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**Gerald Musarra**
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**Via E-Mail (publiccomments@bis.doc.gov)**

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce
14th St. and Pennsylvania Ave., NW.
Washington, DC 20230

Re: Comments on proposed revisions to the Export Administration Regulations and its Commerce Control List to Account for Items Transferred from the United States Munitions List
**RIN: 0694–AF17**

Dear Mr. Mooney:

Lockheed Martin Corporation ("Lockheed Martin") is pleased to submit comments on the proposed rule issued by the Department of Commerce, Bureau of Industry and Security ("BIS") and published in the Federal Register on July 15, 2011 (76 Fed. Reg. 41958). The proposed rule outlines steps for the control of certain items which the President determines no longer warrant control under the State Department's United States Munitions List ("USML") but instead should be controlled under Commerce Department jurisdiction.

Lockheed Martin strongly supports the Administration's Export Control Reform Initiative, including the revision of the USML. The Initiative continues to be essential for supporting America's manufacturing capability, sustained leadership in innovation, new technology development, and global competitiveness, all of which drive the continued security of our nation. We particularly welcome the publication of this new proposed rule providing a regulatory construct for the movement of items from the USML to the Commerce Control List ("CCL"). However, we have several comments, both of a general and specific nature, regarding this proposed rule. We begin with some general comments regarding the state of the export control reform initiative, as it relates to the subject of this proposed rule, followed by comments focused on specific aspects of the proposed rule.

*Status of Export Control Reform*

Given the comprehensive nature of the Administration's Export Control Reform Initiative, considerable additional time and effort will be needed to complete the full range of actions that have been undertaken. For example, for the USML effort alone, in addition to the time required for developing proposed rules and responding to public comments, the Administration will need to consult fully, pursuant to the Arms Export Control Act ("AECA") Section 38(f), with the relevant Congressional Committees regarding proposed changes to the USML. The scale of this consultation is unprecedented, and it poses an enormous challenge to both the Administration and the Committees due to the complex technical and policy judgments that will be required, especially for higher-level items that are proposed for removal from the USML.

While we appreciate the Administration's commitment to address the long-standing concerns about the scope of the USML, and the need to link controls to the sensitivity of the items controlled, the difficulties associated with this task make it likely that the broader USML reform exercise may not be completed for years to come.

As a consequence, Lockheed Martin strongly recommends adoption of an interim measure that is focused on numerous low-level parts and components currently controlled on the USML. Specifically, Lockheed Martin supports prioritizing the immediate movement of the vast majority of parts and components currently controlled on the USML to the CCL, while the ongoing review of higher-level USML items continues. This step was recently recommended to President Obama in a letter from the Coalition for Security and Competitiveness, comprising the major industry trade associations. Such an interim measure would be consistent with former Defense Secretary Robert Gates' strong concern about unnecessary controls on items such as nuts and bolts, as expressed in his April 2010 speech. Lockheed Martin believes that this interim step would yield a significant near-term benefit to U.S. manufacturers and U.S. allies, pose little risk to national security, yet provide for a more careful review of more complex items that may pose greater security risks. Moreover, the Congressional oversight committees have shown substantial receptivity to such an approach, including through House Foreign Affairs Committee Chair Ros-Lehtinen's introduction of a bill this spring which included reform of export controls on generic parts and components.

Finally, Lockheed Martin would like to lay special emphasis on the importance of the management component of the reform effort. In particular, Lockheed Martin believes that the success of the proposed rule in promoting national security and streamlining the export control system is highly dependent upon significantly improved management measures for implementation. This rule will require close coordination between the USML and CCL licensing functions. Such coordination could occur if the Administration is able to integrate the licensing agencies, through the single agency proposed by the Administration; in the alternative, the necessary coordination could be achieved through co-located agencies and adoption of a common IT system, including a "single form" for exporters. Without such coordination between USML and CCL licensing, we would have concerns that the anticipated benefits from this rule may not outweigh the risk of unintended consequences and business disruption resulting from the rule.

