



## COVID-19 Update

April 2020

### UPDATE: FEMA Announces Additional Exemptions to Recently Effective Export Restrictions on Personal Protective Equipment

#### Key Notes:

- Effective April 7, 2020, most exports from the United States of certain respirators, masks and gloves require approval from FEMA.
- Effective April 17, 2020, FEMA announced 10 exemptions to the export restrictions.
- Exempted exports still require clearance from FEMA.
- Restrictions continue until August 8, 2020.

On April 7, 2020, the U.S. Department of Homeland Security's Federal Emergency Management Agency ("FEMA") issued a [temporary final rule](#) ("Rule") to establish export restrictions on certain types of personal protective equipment products ("PPE") and respirators ("Covered Products") used in the response to the COVID-19 pandemic. The Rule implements the [Presidential Memorandum](#) dated April 3, 2020, in which President Trump directed Homeland Security to take action under the Defense Production Act of 1950 (50 U.S.C. § 4501) to prevent diversion of the necessary materials overseas. The Rule will remain in effect until August 8, 2020.

On April 17, 2020, the Federal Emergency Management Agency's (FEMA) filed a [notification of exemptions](#) (the "Exemptions") that identifies 10 exemptions for certain types of exports of the Covered Products. (The notice was published in the Federal Register on April 21, 2020 but effective on the date filed, April 17, 2020.)

#### What PPE and respirators are covered by the Rule?

The Rule covers some, but not all, of the 15 categories of materials the U.S. Department of Health and Human Services identified as "scarce or threatened materials" in a [notice](#) dated March 25, 2020. Specifically, the Covered Products are:

- N-95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece, non-powered, air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates;
- Other Filtering Facepiece Respirators (e.g., those designated as N99, N100, R95, R99, R100, or P95, P99, P100), including single-use, disposable half-mask respiratory protective devices that cover the user's airway (nose and mouth) and offer protection from particulate materials at an N95 filtration efficiency level per 42 CFR § 84.181;
- Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges;
- PPE surgical masks, including masks that cover the user's nose and mouth and provide a physical barrier to fluids and particulate materials; and
- PPE gloves or surgical gloves, including those defined at 21 CFR § 880.6250 (exam gloves) and § 878.4460 (surgical gloves).

The Rule applies to all persons involved in the export of the Covered Products from the United States, including

“manufacturers, brokers, distributors, exporters, and shippers.”

### What will happen to the Covered Products at the border?

The Rule provides that all shipments of the covered PPE will be “temporarily detained” by U.S. Customs and Border Protection while FEMA determines whether to:

1. Return the shipment for domestic use;
2. Issue a rated order under the DPA; or
3. Allow the export of part or all of the shipment.

In reaching a determination about a particular shipment, the Rule states that FEMA will consider the totality of the circumstances, including the following:

- The need to ensure that scarce or threatened items are appropriately allocated for domestic use;
- Minimization of disruption to the supply chain, both domestically and abroad;
- The circumstances surrounding the distribution of the materials and any potential hoarding or price-gouging concerns;
- The quantity and quality of the materials;
- Humanitarian considerations; and
- International relations and diplomatic considerations.

### What shipments are exempt from the Rule?

The Rule originally contained a limited exemption for covered PPE “from shipments made by or on behalf of U.S. manufacturers with continuous export agreements with customers in other countries since at least January 1, 2020, so long as at least 80% of such manufacturer’s domestic production of these materials was distributed in the U.S. in the preceding 12 months.”

Effective April 17, 2020, the following 10 types of shipments of Covered Products are also exempt from the Rule:

1. 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).

2. Exports 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).
3. Intracompany transfers by U.S. companies from domestic facilities to company-owned or affiliated foreign facilities.
4. Shipments of Covered Products exported solely for assembly in medical kits and diagnostic testing kits destined for U.S. sale and delivery.
5. Sealed, sterile medical kits and diagnostic testing kits where only a portion of the kit is made up of one or more Covered Products that cannot be easily removed without damaging the kits.
6. Declared diplomatic shipments from foreign embassies and consulates to their home countries, shipped from and consigned to foreign governments (may be shipped via intermediaries).
7. Shipments to overseas U.S. military addresses, foreign service posts (e.g., diplomatic post offices,) and embassies.
8. In-transit merchandise such as shipments in transit through the United States with a foreign shipper and consignee and shipments temporarily entered into a warehouse or temporarily admitted to a foreign trade zone.
9. Shipments for which the final destination is Canada or Mexico.
10. Shipments by or on behalf of the U.S. federal government, including its military.

Each of the Exemptions includes additional details on their scope and the basis for each exemption.

### What documentation is required to claim an exemption?

Exemptions (2), (3), (4), (8), and (9) require that exporters submit a letter of attestation to FEMA via CBP’s document imaging system certifying the purpose of the shipment. The letter must also include the following information:

- a description of which Exemption the exporter is claiming;
- details regarding the shipment sufficient for CBP and FEMA officials to determine whether the shipment falls under the claimed Exemption(s); and
- a statement that the information provided is true and accurate to the best of the exporter's knowledge, and that the exporter is aware that false information is subject to prosecution under the Defense Production Act.

If FEMA determines that a shipment of covered PPE falls within an exemption, the shipment may be transferred out of the United States without further review by FEMA.

However, FEMA has directed CBP to detain shipments of any manufacturer, broker, distributor, exporter or shipper that CBP believes "is intentionally modifying shipments in a way to take advantage of one or more of these exemptions, diverting materials from the U.S. market or is otherwise trying to circumvent the export restrictions."

### How long will FEMA take to make a determination?

FEMA stated that it plans to make its determinations for most shipments of Covered Products within 2-4 days. To avoid processing delays, exporters should upload their letters of attestation to CBP's document-imaging system at the same time their Electronic Export Information is transmitted in the Automated Export System.

### What are the penalties for violations of the Rule?

Any person who willfully violates the Rule, may face monetary penalties of up to \$10,000 and/or imprisonment for no more than one year under the DPA. Further, under 18 U.S.C. § 554, anyone who fraudulently or knowingly exports anything from the United States contrary to U.S. law, or who facilitates such a transaction, can face fines and/or up to 10 years' imprisonment.

If you need help drafting a letter of attestation or determining whether your shipment falls within one of the exemptions, please contact us.

### FOR MORE INFORMATION

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### Additional Resources

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force](#) page for additional information and resources.

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