

Defense Production Act and COVID-19: FAQs

March 24, 2020

The United States' response to the spread of the novel coronavirus, the virus that causes the disease COVID-19, has put the Defense Production Act, a 1950 wartime law, in the spotlight. Official statements and news reports about the Defense Production Act, including whether it has been "invoked" or utilized, have been abundant, and occasionally inconsistent. [MassPoint Legal and Strategy Advisory PLLC](#) is providing Defense Production Act FAQs for informational purposes.

What is the Defense Production Act?

The Defense Production Act of 1950 ("DPA") is a federal law that was enacted on September 8, 1950, during the Korean War, to facilitate the expansion and diversion of domestic production from civilian use for "military and related purposes."¹ The law was adopted at the urging of President Truman, who recommended to Congress that it enact "legislation authorizing the Government to establish priorities and allocate materials as necessary to promote the national security; to limit the use of materials for nonessential purposes; to prevent inventory hoarding; and to requisition supplies and materials needed for the national defense, particularly excessive and unnecessary inventories."²

The DPA has been amended multiple times. In its current iteration, and most relevant to the response to the outbreak of COVID-19 in the United States, the DPA authorizes the President to procure and allocate—on a priority basis—supplies, services, and production of "scarce and critical" materials and services necessary and appropriate for the "national defense." Although armed conflict was the "national defense" or "national security" concern when the DPA was adopted in 1950, the concepts of national defense and national security have expanded in the decades since.³

What Authority Does the President Have Under the Defense Production Act to Procure Personal Protective Equipment and Ventilators?

The DPA vests the President with "priorities and allocations" authorities to procure and prioritize for the government materials, services, and production where "necessary or appropriate to promote the national defense."⁴

- (1) The President may require that contracts or orders of the federal government "take priority over" other contracts or orders (such as contracts or orders with or for private companies) and compel a party (such as a manufacturer) to accept and perform under a federal government contract or order "in preference to any other contracts or orders."⁵
- (2) The President may "allocate materials, services, and facilities in such manner, and upon such conditions, and to such extent as he [or she] shall deem necessary or appropriate to promote the national defense."⁶

To use the above authorities, the DPA requires the President to first make two findings: (1) that a material subject to a priority contract, order, or allocation is a “*scarce and critical material essential to the national defense*” and (2) that the *requirements of the national defense require the prioritization* a contract or order.⁷ As discussed below, President Trump made these DPA findings with respect to personal protective equipment and ventilators in a March 18, 2020 executive order. The President did not by or pursuant to that Order, however, enter into or require the priority performance of any contract or order for personal protective equipment, ventilators, or other medical equipment or supplies.

Did President Trump “Invoke” the Defense Production Act? What Does Executive Order 13909 Do?

On March 20, 2020, President Trump stated that he “invoked” the DPA to use the “powers of the federal government to help the states” obtain medical equipment, particularly N95 respirators and ventilators. Two days earlier, on March 18, President Trump issued Executive Order 13909, “Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID–19.” The Order relies on the DPA as legal authority, but does not “invoke” the DPA in the sense of activating the law in relation to a specific priority contract, order, or allocation.

In other words, EO 13909 did not by itself effectuate any particular procurement for masks, ventilators, or other medical equipment or supplies. Instead, EO 13909 did the following:

- (1) Made a presidential finding that “that health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment (**PPE**) and ventilators, meet the criteria specified in section 101(b)” of the DPA. In DPA terms, the President, by EO 13909, made the findings required by the DPA that “health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators” are “scarce and critical material essential to the national defense” and “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.”⁸
- (2) Delegated to the HHS Secretary the President’s DPA authority to enter into and require the performance of priority contracts or orders, and to allocate materials, facilities, and services for the production of those “scarce and critical” health and medical resources specifically identified in EO 13909 and as additionally needed to “to respond to the spread of COVID–19 within the United States.”⁹ This means that the HHS Secretary may—**but is not required to**—enter into and require the performance of priority contracts and orders and to allocate materials, facilities and services for respirators, ventilators, and other health and medical resources needed to respond to the COVID-19 outbreak in the United States.¹⁰
- (3) Delegated to the HHS Secretary the authority to “determine,” in consultation with the Commerce Secretary and, “as appropriate,” other heads of federal agencies and departments, 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.” This means that the HHS Secretary may—**but is not required to**—make determinations as to health and medical resources priorities, allocations, and distribution.¹¹

- (4) EO 13909 **requires** the HHS Secretary to issue “orders” and/or adopt or revise “appropriate rules and regulations” as “may be necessary to implement” the Order. Therefore, it is expected that the HHS Secretary will issue orders, rules, or regulations related to the entry into or requirement of any priority contracts or allocations.

