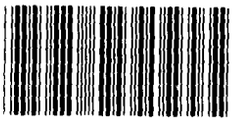
GAO

Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce House of Representatives

March 1986

PATENT POLICY

Department of Commerce Involvement in Department of Energy Activities



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United States
General Accounting Office
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Resources, Community, and
Economic Development Division

B-219920

March 25, 1986

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

In your November 27, 1984, letter and in subsequent agreements with your office, we were asked to examine various issues concerning the Department of Commerce's interactions with the Department of Energy (DOE) relating to government patent policy.

You were particularly concerned that several Commerce actions aimed at influencing DOE patent policy may have been in violation of the law. The actions you asked us to examine were:

1. Commerce's involvement in an Office of Management and Budget (OMB) initiative that included changing DOE patent policies, which led to a proposed reduction in DOE patent attorney staffing.

2. Commerce's role in an OMB decision not to clear a DOE letter to Representative Doug Walgren that expressed concerns regarding patent legislation being considered in the Congress (H.R. 5003).

3. Commerce's role in drafting a letter that Senator Robert Dole sent to OMB that was critical of DOE's actions relating to federal patent policy.

4. Regulations that were being developed by Commerce to implement newly enacted patent legislation (Public Law 98-620). Among other things, these regulations will govern certain aspects of DOE's handling of patent rights at its nonprofit contractor-operated laboratories.

In summary, we found that Commerce provided input into the OMB initiative, advised OMB not to clear the DOE letter to Representative Walgren, and helped draft the letter Senator Dole sent to OMB. However, we are not aware of any Commerce actions relating to these matters that are illegal. Regarding Commerce's handling of the comments on the proposed regulations to implement Public Law 98-620, we found that Commerce did not maintain a record of oral communications concerning

these proposed regulations and changed the regulations because of comments it solicited after the close of the public comment period. These actions may provide a basis for challenging the validity of regulations being promulgated in a court of law if the regulations are finalized without the public's having further opportunity to comment on them.

As requested, our objectives were to examine several of Commerce's actions aimed at influencing DOE patent policy and determine if they were in violation of any law. To accomplish these objectives, we reviewed the OMB management initiative and DOE's fiscal years 1985 and 1986 budget documents relating to DOE patent policy and patent attorney staffing. To determine the circumstances surrounding the nonclearance by OMB of a letter DOE wrote to Representative Walgren, we reviewed OMB guidance, including circulars governing clearance activities and Commerce's and the other 10 agencies' comments that were solicited by OMB on the DOE letter. We reviewed draft letters in Commerce's files of the letter Senator Dole sent to OMB on DOE's actions relating to patent policy and the OMB and DOE responses to the letter to determine Commerce's role surrounding the letter. We also reviewed laws, executive orders, court cases, Federal Register notices, draft regulations, and comments received by Commerce on them to determine the process Commerce followed in developing patent regulations for implementing Public Law 98-620. We conducted our review at Commerce, DOE, OMB, and other federal agencies in Washington D.C., and interviewed officials at these agencies who were involved in matters relating to the four issues.

We discussed the factual information in this report with agency program officials and have included their comments where appropriate. However, in accordance with your wishes, we did not obtain the views of responsible officials on our conclusions, nor did we request official agency comments on a draft of this report. Except as noted above, our work was performed in accordance with generally accepted government auditing standards. We performed our review from August through November 1985.

Background

During the 1980's there has been considerable debate in the Congress and the executive branch over whether federal patent policy would be improved by giving contractors that perform federally funded research and development the patent rights to inventions they conceive while carrying out their work. Part of the discussion concerning such a policy

has centered on whether it would work effectively for research performed at government-owned, contractor-operated laboratories and whether the same policies should apply to both nonprofit and for-profit contractors.

