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COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

COMMITTEE ON BANKING,
HOUSING, AND URBAN AFFAIRS

SELECT COMMITTEE ON ETHICS

United States Senate

WASHINGTON, D.C. 20510

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Dear Colleague:

Within a short time, it is likely that one or more bills will be considered on the Senate floor dealing with the subject of Government patent policy. Bills such as S.414 and S.1215 are intended to address what has been a little understood, but hotly debated controversy over the ownership of patent rights to inventions made in the course of a Federal contract.

At stake in the patent policy issue are the thousands of potentially valuable energy, medical, environmental, manufacturing and other technological discoveries sitting unused on Government shelves. Ineffective and long discredited policies that require the Government to retain ownership of these inventions are at the root of this loss to the taxpayer who financed their creation. Even though the Government lacks the will and know-how to develop and market these inventions, Federal agencies nevertheless have been tied to policies which preclude them from relinquishing title to patent rights. Such title would encourage and stimulate private industry to initiate the extremely risky development and marketing processes essential to making the benefits of inventions available to the consumer and the U.S. economy. Ultimately, it is the entire nation which suffers from these misguided policies by the loss of potentially valuable new products and processes.

The continued implementation of current restrictive policies on commercialization of government patents has serious implications for our national productivity and economic growth. Last year's Federal research budget of $29 billion represented roughly one half of the nation's total investment in research and development. Three-quarters of this sum is used in direct support of research in industry, universities and other private sector laboratories. As a result of this huge national investment, thousands of inventions are identified each year, most of which never reach the marketplace.

A recently released report on Government patent policy prepared by the Federal Council for Science and Technology concludes that there has been a steady decline in the rate of inventive activity by both Government contractors and Federal employees. The number of inventions resulting from the Government's R&D effort has dropped nearly 50% over the period 1968 to 1975. Fiscal year 1975 marked the lowest number of inventions reported since data collection began.

Even more disturbing is the data which confirms that very few government-acquired inventions find their way into commercial use. In testimony before our Committee, NASA's Deputy Counsel indicated that less than 1% of NASA-owned inventions are commercialized, whereas up to 20% of inventions to which the agency has waived title are in use. An extensive study conducted by Harbridge House in 1968 reported a doubling of the commercialization rate when contractors with commercial background positions were allowed exclusive rights to their inventions. As a result of past Government patent policies, the Federal government presently holds title to nearly 30,000 inventions, of which less than 5% have been effectively utilized.

Even the more flexible policies which permit a case-by-case waiver of the title to the contractor have proven to be unsatisfactory because of the high administrative costs and long periods of uncertainty for the contractors. Delays attendant to the processing of normal waiver applications average between 10 and 20 months at the Department of Energy, with extreme cases having been reported to take over 3 years. Agency officials concede that the waiver policies by necessity involve substantial burdens for both the government and the prospective contractors with respect to the petitioning, negotiating, and determining waiver requests, and that the delays experienced in the contracting process as a result of this policy can affect the commercialization of the inventions involved.

For more than 30 years debate has flourished over the most appropriate Federal policy for determining ownership of patents arising out of Federal contracts. In theory, the government follows either a policy of conveying title to government-financed inventions to contractors or retaining title and granting nonexclusive licenses to contractors. In practice, government agencies operate under more than twenty different statutes, regulations and executive orders, plus varying interpretations of policy, all of which have proven to be both costly and confusing to administer.

According to the testimony received by our Committee, there is broad support from industry, universities, and from the major R&D agencies within the Government for granting contractors exclusive rights to their inventions, subject to appropriate safeguards of public interests. Experience has demonstrated clearly that the Government, as a purchaser or consumer of goods and services, is not in a position to exploit its ownership of patents to promote commercialization. Private companies, on the other hand, are much better suited to develop and market a promising invention when the appropriate incentives are provided.

The Senate Commerce Committee has completed an extensive series of hearings on a bill, S.1215, which would restore the incentive for innovation by uniformly allowing the contractors to retain patent rights to their inventions under most circumstances. The Judiciary Committee has reported out a bill, S.414, of a similar purpose, although limited in scope to small business and universities. In his October 31 message to Congress on industrial innovation, the President announced his support of legislation to create a uniform patent policy; however, he proposed that policy be a complex one which would grant exclusive rights to Federal contractors only in defined fields of use.

Whatever may be the merits of the different approaches, we believe that these developments create a unique opportunity to resolve the long-standing controversy over government patent policy in a way that will encourage commercial applications of publicly sponsored research and development and thus benefit the economy. Furthermore, we believe that such an objective can be best achieved by the adoption of a truly uniform patent policy such as embodied in S.1215, and we would hope it would have your cosponsorship and support.

Attached is a copy of S.1215 and a section-by-section analysis of the bill. If you have an questions, please do not hesitate to contact me personally, or have your staff contact Bill Gibb at extension 4-1251.

Sincerely,

Harrison Schmitt