Ronald R. Roos
Deputy General Counsel
and Assistant Secretary,
International Trade and
Compliance

Exelis Inc.
1650 Tysons Blvd.
Suite 1700
McLean, VA 22102

703 790 6357
703 790 6406 Fax
Ron.roos@exelisinc.com
www.exelisinc.com

ITT EXELIS

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To: Regulatory Policy Division
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce
14th Street and Pennsylvania Ave. NW.
Washington, D.C. 20230

Subject: Specially Designed Definition

Comments on Proposed Rule: EAR 772 Specially Designed [RIN 0694-AF66] [08-03-12 R2]

772.1 (b)(3) provision discussion

<u>772.1 (b)(3) as currently proposed under the rule:</u>

> (b)(3) Has the same form, fit, and performance capabilities as a part, component, accessory, or attachment used in or with a commodity that: (i) Is or was in production (i.e., not in development); *and* (ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism reasons;

Within enumerated or referenced commodities and defense articles, many parts and minor assembled components of electrical and mechanical nature may be combined to form other minor or major components of an end item. In such cases, the aggregate of a set of components together (e.g. a completed circuit card) are actually responsible for the commodity or defense article achieving "controlled performance levels, characteristics, or functions" for the defense article versus the particular contribution of a single part or minor component in isolation, which alone may possess no particular military significance, and presents no national security risk through transfer or dissemination of related technology or technical data.

While minor components under consideration for release as not "specially designed" through (b)(3) may not have commercially available equivalents which conform identically in the criteria of "form" and "fit", and therefore are by a design process ("development") tailored to particular configuration for their purpose within a commodity or defense article application, they frequently are identical, closely conforming, or typical in terms of their functional performance capability within the spectrum of widely available, non-USML components.

For example, a particular commodity or defense article application might require a resistor with a value of 0.00017 ohms, whereas standard commercially available values may be acquired in increments of 0.00015, 0.00018 and 0.00020 ohms respectively. In all other respects of environmental capability, mechanical shock resistance, etc., the standard commercially available resistors are compatible with the

intended application. In such a circumstance, because the required resistor of 0.00017 ohms falls within the overall performance capability range of commercially available, non-defense article performance parameters, such an item should appropriately not be subjected to capture as "specially designed".

In another example, a requested alteration for a manufacturer to trim the standard lead length of a commercially available, non-defense article integrated circuit socket by .3mm to make it suitable for fit within a defense article application triggers the capture of the article as "specially designed" under the 120.41 (a)(2) provisions due to the necessary preceding "development" involving a minor design input for such alteration. However, in this example, the alteration in "form" and "fit" has no impact on the relevant electrical performance characteristics ("performance capabilities") of the subject article under consideration. Therefore, here also we would propose the article should not be captured as "specially designed" within the CCL.

Our proposed revision focuses the release criteria on the performance capabilities of the article and whether such capability exceeds that of identical or similar types of articles. In fact, limiting the release criteria to articles which have the same (identical) form, fit and performance capabilities as under the current proposed rule would have the unintended effect of designating articles with the same form and fit but with *lower or inferior* performance capabilities as "specially designed". This logical outcome points toward the criticality of refining the release criteria to address the relevant performance capability parameters for articles of the same type or class under consideration.

In conclusion, we believe the release criteria of (b)(3) as currently proposed is unnecessarily limited. We believe our proposed revision to (b)(3) is consistent with the objectives of the statement of policy in ITAR Section 120.3, i.e., that the new "600 Series" ECCN should not control items that have performance equivalents to those used for civil applications and which otherwise do not have significant military or intelligence applicability such that control under the ITAR or the "600 Series" is warranted. Accordingly, we suggest revising (b)(3) as follows:

<u>Proposed revision:</u>

> **(b)(3) Has performance capabilities not exceeding those of a part, component, accessory, or attachment used in or with a commodity that: (i) Is or was in production (i.e., not in development); *and* (ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons;**

Regards,

Ronald R. Roos
Deputy General Counsel and
Assistant Secretary,
International Trade and Compliance

CC: Lloyd Porter
Trade Compliance Manager
Communications & Force Protection Systems

Karen Jones
Director, Trade Compliance
Electronic Systems