How Does Executive Order 13909 Effect the Production and Distribution of Personal Protective Equipment, Such as N95 Respirators?

Again, EO 13909 (1) found that “health and medical resources needed to respond to the spread of COVID-19,” including but not limited to PPE and ventilators, are eligible for priority procurement and allocation under the DPA and (2) delegated President’s DPA priority contracts and allocation authority to the HHS Secretary without requiring that the HHS Secretary exercise that delegated authority. EO 13909 does not, therefore, effectuate or require the effectuation of any priority contract, order, or allocation for the procurement or production of health and medical resources needed to respond to COVID-19 in the United States. Under EO 13909, it is up to the HHS Secretary to, in his discretion, procure and allocate designated health and medical resources.

In March, HHS Announced an Acquisition of N95 Respirators. Is that a Defense Production Act Acquisition?

On March 4, 2020, HHS announced that it intended, as part of the “government-wide efforts to respond to” the novel coronavirus outbreak, “to purchase 500 million N95 respirators” for the Strategic National Stockpile (SNS) over an 18 month period. The acquisition would not, according to the HHS, be pursuant to priority contracts or orders utilizing DPA authority. Instead, the HHS announcement states that “private sector orders would be filled before the SNS order.” “Through guaranteed orders,” HHS explained, the “acquisition encourages manufacturers to immediately increase production of N95s for use by health care professionals.”

In the same announcement, HHS stated that the SNS “currently holds millions of N95 respirators that may be used in accordance with the Strategies for Optimizing the Supply of N95 Respirators guidance released by the Centers for Disease Control and Prevention (CDC). In an emergency, the SNS could disperse the existing products as well as any available quantity obtained through future contracts to areas in need as requested by state health officials.”

It is not clear whether, when, or in what quantities N95 respirators have been released from the SNS to one or more states or localities.

MassPoint Legal and Strategy Advisory PLLC wishes good health and safety to all in these extraordinary times.

For more information about this publication, contact the author, Hdeel Abdelhady. The Defense Production Act can be viewed at the Legal Information Institute.

Some COVID-19 Resources

CDC COVID-19 information and updates ▪ WHO COVID-19 information and updates

Johns Hopkins Coronavirus Resources Center ▪ U.S. Government Coronavirus information and resources

Notes

¹ Defense Production Act of 1950, Pub. L. No. 81-774, Sept. 8, 1950. As enacted, the DPA authorized the President to, in addition to diverting civilian production through priority allocations and other measures, stabilize wages and prices. See, e.g., Pub. L. No. 81-774 at § 402(b)(2). Today, under the DPA as amended multiple times over the years, the President's original DPA economic authorities have been curtailed or removed entirely. For example, the President may not today impose wage or price controls without the prior authorization by a joint resolution of Congress. 50 U.S.C. § 4514(a). The wage and price control powers originally vested in the President reflected DPA-era concerns about inflation during the Korean War (and previously during World War II).

² Harry S. Truman, *Special Message to the Congress Reporting on the Situation in Korea*, July 19, 1950.

³ In the international trade arena, the Trump Administration in particular has broadly and frequently asserted "national security" and "national defense," such as to impose tariffs and institute export bans on foreign companies. Relatedly, it is under the DPA that the United States, principally through the President and the Committee on Foreign Investment in the United States (CFIUS), reviews and restricts certain foreign investment that threatens U.S. "national security."

⁴ Subchapter I of the DPA outlines the President's "Priorities and Allocations" authorities. The DPA confers additional authorities on the President. Only those authorities most relevant to the current public discussion around COVID-19 are discussed here.

⁵ 50 U.S.C. § 4511(a).

⁶ *Id.*

⁷ *Id.* at § 4511(b).

⁸ [EO 13909](#) Section 1 and 50 U.S.C. § 4511(b). Note that the EO 13909's references to Section 101 of the DPA are keyed to the public law version of the statute, and not to the DPA as codified at Title 50 of the United States Code.

⁹ EO 13909 Section 2(a).

¹⁰ EO 13909 also delegates to the HHS Secretary the President's *authorities* under subchapter III of the DPA, which outlines "general provisions" applicable to priority contracts, orders, and allocations and the DPA's provisions on the United States' productive capacity and supply. *Id.*

¹¹ It appears that the HHS Secretary previously had priority contract, order, and allocation authority pursuant to Executive Order 13603 of March 16, 2012, entitled "National Defense Resources Preparedness." EO 13603, issued by President Obama, delegated the president's priority contract, order, and allocation authority to the HHS with respect to "health resources." EO 13603 at Section(a)(1)(3).