

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## Defense Production Act—Using Authority To Address Emergent Needs

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Since late March 2020, the Defense Production Act of 1950 (DPA)<sup>1</sup> has been used in a variety of ways to respond to the COVID-19 pandemic. The Government's recent activities under the statute illustrate its flexibility, provide guidance regarding how it may be used in the future, and, in some instances, highlight its complexity and its limitations to address threats such as a global pandemic. The statutory authorities are both extensive and complex, as the statute has been amended repeatedly since 1950 in ways that require clarification. Although there is a breadth of authorities under the statute, some provisions are specific to problems that arose during past events and may not be sufficiently flexible to address the emergency circumstances faced today, such as the COVID-19 pandemic.

In the light of the current national emergency caused by COVID-19, this BRIEFING PAPER updates and expands upon BRIEFING PAPERS No. 01-12, *Defense Priorities & Allocations System* (published in November 2001 shortly after the September 11 terrorist attack) regarding the use of the DPA and related regulations.<sup>2</sup> Specifically, after providing background on the DPA and the implementing regulations and reviewing practical considerations and historical use of the Act, this PAPER discusses COVID-19 related actions using the DPA priorities and allocations and related authorities.

### Background

#### The Defense Production Act

The DPA<sup>3</sup> confers on 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.”<sup>4</sup>

The Act broadly defines the term “national defense” to include “programs for military and energy production or construction, military critical

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infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity.”<sup>5</sup> The term 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.”<sup>6</sup> The term “homeland security,” which was added in 2009,<sup>7</sup> includes efforts “(A) to prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; (C) to minimize damage from a terrorist attack in the United States; and (D) to recover from a terrorist attack in the United States.”<sup>8</sup>

Title I, § 101 of the DPA grants the President power to control the distribution of material in the civilian market upon certain findings.<sup>9</sup> To exercise this power, the President must find, under § 101(b), that (1) the critical or strategic material is “essential to the national defense,” and (2) national defense requirements cannot be met without creating a significant dislocation of the normal distribution of the material in civilian markets such as to create an “appreciable hardship.”<sup>10</sup> Upon such findings, § 101(a) authorizes the President to (1) require persons, including businesses, to prioritize and accept contracts for materials and services deemed necessary or appropriate to promote the national defense (referred to as “rated orders”), and (2) allocate or control the distribution of materials, services, and facilities to the extent necessary to promote the national defense (referred to as “allocation”).<sup>11</sup> As discussed below, the expanse of the “national defense” and the degree of intrusion into the civilian market are extremely broad.<sup>12</sup>

Title III of the DPA provides authority to ensure the timely availability of essential domestic industrial re-

sources to support national defense and homeland security requirements through the use of highly tailored economic incentives.<sup>13</sup> Authorized incentives include loans,<sup>14</sup> loan guarantees,<sup>15</sup> direct purchases and purchase commitments,<sup>16</sup> and the authority to procure and install equipment in private industrial facilities.<sup>17</sup>

Title VII of the DPA provides tools and authorities that facilitate planning to potentially enhance the effectiveness of other powers under Title I and Title III.<sup>18</sup> Among other things, the President is authorized to collect information from private industry to facilitate analysis and understanding of domestic industrial capabilities—or, as the Department of Commerce refers to it, “industrial base assessments.”<sup>19</sup> The President also is authorized to consult with industry, finance, labor, and other interests and enter into voluntary agreements for which the participants who work cooperatively are afforded protection from the antitrust laws.<sup>20</sup> Additionally, the President is authorized to establish a group of industry executives with varying expertise for training to potentially serve in Government positions in the event of an emergency.<sup>21</sup> Use of these authorities requires at least some lead time and advance planning to reap the benefits offered.

Title VII also includes authorities for the Committee on Foreign Investment in the United States (CFIUS).<sup>22</sup> We do not address CFIUS here.

### Implementing Regulations

The Department of Commerce’s Defense Priorities and Allocations System (DPAS) regulations, which implement the DPA, are found at 15 C.F.R. Part 700. The regulations address a wide array of topics such as when and how prioritized orders under the DPA (“rated

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orders”) may be placed, how companies that receive such order comply with them, and when they may be rejected. The Commerce regulations are the most commonly referenced and relied upon rated order regulations.<sup>23</sup>

Other agencies have issued DPA regulations as well. For example, the Department of Health and Human Services (HHS) has Health Resources Priorities and Allocations System (HRPAS) regulations.<sup>24</sup> The Federal Emergency Management Agency (FEMA) issued an interim rule regarding rated orders during the COVID-19 response.<sup>25</sup>

**Practical Considerations**

Rated orders are relatively common in the aerospace and defense sector and have been for many years.<sup>26</sup> The use of rated orders enables aircraft platform and other original equipment manufacturers to obtain needed components and supplies by flowing rated orders through the supply chain. The aerospace and defense supply chain has become familiar with rated orders and managing their impact.

