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FMS FAQs: Exports of items that would otherwise be “subject to Export Administration Regulations (EAR),”¹ but are authorized under the Foreign Military Sales (FMS) Program of the Arms Export Control Act (AECA) pursuant to a Letter of Offer and Acceptance (LOA).

Introduction:

These Joint FMS FAQs were developed by the Bureau of Industry and Security (BIS) and the U.S. Census Bureau at the Department of Commerce; the Directorate of Defense Trade Controls (DDTC) and the Office of Regional Security and Arms Transfers (RSAT) at the Department of State; the Defense Security Cooperation Agency (DSCA) at the Department of Defense; and U.S. Customs and Border Protection (CBP) at the Department of Homeland Security.

These Joint FMS FAQs address questions that have been received about items that would otherwise be “subject to the EAR,” but are not “subject to the EAR” because they will be exported under FMS authority. The agencies that developed the FAQs are posting them to provide information to exporters.

These FAQs were created because BIS, DDTC, RSAT, DSCA, and CBP continue to receive questions from the public regarding the export of items that were moved from the USML to the CCL that are being exported under FMS authority. Exporters are having difficulty in understanding how the EAR, [the International Traffic in Arms Regulations \(22 CFR 120-130\) \(ITAR\)](#) and the FMS Program relate to each other for items transitioned from the ITAR to the EAR. The movement of these items to the EAR did not change the FMS Program. However, once the “600 series” military items were moved to the EAR, application questions about the FMS Program increased because the number of FMS exports of items that would otherwise have been subject to the EAR increased significantly. These FAQs will provide guidance to address common questions the agencies have received on this aspect of the FMS Program.

Questions specific to the application of the FMS Program, [the International Traffic in Arms Regulations \(22 CFR 120-130\) \(ITAR\)](#), security cooperation programs, or [the Export Administration Regulations \(15 CFR 730-774\) \(EAR\)](#) should be directed to the relevant agencies, as applicable:

Questions on the FMS Program should be directed to RSAT:

- Email: PM_RSATFMSTeam@state.gov
- Tel: (202) 663-3030
- <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-political-military-affairs/office-of-regional-security-and-arms-transfers/>

¹ If the item is “subject to the EAR,” it is enumerated or otherwise described in an Export Control Classification Number (ECCN) or designated as EAR99. This same footnote applies to all FMS FAQs in which the phrase that would otherwise be “subject to the EAR” is used.

Questions on the retransfer or change of end use of defense articles acquired via the FMS Program should be directed to the third party transfer (TPT) team in RSAT:

- Email: PM_RSAT-TPT@state.gov
- <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-political-military-affairs/office-of-regional-security-and-arms-transfers/>

Questions specific to the ITAR should be directed to DDTC:

- Email: ddtcreponseteam@state.gov
- Tel: (202) 663-1282
- https://www.pmddtc.state.gov/ddtc_public

Questions specific to a security cooperation program administered by DSCA should be directed to DSCA:

- Email: dscan.cr.lmo.mbx.info@mail.mil
- Tel: (703) 697-9709
- <http://www.dscamail/>

Questions specific to the EAR should be directed to BIS:

- E-mail: ECDOEXS@bis.doc.gov
- Tel: (202) 482-4811 - Outreach and Educational Services Division (located in Washington, DC); (949) 660-0144 - Western Regional Office (located in Irvine, CA); (408) 998-8806 - Northern California branch (located in San Jose, CA)
- www.bis.doc.gov

Q.1: I will be exporting an item normally “subject to the EAR,” under FMS authority. [Section 734.3\(b\)\(1\)\(vi\) of the EAR](#) specifies that the export of items exported under FMS authority are not “subject to the EAR.” Does this mean I may apply (or do I have to apply) for a license or other approval from the Department of State under the ITAR for this export?

A.1: 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). The Department of State has the authority to license the export of defense articles or services as described in section 38 of the AECA (22 U.S.C. 2778) and described on the [United States Munitions List \(USML\)](#), which is contained in part 121 of the ITAR. The Department of State may also authorize items not described on the USML if the requirements of [§ 120.5\(b\)](#) have been met, including that the item “is for use in or with a defense article and is included in the same shipment as any defense article.” The Department of State has determined that it has the authority to authorize items normally “subject to the EAR” but that will be exported under FMS authority if the item will be used in or with a USML defense article. Thus, an applicant may include such items on a DDTC application as USML paragraph (x) items when for use in or with USML defense articles listed on the same DDTC application and will be included in the same shipment as those USML defense articles.

Q.2: I understand the ITAR section 120.5(b) approval process. However, in my export scenario, the items will not be exported “in or with” any defense articles that are enumerated or otherwise described on the USML. Because DDTC will not issue a license or other approval, may I apply (or do I have to apply) for a license from BIS to authorize these types of exports?

