

# Defense Production Act Invoked

Coronavirus/COVID-19 Update

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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## President Trump Invokes the Defense Production Act in Response to COVID-19

President Donald Trump announced that he intends to invoke the Defense Production Act of 1950 (DPA) in response to the COVID-19 coronavirus pandemic. The DPA grants the executive branch of the federal government broad authorities to enlist private companies to assist with meeting the demands of a national emergency. As explained in more detail below, the DPA allows the president to exercise several significant of authorities, including:

- requiring private companies to accept and prioritize certain contracts and to prioritize production of critical goods and services;
- providing financial support, such as loans and loan guarantees, to private companies in order to increase the production of necessary materials;
- halting certain foreign investments in companies headquartered in the United States; and
- approving “associations of private interests” to “coordinate actions” in support of the national defense and exempting them from antitrust liability.

After invoking the DPA, President Trump issued Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19. The executive order is based on a finding that in order “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.” It is not clear whether President Trump will invoke additional DPA authorities as the public health crisis continues to unfold.

## Statutory Background

The DPA reflects a congressional finding that “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.” 50 U.S.C. § 4502. Congress enacted the DPA in order to rapidly mobilize the nation’s industrial base as the Korean War loomed. At the time, the DPA gave the president wide-ranging authorities, including the power to demand that manufacturers prioritize defense production, to fix wage and price ceilings, to force settlement of some labor disputes, and to control consumer credit and regulate real estate construction credit. P.L. 83-95, 67 Stat. 129.

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P.L. 83-95. As discussed below, although the DPA has been expanded beyond wartime and now includes other authorities, Congress has allowed all but the first of these original authorities to lapse.

The DPA nonetheless still provides the president an “array of authorities to shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.” 50 U.S.C. § 4502. Although Congress originally intended “national defense” to be limited to war and military preparedness, the DPA’s current definition of “national defense” is significantly broader, as it now 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. Such term 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.

50 U.S.C. §4552(14). Thus, the DPA now extends to national emergencies and emergency preparedness activities, and the Stafford Act defines the latter to 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 ... .” 42 U.S.C. §5195(a)(3).

The DPA defines “critical infrastructure” as “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.” 50 U.S.C. § 4552(2).

## **Authorities Conferred Upon the President by the DPA**

The DPA confers two principal authorities upon the federal government once invoked by the president: (i) directing private industry to prioritize certain contracts and (ii) providing financing to private industry to obtain necessary supplies. Additionally, the act allows the president to halt certain foreign investments while also granting him the authority to permit businesses to cooperate under limited circumstances by granting them immunity from the U.S. antitrust laws.

## **Title I Authorities**

Title I of the DPA authorizes the president to take actions that allow the federal government to prioritize and allocate services and materials by mandating that certain contracts override competing contracts and by directing the allocation of materials and facilities. 50 U.S.C. § 4511(a). To do so, Title I provides, in relevant part, that the president has the authority:

1. to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order ... and to (2) allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. § 4511(a). Thus, the priority performance authority allows the federal government to promote the timely availability of critical materials, equipment and services produced in the private market in the interest of national defense. The allocation authority permits the federal government to influence the general distribution of critical materials, services and facilities.

The DPA stipulates that before invoking Title I authority to “control the general distribution” of private sector materials, the president must find “(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.” 50 U.S.C. § 4511(b).

The federal government’s use of Title I’s authorities is not unprecedented. Indeed, the Department of Defense assigned priority to more than 300,000 contracts in 2011. Dept. of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Aug. 2011, p. 7. Other agencies also have used the contract prioritization authorities granted by Title I: The U.S. Army Corps of Engineers did so in response to Hurricane Katrina and the Federal Emergency Management Agency prioritized contracts for bottled water and the restoration of electrical services in Puerto Rico following Hurricane Maria. Dept. of Homeland Security, *The Defense Production Act Committee Report to Congress, Calendar Year 2017 Report to Congress*, June 18, 2019, p.10. In the 70 years since the DPA was enacted, the president has rarely used this authority to allocate materials, services and facilities — and has not done so since the end of the Cold War. *Id.* at 11.

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Title I also contains certain liability provisions and exemptions. The DPA provides that “[a]ny person who willfully performs any act prohibited, or willfully fails to perform any act required” by the statute “shall be fined up to \$10,000” and/or imprisoned for up to one year. 50 U.S.C. § 4513. When prioritizing a contract pursuant to the DPA, a contractor is generally not liable for actions taken to prioritize the contract as ordered by the government. 50 U.S.C. §4557. When a private company carries out a contract under the DPA, the statute does not necessarily entitle a contractor to be indemnified by the government if the product produced pursuant to the contract injures third parties. See *Hercules v. United States*, 516 U.S. 417 (1996).

There are several notable restrictions on Title I’s applicability. For instance, Title I cannot be used for wage or price controls, unless authorized by a joint resolution of Congress. 50 U.S.C. § 4514. Title I priorities and allocation authority also can only be used to “promote national defense.” In Executive Order 13603, President Barack Obama further constrained that authority so that it “may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense” by the secretaries of defense, health and human services, homeland security or energy, depending on the issue involved. Once a program is determined to promote the national defense, other secretaries who have been delegated the priorities and allocation authority can use their authority for those pre-designated program purposes.