For commercial resources and supplies, historically there has been a greater reluctance by the Government to use a rated order to assert priorities or to require allocations by companies that have not indicated an interest in providing the supplies or equipment.

An issue revealed by the pandemic was the fact that domestic manufacture of certain personal protective equipment (PPE) had virtually ceased in the United

States. Although it would have been possible under the DPA for the Government to provide for loans, loan guarantees, or purchase commitments to promote production of PPE, those mechanisms could not operate quickly enough to provide urgently needed supplies. In other words, it is difficult to incentivize an industry that has effectively ceased to operate within the United States. It may be that existing authorities require modification or additional flexibility to provide relief in situations involving health and medical resources.

**Historical Usage Of The DPA**

The Department of Defense (DOD) has used Title I of the DPA for years to prioritize the supply of products needed to support the production of defense items. The 2001 BRIEFING PAPER addressed those provisions in detail.<sup>27</sup>

DOD historically has used Title III of the DPA in a relatively limited manner to bolster domestic capacity to produce needed materials consistent with the DOD mission. DOD has established a special office, known as the Office of Industrial Policy,<sup>28</sup> to fund and manage such activities.

**National Emergency Declaration & COVID-19 Related Actions Using DPA Authorities**

In the response to COVID-19, the President issued a series of orders and directives. These are summarized in the following table and discussed below.

**Executive Orders & Presidential Directives Related To COVID-19 & The DPA**

Action	Date Signed	Title
Proclamation	March 13, 2020	Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak
EO 13909	March 18, 2020	Prioritizing and Allocating Health and Medical Resources To Respond to the Spread of COVID-19
EO 13910	March 23, 2020	Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19
Memorandum	March 27, 2020	Memorandum on Order Under the Defense Production Act Regarding General Motors Company
EO 13911	March 27, 2020	Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID-19
Memorandum	April 2, 2020	Memorandum on Order Under the Defense Production Act Regarding 3M Company
Memorandum	April 2, 2020	Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators
EO 13917	April 28, 2020	Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19
EO 13922	May 14, 2020	Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID-19 Outbreak

### National Emergency Declaration

On March 13, 2020, the President declared that the outbreak of COVID-19 in the United States constituted a national emergency.<sup>29</sup>

During the response to COVID-19, the DPA has been used in a variety of ways, including some with little or no precedent in practice. According to the Congressional Research Service, prior to COVID-19, DPA authorities had not been used for public health emergencies (though they had been used for disaster relief).<sup>30</sup>

### Executive Order 13909—Prioritizing & Allocating Health & Medical Resources

On March 18, 2020, President Trump announced that he was invoking the authority of the DPA to support the COVID-19 response. Specifically, the President issued Executive Order (EO) 13909, which was entitled “Prioritizing and Allocating Health and Medical Resources To Respond to the Spread of COVID-19.”<sup>31</sup> That order invoked the DPA, referencing the national emergency declaration and DPA Title III, § 301. EO 13909 contained a finding under § 101(b) of the Act that certain health and medical resources were necessary to respond to Covid-19—specifically PPE and ventilators met the requirements of DPA § 101(b) because (1) such items were scarce and critical material essential to the national defense, and (2) the requirements of national defense could not be met otherwise, without creating “significant dislocation” of civilian markets to a degree that would create “appreciable hardship.”<sup>32</sup> Pursuant to that finding, EO 13909 delegated to the Secretary of HHS authority to determine priorities and allocate “all health and medical resources” in the civilian market to respond to COVID-19. The HHS Secretary was thus authorized to issue such orders and adopt or revise rules necessary to implement EO 13909. No rated orders or allocations were made at the time this order was issued. Rather, the announcement expressed the intent to do so, if necessary.