A.2: As noted in Q.1, items that are “subject to the EAR,” but will be exported under the FMS authority, are not “subject to the EAR” pursuant to § 734.3(b)(1)(vi) of the EAR. Therefore, BIS will not issue a license for the export of these items. When exported under FMS authority, these items are “defense articles” under section 47 of the AECA (22 U.S.C. 2794) but are not defense articles described on the USML. Therefore, 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,” but are not because they are exported under the FMS authority. If a license application is submitted to BIS for the export of such items, BIS will generally include the following statement in its RWA notification:

This application is returned without action because the items described in this proposed transaction were sold by the Department of Defense to a foreign country under the Foreign Military Sales (FMS) Program of the Arms Export Control Act (AECA) pursuant to a Letter of Offer and Acceptance (LOA) authorizing the transfer (export). The items being exported do not require a license under the EAR, 15 CFR 730-774. These items, which would otherwise be “subject to the EAR,” are being exported under FMS authority. Therefore, the items for purposes of this specific export are not “subject to the EAR,” pursuant to section 734.3(b)(1)(vi) of the EAR.

Q.3: Answers A.1 and A.2 above clarify that a license or other approval is not required under the EAR or the ITAR for the export of items that are “subject to the EAR,” but will be exported under FMS authority, as specified in § 734.3(b)(1)(vi) of the EAR. Does this mean there is no U.S. Government authorization required for such exports?

A.3: The terms and conditions of the LOA govern the export, reexport, or other transfer of the items shipped under the FMS case and thus serve as the U.S. Government authorization. See also § 734.3(b)(1)(vi) of the EAR.

Q.4: In order to abide by § 734.3(b)(1)(vi) for the export of items that would otherwise be “subject to the EAR,” but are not because they will be exported under FMS authority, is it necessary to obtain a return without action (RWA) notification from DDTC and BIS?

A.4: No. An exporter is not required to obtain an RWA notification from either BIS or DDTC for such exports. BIS and DDTC will issue RWA notifications if applicable, but exporters are encouraged not to apply for licenses or other authorizations when they know a license is not required from BIS and DDTC.

Q.5: How do I determine whether or not I need a license or other authorization from BIS for the export of items under FMS authority?

A.5: The export of an item under FMS authority does not require a license or other authorization (including a No License Required (NLR) designation) from BIS. The exporter must have determined that the:

(i) item to be exported, reexported, or transferred (in-country) is not enumerated or otherwise described on the USML;

(ii) item would otherwise be “subject to the EAR” because the item would either meet a control parameter of an Export Control Classification Number (ECCN) or would be designated EAR99, absent being excluded from the EAR on the basis of § 734.3(b)(1)(vi); *and*

(iii) item to be exported, reexported, or transferred (in-country) meets the criteria of § 734.3(b)(1)(vi) – meaning it will be exported under FMS authority.

Q.6: If I’m not sure if my item will be exported under FMS authority, does § 734.3(b)(1)(vi) apply?

A.6: An export is either being made under FMS authority, or it is not. To be not “subject to the EAR” pursuant to § 734.3(b)(1)(vi), the export must meet the criteria of § 734.3(b)(1)(vi). If the export does not meet the criteria in § 734.3(b)(1)(vi), the export of the item is “subject to the EAR” (provided the item is not subject to the exclusive jurisdiction of another U.S. Government export control agency and not otherwise subject to the EAR based on other exclusion criteria in part 734) and may require an EAR authorization (depending on the specifics of the export). If submitting an application to BIS for the export of items that may be authorized under an FMS case pursuant to an LOA, the applicant should note the possible eligibility of the FMS authorization within the application. BIS will review the license application as any other similar license application but, if approved, will likely include a rider putting the exporter on notice that the license is not applicable if the items are exported under FMS authority pursuant to an LOA.

BIS does not administer the FMS Program nor does it enter into LOAs. Therefore, when an exporter is not sure whether an export will be made under FMS authority, the exporter is advised to initially contact the Implementing Agency/Line Manager that has implemented the contract with the exporter and then, as needed, contact RSAT and/or DSCA to determine whether the export is within the scope of a particular FMS case and an LOA. See the contacts for RSAT and DSCA at the beginning of these FAQs under the **Introduction** section.

Q.7: Based on the Q&As above, I understand the relationship between the FMS authority and transfers (exports) pursuant to the applicable LOA for purposes of § 734.3(b)(1)(vi) of the EAR. However, I am not sure how to interpret the last sentence of § 734.3(e), which states the following:

“Exports, reexports, or in-country transfers of items subject to the EAR under a Foreign Military Sales case that exceed the scope of § 126.6(c) of the ITAR or the scope of actions made by the Department of State’s Office of Regional Security and Arms Transfers require separate authorization from BIS.”

