

Implications of COVID-19 on the Government’s Authorities Under The Defense Production Act of 1950 (DPA) (50 U.S.C. §§ 4501 et seq.)

On March 18, 2020, the President signed an “Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19,” which invoked the President’s authority to shape the domestic industrial base to prepare and respond to national emergencies under the Defense Production Act of 1950 (“DPA”). The Executive Order determined that health and medical resources needed to respond to the spread of COVID-19 are scarce and critical materials essential to the national defense. The Executive Order delegated to the Secretary of Health and Human Services 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, for responding to the spread of COVID-19 within the United States.

What is the purpose of the DPA?

To ensure the adequacy of productive capacity and supply; to satisfy production requirements under both peacetime and emergency conditions; and to ensure that national defense requirements are met.

What are the principal DPA authorities?

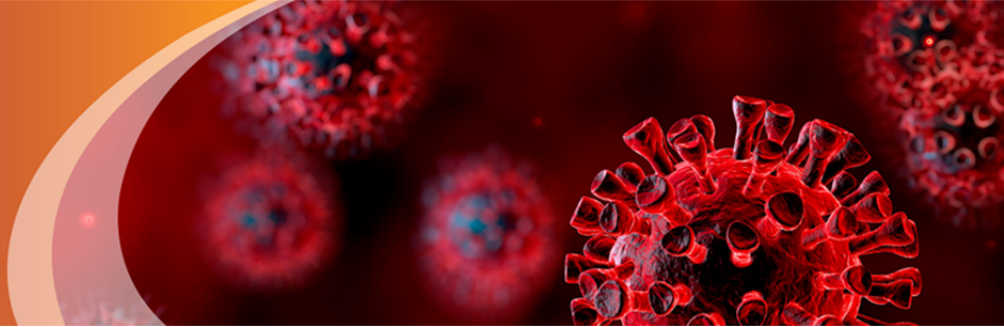
The DPA authorizes the President to:

- require U.S. companies to accept and prioritize certain contracts for materials and services as necessary to promote the national defense;
- allocate materials, services, and facilities as necessary or appropriate to promote the national defense;
- establish incentives, guarantee loans, or make loans for the production of essential materials;
- procure and install equipment in government-owned or privately-owned facilities; and
- approve voluntary agreements by industry to provide for the national defense under an exception to anti-trust laws.

What constitutes national defense?

“National defense” includes programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. It also includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act and critical infrastructure protection and restoration.

- “Emergency preparedness activities” are very broad and include “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard.”



Who may be required to accept a DPA order?

Any person (including corporations or other businesses) the President finds to be capable of performance.

What if I am not a federal government contractor?

Any person (including a business) that receives an order or contract subject to the DPA is required to accept it and prioritize it unless that person meets certain exceptions.

What if I do not already sell the item or service?

The DPA authorizes the President to issue and prioritize orders to any person the President “finds to be capable of their performance,” and does not limit this authority to current suppliers.

*Note that this statutory authority is broader than the ordering procedures in the prior implementing Defense Prioritization and Allocation System (DPAS) regulations, which permit a person who does not supply the items or perform the services to reject the government’s order.

What does it mean to “prioritize” an order?

The order must be fulfilled by the delivery date regardless of pre-existing non-DPA covered orders. The company may need to modify its production or delivery schedules to ensure the DPA-covered order deadline is met.

What does “allocation” mean?

The President can control general distribution of any material in the civilian market when the President has determined that such material is a scarce and critical material essential to the national defense, and the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of normal distribution of such material in the civilian market. It includes exercising control of materials, services, and facilities per the types of orders described immediately below.

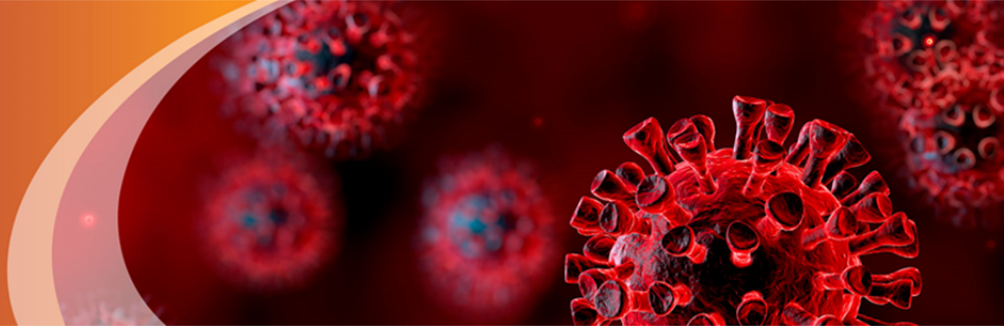
How are “allocations” accomplished?