*Proposed Rule Outlining Steps to Transfer Certain Items from the USML to the CCL*

In addition to the general comments above related to export control reform, we have several specific comments related to the proposed rule. We note that it is difficult to comment effectively in detail on the proposed rule in the absence of having the full context provided by additional USML Category rewrites or the 600-Series. Pending the release of these future rules, we suggest that the proposed rule be finalized as an "Interim Final" rule instead of as a final rule so that further changes can be more readily considered after the initial implementation period.

***Licensing***

We are concerned that there may be two potential significant unintended consequences for licensing activities. First, the proposed rule could slow down licensing for the transferred items. The notice of proposed rulemaking states that license applications for "600 series" items would be reviewed under the executive order that applies to dual-use licenses. This executive order only requires license decisions to be made within 39 days, and actual practice in 2011 has been an average of 31 days. In contrast, overall license processing time for USML items by the

State Department has been 17 days. Although the rule states further that the U.S. Government "intends" that license processing times would not increase as items move from the ITAR to the CCL, it is not clear whether BIS will be able to reduce significantly its current license processing time, particularly in light of the increased licensing activity that likely will result from the movement of many items from the USML to the CCL, without additional staffing resources for BIS and other agencies involved in the license review process. Thus, the successful implementation of this proposal depends upon the Administration and Congressional appropriators providing necessary funding for the relevant agency functions.

Second, we are concerned that the proposed rule, if adopted, could result in requirements for double licensing (from both BIS and the State Department) for certain transactions. Specifically, it appears that a large majority of the items being transferred would be parts and components for USML end-items. Many of those parts and components will no longer require a license at BIS, as some will become only subject to anti-terrorism controls, and others will be eligible for license-free shipment under the STA License Exception. However, some other parts and components will still require BIS licensing, (*e.g.*, for export outside the STA countries, or for those items not eligible for License Exception STA). In those cases, exporters will need to seek a State license for the end-item and any major components remaining on the USML, and a BIS license for related parts and components shipped separately as part of the same order, such as spares that are not integrated into the end-item. Further, even where STA is available for the parts and components export, there will be an administrative burden in ensuring full compliance with STA. Thus, in these circumstances, the rule could increase defense exporters' burden from the current system.

One example for this burden is from Lockheed Martin's Missile & Fire Control (LMMFC) business. For LMMFC products like SNIPER (USML XII(a)), the Sniper Pod will continue to require State Department licensing. The pods are Significant Military Equipment (SME). (Other LMMFC programs with the same effect would be Arrowhead, M-TADS/PNVS, Javelin and possibly more.) Depending on the Category XII rule-making, this business would be subject to "split" jurisdiction, whereby the SME end-items and certain SME components would be subject to the USML and certain related parts and components would be transferred to the CCL. For one contract, LMMFC may be forced to obtain a State Department authorization (TAA, possibly MLAs, DSP-5s for hardware, DSP-73s; License Exemption 123.4(a)(1)) plus BIS authorizations (License and/or applicable License Exception).

Lockheed Martin recommends that BIS, in coordination with the State Department, consider adopting various methods whereby the agencies could alleviate these potential burdens on exporters. Our suggestions are as follows:

1. As an interim measure, we recommend the "grandfathering" of existing State Department licenses for items transferred over to BIS, so that exporters could export under an unexpired State Department license even after the jurisdiction had changed. We also recommend that BIS coordinate with the Census Bureau to grandfather AES entries affected by the transfers of jurisdiction.

2. If exporters apply to the State Department for a license relating to a product which has been transferred to BIS jurisdiction, we suggest that any "Return Without Action" responses from the State Department indicate the ECCNs for these items. This approach would ensure that exporters understand what authorization they need to request from BIS. To do this, State would need to implement a procedure of seeking classification guidance from BIS before issuing RWAs for this reason. As a related point, we believe that this system would be significantly facilitated by the early implementation of the single IT system being developed by

the inter-agency. Exporters would then be able to apply for an export license using a single form, and would receive information regarding the agency which has export licensing jurisdiction. We suggest that BIS and other agencies give this single form licensing initiative high priority.

