Before the
DEPARTMENT OF HOMELAND SECURITY
Washington, DC 20528

In the Matter of	)
	)
Procedures for Handling Critical Infrastructure	)
Information; Proposed Rule	)

To: Associate General Counsel

REPLY COMMENTS OF LOCKHEED MARTIN CORPORATION

Lockheed Martin Corporation ("Lockheed Martin") submits the following Reply Comments in response to the Interim Rule with Request for Comments published in the Federal Register dated February 20, 2004[1] relating to the receipt, care, and storage of Critical Infrastructure Information ("CII") voluntarily submitted to DHS (the "Interim Rule").

Lockheed Martin previously submitted Comments in response to the Notice of Proposed Rulemaking issued by DHS on April 15, 2003.[2]

I. INTRODUCTION

Lockheed Martin commends DHS for addressing this important matter of national security and for carefully addressing many of the concerns and proposals of those affected. Lockheed Martin may be affected by this rule as a result of being directly involved in the management of critical infrastructure assets. Lockheed Martin may also be affected as a federal contractor and is equally as interested in this proceeding as a corporate citizen committed to strengthening the security of the homeland.

Lockheed Martin supports the goals of the Interim Rule including the goal of encouraging the sharing of information that supports DHS' mission by those that have the ability and/or duty to protect our nation.

Private sector sharing of information with the government requires a Rule that eliminates, to the extent possible, the legitimate concerns of those who submit the information that the information could be released under the Freedom of Information Act (FOIA). Adoption of such a rule will enable DHS to have ready access to information to assist in preventing terrorism, protecting lives and property, and promoting economic stability—information critical to successful performance of the Department's mission but which might not otherwise be made available without a rule that guards

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[1] Interim Rule with Request for Comments, Procedures for Handling Critical Infrastructure Information, 69 FR 8073 (February 20, 2004).

[2] Notice of Proposed Rulemaking, Procedures for Handling Critical Infrastructure Information; Proposed Rule, 68 FR 18524 (April 15, 2003) ("NPRM").

against its disclosure.

Lockheed Martin believes these rules assist in creating an environment whereby industry participants can be comfortable sharing critical information. Several issues are presented by the Interim Rule, however, that could be clarified or resolved in order to further improve the Final Rule and render it more effective. These items are set forth below.[3]

II. REMAINING ISSUES FOR WHICH RESOLUTION/CLARIFICATION IS SOUGHT

Anticipating that some commenters might assert that protecting voluntarily submitted CII would deprive third parties of a right to access that CII via FOIA, Lockheed Martin previously commented that, if the protections in the proposed rule are not implemented, there will likely be no CII for anyone to access via FOIA. This fundamental concept was not addressed by DHS in the publication of the Interim Rule. No statement may have been needed but Lockheed Martin believes it important to reiterate the point. To be clear, passage of a Final Rule protecting submitted CII from disclosure under FOIA will not deprive the public of existing records or information. It will encourage the submission of information useful in protecting the homeland that would not otherwise be available to the government without the rule, and therefore not available to the public in any case.

Lockheed Martin previously commented that a specific request for forwarding CII to DHS's IAIP Directorate may not always be made by the submitter. The Department stated that Sections 29.5(a), 29.5(b), and 29.5(c) were revised to remove references to indirect submissions and to clarify that submissions must be made directly to the Protected CII Program Manager or the Program Manager's designee. The Department also advised that it intends to use a phased approach that gradually expands the capabilities of the Program to receive submissions. Initially, DHS stated, submissions will be received only by the Protected CII Program Office within the Information Analysis and Infrastructure Directorate (IAIP) of the Department but that subsequent phases will expand the points of entry for information within the Department. 69 F.R. 8077.

The Department also stated that references throughout the rule to the Protected CII Program Manager have been revised to include "or designees," where appropriate, to indicate that other individuals will be designated to handle receipt, validation, and other duties related to the day-to-day operations of the Protected CII Program. 69 F.R. 8077.