When does this sentence apply? How does the sentence relate to paragraph (b)(1)(vi)? I am concerned that even if my item is not subject to the EAR based on § 734.3(b)(1)(vi), that my export may still require an EAR authorization because of the last sentence of paragraph (e).

A.7: Section 734.3(e) of the EAR only applies to items that are “subject to the EAR.” If the item to be exported, reexported, or transferred (in-country) meets the criteria of § 734.3(b)(1)(vi), paragraph (e) does not apply. Paragraph (b)(1)(vi) was added to the EAR to clarify the scope of paragraph (e) by specifying that items that would otherwise be subject to the EAR and are sold or leased by the Department of Defense to a foreign country or international organization under AECA authority, are subject to the authorities set out in section 2 of the AECA, not the EAR.

The phrase “scope of actions taken by RSAT” in the last sentence of paragraph (e) includes exports within the scope of FMS authorization. All exports being exported under FMS authority are “defense articles” under section 47 of the AECA (22 U.S.C. 2794) and are not “subject to the EAR.”

Paragraph (e) may apply to items that are subject to the EAR that are related to items sold or leased under AECA Programs but are not themselves exported under the FMS or similar authorities. For example, the export of replacement components pursuant to a direct commercial sale for use in a military aircraft originally exported under FMS authority, would require a separate EAR authorization if the replacement components are “subject to the EAR” and not provided through FMS authorities. BIS cannot advise exporters on whether initial or follow-on exports are within the scope of an LOA. Questions regarding the scope of a particular authority for an FMS case and an LOA should be directed initially to the Implementing Agency/Line Manager that has implemented the contract with the exporter and then directed at [RSAT](#) and [DSCA](#), as needed.

RSAT notes that any item, to include technical data and services, acquired through an FMS case is subject to the terms and conditions of the LOA. The foreign government that signs the LOA is obligated to obtain U.S. Government /RSAT written consent, through the Department of State Third Party Transfer (TPT) process, prior to any transfer (including access to FMS-origin equipment) to entities that are not employees or officers of that government. A TPT is also required if there is a change in end use for the item or modification to that item. For specific examples and/or determinations of what constitutes a requirement for a TPT, please contact the RSAT/TPT team.

Q.8: Paragraph (b)(2) of [License Exception GOV in § 740.11](#) has paragraphs that authorize exports, reexports, and transfers (in-country) for certain cooperative programs. Paragraphs (b)(2)(iii)(B) and (b)(2)(v) of § 740.11 appear to authorize exports under FMS authority because such FMS-related transfers (exports) are part of a cooperative program. In addition, paragraph (b)(2)(iv) provides a broad authorization for items exported at the direction of U.S. Department of Defense and appears to be another available authorization. Can these paragraphs of License Exception GOV be used to authorize exports of items that would otherwise be “subject to the EAR,” but are not because the items are to be exported under FMS authority?

A.8: No. An EAR license exception can only be used if the item proposed for export is “subject to the EAR” and the export, reexport, or transfer (in-country) requires an authorization under the EAR. The export of an item that is not “subject to the EAR” on the basis of § 734.3(b)(1)(vi) does not require authorization under the EAR. If an item is “subject to the EAR” because it meets the criteria of § 734.3(e) or is otherwise “subject to the EAR,” then those authorizing paragraphs of License Exception GOV, as well as other EAR authorizations, could be reviewed for applicability, once the determination that authorization under the EAR is required has been made.

As the United States Government engages in a variety of different types of cooperative programs, paragraph (b)(2)(iii)(B) of License Exception GOV has broad applicability to other types of cooperative programs. Paragraph (b)(2)(iv), for exports directed by the U.S. Department of Defense, is also a broad authorization but, as noted above, is only needed if the items are “subject to the EAR.” If the export, reexport, or transfer (in-country) was “subject to the EAR” and an EAR authorization was required, License Exception GOV under paragraphs (b)(2)(iii)(B), (b)(2)(iv), and (b)(2)(v), as well as other authorizations described under License Exception GOV, could be used as the EAR authorization provided the applicable criteria of the authorizing paragraph were met.

Q.9: For purposes of export clearance, if I wanted to alert U.S. Customs and Border Protection (CBP) that the items are not “subject to the EAR” pursuant to § 734.3(b)(1)(vi), does BIS have suggestions on how to communicate that?

A.9: The following statement may be included in export control documents that may accompany the export, “Not subject to the EAR (NOEAR) pursuant to section 734.3(b)(1)(vi).”