3. We suggest that BIS ensure adequate interagency coordination and training within the U.S. Government, such that all involved persons clearly understand the new jurisdictional system and procedures, including the use of License Exception STA. We also suggest that BIS and the State Department do significant outreach to industry regarding these issues, particularly small and medium-sized exporters, who may not be familiar with the Export Administration Regulations. The division of jurisdiction for defense trade between DDTC and BIS may pose compliance challenges for defense exporters which have historically focused on mastering the DDTC licensing system. Companies will need to train their personnel to a much greater degree than previously, regarding the nuances of the BIS system. For instance, BIS has "catch-all" rules based on end-use / end-user and which apply even to goods that do not otherwise require a license (Part 744); this approach does not exist at DDTC. Therefore, the success of the new rule will depend on BIS providing significant outreach to companies which have traditionally exported solely under the ITAR, particularly to small and medium-sized companies. Again, such outreach will depend on sufficient resource allocation by the Administration and Congress.

As a related point, we request that BIS develop an industry interface to SNAP-R which would permit industry systems to upload license requests. This would greatly facilitate industry's transition to BIS licensing.

4. It is important to ensure that this rule does not result in modification or "roll-back" of previously-issued Commodity Jurisdiction (CJ) determinations by the Department of State. If the U.S. government has previously considered a specific item, and issued a binding ruling regarding its jurisdiction, that ruling should continue to apply notwithstanding the USML-CCL rule. Any other approach would penalize exporters who have gone through the time and expense of a CJ determination and acted in reliance on that determination.

5. Finally, we suggest that BIS consider treating a State license for the end-item or system as authorizing exports of related parts / components. There is analogous precedent for this approach in the context of BIS's interaction with the Treasury Department's Office of Foreign Assets Control (OFAC). Section 746.7(a)(2) of the EAR provides that "[t]o avoid duplication, exporters or reexporters are not required to seek separate authorization from BIS for an export or reexport subject both to the EAR and to OFAC's Iranian Transactions Regulations. Therefore, if OFAC authorizes an export or reexport, such authorization is considered authorization for purposes of the EAR as well." While the current context is somewhat different, in that State would not have licensed the export of the parts / components at issue, it should be possible to craft an EAR license exception whereby exporters are authorized to export parts / components necessary to execute on a transaction authorized by the State Department.

***STA License Exception***

The proposed rule creates an interagency mechanism for exporters to request STA eligibility for 600-series items transferred from the USML. It further provides that if BIS approves STA treatment for the item, then BIS will publish the determination on its website. Therefore, an affirmative STA eligibility determination will be a public outcome, available to competitors. To address concern that this publication might raise issues of business proprietary

information, BIS plans to publish a "redacted version" of its determination on the BIS website. See 76 Fed. Reg. at 41,964. Thus, we understand from BIS that companies could state in their STA eligibility requests what information they are willing to make public, e.g. by providing proposed text to describe the end-item.

Lockheed Martin has two comments regarding this approach. First, it is important that the items approved for STA are sufficiently descriptive for third parties to rely on the published determinations to conduct their own exports. Under the proposed rule, once an eligibility request for a particular end-item has been approved, anyone complying with the requirements of STA is entitled to use the exception for exports, reexports, and transfers of the approved end-item. While we appreciate BIS's initiative to allow companies to protect proprietary information, it raises potential concerns for exporters who wish to rely on another company's STA eligibility determination for a particular product. If the description of the approved end-item is too generic, exporters, reexporters, or transferors may have difficulty determining (or may not be comfortable determining) that their items match the description of the end-items approved for export or transfer under STA. It may therefore force companies to seek STA eligibility determinations that are duplicative of already-approved eligibility requests, which would further increase the burden on BIS. We suggest that the description provide sufficient detail for other exporters to determine whether they can rely on STA for their own end items.

