NORTHROP GRUMMAN

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August 6, 2012

U.S. Department of Commerce
Regulatory Policy Division, Office of Exporter Services
Room 2099B
Bureau of Industry and Security
14th and Pennsylvania Avenue, NW
Washington, D.C. 20230

ATTN: Ms. Hillary Hess/Mr. Timothy Mooney

SUBJECT: RIN0694-AF65 Revisions to the Export Administration Regulations
Implementation of Export Control Reform
Revisions to License Exceptions after Retrospective Regulatory Review

Dear Ms. Hess/Mr. Mooney:

Northrop Grumman appreciates the Department's publication of the proposed rule and incorporation of U.S. industry suggestions to the prior proposed rule of July 15, 2011 (76 FR 41958) for transition of items from the United States Munitions List (USML) and the prior proposed rule of August 5, 2011(76 FR 47527) re streamlining of Bureau of Industry and Security (BIS) regulations.

Amending the USML to control only those items that represent strategic geopolitical advantages of U.S. military industrial complex will streamline supplies to critical allies of the United States. We support the objective of export control reform. Undertaking such a ground breaking reform requires prudence moving forward. For instance, EAR exceptions should not be more restrictive than comparable ITAR exemptions and EAR procedures should not be more burdensome than the ITAR, nor should a third regime that is a combination of ITAR and EAR, with its own set of requirements, be imposed. Continued cooperation between the Departments of Defense, State and Commerce, along with the exporting community, will ensure that the original goals of the Export Control Reform Initiative remain central to our focus moving forward.

We offer the following comments in response to the proposed rule referenced above:

1) **Part 734**

Consistent with our comments to the August 15, 2011 proposed transition rule, we believe the *de minimis rule*, as currently structured, with a 0% percent de minimis for any 600 series items to 126.1 countries and 10% for all other CCL items to Country Group E, establishes a dual standard of complexity for foreign manufacturers looking to calculate the de minimis applicable to their foreign end items. Such a dual standard may have the unintended consequence of discouraging foreign manufacturers from buying 600 series goods from U.S. manufacturers. Therefore, we support an approach that will enable foreign manufacturers to implement U.S. extra-territorial

controls with predictability while protecting U.S. national security considerations. We recommend a consistent approach to de minimis for Country Group E within the EAR for NS controlled content.

2) **Part 736.2 and Reexport/Re-Transfers of Foreign Produced Direct Product of U.S. Technology and Software**

Consistent with our comments to the Department of State regarding the transition rule and reexport/re-transfers of U.S. origin items originally exported under authorization of the U.S. Department of State, we request that reexport/retransfers be authorized through various mechanisms, for both the U.S. origin items incorporated into a foreign manufactured product, as well as for the foreign items produced as a direct product of U.S. Technology and Software. The disposition of such items should be dependent on meeting various criteria, including ECCN and destination, as follows:

a) Inclusion of a re-transfer/distribution territory on a currently valid Department of State authorization;
b) Re-export authorization granted without prior approval (but meeting all conditions) of §123.9(e);
c) Written re-export authority granted by the Department of Commerce;
d) License Exceptions or No License Required for items meeting the criteria identified within Part 736

3) **Part 740**

a) **§740.9 Temporary imports, exports and reexport (TMP)**. We appreciate the additional clarity regarding the definition of tools of trade, and other conditions governing temporary exports.

1. **740.9** term of the License Exception of one year should be increased to four years consistent with the ITAR period of a DSP-73 to authorize a temporary export, as well as the proposed changes to validity period of EAR export licenses.
2. **740.9(a)(12)**We have concerns regarding the language in §740.9(a)(12) regarding temporary exports of body armor subject to the EAR. We have provided prior comments to the Department of State, both on the proposed rule for ITAR exemption §123.17 and USML Category X, Personal Protective Equipment and Shelters, that addresses these concerns. First, the requirement for a customs inspection prior to lawfully exporting the body armor is a unique requirement that is not required for any other export. In many cases, the body armor is Government Furnished Equipment (GFE) that remains U.S. Government property. This GFE is issued to private contractor employees on a U.S. Government military base, prior to their departure on a military transport aircraft into a war zone. Once the body armor is issued, the individual in many cases does not leave the base, but is deployed, often immediately. Whether exported via license or license exemption/exception, the Electronic Export Information is filed pre-departure with AES, so the U.S. Government has the visibility and oversight to export transaction details. However, in a license exception scenario, there is a requirement for a personal inspection by a customs officer that is not practical or warranted since the individual is acting on U.S. Government direction

in fulfillment of a U.S. Government contract. We recommend further engagement by both the Commerce and State Departments with the Department of Defense to identify practical solutions and procedures to be implemented in such scenarios. Otherwise, industry will continue to obtain export licenses for these temporary exports, as no personal inspection is required.

b.) **§740.11 Governments, International Organizations, International Inspections under the Chemical Weapons and the International Space Station (GOV).** §740.11(b)(iii)(B)(2) requires written authorization from the Secretary or agency head of the U.S. Government department or agency responsible for the program, agreement or arrangement, or his or her designee…we interpret this language to include specific contractual language in a U.S. Government contract directing the seller to invoke the exemption for OCONUS activity. In many cases, the U.S. Government contract will be of a broad scope, and include such a requirement as a contract clause, and the specific work scope for each activity is detailed in a Task Order. The Task Order will contain the information on specific items to be exported, the locations and end users and other foreign participants, etc. Together, the contract and the Task Order meet the requirements. In addition, since it is routine to have both a prime and multiple sub-contractors with U.S. Government contract clauses flowed down from the prime to sub as required by law, we interpret the term "pursuant to a contract between the exporter and a department or agency of the U.S. Government" to include sub-contractors if the U.S. Government contract clause is a required flow down. We recommend that the final rule publication include examples and scenarios to clearly illustrate use of the exception for both the U.S. Government contracting agencies and the U.S. exporters.

