

An Overview of the Recent Executive Orders Pursuant to the Defense Production Act

I. Overview of Executive Orders

On March 18, 2020, President Trump issued an Executive Order on “Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19” (the “Order”), invoking the use of the Defense Production Act (the “DPA”).¹ This Order, issued in response to the national emergency caused by COVID-19 and the threatened strain on the nation’s healthcare system, can cover the production of health and medical resources, including personal protective equipment and ventilators. The President delegated his authority under the DPA to the Secretary of Health and Human Services (“HHS”) with respect to all health and medical resources needed to respond to COVID-19. The Secretary of HHS may use the authority to determine 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.² The Secretary of HHS may consult with the Secretary of Commerce and other executive branch leaders, as appropriate, in making this decision.

On March 27, 2020, President Trump issued two new Executive Orders invoking the DPA. The first Executive Order directed the Secretary of HHS to require General Motors Company (“GM”) to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.³ The second Executive Order authorized the government to guarantee loans by private institutions, make loans, and take additional actions to support domestic industrial base capabilities to produce the required health and medical resources.⁴

II. History and Key Provisions of the Defense Production Act

The DPA provides the President certain powers to ensure that domestic industry can meet requirements related to national defense that are deemed necessary.⁵ The DPA was enacted initially in 1950 at the start of the Korean War, and it has been reauthorized more than 50 times, most recently in 2019, extending certain of its original provisions through 2025.⁶ The use of the DPA has broadened from its original military focus and has been invoked

¹ Executive Order 13909, “Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19” (March 18, 2020).

² *Id.* President Trump also issued Executive Order 13910, “Preventing Hoarding of Health and Medical Resources To Respond to the Spread of Covid-19” (March 23, 2020), delegating authority to the Secretary of HHS to implement regulations, as necessary, to prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States.

³ Executive Order (unnumbered at the time of this memo), “Memorandum on Order Under the Defense Production Act Regarding General Motors Company” (March 27, 2020).

⁴ Executive Order (unnumbered at the time of this memo), “Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19” (March 27, 2020).

⁵ P.L. 81-774, 50 U.S.C. §§ 4501 *et seq.*

⁶ Congressional Research Service, “*The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*” at p. 1, (last updated March 2, 2020), available at <https://fas.org/sgp/crs/natsec/R43767.pdf>.

to supply materials and services in response to terrorism or natural crises.⁷ The President has the authority to delegate the powers enacted by the DPA to other federal agencies.⁸

The relevant portion of the DPA for this Order is the “Priorities and Allocations” authority.⁹ The President can require individuals, businesses and corporations to accept and prioritize government contracts to manufacture essential goods and resources in the country’s national defense.¹⁰ The President also can allocate materials, services and facilities as necessary to promote the national defense and to ensure that there is a sufficient supply of such materials, services and facilities.¹¹ The DPA cannot be used to control the general distribution of any material or good in the civilian market “unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”¹²

Recent examples of the *priority* authority being used were to support humanitarian efforts in New Orleans after Hurricane Katrina and in Puerto Rico after Hurricane Maria. The *allocation* authority has not been specifically enacted since the Cold War and has been rarely invoked.¹³ Before this Order, President Trump last invoked the DPA in July 2019 regarding the domestic production of rare earth metals and alloys.¹⁴

Companies and individuals that prioritize and accept federal contracts pursuant to the DPA are shielded from damages or penalties that may result from the government stepping ahead of other private counterparties with existing contractual relationships.¹⁵ This immunity, however, does not extend to claims regarding the produced goods themselves, such as a breach of warranty claim.

⁷ 50 U.S.C. § 4502 (a)(1) (“The security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States.”)

⁸ 50 U.S.C. § 4511(d).

⁹ 50 U.S.C. § 4511(a). The DPA also authorizes the President to incentivize private businesses to expand the production of certain goods, and to call private industry leaders into government service, among other active provisions.

¹⁰ *Id.*

¹¹ *Id.*

¹² 50 U.S.C. § 4511(b).

¹³ Congressional Research Service, “*The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*” at p. 9, (last updated March 2, 2020), available at <https://fas.org/sgp/crs/natsec/R43767.pdf>.

¹⁴ Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended (July 22, 2019). rare earth metals and alloys are primarily exported from China and produced minimally in the United States, but are essential to a number of national technologies and defense resources. *See also* Pentagon races to track U.S. rare earths output amid China trade dispute, Ernest Scheyder, (July 12, 2019), available at <https://www.reuters.com/article/us-usa-rareearths-pentagon-exclusive/exclusive-pentagon-races-to-track-us-rare-earths-output-amid-china-trade-dispute-idUSKCN1U727N>.

¹⁵ 50 U.S.C. § 4557.

III. Next Steps

The federal government has ordered GM to produce ventilators, but the government has not yet issued production orders to others in the private sector pursuant to the DPA for health and medical resources; instead, the government has been working with those companies to meet the demand in other ways.¹⁶ Other orders could begin at any time if the President and the designated representatives of HHS determine such steps are necessary. President Trump has designated current Director of Trade and Manufacturing Policy Peter Navarro as the policy coordinator for DPA orders.¹⁷ The administration of such future orders likely will be through the Defense Priorities and Allocations System (DPAS), which are regulations covering the “placement, acceptance, and performance of priority rated contracts and orders and for the allocation of materials, services, and facilities.”¹⁸ Companies should review carefully any such orders and raise follow-up questions, upon receipt, to ensure a full understanding of what is being required of them.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Landis C. Best at 212.701.3694 or lb主@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; or Peter T. Mazzone at 212.701.3051 or pmazzone@cahill.com; or email publications@cahill.com.

¹⁶ FEMA: Defense Production Act no longer needed to secure thousands of test kits, Quint Forgey, Sarah Owerhohle, and Megan Cassella, (March 24, 2020), available at <https://www.politico.com/news/2020/03/24/trump-administration-defense-production-act-146070>.

¹⁷ Trump Taps Peter Navarro as Defense Production Act Policy Coordinator During Coronavirus Pandemic, Jeffrey Martin, (March 27, 2020), available at <https://www.newsweek.com/trump-taps-peter-navarro-defense-production-act-policy-coordinator-during-coronavirus-pandemic-1494782>.

¹⁸ 15 C.F.R. § 700.1.