A related concern is that it is not clear how the STA published descriptions would apply to items for which there is not a "model number or other equally specific descriptor," such as technology. We suggest that BIS clarify this point and/or provide examples of acceptable approaches.

Second, we believe that exporters may find it quite burdensome to compile the supporting documentation required in order to obtain an STA eligibility determination. Per the proposed changes to Part 748, Supp. 2, exporters must submit information as to why the item does not provide a critical military or intelligence advantage, information about the item's availability in countries that are not regime partners and close allies, and information, if known, about how the item is controlled for export purposes by other countries. In many instances, this information will not be readily available to exporters, and it may not be worth gathering the information in order to obtain STA eligibility. We suggest streamlining this process to allow for greater usage of the STA exemption. For instance, exporters could be given the option to submit this information where it is available, and if the interagency believes that additional information is critical to STA eligibility in the particular case, then BIS could seek such information from the exporter.

Lockheed Martin has one other comment regarding License Exception STA. The proposed rule (Section 740.2(a)(13)) authorizes the use of STA to export 600-series items, under certain conditions, for ultimate end use by government entities in one of the STA-36 countries. We recommend that exporters also be authorized to use STA to export 600-series items for ultimate end use by a U.S. Government entity.

***Parts and Components for Repair***

The rule should ensure that it does not become any more difficult to export parts and components for repairing end-items in certain situations. Under the rule, parts and components of USML items may be transferred to the CCL while the item itself remains on the USML. In those cases, the parts, which will be covered under the new series 600 ECCNs, can be exported under BIS's license exception RPL where applicable. However, the RPL license

exception would require that the exported spare parts be one-for-one replacements for parts of an item that had been previously lawfully exported.

In contrast, if the parts remained on the USML, they could be shipped under the license exemption in ITAR section 123.16(b)(2), which does not contain the one-to-one replacement requirement. That exemption permits the unlicensed export of repair parts if the value of any single transaction is less than $500, provided there are no more than 24 shipments per year to each approved end user. Where spare parts needed for repairs are relatively inexpensive, this rule provides useful flexibility to exporters. Moreover, ITAR section 123.4(a)(1) provides an exemption for the temporary import and subsequent export of items for servicing. Further, the State Department has proposed to further liberalize spare parts exports. (See Proposed Rule, 76 Fed. Reg. 13928, March 15, 2011.)

Under the proposed rule, it is unclear whether those parts that are transferred to the CCL will have at least parity with the situation if they had remained on the USML. Although License Exception STA could complement RPL, it will not apply to exports to countries not eligible to receive items under the exception. License Exception LVS might also play a useful role, although it contains certain restrictions (e.g., limitation to Country Group B). We recommend that BIS carefully review the available ITAR exemptions and relevant EAR license exceptions in order to ensure that the substance of the current and anticipated ITAR authorizations is fully available under the EAR, i.e. that there is no "roll-back" of exemption authority.

Further, Lockheed Martin is concerned that License Exception RPL would impose a greater record-keeping burden on exporters than is the case under Section 123.4(a)(1). Section 740.10(c) would require exporters to maintain seven types of information for any items exported or reexported to repair, replace, or service items exported under a 600-series ECCN. These requirements go beyond the record-keeping requirements applicable to Section 123.4(a)(1). See 22 C.F.R. 123.26 (requiring exporters using exemptions to maintain a description of the data, the name of the end-user, the date / time of the export, and the method of transmission).

***Specially Designed***

The proposed rule sets forth a new, technically complicated definition of the term "specially designed", which is both extensively used in the current CCL (264 times) and will be used to describe many items transferred from the USML to the 600-series. This definition may be difficult for exporters to understand and apply in order to properly classify their transferred products.