Since 1980 a number of actions have been taken to increase the opportunities for contractors to obtain patent rights to inventions conceived under federally funded research and development contracts. The following are principal among these actions:

- Enactment of the Patent and Trademark Amendments Act of 1980 (Public Law 96-517, Dec. 12, 1980, 94 Stat. 3015, 35 U.S.C. Chapter 38). This law generally allows small business and nonprofit contractors to retain title to inventions resulting from federally funded research and development. An exception in this law allowed agencies to exclude from this provision inventions developed by small business and nonprofit contractors under funding agreements covering the operation of government-owned laboratories.
- Issuance of the President's February 18, 1983, Patent Policy Memorandum. The memorandum directs the heads of agencies, to the extent permitted by law, to give all contractors the same or substantially the same rights to own inventions resulting from federal research and development funding that Public Law 96-517 gave to small businesses and nonprofit organizations.
- Enactment of the Trademark Clarification Act of 1984 (Public Law 98-620, Nov. 8, 1984, 98 Stat. 3335). Title V of this act, among other things, narrowed the scope of the above-mentioned exception in the patent rights provisions of Public Law 96-517. Thus, federal agencies could no longer keep small businesses and nonprofit contractors who operate government-owned laboratories from electing to retain patent rights to most inventions developed at the laboratories.
- Revision of the Federal Acquisition Regulation in 1984. The revised regulations simplify the procedures for contractors to obtain patent rights to inventions conceived under federally funded research and development.

Commerce and DOE Roles in Patent Policy

Both Commerce and DOE play major roles in formulating and implementing government patent policy. OMB assigned Commerce as the lead agency for implementing Public Law 96-517, on January 12, 1982. As

lead agency, Commerce's authority includes reviewing agency implementing regulations, monitoring and evaluating the act's implementation, and recommending appropriate changes to OMB's Office of Federal Procurement Policy.

Commerce has also been assigned a lead role in implementing Public Law 98-620. The act authorized Commerce to issue regulations that may be made applicable to federal agencies implementing the provisions of certain sections of the law. These sections covered, among other things, the disposition of patent rights for inventions covered by the law.

The Secretary of Commerce gave the Office of Productivity, Technology and Innovation (OPTI) the responsibility to perform lead agency functions concerning federal patent policy. This included coordinating, monitoring, and gathering relevant data; evaluating relevant programs and activities; developing uniform governmentwide standards for implementing federal patent policy; preparing reports; disseminating information; and making recommendations. OPTI was also to take other actions necessary to assure maximum private-sector opportunity for commercializing inventions resulting from projects financed with federal government funds. OPTI's Federal Technology Management Policy Division has performed much of the work related to these responsibilities.

DOE's involvement in patent policy stems from authority contained in the Atomic Energy Act of 1954 (42 U.S.C. 2182) and the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908). The Atomic Energy Act gives DOE a vested right in any invention or discovery useful in the production or utilization of special nuclear material or atomic energy made or conceived in the course of a contract, subcontract, or arrangement with DOE. The invention or discovery would become the property of DOE unless it waived its claim to the invention or discovery. The Federal Nonnuclear Energy Research and Development Act gives title to all inventions made or conceived under a contract with DOE to the United States, unless DOE waives all or any part of the rights.

DOE conducts its research and development activities through numerous organizations, including DOE's nine multiprogram laboratories, universities, and private industry. DOE-funded research and development activities that these organizations carry out include, in part, projects in nuclear weapons, nuclear energy, fossil energy, energy conservation and renewable energy, and basic sciences.

During the past 5 years, DOE and Commerce have at times taken different positions on how federal patent policies should be administered. These viewpoints are reflected in their actions relating to the issues discussed below.

Commerce's Involvement in an OMB Initiative That Led to a Proposed Reduction in DOE Patent Attorney Staffing

In 1983 OMB developed a number of management initiatives as part of Reform 88[1] for DOE's fiscal year 1985 budget aimed at improving DOE operations and management. One of these initiatives included changing DOE patent policies and reducing DOE patent attorney staffing.

According to DOE's fiscal year 1985 congressional budget request, these initiatives were designed to improve the efficiency and effectiveness of DOE's management systems, take advantage of economies available through increased or improved utilization of private sector capabilities, and place DOE's financial systems on "a more business-like basis."

