



## BIS Issues Guidance on Export Controls Under the Foreign Military Sales (FMS) Program

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The U.S. Foreign Military Sales (FMS) Program offers government contractors and suppliers to the U.S. defense industry valuable access to markets outside the United States and to bona fide customers in those markets. The FMS Program also presents unique export compliance advantages over other means of selling products to foreign governments and entities, such as Direct Commercial Sale (DCS) and Foreign Military Financing (FMF) arrangements.

Under the FMS process, foreign governments usually proceed through the U.S. Government, which issues a solicitation for desired supplies. From a contractor's perspective, the deal resembles a traditional government procurement with delivery usually being made to a U.S. location for export by the U.S. Government. In some instances, however, the contractor is requested to ship overseas and thus take on any export licensing obligations. This can occur for exports of both military items regulated under the International Traffic in Arms Regulations (ITAR), administered by the U.S. State Department's Directorate of Defense Trade Controls (DDTC), and military and dual-use items regulated under the Export Administration Regulations (EAR), administered by the U.S. Commerce Department's Bureau of Industry and Security (BIS).

Under the EAR, in particular, exports of dual-use and military items otherwise subject to the EAR are broadly excluded from the regulations when sold pursuant to an FMS case. The exclusion, which is codified at EAR Section 734.3b)(1)(vi), renders items sold under the FMS Program not "subject to the EAR." Thus, they are outside EAR jurisdiction and export licensing requirements. Applying the exclusion, however, is not always straightforward and became more complicated after Export Control Reform, which transferred many defense articles from the ITAR's U.S. Munitions List (USML) to the EAR's Commerce Control List (under "600 series" classifications).

To address persisting confusion about the scope and meaning of the EAR's FMS exclusion, BIS recently published new guidance on FMS exports in the form of nine FAQs (the "FMS FAQs"). Issued

jointly by BIS, DDTC, the Office of Regional Stability and Arms Transfer (RSAT), and the Defense Security Cooperation Agency (DCSA), the FMS FAQs address the most common questions BIS receives from industry about how to treat items ordinarily subject to the EAR that are for export under FMS Programs. For exporters involved in FMS transactions, the FMS FAQs offer much needed clarification of the regulations and practical guidance. The following highlights a few key points from the guidance.

### ***Licensing Requirements for FMS Items Otherwise Subject to the EAR***

Exports under the FMS Program are subject to a unique export licensing regime. As clarified in the FMS FAQs, "Items that will be exported under FMS authority are not "subject to the EAR" pursuant to § 734.3(b)(1)(vi) of the EAR because they are "defense articles" pursuant to section 47 of the AECA (22 U.S.C. 2794)."[1] This means that BIS will not grant an EAR license for these exports, which could potentially include "600 series" items, other items described in an Export Control Classification Number (ECCN), and EAR99 items.

So, what is the export licensing requirement for items otherwise subject to the EAR that are exported pursuant to an FMS case? The FMS FAQs provide two answers. DDTC may authorize exports of EAR items used "in or with" USML defense articles and included in the same shipments as those defense articles, under the USML paragraph (x) designation.[2] Otherwise, when the items are exported under FMS authority, "no license or other approval under the ITAR or EAR is required for the export of defense articles that would otherwise be "subject to the EAR"."[3] In that case, the terms and conditions of the relevant FMS case Letter of Offer and Acceptance (LOA) serve as the U.S. Government authorization.

The FMS FAQs further clarify that BIS will issue a standard Return Without Action (RWA) notice for license requests for exports under FMS cases. The RWA notice will indicate that the items are exported under FMS authority and therefore are not "subject to the EAR" and do not require an EAR license. As stated in the FMS FAQs, the exporter need not obtain an RWA notice to proceed with the exports.

### ***Procedures for Determining if an Export is Under FMS Authorization***

A recurring problem for exporters involved in FMS transactions is verifying that an export is in fact authorized by an FMS LOA, which is a necessary condition for exclusion from the EAR. Some exporters do not have access to the LOA. This is common where the exporter is an indirect supplier to the parties and where their customers are simply unable or unwilling to provide the LOA. Without access to the LOA, the exporter has limited ability to verify that a transaction is within the scope of an FMS Program, a common problem for exporters of replacement parts and components of larger defense systems.

To address these circumstances, the FMS FAQs provide instructions for exporters to determine whether items may be exported under FMS authority. They direct the exporter to (i) determine if the item is described on the USML, and thus under DDTC jurisdiction; (ii) determine if the item is otherwise "subject to the EAR"; and (iii) determine if the export is under FMS authority, including within the scope of a valid LOA. If the exporter still is not certain that FMS authority applies, the FMS FAQs instruct the exporter to contact the Implementing Agency or Line Manager that has implemented the contract and

then, as needed, contact RSAT or DSCA to determine whether the export is within the scope of a particular FMS case and LOA. The FMS FAQs include relevant contact information for each agency.

### ***Exporting Under FMS Authorization***

Exports under FMS authority are subject to usual export declaration requirements and scrutiny by U.S. Customs and Border Protection. To facilitate proper review and avoid complications at the port, the FMS FAQs recommend including the following statement in export control documents that accompany the exported items ordinarily subject to the EAR: ?Not subject to the EAR (NOEAR) pursuant to section 734.3(b)(1)(vi).?

In addition, exporters involved in FMS transactions should ensure that their export compliance programs are adapted to FMS Program exports. This includes having adequate procedures for verifying that transactions are covered by a LOA and procedures to retain appropriate records supporting FMS determinations and exports. Exporters unable to confirm FMS authority for transactions should follow the instructions set forth in the FMS FAQs and, where necessary, seek guidance from the relevant U.S. Government agencies.

Williams Mullen attorneys regularly advise government contractors and exporters on all aspects of FMS and other defense sales and services. For more information, please contact Christopher H. Skinner at (202) 293-8129 or [cskinner@williamsmullen.com](mailto:cskinner@williamsmullen.com).

[1] See FMS FAQs at A.2.

[2] See FMS FAQs at A.1 and ITAR § 120.5(b).

[3] See FMS FAQs at A.2.

## **Related People**

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## **Related Services**

- International Trade and Business
- ITAR, Export Controls and Economic Sanctions