Although this definition is intended to clarify the scope of items controlled under particular provisions of the CCL, we believe that its length and complexity may ultimately hinder industry understanding of its meaning. There are many defined terms, and ambiguities, to be construed, which will need to occur in the context of particular ECCNs. Thus, it may be too complicated for industry to self-classify their items under this standard, leading to a high volume of commodity classification requests. We do not find that the definition meets BIS's stated standard that it should "be capable of being easily understood and applied by exporters, prosecutors, juries, and the U.S. Government." 76 Fed. Reg. at 41,968.

Moreover, it is unclear how the proposed definition would operate in relation to the definition of "specially designed" in the Missile Technology Control Regime (MTCR), for MTCR-controlled items. While BIS states that its approach meets the objective of consistency with the definitions used by the international export control regimes, BIS also states that the MTCR

definition relies on the concept of "exclusively used" while the definition proposed by BIS "would not be limited to items with an exclusive use". See 76 Fed. Reg. at 41,968. It appears possible that the proposed definition would capture items that BIS does not currently control under the narrower MTCR definition.

Lockheed Martin respectfully submits that there is no legal or practical requirement for BIS to finalize a definition of "specially designed" at this time, and that it should not do so given the challenges discussed above. We recommend that BIS delete the proposed definition from the rule. The proposal seems more appropriate for consideration in the context of BIS's ongoing consideration of how the CCL item descriptions could be more clear and positive. See 75 Fed. Reg. 76,664 (Dec. 9, 2010). We recommend that BIS continue to evaluate whether a definition of "specially designed" is necessary and, if so, how best to develop a definition that is easily implemented by industry. We believe that further work would need to be done, in consultation with technical advisory committees and industry generally, to determine whether a clear definition can be achieved, and this work would need to consider the application of "specially designed" in the context of each of the many ECCNs where the terms appears on the CCL. We recommend that BIS consider whether this is the best use of agency and industry resources, given the fact that -- as BIS acknowledges -- this approach is in tension with a core element of the export control reform initiative: moving away from design-intent control parameters toward a "positive list". It may be more useful to identify the most important ECCNs using this term, identify the appropriate technical parameters, and submit the proposed revisions to the multilateral regimes.

***Other Comments***

First, Lockheed Martin requests clarification about the application of the 10% *de minimis* standard for 600-series items incorporated into foreign products. The proposed rule states in Section 734.4(b)(3) that foreign-made items incorporating 600-series content are "excluded" from the 25% *de minimis* rule in Section 734.4(d), and are instead subject to a 10% de minimis standard per Section 734.4(c). It appears that this proposal would mean that an item containing 50% U.S. content, but only 5% 600-series content, would not be subject to the EAR, because an exporter could rely on the 10% *de minimis* rule for 600-series items. If that interpretation is correct, BIS may wish to clarify or amend its approach. BIS may intend that 600-series items will be subject to the EAR if either (1) the 600-series content is over 10%, or (2) the 600-series content is less than 10%, but the controlled U.S. content (as currently defined in Part 734 of the EAR) is over 25% (or 10% in the case of certain embargoed destinations).

Second, BIS proposes to create ECCN 0A919 to license foreign-made "military commodities" that incorporate more than *de minimis* 600-series content. We request clarification as to the jurisdiction of these commodities if they enter the United States. Specifically, please confirm that these commodities remain subject to ECCN 0A919, and do not become subject to the USML, if they enter the United States.

Third, there is a risk that this rule will result in higher penalties being imposed on the exporting community for minor violations. The State Department generally does not issue monetary penalties for minor issues, but BIS frequently does so. We recommend that BIS consider an approach that is more similar to the State Department's enforcement policy, at least for the first few years of implementation.

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Thank you again for the opportunity to provide comments on the proposed rule. We look forward to continuing to work closely with the Department on achieving the important goals of the Administration's Export Control Reform effort.

Sincerely,

Gerald Musarra
Vice President
Government & Regulatory Affairs