As part of the patent policy initiative, OMB assessed whether improvements would result if patent policies were revised to allow the contractors who operated DOE's government-owned, contractor-operated facilities to more easily obtain patent rights to inventions resulting from their research. Under the proposed change in policy, contractors would no longer be required to file a written request for DOE to waive the government's title to an invention in order to obtain patent rights. Thus, it was expected that fewer staff would be needed to process patent waiver requests.

Documents we obtained indicate that Commerce's Federal Technology Management Policy Division officials participated in at least two activities relating to the DOE patent management initiative. Officials in the Division prepared documents for OMB that contained recommendations that they believed would reduce the cost of government patent operations while protecting the government's right to use inventions it had funded. The recommendations included

- allowing nonprofit organizations that are contract operators of government laboratories to own inventions and
- proposals to seek changes to DOE-related statutes that require government ownership of contractor inventions unless waivers are granted.

[1]OMB's "Reform 88" encompassed a set of management initiatives on the part of the administration aimed at bringing about lasting reforms in the management and administrative processes that drive the federal government.

The documents stated that the recommendations will lead to "significant tangible reductions" in the cost of DOE patent operations.

The Director of Commerce's Federal Technology Management Policy Division also participated in a meeting with OMB and DOE officials on October 20, 1983, to discuss the management initiative. According to participants at the meeting, discussions took place on both the merits of the proposed policy change and how it would affect DOE patent staffing. The Deputy General Counsel for Procurement Policy at DOE told us that the Director commented at the meeting that if DOE changed its patent policies, the number of DOE's patent attorneys could be reduced.

The Deputy General Counsel stated that soon after this meeting, DOE received OMB's response to DOE's fiscal year 1985 budget proposal. The Deputy General Counsel said that as a result of the management initiative on patent policy, OMB proposed cumulative reductions of 10 attorneys in fiscal year 1985, 20 attorneys in fiscal year 1986, and 30 attorneys in fiscal years 1987 through 1989 in DOE patent attorney staffing. The response also called for a reduction of $0.5 million in fiscal year 1985 and $1 million in fiscal year 1986 in DOE's Office of the General Counsel's budget.

DOE appealed OMB's proposed reduction in its budget. In its appeal, DOE estimated that a maximum reduction of three positions could result from the full implementation of OMB's management initiative. According to DOE, a reduction of DOE's patent staff below this level would eliminate employees who handle matters having no relation to the management initiative and would have a serious adverse impact on DOE's ability to discharge assigned duties. The Deputy General Counsel for Procurement Policy at DOE said that OMB subsequently agreed to a staff reduction of three patent attorneys. However, the Office of the General Counsel's budget was also reduced by $0.5 million and $1 million in fiscal years 1985 and 1986, respectively, as OMB originally proposed.

The Director of Commerce's Federal Technology Management Policy Division acknowledged that it participated in the patent management initiative, but stated that this participation resulted from an OMB request for assistance. He believed that Commerce's participation in the management initiative was appropriate in view of Commerce's lead agency role in patent policy under Public Law 96-517 and Public Law 98-620. He said that Commerce's actions in support of the initiative were based on its views that the policy change was desirable and that the change would allow DOE to reduce the number of its patent attorneys. He said

Commerce had not attempted to use the management initiative as a way to compel DOE to change its patent policies by reducing its patent staffing. He also believed Commerce's involvement did not influence OMB's reduction in DOE's budget. Officials in the Office of the Assistant General Counsel for Patents, DOE, expressed concern, however, that Commerce may have attempted to use the initiative to force a change in DOE policy by reducing DOE patent staffing. However, the only specific Commerce activity relating to the initiative that they cited to support this concern was Commerce's participation in the October 20, 1983, meeting with OMB and DOE on patent policies. DOE officials said if DOE staff were substantially reduced, DOE might no longer have sufficient staff to process patent waiver requests and carry out other activities necessary to administer its existing patent policies.