Submitters are likely still to submit information with an expectation of protection other than directly to the Protected CII Program Manager or the Program Manager's designee and such information may not qualify for protection. Lockheed Martin continues to believe that a Final Rule should provide that information submitted with any reasonable indication that the submitter expects it to qualify as Protected CII should qualify as Protected CII unless it has been deemed otherwise.

Regarding CII Program Manager validation, Lockheed Martin previously suggested that the rule more clearly define the availability of a FOIA exemption and indemnity from suit during internal government processing of information and during the procedures for validation of the request for Protected CII status.

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[3] While some of these issues were previously submitted during the comment period, it is understandable, given the large number of comments received, that some may have been inadvertently overlooked in the analysis.

Referencing "nine comments requesting that the rule be clarified to explain how FOIA requests will be handled during the period of time in which the Protected CII Program Manager is making a determination regarding whether the submission is Protected CII," DHS stated that "FOIA requests concerning Protected CII will be handled in accordance with the Department's existing FOIA processes and Executive Order 12600," citing to U.S. Department of Justice, Office of Information and Privacy's Freedom of Information Act Guide & Privacy Act Overview, May 2002 Edition. The Department stated that the Protected CII Program Manager or designees will work closely with the Department's FOIA Officer to handle FOIA requests of Protected CII in a manner consistent with FOIA. 69 F.R. 8078.

Lockheed Martin believes that any Final Rule, to be effective, must specify that a FOIA exemption and indemnity from suit will be available during internal government processing of information and during the procedures for validation of the request for Protected CII status.

Lockheed Martin commented on the bar to use in civil actions and the fact that there is no creation of a private right of action, which provisions do not appear to be available if the submitted information fails to qualify as "Protected CII" even if the submitter expected it. This issue does not appear to have been addressed in the publication of the Interim Rule. Accordingly, Lockheed Martin seeks clarification that a good faith submission of information that fails to qualify as protected CII will nonetheless qualify for the bar to use in a civil action unless the submitter affirmatively elects not to withdraw the information and not to seek destruction of the submitted information.

Lockheed Martin previously commented that, under Section 29.7 (allowing use of information "to carry out official duties…"), the term "official duties" was not defined and that it should include actions of Federal contactors. This issue does not appear to have been addressed in the publication of the Interim Rule. Lockheed Martin again requests that a definition of "official duties" encompassing the actions of federal contractors be added.

Section 29.8(c) of the proposed rule provided that Protected CII could be shared with a Federal contractor "after a CII Officer certifies that the contractor is performing services in support of the purposes of DHS." Lockheed Martin suggested that the CII Officer make certifications with respect to specific CII on a case-by-case basis. This issue does not appear to have been addressed in the publication of the Interim Rule and Lockheed Martin again requests that the CII Officer be required, under the Final Rule, to make a certification with respect to specific CII on a case-by-case basis.

Lockheed Martin previously commented about inherent problems with the prohibition, under Section 29.8(c), against a contractor sharing information with any of its "components," employees, or other contractors or subcontractors without prior written approval of a CII Officer or prior written authorization from the submitter. Corporate contractors exist only through their various individual employees. Thus, the inability to share CII with corporate employees would be unworkable. Lockheed Martin also sought clarification regarding whether the previously proposed rule contemplated that CII Officers must authorize specific employees to use CII, or whether groups or types of employees could be authorized, and clarification on what type of language will constitute authorization from the submitter. Clarification of both issues is vital, although clarification of the latter issue could resolve both issues.

Lockheed Martin also previously sought a more general clarification on what type of language would constitute authorization from the submitter to enable sharing of the CII and continues to believe that guidance here would be useful.

Lockheed Martin supports the language in the Interim Rule that sets conditions on when protected information may be shared with state and local governments[4] as well as federal contractors[5] and the language that limits use of the information. Lockheed Martin further supports the protection provided under Section 29.8(g)(1) stating that protected information shared by the Program Manager or his/her designee with state and local governments will be protected against disclosure notwithstanding the provisions of any state or local law otherwise requiring disclosure of records or information.