### Executive Order 13910—Anti-Hoarding

In furtherance of the EO prioritizing medical resources, the President issued an anti-hoarding EO on March 23, 2020,<sup>33</sup> under the authority of DPA § 102<sup>34</sup> with respect to PPE and sanitizing and disinfecting products. Among other things, EO 13910 delegated to

the HHS Secretary the authority to obtain information and conduct investigations necessary to assess the capabilities of the industrial base to support the national defense.

### Executive Order 13911—Exercise Of Title III & Title VII Authorities

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act became law.<sup>35</sup> As further discussed below, that same day, the President issued EO 13911 delegating authority under DPA Title III to the Secretaries of HHS and DHS with respect to loans, loan guarantees, strategic purchases, and purchase commitments. He also delegated authority to enter into voluntary agreements and action plans under Title VII.<sup>36</sup>

### Memorandum On Order—General Motors

On March 27, 2020, the President issued a “Memorandum on Order” regarding General Motors Company to direct ventilator production.<sup>37</sup> The order relied on the earlier finding under DPA § 101(b) with regard to scarcity of ventilators and the need to disrupt the civilian market. Specifically, the order directed the HHS Secretary to “use any and all authority available under the Act to require General Motors (GM) Company to accept, perform, and prioritize” contracts or orders for ventilators.

The memorandum and order regarding GM are interesting in at least two respects. First, GM at the time was not a manufacturer of ventilators. Under the applicable regulations,<sup>38</sup> a supplier may reject an order for an item that it does not supply. According to public reports,<sup>39</sup> GM was in the process of determining if it could reopen a closed facility that had been used for manufacturing electronic automobile parts and potentially produce a ventilator similar to the model being produced by Ventec Life Systems of Bothell, Washington. GM was interested in seeing if its manufacturing and supply chain capabilities could be used to increase production of Ventec’s VOCSN ventilator and was conducting rapidly developing negotiations with Ventec to determine if a partnership could be formed. However, those negotiations had not been completed, *i.e.*, GM was not a ventilator manufacturer at the time of the order. According to public sources, on March 23, 2020, GM and Ventec had made a proposal to the Federal Emergency Management

Agency (FEMA), but had not heard back. GM and Ventec proceeded according to the expedited schedule they had established for their negotiations.<sup>40</sup> Second, GM did not own the technology or rights in the Ventec product—the collaborative process was necessary. GM and Ventec quickly reached agreement with the Government on a \$490 million dollar contract to produce 30,000 units of a simplified version of the Ventec ventilator by the end of August 2020.<sup>41</sup>

#### Memorandum On Order—Purchase Of N95 Respirators

On April 2, 2020, again relying on the authority under DPA § 101, President Trump issued another “Memorandum on Order” noting the importance of proper distribution of health and medical resources and finding that health and medical resources needed to respond to COVID-19, including PPE and ventilators, met the criteria of § 101(b) (*i.e.*, that resources were scarce, critical, and essential to national defense and that the national defense needs could not be met without dislocation of the civilian market).<sup>42</sup> He ordered that FEMA and the HHS Secretary “use any and all authority available under the Act” to acquire N95 respirators from 3M Company, or any of its affiliates, or subsidiaries.

#### Memorandum On Order—Managing Supply Chain For Ventilator Production

Also on April 2, 2020, the President issued another “Memorandum on Order” and used the DPA authority to manage the supply chain for distribution of materials needed for the production of ventilators.<sup>43</sup> He specifically ordered that the HHS Secretary, in conjunction with the DHS Secretary, “use any and all authority available under the Act” to facilitate the supply of materials to certain ventilator producers: General Electric Company, Hill-Rom Holdings, Inc., Medtronic Public Limited Company, ResMed, Inc., Royal Philips N.V., and Vyaire Medical, Inc.

#### Executive Order 13917—Continued Food Production

On April 28, 2020, President Trump issued EO 13917 directing continued operation of processing facilities for beef, pork, and poultry.<sup>44</sup> EO 13917 makes the determination required by DPA § 101(b)<sup>45</sup> to activate the President’s powers under the statute to intervene in the com-

mercial meat and poultry market. EO 13917 makes the policy finding that it is important to national defense that processors of beef, pork, and poultry carry on operations and fulfillment of orders to ensure a continued supply of protein for the American people. EO 13917 notes that recent outbreaks of COVID-19 have led to reduction in production capacity at such facilities. It also notes that some state actions have led to the complete closure of large processing facilities. According to EO 13917, those actions may differ from, or be inconsistent with, recent joint guidance from the Centers for Disease Control (CDC) and the Occupational Safety and Health Administration (OSHA) guidance regarding operation of meat and poultry facilities.