Analysis of Commerce's Involvement

We are unaware of any law or regulation that would prohibit OMB from seeking advice or assistance from Commerce or other agencies, when it is considering the budget of another agency. It is clear that Commerce provided input into the OMB patent policy management initiative and that the management initiative did lead to some reduction in budget and staffing in DOE's Office of the General Counsel, although less than originally proposed by OMB. The precise role that Commerce played in the management initiative is less clear. The documentation we have obtained provides little information on Commerce's role in initiating or implementing the management initiative. Most of the information we have on Commerce's role comes from discussions with Commerce officials. According to these officials, OMB requested Commerce's involvement. OMB officials said that information related to Commerce's involvement is part of the executive branch's deliberative process and declined to discuss it with us. DOE officials expressed concern that Commerce may have used the management initiative as a way to influence DOE patent policy by reducing patent staff. However, they did not provide us with any additional information that substantiates this concern. Because of this, it cannot be conclusively determined that Commerce's role in the management initiative was other than that which the Commerce officials described.

Commerce's Role in OMB's Decision Not to Clear DOE's Letter to Representative Walgren on House Bill 5003

In his May 21, 1984, letter, Representative Doug Walgren requested DOE to review and comment on House bill 5003. This bill would have extended to all contractors, regardless of size, the policy of Public Law 96-517, which generally allows small businesses and nonprofit organizations to elect to retain title to inventions resulting from federally sponsored research and development. House bill 5003 also proposed to eliminate a provision of Public Law 96-517 that allowed agencies to exempt inventions conceived under funding agreements for the operation of government research or production facilities from Public Law 96-517's general provisions allowing contractors to retain title to inventions. DOE had used the exemption in Public Law 96-517 to preclude contractors who operated government-owned, contractor-operated facilities from retaining title to inventions.

In July 1984, DOE prepared a letter responding to Representative Walgren's request for comments. In its letter, DOE said it was in general agreement with extending the philosophy of Public Law 96-517 to other businesses. However, it did not believe that its government-owned, contractor-operated facilities were businesses in the ordinary sense and, thus, the proposed legislation did not adequately reflect DOE's unique relationship with its government-owned, contractor-operated facilities. Because of this, DOE recommended that the legislation be amended to retain an exemption for these facilities, such as included in Public Law 96-517.

DOE sent this letter to OMB, for coordination and clearance, pursuant to OMB Circular A-19. This circular requires that before an agency transmits any letter commenting on proposed legislation outside of the executive branch, it must submit the document to OMB for clearance and coordination. It also stated that OMB will coordinate the letter with other interested agencies and then provide advice to the originating agency. On July 17, 1984, OMB solicited the advice of 11 agencies[2] on DOE's letter to Representative Walgren. Of these agencies, Commerce, the National Science Foundation, and the Department of Agriculture objected to the DOE letter. The other eight agencies either did not provide any comments or did not object to the letter.

In Commerce's July 26, 1984, letter to OMB, it strongly opposed submission of DOE's letter to Representative Walgren. In addition, Commerce

[2]The Department of Commerce, Office of Science and Technology Policy, Department of Justice, Department of Defense, Small Business Administration, Department of Health and Human Services, National Aeronautics and Space Administration, Department of the Interior, Department of Agriculture, Veterans Administration, and National Science Foundation.

wrote the President's Science Advisor on July 24, 1984, requesting him to use his influence ". . . to urge that OMB not clear the DOE letter to Mr. Walgren." The Assistant Director, Office of Science and Technology Policy, Executive Office of the President told us that Commerce knew that the Science Advisor would be involved in a review of DOE's letter to Representative Walgren. Therefore, Commerce tried to get him to support its position on the letter. However, according to the Assistant Director, by the time the Science Advisor received the Commerce letter, OMB had already made the decision not to clear it. On July 30, 1984, the Science Advisor wrote to Commerce that he understood ". . . that the letter was not cleared by OMB . . . ."

The Deputy General Counsel, OMB, said the actions OMB took in deciding whether or not to clear the DOE letter and what role Commerce played in the clearance process are part of the executive branch's deliberative process and he declined to discuss it with us. He added that any decisions regarding the letter were probably made through meetings, which are not documented.

