The Trump Administration Again Expands Its Use of the Defense Production Act to Combat the Coronavirus Pandemic

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On April 2, President Trump moved to use the Defense Production Act of 1950 ("DPA") to expand the authority of the Department of Homeland Security to intervene in the private sector to order and prioritize production of supplies and equipment needed to address the coronavirus pandemic.[1]

With the coronavirus outbreak, attention has been focused on the DPA[2], a statute dating back to the time of the Korean War, which authorizes the President in times of national emergency to:

- Make direct purchases and purchase commitments of critical supplies and services;
- Interrupt normal flow of goods, even when under contract, by requiring U.S. businesses to prioritize government contracts over all other orders;
- Install equipment in private industrial facilities to secure production of critical supplies to meet national defense and homeland security needs;
- Allocate or control the general distribution of material, services and facilities to promote the national defense;
- Provide incentives to contractors such as loans and loan guarantees;
- Establish voluntary agreements with private industry;
- Investigate and prosecute hoarding; and
- Employ persons "of outstanding experience and ability."

The President delegated his DPA authority to department and agency heads in a 2012 executive order.[3] "While the authorities are most frequently used by, and commonly associated with, the Department of Defense (DOD), they can be and have been used by numerous other executive departments and agencies."[4]

The purchase and allocation of critical supplies under the DPA is delegated to various agencies, which can order suppliers to prioritize production and delivery. Other pending commercial contracts are in effect put on hold pending satisfaction of government needs. Contractors must offer similar prices, terms and conditions as for non-DPA orders. Contractors are also required to pass these priorities down to their respective suppliers and subcontractors.

Although the Trump administration issued an executive order on March 18 invoking the DPA[5], it did not find it necessary to take action under the law until March 23, when President Trump did take an initial step under the DPA by issuing an Executive Order authorizing the Attorney General to investigate and prosecute hoarding of personal protection equipment and related price gouging.[6]

On March 27, the administration went further, "directing the Secretary of Health and Human Services to use any and all authority available under the Defense Production Act to require General

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Motors to accept, perform, and prioritize Federal contracts for ventilators."[7] Several governors who had been urging the Trump administration to expand its use of DPA authority applauded that news and called for "more of the strategic powers of the president to be used nationally."[8]

On April 2, President Trump headed this plea by ordering the Department of Homeland Security to utilize its powers under the DPA twice—once to force 3M Co. to supply N95 masks and also to assist several producers of ventilators to obtain input material necessary to support a significant increase in their production of much-needed ventilators.[9] The ventilator producers named include General Electric Co., Hill-Rom Holdings Inc., Medtronic Public Ltd. Co., ResMed Inc., Royal Philips NV and Vyaire Medical Inc. Not named for this supply chain assistance was General Motors Co., which had last week been ordered to produce large numbers of ventilators, notwithstanding its earlier statements that it would do so voluntarily.

President Trump stated that he was invoking the DPA to remove obstacles in the supply chain that threaten the rapid production of medical equipment. Industry seems to be in agreement with a Medtronic spokesperson saying the company's "preliminary understanding is that the administration 'is working to ensure that ventilator manufacturers, such as Medtronic, have the necessary supplies we need to continue to increase our production of these critical products.'"[10] In view of the hundreds of parts that go into a ventilator, having DPA authority will assist final assemblers to acquire parts by prioritizing their orders and, where necessary, to overcome state stay-at-home directives that may be having a negative impact on the production of component parts for ventilators.

We will monitor government activity in this area and post updates on this site as appropriate.

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[1] Statement from the President Regarding the Defense Production Act, Apr. 2, 2020 https://www.whitehouse.gov/briefings-statements/statement-president-regarding-defense-production-act-2

[2] 50 U.S.C. § 4501 *et seq.*

[3] See Executive Order 13,603 (March 16, 2012)

[4] Congressional Research Service, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress, R43767 (updated mar. 2, 2020).

[5] Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19, Mar. 18, 2020, https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/.

[6] *See* 50 U.S.C. § 4512; see also Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, Mar. 23, 2020, https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/.

[7] Statement from the President Regarding the Defense Production Act, Mar. 27, 2020, https://www.whitehouse.gov/briefings-statements/statement-president-regarding-defense-production-act/.

[8] Gavin Bade, '*GM was wasting time*': *Trump invokes DPA to force GM to make ventilators*, POLITICO, Mar. 27, 2020 (quoting Gov. Michigan Governor Gretchen Whitmer), https://www.politico.com/news/2020/03/27/trump-slams-gm-over-ventilator-production-delays-costs-151885.

[9] Presidential Memoranda: Memorandum on Order Under the Defense Production Act Regarding

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the Purchase of Ventilators, Apr. 2, 2020, https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators/; Presidential Memoranda: Memorandum on Order Under the Defense Production Act Regarding 3M Company, Apr. 2, 2020, https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/.

[10] Gavin Bade, Trump expands DPA, amid mounting pressure, POLITICO, Apr. 2, 2020, https://www.politico.com/news/2020/04/02/trump-expands-dpa-order-162128.

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