

Alert

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U.S. to Prohibit the Export of Certain Personal Protective Equipment

On Friday, April 10, the Federal Emergency Management Agency (FEMA), published a temporary final rule that restricts the exportation of certain personal protective equipment (PPE) from the United States. The temporary rule became effective upon publication and is scheduled to remain in effect for 120 days (i.e., until August 8), although this could be extended. Specific PPE that may be subject to restriction from export includes:

- N95 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) and such gloves intended for the same purposes.

The temporary rule implements a policy statement issued by President Trump on Friday, April 3 pursuant to the Defense Production Act, wherein he described various executive orders that had been issued with regard to the allocation of medical resources, in particular PPE, and generally directed the Department of Homeland Security (of which FEMA is a component) to safeguard the domestic supply of these resources by preventing hoarding and prioritizing their allocation. In addition, "Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use" established a policy "to prevent domestic brokers, distributors, and other intermediaries from diverting such material overseas" on the grounds that the domestic need for this equipment exceeds the supply.

As further clarified in a joint statement from FEMA and U.S. Customs and Border Protection (CBP), shipments of the described PPE in transit for export will be seized by CBP to allow FEMA to determine "whether to return the PPE for use within the United States; to purchase the PPE on behalf of the United States; or, allow it to be exported."

CBP also provided an Updated Guidance Memorandum on April 9 confirming that the enforcement of the temporary rule will be on commercial quantities, or quantities valued at over \$2,500 and containing more than 10,000 units of equipment.

The rule does provide an exception for certain manufacturers with pre-existing commercial relationships. Shipments by U.S. manufacturers that have had continuous export agreements in place with customers in other countries since at least January 1, 2020, will be allowed "so long as at least 80 percent of such manufacturer's domestic production of covered materials, on a per item



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basis, was distributed in the United States in the preceding 12 months.”

The Updated Guidance Memorandum also included exceptions for:

- Exports to Canada or Mexico;
- Exports by critical infrastructure industries for worker protections;
- Exports to U.S. Government agencies such as U.S. military bases overseas;
- Exports by U.S. Government agencies;
- Exports by U.S. charities;
- Exports by the 3M Company;
- In transit shipments; and
- Express or mail parcels that do not meet the commercial quantity definition.

It remains unclear whether CBP and FEMA will apply the rule narrowly or expand it more broadly to include other forms of PPE, such as surgical gowns, examination gowns, face shields, etc. It is also unclear whether this rule will impact imports of PPE from countries considering retaliation against the policy. However, as a practical matter, shippers, forwarders, and carriers engaged in the export of PPE should expect their shipments to be detained by CBP pending approval of the export by FEMA.

For more information regarding this temporary rule or other trade issues arising from the global response to COVID-19, please contact a member of the Cozen O'Connor Transportation and Trade Group.