There are three types of allocation actions.

(a) Set-aside. A set-aside is an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

(b) Directive. A directive is an official action that requires a person to take or refrain from taking certain actions. For example, a **directive can require a person to: stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another.**

(c) Allotment. An allotment is an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.



What additional resources may the President make available?

Although not invoked by the March 18 Executive Order, the DPA under certain circumstances permits the President to authorize federal agencies to provide loan guarantees for loans by private institutions, or to make provision for loans to private businesses to reduce current or projected shortfalls of essential materials.

Does the DPA provide protection against claims from 3rd parties?

In general, “no person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance” with the DPA, even if a rule, regulation, or order under the DPA is later declared invalid. However, the breadth of this immunity may not extend beyond damages or penalties related to prioritizing a DPA order over commercial orders.

What other protections does the DPA provide?

Approved industry voluntary agreements are afforded a special legal defense if actions within that agreement would otherwise violate antitrust or contract laws.

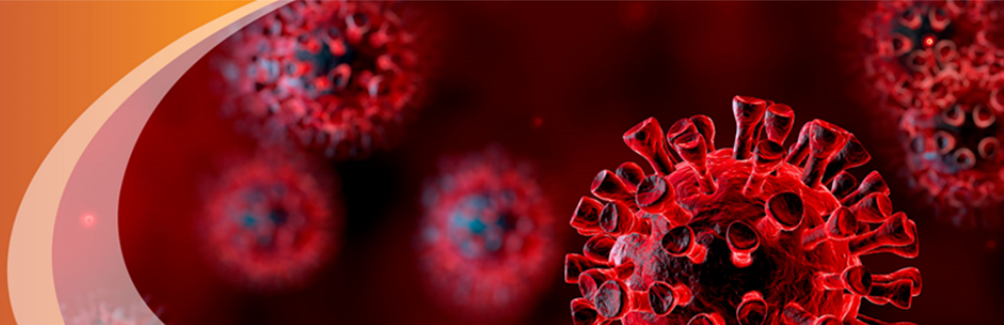
What if I refuse to comply?

Failure to perform as required under the DPA may result in a fine of \$10,000 and up to a year in prison. 50 U.S.C. § 4513. The business or person may also be forced to comply by court order. 50 U.S.C. § 4556.

How is the DPA Implemented?

The DPA’s “Priorities and Allocations” authorities are delegated to various agencies and implemented through agency regulations establishing the priority to be given to orders issued under that agency’s Priorities and Allocations System.

- These include the Defense Priorities and Allocations System (15 C.F.R. Part 700); Health Resources Priorities and Allocations System (45 C.F.R. Part 101); Agriculture Priorities and Allocations System (7 C.F.R. Part 789); Energy Priorities and Allocations System (10 C.F.R. Part 217); Transportation Priorities and Allocation System (49 C.F.R. Part 33).
- Executive Order 13603 delegated priorities and allocation authorities, among other DPA authorities, to the Secretaries of Agriculture, Energy, Health and Human Services, Transportation, Defense, and Commerce.
- Other executive orders and regulations implement the DPA, including 44 CFR Part 332 regarding voluntary agreements and 48 C.F.R. Subpart 32.3 regarding loan guarantees.

**What changed with the new executive order?**

On March 18, 2020, the President issued an Executive Order “On Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19.” This EO expands the authority granted to the Department of Health and Human Services’ (“HHS”), essentially to be co-extensive with the authority granted under Title I of the DPA with regard to certain health and medical resources. 50 U.S.C. § 4501 *et seq.* HHS may now issue its own priority and allocation orders for health and medical resources related to COVID-19.

- The March 18, 2020 EO specifically applies to “health and medical resources needed to respond to the spread of COVID-19” including, for example, personal protective equipment, ventilators, vaccines and medical services. The EO does not specifically require HHS to obtain separate presidential approval for health and medical resources it identifies as critical to national defense and subject to DPA orders.
- HHS’ expanded authority will almost certainly be used to issue priority orders for respirators and other health products, but could also be used to control the private sector distribution of available respirators and other medical equipment, and even compel use of available manufacturing equipment to furnish supplies.

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