The CDC/OSHA Interim Guidance issued on April 26, 2020, recognizes that meat and poultry processing facilities are a part of the nation’s critical infrastructure.<sup>46</sup> The guidance contains a detailed explanation of measures necessary to ensure safe operations of meat and poultry processing facilities.<sup>47</sup>

The Department of Labor (DOL) issued a Statement of Enforcement Policy on April 28, 2020 to “clarify the effect of the Joint Meat Processing Guidance.”<sup>48</sup> DOL indicated that OSHA will use “enforcement discretion” for employers that adhere to the guidance. DOL noted expressly that “[i]t is important that employers seek to adhere to this [Interim] Guidance.” Employers who determine that certain measures are not feasible “should document” their reasons. OSHA will take into account “good faith attempts” to follow the guidance and “does not anticipate” citing employers who make such attempts. In particular, DOL stated that because of the DPA invocation, no part of the guidance “should be construed to indicate that state and local authorities may direct” closure of a processing facility or operation of such a facility with procedures other than the Guidance. DOL pointed out that courts likely will consider compliance with OSHA guidance as evidence favoring the employer in the event of litigation. DOL stated that given the DPA invocation, when an employer has “demonstrated good faith attempts” to comply with the guidance and is sued for workplace exposures, DOL will consider participating in that litigation. However, DOL also will consider participating in litigation by workers if their employer has not taken good faith steps to comply with the guidance.

Section 2 of EO 13917 delegated authority to the Secretary of Agriculture under the DPA to issue rated orders and allocate resources with respect to “food supply chain resources, including meat and poultry” during the national emergency caused by the outbreak of COVID-19 in the United States. Section 2 of EO 13917 further instructed the Secretary of Agriculture, in consultation with other agencies, to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry consistent with the CDC and OSHA guidance referenced above. Finally, EO 13917 directed the Secretary of Agriculture to issue orders and adopt and revise rules and regulations such as may be necessary to implement the order.

## CARES Act & Expansion Of Certain Title III Authorities

In addition to containing various stimulus provisions, the CARES Act,<sup>49</sup> signed by the President on March 27, 2020, temporarily removed certain restrictions on the use of some DPA authorities to improve access to critical resources and to protect the capability of industry to respond rapidly to the current emergency.

### DOD-Related Provisions

The CARES Act included, for procurement by DOD, an additional \$1 billion in appropriations to be used for “DPA” purchases—available until expended—for prevention, preparation for, and response to the coronavirus, either domestically or internationally. (The DPA, of course, also can be used to prioritize acquisition of necessary equipment, supplies, and resources with existing DOD funds).<sup>50</sup>

This DOD-related section of the CARES Act also waived certain restrictions on the use of particular Title III DPA authorities for a two-year period beginning on the date of enactment.<sup>51</sup> For instance, the DPA provides for guarantees of loans by private institutions for purposes of financing production, capabilities, or supplies necessary to create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.<sup>52</sup> Guarantees normally require that an appropriations act provide advance budget authority for the cost of the guarantee and limit the loan

principal that can be guaranteed.<sup>53</sup> The CARES Act waives this requirement.<sup>54</sup>

The DPA also authorizes loans to private businesses (including nonprofit research corporations and providers of critical infrastructure) to reduce current or projected shortfalls of industrial resources, critical technology items, or materials essential for the national defense.<sup>55</sup> Loans normally are subject to the requirement for an appropriations act providing advance budget authority and a limitation on the total loan principle;<sup>56</sup> however, the DOD provisions of the CARES Act also waive this requirement.<sup>57</sup>

### Relief From Certain Restrictions Otherwise Applicable To DPA Authorities

In addition to the DPA-related changes affecting DOD appropriations, § 4017 of the CARES Act removes other restrictions on use of the DPA for limited periods.<sup>58</sup> These provisions may be used by any agency to which DPA authority has been delegated.

