accelerated rulemaking plans, shortening timelines for the FAA and other departments to effect regulatory reforms.
- The DOT will provide immediate interim relief to space companies by expanding its use of waivers and programmatic approvals for spaceflights.
- The FAA will refocus its resources to strengthen departments that deal most directly with licensing and regulatory approvals.
- The DOT will establish a joint task force with other US government agencies to coordinate approval processes and minimize confusion for commercial applicants.

### **NASA**

Then-acting NASA Administrator Robert Lightfoot (who has since been replaced by James Bridenstine, a co-sponsor of H.R. 2809) stated at the February 21 Space Council meeting that NASA will begin transitioning all human spaceflight in low-earth orbit to commercial partners. He also stated that NASA will facilitate and nurture entrepreneurial and commercial market forces on the lunar surface, adding that these forces “will define the long-term human exploration and advancement” of the moon. He described how NASA would accomplish these goals and others as part of its new Exploration Campaign:

- In accordance with the White House’s December 2017 release of Space Policy Directive One, NASA is re-directing its immediate efforts toward facilitating long-term exploration and utilization of the moon, instead of Mars, with an emphasis on commercial partnerships.
- In accordance with the White House’s Fiscal Year 2019 budget proposal, NASA intends to transition the International Space Station to commercial partners by 2025, in order to support NASA’s needs as

well as the needs of an emerging private sector market. (This proposal has met early opposition in Congress.)

- NASA will support a commercial lunar lander initiative, with an initial strategic presence of a robotic lander on the moon no later than 2020, and further development toward a human lander at a date to be determined.

## **International Competition for Space Industries**

Space Council members have repeatedly acknowledged that the US faces growing competition from at least 70 countries involved in spaceflight industries. Similar findings appear in H.R. 2809. Though neither the Bill nor the Space Council members mentioned them by name, several governments have recently taken official action to encourage and facilitate the growth of spaceflight enterprises. For example, the Grand Duchy of Luxembourg passed a 2016 law guaranteeing asteroid miners' property rights. Over the last two years, Luxembourg has signed agreements with China, Japan, the United Arab Emirates, the European Space Agency, the European Investment Bank, as well as private companies from several other countries, all promising cooperation in space exploration and economic development. The United Kingdom recently passed its own "Space Industry Act 2018" to regulate and facilitate commercial space operations and launches from UK territory.

Nations with robust existing space programs are expanding their activity in both traditional and emerging commercial spaceflight. As the Space Council heard in testimony from academic and industry experts, the Chinese commercial space sector is rapidly developing, though the Chinese government and military maintain firm control of the space capabilities. As one expert noted, China's space industry, largely composed of state-owned enterprises, is intermixed with the country's government and military to the extent that the industry is essentially a single integrated space enterprise.

## **Summary**

Space industries are growing worldwide. The House of Representatives, the Space Council, and leaders of other US government agencies have acknowledged the increasing international competition for this business. In response, these entities have promoted an increasingly supportive legal and regulatory environment. However, the contours of this environment remain undetermined. The Senate has yet to vote on H.R. 2809, and agencies including the DOC, DOT, and NASA are all considering how and when to implement regulatory changes. Companies and investors considering new spaceflight enterprises should reach out to counsel for the latest guidance on opportunities and risks in this rapidly changing legal landscape.

---

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Barry M. Sabin**

barry.sabin@lw.com  
+1.202.637.2263  
Washington, D.C.

**Patrick Laporte**

patrick.laporte@lw.com  
+33.1.40.62.28.90  
Paris

**Les P. Carnegie**

les.carnegie@lw.com  
+1.202.637.1096  
Washington, D.C.

**William M. McGlone**

william.mcglone@lw.com  
+1.202.637.2202  
Washington, D.C.

**Austin C. Murnane**

austin.murnane@lw.com  
+1.212.906.4775  
New York

---

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at [www.lw.com](http://www.lw.com). If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp> to subscribe to the firm's global client mailings program.

**Endnotes**

---

<sup>1</sup> The Bill was first proposed on June 7, 2017.