DOE's Deputy General Counsel for Procurement Policy, who was the primary DOE official involved in preparing the letter, told us that OMB did not clear DOE's letter to Representative Walgren but that DOE has no record of OMB's response to DOE's request for clearance or records showing why OMB did not concur with the letter. Neither he nor other DOE officials with whom we spoke knew what advice, if any, OMB gave DOE on the letter. The Deputy General Counsel said that after OMB did not clear the letter, DOE decided not to appeal its decision or take any further action on the matter because DOE perceived that the letter did not follow presidential patent policy.

Analysis of Commerce's Role

Documents obtained in meetings with Commerce and DOE officials indicate that Commerce took two actions to oppose the DOE letter to Representative Walgren: (1) it sent comments to OMB opposing clearance of the DOE letter and (2) it requested the President's Science Advisor to use his influence to persuade OMB not to clear the DOE letter. We have found no evidence that Commerce took any other actions in the matter, and it is not clear what influence Commerce's actions had on OMB's decision not to clear the DOE letter.

We have no basis to conclude that either of the two actions Commerce took, of which we are aware, were unlawful. It appears that Commerce's activities in opposing DOE's views on House bill 5003 were in compliance

with the requirements of OMB Circular A-19. Commerce could state its views to OMB and others in the administration regarding the DOE position on House bill 5003. Also, we are not aware of any law or regulation that would prohibit Commerce from contacting the President's Science Advisor on the matter.

Even though OMB did not clear DOE's letter, it appears that DOE could have made its views known to Representative Walgren if it chose to do so. In our opinion, OMB Circular A-19 contemplates that OMB would transmit advice to DOE on its letter. If DOE received advice from OMB contrary to its views, it had two options. It could modify its views to conform to OMB's advice or, if DOE did not wish to modify its views, it was obligated to incorporate the full advice it received from OMB in its letter in addition to its own views. It could have then sent the letter to Representative Walgren. DOE, however, chose not to take any further action on the letter after OMB declined to clear it.

Commerce's Role in Drafting a Letter Criticizing DOE's Actions Relating to Federal Patent Policy

On August 24, 1984, Senator Robert Dole sent a letter to the Associate Director for Natural Resources, Energy and Science, OMB, calling his attention to the existence of continuing opposition within DOE to the implementation of the President's new policies regarding contractor ownership of inventions developed under federal research and development contracts. The letter said that:

- DOE had taken no actions to comply with President Reagan's February 18, 1983, Patent Policy Memorandum. The memorandum directed the heads of agencies, to the extent permitted by law, to give all contractors the same or substantially the same rights to own inventions resulting from federal research and development funding that Public Law 96-517 gave to small business and nonprofit organizations.
- DOE had prevented nonprofit operators of its government-owned laboratories from owning their inventions by making blanket use of an exemption contained in Public Law 96-517.
- DOE had attempted to influence the Congress to exclude DOE from provisions in proposed legislation that would extend provisions of Public Law 96-517 to for-profit firms and repeal the exemption DOE used to retain invention ownership rather than give it to nonprofit contractors.
- DOE had not implemented the patent part of the Federal Acquisition Regulation and had continued to use patent clauses in its contracts that placed a substantial burden on contractors.

Because of this, Senator Dole said he believed that OMB should use its statuatory authority to require a review of DOE's patent regulations—Patent Rights Under Government Contracts (48 CFR Subpart 927.3)—for the purpose of revising them to be consistent with administration directives.

The Director and Deputy Director of Commerce's Federal Technology Management Policy Division said they had discussed DOE's actions to resist changes in patent policy with Senator Dole's staff and that the letter to OMB's Associate Director for Natural Resources, Energy and Science resulted from these discussions. They also acknowledged that they saw drafts of the letter and participated in writing it, but they said the letter went through several drafts and, thus, it was difficult for them to say exactly what part of the letter they wrote.

The OMB Associate Director's September 20, 1984, response to Senator Dole stated that the Associate Director had discussed with DOE the concerns regarding DOE's compliance with the President's Patent Policy Memorandum. He also said that DOE had taken a number of steps in support of the President's patent policies and that DOE was making use of the flexibility available under its statutes to comply with the provisions and spirit of the memorandum. He said he fully supported the actions of DOE to comply with the President's patent policies and that he urged DOE to supply additional information to Senator Dole.