c.) **§740.13 Technology and Software-Unrestricted (TSU).** We recommend removal of the word "copies" from the header of §740.13(g). If the intent of the proposed revision is to provide the same license exception as available under the ITAR §125.4(b)(4) we understand the use of identical language. That license exemption also sets a standard for authorizing export under exemption of technology previously authorized for the same recipient, regardless of whether the previously authorized technology was in fact exported. The use of the term "copies" is misleading in terms of understanding the requirements for authorizing use of that exemption, or this proposed exception revision. Removal will clarify the intent of the language. We recommend revision of the remaining language in the first paragraph of §740.13(g) as "This paragraph authorizes the export, reexport or in-country transfer of technology previously authorized for export, reexport, or in-country transfer to the same recipient."

d.) **§740.20 License Exception Strategic Trade Authorization (STA). Note 2 to paragraph (c).** As explained by Department personnel at numerous public meetings, we understand the need for vetting of entities using prior licensing activity to verify the U.S. Government has previously established the bona fides of the recipient; however in practical business terms, U.S. exporters will only have access to their own licensing records, and therefore use of STA will necessarily be restricted to the exporter's own knowledge. In addition, entity names may change from time to time for various reasons. The Department of State currently has a mechanism to update name changes of foreign parties and also posts specific website guidance applicable to existing authorizations. We

believe that evidence of a name change by the foreign party combined with prior licensing activity under a previous company name would also meet the criteria for a prior licensing activity. Further, some entities may be on unpublished or intelligence lists for which only the U.S. Government would have access or knowledge. Therefore, we recommend transfer of the requirement to verify the U.S. Government has previously established the bona fides of the recipient from industry to the U.S. Government. A recommended approach would be to implement a U.S. Government check at the point of pre-departure filing of the Electronic Export Information (EEI) in the AES system. The system could return an appropriate message that the consignee or end user is ineligible for the use of License Exception STA and note that an ITN will not be issued as the export filing will not be accepted. Further, the system should have the capability and capacity to flag or cancel the transaction using information not available to U.S. exporters, regardless of prior authorized licensing activity.

4) **Part 743.5 Prior notifications to Congress of Exports of Major Defense Equipment and other transactions.** The proposed positive lists have been developed under the auspices of "items the president has determined no longer require control under…." and the items are being notified via the 38(f) process. Once completed those items are no longer controlled under the Arms Export Control Act (AECA). This is no different than an individual item which is the subject of a Commodity Jurisdiction Determination being moved from the USML to the CCL via the same process. The item is determined to be no longer subject to the jurisdiction of the ITAR. While we are unaware of any provision for Congressional Notification in the Export Administration Act (EAA) or International Emergency Powers Act (IEEPA) to provide notification to Congress, we understand the oversight concerns of the Congress, and believe that the current proposed language would require two notifications for the same contract, one for the platform and other items remaining subject to the ITAR, and a second one for the "600 series" items. If the Commerce Department imposes a notification requirement within the EAR, this duplication, if not closely coordinated, may lead to a myriad confusion regarding the type of items and valuation associated with the notified transaction. We also believe that additional and potentially burdensome infrastructure within the Commerce Department would be required to track status and interaction with the Congressional staff during the notification process. We therefore recommend that there be one coordinated notification applicable to the entire value, for all export authorizations required, regardless of agency. Another alternative is for the U.S. exporter to identify within the Commerce Department export application that the platform had already been notified by the State Department, identifying the previous Congressional Notification Identification number, eliminating the need for a duplicative notification.

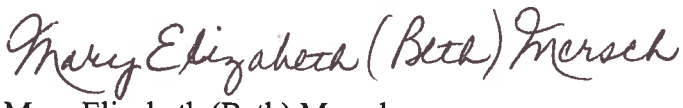
5) **Part 758**

   a) **§758.1**. We believe that "600 series" .y items should be treated the same with respect to AES filing requirements as all other AT level controlled items, and therefore §758.(b)(3) should be revised to read "For all exports of "600 series" items, except .y, regardless of value or destination, including Canada…"
   b) **§758.6.** We oppose different Destination Control Statement (DCS) requirements applicable to "600 series" versus other EAR controlled items. In addition to the fact that these statements are pre-programmed into automated systems and would be costly to update, we believe that identification of the ECCN ("600 series") which is already

incorporated into most export control documents (invoice, bill of lading or airway bill in particular) is sufficient to advise end-users of the restrictions. To provide further assurance of notification to foreign recipients of "600 series" items, we recommend the Commerce Department regulations include a requirement for the U.S. exporter to include the notification regarding "600 series" items into the business agreement (purchase order, contract, etc.) or other written notification between the parties, as that document is the legally binding contract between the parties and typically includes language regarding compliance with U.S. laws and regulations.

We appreciate the opportunity to provide comments on this significant proposed rule. If you have any questions or require further discussion, please contact me at (703) 280-4056 or beth.mersch@ngc.com to engage the appropriate individuals.

Sincerely,



Mary Elizabeth (Beth) Mersch
Director, Export Operations