President Trump’s Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 includes a finding that personal protective equipment and ventilators meet criteria to be considered “scarce and critical material essential to the national defense” under the DPA. The executive order delegates the authority to prioritize certain contract performance to the secretary of the Department of Health and Human Services (HHS). It also authorizes the HHS secretary to determine the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials for responding to the spread of COVID-19.

## Title III Authorities

The authorities granted under Title III are aimed at ensuring that the United States has an adequate supply of essential goods to support the national defense. It permits the president to provide financial incentives to private industry and authorizes the president to direct the installation of equipment at industrial facilities if either are needed to reduce current or projected shortfalls of critical resources. Specifically, Title III provides that “the President may make provision for loans to private business enterprises ... for the creation, maintenance ... or restoration of capacity, the

development of technological processes, or the production of essential materials ... .” 50 U.S.C. § 4532. Title III also permits the president to use financing to ensure that “critical components, critical technology items, and essential materials” are available from reliable sources when needed to meet a national emergency. *Id.* These authorities might become available, for example, to provide or guarantee a loan to a medical supply company that is responsible for critical supplies in response to COVID-19.

The financing measures permitted by Title III are to be made “on such terms and conditions as the President deems necessary.” 50 U.S.C. § 4532(a)(1). Unless the loan is made pursuant to a national emergency, Title III imposes several other prerequisites, including requiring findings that “without the loan, United States industry cannot reasonably be expected to provide the needed capacity,” the loan is the “most cost-effective, expedient, and practical alternative method for meeting the need,” and the “loan bears interest at a rate determined by the Secretary of the Treasury to be reasonable.” 50 U.S.C. §4531(a)(2)(C).

Title III also provides the president with several other authorities to create, maintain or restore essential domestic industrial capabilities. For instance, Title III authorizes the president to purchase (or make purchase commitments for) industrial resources or critical technology items, 50 U.S.C. § 4533(a), or to make subsidized payments to private companies for domestically produced materials, 50 U.S.C. § 4533(c). In addition, Title III permits the president to direct the installation of equipment at industrial facilities in order to expand their capacity of critical resources. 50 U.S.C. § 4533(e)(1). The act requires industrial plant owners where the equipment is installed to waive liability against the United States and indemnify the government against potential claims by third parties. 50 U.S.C. § 4533(e)(2).

There are several notable constraints to the president’s use of authorities under Title III, including requiring that the president make a specific finding of a supply shortfall and notify Congress — with a 30-day waiting period in which Congress may comment — if the proposed purchase exceeds \$50 million. These requirements, however, can be waived during certain circumstances, including where the president has declared a national emergency. 50 U.S.C. § 4533(a)(7)(1).

## Foreign Investment Controls and Limited Antitrust Exemption

The DPA also grants the president the authority to halt a U.S. company’s merger, acquisition or takeover by a foreign entity. Separately, the statute provides an exemption from criminal and civil liability under the U.S. antitrust laws under certain circumstances.

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The president, acting through the Committee on Foreign Investment in the United States (CFIUS), can exercise authority to suspend or prohibit a foreign investment that would lead to the control of a U.S. company upon finding that (i) “credible evidence” exists that the foreign investor might take action that threatens to impair national security; and (ii) no other laws provide adequate and appropriate authority for the president to protect national security. 50 U.S.C. § 4565(B). President Trump exercised this authority when prohibiting Broadcom’s \$117 billion takeover bid for U.S. chipmaker Qualcomm, as well as more recently when, on March 6, 2020, he blocked the acquisition of U.S. travel software company StayNTouch, Inc. There are no indications of the president altering the current CFIUS-related authorities, although federal workforce adjustments to the pandemic may well result in CFIUS-related delays or a slowing of its acceptance of new filings.

The need for the antitrust exemption arises when the president consults with “representatives of industry, business, financing, agriculture, labor, and other interests” for the purpose of forming, “with the approval of the President ... voluntary agreements

and plans of action to help provide for the national defense.” 50 U.S.C. § 4558(1). The DPA grants the attorney general and the Federal Trade Commission various roles in the development and monitoring of any resulting voluntary agreements and plans of action. Within narrowly defined parameters, action taken to develop and carry out the agreements and plans are protected from antitrust liability.

## Conclusion

Clients should bear in mind that in the context of national emergencies, the DPA confers broad authorities upon the federal government to shape industrial production by ordering companies to prioritize contracts and incentivizing private production through loans and loan guarantees. While an invocation of the DPA in response to national emergencies is not without precedent, it is not certain how the HHS secretary will use the authorities delegated to him by President Trump’s recent executive order, and to what extent the president intends to use the DPA’s other array of authorities amid the evolving crisis created by COVID-19.

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Associate **Sam Auld** assisted in the preparation of this alert.