DOE's Director of the Office of Energy Research also wrote a letter on December 4, 1984, to supplement OMB's Associate Director's September 20, 1984, reply to Senator Dole. The letter stated that DOE fully supported the goals of the President's patent policy memorandum and outlined the steps DOE had taken to comply with the provisions and spirit of the memorandum.

Commerce's Federal Technology Management Policy Division officials involved in preparing the letter told us that they had drafted a revised version of DOE patent regulations pertaining to small business and nonprofit firms as suggested in Senator Dole's letter. They said they planned to give it to OMB, but discontinued work on it when Public Law 98-620 was enacted. Public Law 98-620 eliminated the exemption that DOE had used to exclude inventions conceived under funding agreements covering its government-owned, contractor-operated facilities from the general patent ownership provisions contained in Public Law 96-517.

Analysis of Commerce's Actions

Although Commerce officials were involved in preparing Senator Dole's letter to the OMB Associate Director, we are unaware of any law or regulation that prohibits this kind of communication and interaction between executive branch officials and employees and members of Congress. As a general rule, antilobbying appropriation restrictions[3] are aimed at prohibiting grass-roots lobbying where officials of the executive branch expend federal funds to exhort the public to urge members of Congress to support or oppose legislation. Such restrictions do not prohibit direct contact by executive branch officials with members of Congress. In this connection, the antilobbying statute, 18 U.S.C. 1913, provides an exception for official communications between officials of the executive branch and members of Congress. Similarly, our interpretations and reports on other antilobbying appropriation restrictions[4] have always permitted direct communications by officials of the executive branch with members of Congress.

Process Commerce Followed in Developing Regulations That Affect How DOE Handles Patent Rights

Public Law 98-620 gave Commerce the responsibility for developing regulations to implement certain sections of the law dealing with government research and development patent policy. Commerce assigned responsibility for developing these regulations to the Federal Technology Management Policy Division. Among other things, the Commerce regulations will generally govern DOE's handling of patent rights for inventions developed at its government-owned laboratories operated by nonprofit contractors. Various disagreements have occurred between Commerce and DOE on how sections of Public Law 98-620 should be interpreted in the regulations.

As part of its efforts to develop the regulations, the Division solicited and obtained comments on the proposed regulations from parties outside Commerce both before and after a Notice of Proposed Rulemaking was announced in the Federal Register. Before it prepared the Notice of Proposed Rulemaking, the Division requested comments on a draft of the regulations from various parties within and outside the government. Commerce records indicate that 13 parties submitted written comments to Commerce on the draft regulations. According to

[3]Various appropriation acts contain general provisions prohibiting the use of appropriated funds for publicity and propaganda. We have construed the appropriation act restrictions as applying to "indirect" lobbying only and not to direct communication with members of Congress or to expression of executive branch opinion on legislative issues.

[4]Comptroller General Decision 63 Comp. Gen 624 (1984) and cases cited therein, and No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded (GAO/GGD-84-46, Mar. 20, 1984).

the Division Director, Commerce also received oral comments on the draft regulations, but no record was kept of them. Following receipt of these comments, Commerce published the proposed regulations in the Federal Register.

In the April 4, 1985, Federal Register Notice of Proposed Rulemaking, Commerce also solicited comments on the proposed regulations to implement Public Law 98-620. In response to the notice, Commerce received 23 written comments from 17 different sources. The Division Director said that Commerce also held meetings with certain commenters, including DOE and the Department of Defense, to discuss their written comments. He said that it was also possible that oral comments on the regulations were received by Division officials. The Director said that the meetings and oral comments were not documented; however, he said that he knew of no oral comments that were substantive in nature.

The written comments received both before and after Commerce published the Notice of Proposed Rulemaking were placed in a file that was available for viewing June 3, 1985, by the public. Our review of the public file after the closing date for commenting on the regulations showed that it did not contain any information on the oral comments Commerce received on the proposed regulations or the meetings held to discuss written comments.

