

CLIENT ALERT

White House Issues Order under Defense Production Act as Part of COVID Response

March 19, 2020

On March 18, 2020, President Trump significantly expanded the authority delegated to the Secretary of Health and Human Services (HHS) in his “[Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19](#).” The Order is based on a finding that, “to ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19, it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the Nation’s healthcare system and others that need them most at this time.”

Specifically, the Order delegated to the Secretary the authority to require performance of contracts or orders (other than contracts of employment) over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate. The Order also authorized the HHS Secretary 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, for responding to the spread of COVID-19 within the United States, and may issue such orders and adopt and revise appropriate rules and regulations as may be necessary. This grant of authority to HHS is quite broad and apparently distinct from existing requirements and limitations of the Defense Priority and Allocation System regulations set forth in 15 CFR Part 700. The Order leaves open a number of questions that will need to be addressed by the Secretary, including the impact on existing medical supply contracts and healthcare providers’ and suppliers’ abilities to manage the allocation of healthcare resources to treat their patients.

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