Lockheed Martin previously suggested that submitters be given a defined period of time in which to require the return and/or destruction of information/material that might not qualify for protection. DHS modified its rules to allow the submitter to request in writing that the status of Protected CII material be changed and stated that there may be other circumstances that require the status of Protected CII to be changed. Thus, Section 29.6(f) was revised to ensure that submitters and those entities with which the Protected CII was shared are made aware of any change in status. 69 F.R. 8080. DHS said that a provision requiring that material be returned to a submitter in the event that a final validation determination is made that the submission is not Protected CII could potentially place a

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[4] Sec. 29.8 Disclosure of Protected Critical Infrastructure Information.
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(b) Federal, State, and local government sharing. The Protected CII Program Manager or the Protected CII Program Manager's designees may provide Protected CII to an employee of the Federal government, or of a State or local government, provided that such information is shared for purposes of securing the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or for another informational purpose including, without limitation, the identification, analysis, prevention, preemption, and/or disruption of terrorist threats to our homeland. Protected CII may be provided to a State or local government entity only pursuant to its express written agreement with the Protected CII Program Manager to comply with the requirements of paragraph (d) of this section and that acknowledges the understanding and responsibilities of the recipient.

[5] Sec. 29.8 Disclosure of Protected Critical Infrastructure Information.
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(c) Disclosure of information to Federal contractors. Disclosure of Protected CII to Federal contractors may be made only after the Protected CII Program Manager or a Protected CII Officer certifies that the contractor is performing services in support of the purposes of DHS, the contractor has signed corporate or individual confidentiality agreements as appropriate, covering an identified category of contractor employees where appropriate, and has agreed by contract to comply with all the requirements of the Protected CII Program. The contractor shall safeguard Protected CII in accordance with these procedures and shall not remove any ``Protected CII'' markings. Contractors shall not further disclose Protected CII to any of their components, additional employees, or other contractors (including subcontractors) without the prior written approval of the Protected CII Program Manager or the Protected CII Program Manager's designees, unless such disclosure is expressly authorized in writing by the submitter and is the subject of timely notification to the Protected CII Program Manager.

significant administrative burden on the Department. Lockheed Martin believes that the Department's concerns about administrative burdens are valid and suggests that--in order to address the equally valid concerns of submitters that CII might lose its protection--that a Final Rule provide for *destruction* by DHS of all documentation that fails to qualify for protected CII status.

Lockheed Martin has suggested that private sector members of the DHS Advisory Council, some of which will inevitably be competitors of those who will submit CII to DHS, should not be allowed to access CII submitted under the Rule unless expressly authorized in writing by the submitter. As a result of a corporation's duty to its shareholders, a very real danger exists that useful/valuable CII will be withheld from DHS if submission would allow it to be seen by a competitor. This comment/issue does not appear to have been addressed in the publication of the Interim Rule and Lockheed Martin requests that the Final Rule accommodate this concern.

III. ADDITIONAL ISSUES

Section 29.4(e) of the Interim Rule, entitled "Protected Critical Infrastructure Information Management System (PCIIMS)," states that an electronic tracking system will be developed to track submitted information.[6] The provision also states, "This compilation of Protected CII shall be safeguarded and protected in accordance with the provisions of the CII Act of 2002." Lockheed Martin suggests that this section be revised to provide that the electronic tracking system record the receipt, acknowledgement, validation, storage, dissemination, and destruction of Protected CII by making minimal necessary reference to the CII but without including the actual protected information itself as part of this system.

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[6] Sec. 29.4 Protected Critical Infrastructure Information Program Administration.
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(e) Protected Critical Infrastructure Information Management System (PCIIMS). The Protected CII Program Manager or the Protected CII Program Manager's designees shall develop and use an electronic database, to be known as the "Protected Critical Infrastructure Information Management System" (PCIIMS), to record the receipt, acknowledgement, validation, storage, dissemination, and destruction of Protected CII. This compilation of Protected CII shall be safeguarded and protected in accordance with the provisions of the CII Act of 2002.

IV. CONCLUSION

Lockheed Martin supports the efforts of the Department and the progress made in promulgating the Interim Rule. Lockheed Martin asks DHS to consider resolving/clarifying the few issues raised above.

Respectfully submitted,

By: /s/

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