THE SECRETARY OF COMMERCE
Washington, D.C. 20230

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The Honorable John Warner
Chairman, Committee on Armed Services
United States Senate
Washington, DC 20510-6050

Dear Mr. Chairman:

I would like to offer the views of the Department of Commerce on several provisions of the National Defense Authorization Act for Fiscal Year 2000 (NDAA), now pending in conference, that relate directly to this Department's responsibilities.

First, I reiterate the Administration's strong opposition to sections 1049 and 1050 of S.1059, as outlined in the Statement of Administration Policy of May 24, 1999, and Office of Management and Budget Director Lew's letter to Representative Dingell on June 23, 1999. If enacted, these provisions would erode the current system of domestic and international spectrum management to the detriment of Federal agencies, State and local governments, and the private sector.

Section 1049 would elevate the Department of Defense's current use of the spectrum above all other future Federal, State, and local government users and future private sector users in all shared or government-exclusive bands. The provision would undermine the President's authority to set spectrum management priorities for the Federal Government and impair the Federal Communications Commission's (FCC) ability to manage the spectrum for the private sector and State and local governments, including public safety and law enforcement services. It could also discourage investment in new and more spectrum-efficient technologies; create disincentives for spectrum sharing; adversely affect future spectrum auction receipts; and impose significant costs on Federal agencies, State and local governments, and the private sector.

Section 1050 would prohibit the Federal Government from providing licenses, permits or funding to entities broadcasting without specific authorization from outside the United States into the country on frequencies reserved to or used by the Department of Defense. These matters are more appropriately addressed by the U.S. Government in accordance with the radio regulations established by the International Telecommunication Union (ITU). The provision would be inconsistent with U.S. obligations under the ITU and could set a precedent that other countries could follow to the detriment of U.S. interests abroad.

The vast majority of State and local government and private sector licenses are issued in bands of spectrum shared by the Federal Government and private sector. Currently, more than one-half of private sector license assignments below 3.1 GHz are in shared bands, which represent

billions of dollars of current and future investments in communications systems. Private sector and Federal Government investments have been made on the basis of spectrum priorities reached through carefully negotiated agreements entered into domestically by Federal agencies, through the National Telecommunications and Information Administration (NTIA), the private sector, through the FCC, and internationally, through the U.S. participation in the ITU over the past 75 years.

I share the Committee's concerns about meeting critical spectrum requirements to secure the national defense. However, sections 1049 and 1050 would impede progress on solutions to the Department of Defense's concerns that are currently being addressed through the spectrum management process. Spectrum management policy is becoming increasingly complex as new radio communication technologies and applications make new demands on the spectrum. In accordance with the Communications Act of 1934, the President authorizes all use of the radio spectrum by Federal agencies through NTIA. NTIA's decisions are informed by the Interdepartment Radio Advisory Committee and are coordinated with the FCC where applicable. This process includes formal consideration of the concerns of the Department of Defense and all other agencies regarding spectrum allocations. Therefore, we believe that these needs can be addressed through the current spectrum management process and must continue to be evaluated in the context of the national and public interest as a whole.

In many spectrum bands, the Department of Defense has priority, and in some bands exclusive use, to protect its operations. In a few bands, priority has been given to civilian agencies having a greater or equal need to protect their necessary operations. For example, in the frequency range of 2700-2900 MHz, the National Weather Service (NWS) of the Department's National Oceanic and Atmospheric Administration (NOAA) operates its NEXRAD weather radars, and the Federal Aviation Administration operates a network of radars used for the guidance and protection of air traffic. Military use of the band for radio location is permitted, but that use must be fully coordinated with meteorology and aviation uses. The proposals contained in this legislation would permit unconstrained military use of the band, even though the public could be unintentionally endangered by the loss of aviation guidance and weather warning information. Military operations in this band other than meteorological aids and aeronautical radio navigation have had a history of interference with NWS radars. This interference has been manageable only because of the requirement that the Department of Defense coordinate its operations with the civilian agencies operating within the band.

Similar problems would be expected with NOAA's radiosonde operations. The 1670-1700 MHz range currently is the NWS's primary band for radiosonde operations, though it is also used by Defense, other civilian Federal agencies and by the private sector. Additionally, NWS uses the 401-406 MHz band, which is also used by these same parties. Coordination is what keps these radiosonde operations mutually compatible, and this coordination would no longer be required should the proposed provisions become law. These provisions could cause harmful interference to all radiosonde operators in the future. For the NWS, the loss of significant amounts of data

would degrade seriously the accuracy of its weather forecasts and cause unnecessary increased risk to both life and property.