As of February 4, 1986, final regulations had not been published. Commerce's Federal Technology Management Policy Division Director said he called OMB officials in August 1985, to tell them that the final regulations were being sent to OMB for approval. He said he was told by OMB to send the draft of the final regulations to the Committee on Intellectual Property for Innovation and Technology Transfer of the Federal Coordinating Council for Science, Engineering, and Technology[5] for comment. Commerce sent the regulations to the member agencies of the Committee for comment on August 9, 1985. It received comments from DOE, the Department of Defense, and the Department of Agriculture. As a result of these comments, we found that Commerce made a number of changes to the August 5, 1985, version of its draft final regulations. The final

[5]This Committee has 15 member agencies. It is concerned with establishment, maintenance, licensing, disposal and infringement of intellectual property rights in ideas, writings, computer programs, inventions, and technical data created in performance of or affected by government programs and policies. Intellectual property rights for the purpose of Committee consideration include patents, copyrights, trademarks, trade secrets, or other legal means of affording proprietorship in a person or the government.

rulemaking was sent to OMB for approval on January 14, 1986. On January 28, 1986, OMB wrote Commerce that it was necessary for it to extend its review period on this rulemaking.

Analysis of Commerce Actions

When an agency receives written or oral communications before issuing a formal Notice of Proposed Rulemaking, the communications generally do not have to be placed in a public file. However, if the information contained in such communications forms the basis for agency action, then that information must be disclosed to the public in some form. Written communications received after the notice of rulemaking must be included in the public file. Oral communications received after the notice should be summarized in writing and also placed in the public file established for the rulemaking docket immediately after the communications are received so that interested parties may comment on them.[6]

Commerce officials said that they received both written and oral communications before the Notice of Proposed Rulemaking was published. We are not aware of any written or oral communications Commerce received before the rulemaking was published that formed the basis for agency action but were not included in the public file. However, because Commerce maintained no record of oral communications it received, we cannot say with any degree of certainty that no such communication took place.

Commerce also received both written and oral communications relating to the proposed regulations after the rulemaking notice was issued. Under Home Box Office, Inc., v. Federal Communications Commission, Commerce should have maintained a record of such communications; however, it did not keep a record of the oral communications.

Commerce also solicited comments on the proposed regulations from 15 federal agencies after the closing date for receipt of comments on the regulations specified in the Federal Register. As a result of comments received, Commerce made changes to the draft final regulations.

Generally, the only consequence that may result from an agency's not maintaining a record of oral communications and changing the regulations because of comments it solicited after the close of the comment period is that someone could challenge the validity of the regulations being promulgated. In the present case, Commerce did not include the

[6]Home Box Office, Inc., v. Federal Communications Commission, 567 F. 2d 9,57 (D.C. Cir. 1977).

oral comments it received in the file and solicited comments after the close of the comment period and changed its patent regulations based on these comments. These actions could provide the basis for a challenge in a court of law of its patent regulations, if the public is not given an opportunity to comment on the revised regulations before they are finalized.[7]

Aside from the potential defect in the validity of the regulation caused by Commerce's failure to record oral comments and changing the draft final regulations because of comments it solicited after the close of the comment period, we do not believe that any of Commerce's activities of which we are aware violated any law or regulation.

As your office requested, we did not obtain agency comments on this report. Also, as arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its publication date. At that time we will send copies to the Director, Office of Management and Budget; the Secretary of Commerce; and the Secretary of Energy and make copies available to other interested parties upon request.

Sincerely yours,

J. Dexter Peach

J. Dexter Peach
Director

[7]Section 5 U.S.C. 553 of the Administrative Procedure Act requires an agency engaged in proposed rulemaking to provide an opportunity for interested persons to comment. This procedural requirement is intended to provide fair treatment for persons affected by the rule. There must be an exchange of views, information, and criticism between interested persons and the agency. An agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible. Home Box Office, Inc., v. Federal Communications Commission, 567 F. 2d 9, 35 (D.C. Cir. 1977). It is arguable that Commerce may not have complied with this standard when it solicited the views of other agencies after the close of the public comment period and changed its regulations on the basis of these agency comments. Members of the public would be unable to criticize the revised regulations or submit alternative proposals unless they are afforded another opportunity to comment.

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