

PUBLICATION

Defense Production Act is Invoked by President Trump

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HHS Authorized to Direct Production and Distribution of National Health Supply Chain

UPDATED: March 19, 2020: After invoking the Defense Production Act for the COVID19 pandemic (see our prior Alert below), President Trump issued an "Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19" on March 18, 2020. The Executive Order includes the finding that personal protective equipment and ventilators meet criteria to be considered "scarce and critical material essential to the national defense" under the DPA, which has previously been applied to emergencies and critical infrastructure matters, as noted below.

The Executive Order delegates the President's authority to the U.S. Department of Health and Human Services (HHS) to direct production and distribution of personal protective equipment, ventilators, and "any additional specific health and medical resources" that meet the criteria of the DPA, as determined by HHS.

The Executive Order also provides that HHS shall "consult with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States." Under this delegated authority, HHS is now charged with issuing orders, rules and regulations as necessary, to ensure production and distribution of these critical supplies to health care providers. Allocation of limited supplies of medical equipment throughout the nation will be a difficult and painful exercise. As of the time of this update, no further details have been issued by the White House or HHS, but we will continue to monitor and report on such developments.

Original Alert (March 18, 2020): On March 18, 2020, President Donald Trump announced his invocation of the Defense Production Act (DPA), which authorizes the President to direct industries to produce critical equipment. The Trump Administration has not yet provided details as of the time of this alert on how the DPA will be applied specifically within the context of COVID-19, but it was invoked presumably to address shortfalls in health care supplies in the face of the coronavirus (COVID-19) pandemic.

Presidential Authority:

The DPA authorizes the President to:

1. require businesses to execute contracts and fulfill orders deemed necessary for national defense;
2. establish regulations, orders, or agencies to allocate materials, services, and facilities to promote national defense; and
3. procure scarce or critical materials required for defense needs, from private industry.

Application Pre-COVID-19:

The DPA was established in 1950 during the Korean War following war powers legislation used during World War II to direct private industry to produce weapons, vehicles and other materiel for war. At that time, automakers in Detroit, for instance, shifted production from automobiles to tanks.

In the 1950s, the DPA was used to establish the Office of Defense Mobilization, institute wage and price controls, regulate production in heavy industries such as steel and mining, allocate industrial materials in short supply, and order the dispersal of wartime manufacturing plants across the U.S. Under the authority of the DPA, the Department of Defense provided capital and interest-free loans, and directed mining and manufacturing resources to the steel and mining industries.

In the 1980s, the DPA was used to fund creation of new technologies and new materials, such as silicon carbide ceramics, indium phosphide and gallium arsenide semiconductors, microwave power tubes, radiation-hardened microelectronics, superconducting wire, and metal composites.

The DPA was revised by Congress in 1994 to apply to disaster relief for use by the Federal Emergency Management Agency (FEMA), and, in the wake of the September 11, 2001 terrorist attacks, was again amended in 2003 to apply to critical infrastructure protection and restoration, regardless of whether the infrastructure is owned by federal, state, local, or private entities. In 2005, in the aftermath of Hurricane Katrina, the Department of Commerce authorized FEMA and the Department of Homeland Security (DHS) to use DPA regulations for recovery operations.

In a proactive measure, the DPA was amended in 2009 to include domestic preparedness and national emergency response efforts, which appears to be the basis for the invocation of DPA at this time by President Trump. Most recently, FEMA operated extensively under the authority of the DPA during the 2017 disaster season, including prioritizing contracts for manufactured housing units, food and bottled water, and the restoration of electrical transmission and distribution systems in Puerto Rico.

Application in the Context of COVID-19

While the Trump Administration has not yet provided details as of the time of this alert on how the DPA will be applied specifically within the context of COVID-19, the anticipated focus of the President's invocation is to provide funding to purchase critical health care equipment and supplies manufactured domestically as well as technology needed to manufacture those items. In addition to funding, the President may also employ industry experts to assist with production, as well as to potentially serve in executive roles as needed.

Such funding may include purchases or purchase commitments for critical supplies, subsidies, or purchase of specialized manufacturing equipment for government and privately-held manufacturers to increase production of the required product. Loans and loan guarantees may also be extended to reduce supply shortfalls. Current funding limits are limited to \$750 million per year, and budget authority for loans and loan guarantees require congressional appropriations approval.

The DPA also establishes liability protection for acting or failing to act in compliance with imposed obligations.

As this is a rapidly developing situation, we will continue to monitor developments in this area for our clients as part of our ongoing updates on legal and policy developments related to COVID-19. Also, please visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website for continuing updates.