The Administration is also concerned about several other provisions that bear on the export control responsibilities of the Department of Commerce.

Section 1407 of the House-passed bill would require the President to negotiate and submit to Congress a new post-shipment verification regime that allows for inspections "without notice" of high-performance computers in China by United States nationals designated by the United States. The section would also apply changes in the Composite Theoretical Performance (CTP) threshold for pre-license notifications under section 1211 of the NDAA for FY 98 to post-shipment verifications under section 1213.

We believe that "no notice" inspections are unworkable and unnecessary. No other country has signed an agreement giving the United States such broad authority to make inspections without notice on such a broad category of items. The United States would not sign such an agreement, and it is unrealistic to expect that China or any other country would do so. Even if the Chinese would agree to such a request, it could not be implemented as intended. Chinese companies are unlikely to open the door to U.S. Government officials unless the U.S. officials are accompanied by Chinese authorities, just as a U.S. company would not open its door to Chinese government officials who appeared unannounced. The only way the inspection program can work effectively is if it has the power of the Chinese authorities behind it.

The Department supports that portion of section 1407 that would match the CTP threshold for post-shipment verifications to that for prelicense notifications, but we also request that the provision be clarified in light of the President's recent action announcing an increase in the CTP level for notifications. Implementation of that announcement for the military level for Tier III countries will take place six months after the required report is sent to Congress. We recommend adding language to section 1407 making explicit that the "linkage" it creates between the CTP thresholds for pre-export notifications and post shipment verifications applies to the decision that has already been made. If the bill is passed before the decision takes effect in six months, language similar to that underscored below would be appropriate.

> ``1213 (e) Adjustment of Performance Levels.--Whenever a new composite theoretical performance level is established under section 1211(d), that level shall apply for purposes of subsection (a) of this section in lieu of the level set forth in that subsection. <u>This provision shall apply to any change in Composite Theoretical Performance proposed by the President subsequent to the passage of the National Defense Authorization Act for Fiscal Year 2000 and any proposed change for which the report required by section 1211 was submitted to the required committees prior to the passage of the National Defense Authorization Act for Fiscal Year 2000"</u>.

Section 1408 of the House-passed bill would require the President to submit to the Congress recommendations for establishing a mechanism for determining what technologies and items are critical to national security and expedited procedures for addressing those that are not. We oppose this provision.

Section 1408 is unnecessary because the current export licensing system already contains procedures for adding and removing items from the control list. Further, since an item would not be on the list unless it were critical to national security, a category for those items subject to control but not critical is likely to be an empty box. In the existing system, those items are simply decontrolled.

In addition, this section is, in effect, an amendment to the Export Administration Act (EAA), which expired in 1994. Renewal of that Act is now under consideration in both the House and Senate, with both the House International Relations Committee and the Senate Banking Committee having held hearings. The Senate proposal to renew the EAA contains, among other matters, a provision similar to section 1408 . It is the Administration's view that amendments to the EAA should be considered within the context of a comprehensive reauthorization of that statute. The Administration is presently reviewing that bill and has agreed to work with Congressional staff to determine whether a mutually acceptable bill can be developed.

In view of this ongoing process, which is moving quite rapidly, we believe it would be more appropriate to remove this section from the NDAA conference report and let the committees of jurisdiction address the issue in their work on EAA renewal.

Finally, section 1069 of the Senate-passed bill would require notification to the Congress whenever "an investigation is undertaken" of a company for violations of export controls in connection with satellites. We oppose this provision. Requiring notification to Congress whenever an investigation is undertaken would interfere with law enforcement activities and could jeopardize the outcome of cases. Confidentiality is essential in the beginning stages of an investigation, and it is important to strictly limit the parties who have access to such information. Existing legislation provides adequate tools for Congressional oversight of Federal Government activities and programs without this provision.

Sincerely,

William M. Daley

cc: The Honorable John McCain
The Honorable Ernest F. Hollings

Identical Letters Sent to:

The Honorable Ike Skelton
The Honorable Floyd Spence
The Honorable Carl Levin

with cc's to:

The Honorable Tim Bliley
The Honorable Joe Barton
The Honorable John D. Dingell
The Honorable Benjamin Gilman
The Honorable Doug Bereuter
The Honorable San Gejdenson