*Restrictions inapplicable for two years*—Among other things, the DPA permits the President, for purposes of creating, maintaining, protecting, expanding, or restoring domestic industrial base capabilities essential for the national defense, to do the following: (1) purchase or commit to purchase an industrial resource or critical technology for Government use or resale; (2) encourage exploration, development, and mining of critical and strategic materials; (3) develop production capabilities; or (4) increase use of emerging technologies in security program applications and the rapid transition of emerging technologies from Government or commercial sponsored research and development.<sup>59</sup> Normally, if any action to correct a domestic industrial resource shortfall would cause the aggregate outstanding amount of these actions to exceed \$50 million, no action could be taken without a specific Act of Congress.<sup>60</sup> The CARES Act made this restriction inapplicable for a two-year period beginning on the date of enactment.<sup>61</sup>

The Government may use the DPA Fund to carry out the purposes of Title III of the DPA.<sup>62</sup> Although amounts in the DPA Fund are available until expended, the DPA provides that if the Fund balance at the close of a fiscal year exceeds \$750 million (excluding moneys appropri-

ated in or obligated in that year), the excess shall be paid into a Treasury General Fund.<sup>63</sup> The CARES Act provided an exception to this rule, making the reversion to Treasury inapplicable for a two-year period beginning on the date of enactment, thus enabling increased appropriations for the Fund.<sup>64</sup>

*Restrictions inapplicable for one year*—With respect to loans to private businesses (discussed above), if any loan to correct a shortfall causes the aggregate amount of all obligations related to the shortfall to exceed \$50 million, the President normally is required to notify the Senate Banking and House Financial Services Committees and wait 30 days before proceeding.<sup>65</sup> This notice and waiting period is inapplicable for one year from the date of enactment of the CARES Act.<sup>66</sup>

Similarly, the CARES Act also waived for one year the normal rule for purchases or commitments that any action to correct a shortfall causing the aggregate amount of all such actions to exceed \$50 million requires notice to the Senate Banking and House Financial Services Committees and a 30-day waiting period.<sup>67</sup>

#### Executive Order 13911—Delegation Of Title III Authorities To DHS And HHS

By EO 13911 dated March 27, 2020,<sup>68</sup> as noted above, the President delegated to the Secretaries of HHS and DHS the authority conferred by DPA § 301 with respect to guarantees of loans by private businesses,<sup>69</sup> the authority conferred by DPA § 302 regarding loans to private businesses,<sup>70</sup> and the authority conferred by DPA § 303 with respect to purchases from or purchase commitments to private businesses.<sup>71</sup>

Section 2 of EO 13911 provided for the Secretaries of HHS and DHS to use these authorities in consultation with the Secretary of Defense and the heads of other departments and agencies as they deem appropriate to respond to COVID-19. EO 13911 waived for the period of the national emergency the requirements of DPA § 301(a)(2) (presidential determination required except during a period of national emergency),<sup>72</sup> DPA § 301(d)(1)(A) (requirement for notice to Congress if any guarantee related to a domestic industrial base shortfall would cause the aggregate amount of all outstanding guarantees for such a shortfall to exceed \$50 million),<sup>73</sup> and DPA § 303 (a)(1) to (a)(6) with re-

spect to purchases or purchase commitments.<sup>74</sup> In addition, § 2 of the EO provided authorization for each of the Secretaries of HHS or DHS to submit a specific proposed presidential determination that a *specific* loan is necessary to avert an industrial resource or critical technology shortfall, consistent with DPA § 302(d)(2)(B).<sup>75</sup>

EO 13911 also provided additional delegations with respect to certain DPA Title I authorities. In § 4, the Secretaries of HHS and DHS each were delegated the authority of the President under DPA § 107.<sup>76</sup> That authority includes providing incentives to develop, maintain, modernize, restore, and expand production capabilities of domestic sources for “critical components, critical technology items, materials, and industrial resources essential for the execution of the national security strategy of the United States.”<sup>77</sup> “Appropriate action” is authorized to assure that the critical components, critical technology items, materials, and industrial resources are available from “reliable” sources when needed.<sup>78</sup> Appropriate action may include restricting procurements to reliable sources; restricting procurements to domestic sources; stockpiling critical resources; and developing substitutes for a critical component or critical technology item.<sup>79</sup> The President also made an additional delegation of authority in EO 13911 to the DHS Secretary with respect to health and medical resources under DPA § 101 (priorities and allocations, including controlling distribution in the civilian market and including applicable services) and § 102 (anti-hoarding).<sup>80</sup>

