

## Trade Compliance Flash: FEMA Issues New Exemptions from Export Restrictions on Personal Protective Equipment (PPE)

International Alert

**04.23.2020**

The Federal Emergency Management Agency (FEMA) published a [Federal Register Notice](#) on April 21, 2020, formalizing 10 new exemptions to the current restrictions on the export of personal protective equipment (Covered PPE) used to combat the outbreak of COVID-19 in the United States. These exemptions clarify that the export restrictions are targeted primarily at commercial shipments of Covered PPE and are meant to be minimally disruptive to U.S. companies and other U.S. entities seeking to export such items. Among other categories, the exemptions allow for the export of PPE by non-profits and non-government organizations, intracompany transfers, shipments to Canada and Mexico, and shipments of materials for the production of medical and diagnostic testing kits outside the United States.

As previously discussed in our [Q&A on Export Restrictions on PPE](#), FEMA acted quickly to restrict the export of five categories of Covered PPE from the United States—including N95 and other respirators, surgical masks, and exam gloves—on April 9, 2020, following a Presidential Memorandum allocating such items for domestic use. FEMA's restrictions are administered in part by the U.S. Customs and Border Protection (CBP), which is instructed to detain Covered PPE shipments pending review by FEMA as to whether they should be allocated for domestic use.

The rapid roll-out of these restrictions created uncertainty for many U.S. companies, non-profits, and individuals who may be required to export Covered PPE for humanitarian purposes, protection of American workers abroad, continuity of supply chains, and reasons other than commercial sale. The new exemptions now address this uncertainty, signaling FEMA's policy stance on certain legitimate exports with no direct commercial purpose and signaling the agency's continued flexibility in implementation of emergency export restrictions.

At the time of drafting, FEMA and CBP are continuing to refine the procedures for claiming exemptions to the export restrictions. Notably, certain exemptions require submission of a Letter of Attestation to CBP providing details sufficient for FEMA to assess the applicability of the exemption and certifying the truth and accuracy of all information provided. The agencies continue to refine the formal and procedural requirements for submitting such letters, which are details of crucial importance to exporters seeking an exemption. We anticipate further updates and progress in this area as roll out of the export restrictions continues.

We discuss the exemptions and procedural guidelines in detail below.

### The Exemptions

Since the new export restrictions were introduced, FEMA has made clear that it does not seek or intend to prohibit all exports of Covered PPE outside the United States. When issuing the Rule, FEMA provided one exemption and made clear that it may announce new exemptions that it determines are "necessary or appropriate to promote the national defense." Now, through the April 21, 2020 [Federal Register Notice](#), FEMA has provided 10 new exemptions, bringing the total number of exemptions to 11. FEMA may also develop additional guidance on which exports are covered by the exemptions and encourages manufacturers to contact FEMA with specific information about their eligibility for the exemption. As explained in more detail below, a Letter of Attestation is also required to claim certain exemptions. Where applicable to a particular exemption, we have noted the Letter of Attestation requirement.

We summarize the exemptions below:

- **Shipments by Certain U.S. Manufacturers**: The Rule provides an explicit exemption for shipments where the (a) shipment is made

by or on behalf of U.S. manufacturers that have had continuous export agreements with foreign customers since at least January 1, 2020; and (b) 80 percent of the manufacturer's products covered by the Rule (on a per item basis) were distributed within the United States over the preceding 12 months.

