

## FEMA Issues New Exemptions to Temporary Rule Authorizing CBP to Detain Certain Exports of Health and Medical Materials

April 20, 2020

### Key Points

- Effective April 17, 2020, FEMA expanded exemptions to its April 7, 2020, Temporary Rule that implemented export restrictions on certain shipments of personal protective equipment.
- FEMA issued the Temporary Rule to ensure that scarce or threatened supplies of personal protective equipment used in response to the spread of COVID-19 remain in the United States for domestic use.
- Under the new exemptions to the Temporary Rule, shipments of personal protective equipment may be exported from the United States if they fall within certain categories.

### Background

On April 17, 2020, the Federal Emergency Management Agency (FEMA) issued **updated guidance** (the “Guidance”) regarding exemptions to its **temporary final rule** (the “Temporary Rule”) of April 7, 2020.

As detailed in a previous **Akin Gump client alert**, the Temporary Rule established export restrictions on five types of personal protective equipment (PPE) and authorized U.S. Customs and Border Protection (CBP) to temporarily detain exports of those products pending a determination by FEMA on whether to return the shipment for domestic use, to issue a Defense Production Act (DPA)-rated order for the shipment, or to allow the exportation of part or all of the shipment.

FEMA’s Guidance establishes 10 new exemptions, effective immediately, that permit covered PPE shipments to leave the United States without FEMA’s explicit approval. The Guidance follows FEMA’s April 9, 2020, circulation of an internal CBP memorandum that had suggested several possible exclusions to the Temporary Rule.

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## Exemptions to the Temporary Rule

The Temporary Rule provides an explicit exemption for shipments 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 if 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.

The Guidance lists 10 additional categories of shipments that are exempt from the Temporary Rule and may be exported from the United States without further review by FEMA.

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 of Covered Materials 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 of Covered Materials by U.S. Companies from Domestic Facilities to Company-owned or Affiliated Foreign Facilities.
4. Shipments of Covered Materials that are 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 Materials That Cannot be Easily Removed Without Damaging the Kits.
6. Declared Diplomatic Shipments from Foreign Embassies and Consulates to their Home Countries. These May be Shipped via Intermediaries (Logistics Providers) but are Shipped from and Consigned to Foreign Governments.
7. Shipments to Overseas U.S. Military Addresses, Foreign Service Posts (e.g. Diplomatic Post Offices), and Embassies.
8. 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.
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.

## Guidance for the Customs and Export Communities

For exemptions (2), (3), (4), (8) and (9) above, FEMA requires submission of a letter of attestation via CBP's document imaging system (DIS) certifying the purpose of the shipment. The letter should be submitted to CBP with other documentation related to the shipment, and contain the following information:

1. A description of which exemption(s) the exporter is claiming.
2. Details regarding the shipment that are sufficient for CBP and FEMA officials to determine whether the shipment falls under the claimed exemption(s).

3. 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 false information is subject to prosecution under the DPA, as outlined in the Temporary Rule.

The Guidance does not specify requirements for accompanying documentation for exporters relying on the other exemptions.

Under the Guidance, FEMA retains discretion to waive any exemption at any time and fully review shipments of covered material to promote national defense interests. Furthermore, if CBP finds that a manufacturer is manipulating shipments of covered PPE to take advantage of the exceptions, CBP may detain the shipment and forward the shipment information to FEMA for review.

The Guidance eliminated some of the possible exclusions suggested by the earlier internal CBP memorandum. In particular, the Guidance contains no indication that FEMA or CBP will limit their focus to shipments of "commercial quantities." The Guidance also omits any mention of an exclusion for express or mail parcels that was originally suggested in the CBP memorandum.

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