- **Shipments to U.S. Commonwealths and Territories, Including Guam, American Samoa, Puerto Rico, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (Including Minor Outlying Islands):** Although these are not technically exports, this exemption was included to clear up a common point of confusion regarding shipments to these locations.
- **Exports of Covered PPE by Non-profit or Non-governmental Organizations that are Solely for Donation to Foreign Charities or Governments for Free Distribution (Not Sale) at their Destination(s):** The Notice provides that a shipment will be exempt from the Rule provided that (a) the U.S. exporter is a non-governmental organization; (b) the foreign recipient is a foreign government or charity; and (c) the Covered PPE cannot be sold upon receipt.
  - Note: FEMA will require a Letter of Attestation from exporters claiming this exemption, submitted according to the procedures discussed below.
- **Intracompany Transfers of Covered Materials by U.S. Companies from Domestic Facilities to Company-owned or Affiliated Foreign Facilities**
  - Note: FEMA will require a Letter of Attestation from exporters claiming this exemption, submitted according to the procedures discussed below.
- **Shipments of Covered Materials that are Exported Solely for Assembly in Medical Kits and Diagnostic Testing Kits Destined for U.S. Sale and Delivery**
  - Note: FEMA will require a Letter of Attestation from exporters claiming this exemption, submitted according to the procedures discussed below.
- **Sealed, Sterile Medical Kits and Diagnostic Testing Kits Where Only a Portion of the Kit is Made Up of One or More Covered Materials That Cannot be Easily Removed Without Damaging the Kits**
- **Declared Diplomatic Shipments from Foreign Embassies and Consulates to their Home Countries**
- **Shipments to Overseas U.S. Military Addresses, Foreign Service Posts ( e.g., Diplomatic Post Offices), and Embassies**
- **In-Transit Merchandise: Shipments in Transit through the United States with a Foreign Shipper and Consignee, Including Shipments Temporarily Entered into a Warehouse or Temporarily Admitted to a Foreign Trade Zone**
  - Note: FEMA will require a Letter of Attestation from exporters claiming this exemption, submitted according to the procedures discussed below.
- **Shipments for Which the Final Destination is Canada or Mexico**
  - Note: FEMA will require a Letter of Attestation from exporters claiming this exemption, submitted according to the procedures discussed below.
- **Shipments by or on behalf of the U.S. Federal Government, including the U.S. Military**

## Procedural Guidance for Claiming the Exemptions

Exports of Covered PPE are now subject to detention by CBP, pending FEMA's review of whether the shipment meets the exemption's criteria. Covered PPE determined to fall within an exemption is then authorized for export without further review. Nevertheless, FEMA retains the ability to waive the exemption and fully review the shipment if FEMA determines that doing so "is necessary or appropriate to promote the national defense." Further, if CBP believes that a manufacturer, broker, distributor, exporter, or shipper of the Covered PPE is intentionally altering their shipments to take advantage of the exemptions, the agency may be more likely to detain the shipment for greater scrutiny by FEMA.

As noted above, a Letter of Attestation is required to claim several of the exemptions. The Letter of Attestation must include: (a) a description of which exemption(s) the export is claiming; (b) details sufficient for FEMA and CBP to determine whether the claimed exemption(s) apply; and (c) a statement that the provided information is true and accurate to the best of the exporter's knowledge and that the exporter is aware that the submission of false information may subject them to prosecution. Further, the Letter of Attestation for exports claiming that their final destination is Canada or Mexico must also include a statement that the products are being shipped for use in Canada and Mexico and will not be transhipped through those countries. To minimize delay, exporters should carefully review the language of the relevant exemption they are claiming to ensure that they tailor their Letter of Attestation to satisfy FEMA's criteria.

The Letter of Attestation must be submitted through CBP's Document Imaging System (DIS) electronically, either (a) through secure web services, file transfer protocol, or messaging queue, or (b) by email to [docs@cbp.dhs.gov](mailto:docs@cbp.dhs.gov). For submission of Letters of Attestation through secure web services, file transfer protocol, or messaging queue, CBP directs exporters to Appendix B of its DIS Implementation Guide, [available here](#). CBP requires use of Data Element "ITN" for submissions of the Letter of Attestation. Additional guidance and a template for submission of the Letter of Attestation are likely forthcoming.

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As events around the COVID-19 crisis unfold, and the government continues to act in response, affected and potentially affected companies and individuals would be advised to proactively consider how to respond and prepare.

Miller & Chevalier has the experience and expertise to help you navigate these new FEMA and CBP export requirements as well as future restrictions. Together, our [Customs & Import Trade Policy](#) and [Economic Sanctions & Export Controls](#) teams have extensive experience handling matters before government agencies, including negotiating the release of merchandise detained by CBP and obtaining authorization from the Department of Commerce's Bureau of Industry and Security (BIS) for the export of restricted items. As government responses to the COVID-19 crisis are rapidly developing, we can ensure that you are in compliance with any new export restrictions, help you submit comments to the government, and advocate on your behalf before government agencies and Congress.

Given the ongoing nature of the COVID-19 crisis and the government's actions, we will continue to update this Trade Compliance Flash as appropriate.

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