#### Executive Order 13922—Delegation Of Title III Authorities To U.S. International Development Finance Corporation

By EO 13922, dated May 14, 2020, the President delegated to the Chief Executive Officer of the U.S. International Development Finance Corporation (DFC) authority conferred by DPA § 302 (loans to private businesses) and § 303 (purchases from or purchase commitments to private businesses).<sup>81</sup> The DFC’s finance expertise provides a resource beyond HHS and DHS to implement these provisions. The authority is for the two-year period during which certain requirements, which are discussed above, are waived under the CARES Act. The DFC CEO is authorized to use this authority in

consultation with the Secretaries of HHS and DHS, as deemed appropriate for domestic production of strategic resources needed to respond to the COVID-19, or to strengthen domestic supply chains. The loan authority delegated under EO 13922 is limited to loans that create, maintain, protect, expand, or restore domestic industrial base capabilities which support (1) response to and recovery from the COVID-19 outbreak or (2) resiliency of relevant domestic supply chains. Loans must be made in accordance with Office of Management and Budget (OMB) Circular A-11, “Preparation, Submission and Execution of the Budget,”<sup>82</sup> OMB Circular A-129, “Policies for Federal Credit Programs and Non-Tax Receivables,”<sup>83</sup> and the Federal Credit Reform Act of 1990.<sup>84</sup> The DFC CEO is authorized to issue regulations as necessary to implement the EO.

## DPA Authorities—Regulation Of Exports

On April 10, 2020, FEMA issued a temporary final rule to regulate exports of certain respirators and PPE.<sup>85</sup> FEMA promulgated the PPE export rule under the authority of the DPA § 101<sup>86</sup> and DPA § 704<sup>87</sup> and EO 13909 of March 18, 2020,<sup>88</sup> EO 13910 of March 23, 2020,<sup>89</sup> and EO 13911 of March 27, 2020,<sup>90</sup> regarding the COVID-19 pandemic.<sup>91</sup>

The stated purpose of the rule is to aid the U.S. response to the spread of COVID-19 by ensuring that scarce or threatened health and medical resources (referred to as “covered materials”) are appropriately allocated for domestic use.<sup>92</sup> All shipments of covered materials are allocated for domestic use and may not be exported from the United States without explicit approval by FEMA.<sup>93</sup>

*Covered Materials*—The items covered by the PPE export rule are N95 filtering facepiece respirators, certain other filtering facepiece respirators that cover the user’s airway (nose and mouth) and offer protection from particulate materials at an N95 filtration efficiency level, elastomeric air-purifying respirators and filters/cartridges, PPE surgical masks, and PPE gloves and surgical gloves.<sup>94</sup>

*Restrictions*—Under the rule, before any shipments of covered materials may leave the United States, Customs and Border Protection (CBP) will notify

FEMA of an intended shipment and detain the shipment temporarily, during which time FEMA will determine whether to return for domestic use, issue a rated order for, or allow the export of part or all of the shipment.<sup>95</sup> In making such determinations, FEMA may consult other agencies and will consider factors such as (1) the need to ensure that scarce or threatened items are appropriately allocated for domestic use; (2) minimization of disruption to the supply chain, both domestically and abroad; (3) the circumstances surrounding the distribution of the materials and potential hoarding or price-gouging concerns; (4) the quantity and quality of the materials; (5) humanitarian considerations; and (6) international relations and diplomatic considerations.<sup>96</sup>

The rule contains an exemption to address certain preexisting commercial relationships.<sup>97</sup> FEMA will not purchase covered materials from shipments made by or on behalf of U.S. manufacturers with continuous export agreements with customers in other countries since at least January 1, 2020, provided that at least 80% of such manufacturer’s domestic production of covered materials, on a per item basis, was distributed in the United States in the preceding 12 months.<sup>98</sup> If FEMA determines that a shipment of covered materials falls within this exemption, such materials may be transferred out of the United States without further review by FEMA.<sup>99</sup> This exemption, however, is not unlimited as FEMA may waive it and fully review shipments of covered material if necessary or appropriate to promote the national defense.<sup>100</sup> As issued, the rule further stated that additional exemptions might be added by publication in the *Federal Register*.<sup>101</sup>

Later in April 2020, FEMA added more exemptions.<sup>102</sup> Among others, FEMA made clear that shipments to U.S. territories are not “exports” for purposes of the temporary rule.<sup>103</sup> Other exemptions included but were not limited to (1) intracompany transfers of covered materials by U.S. companies from domestic facilities to company-owned or affiliated foreign facilities;<sup>104</sup> (2) shipments of covered materials that are exported solely for assembly in medical kits and diagnostic testing kits destined for U.S. sale and delivery;<sup>105</sup> and (3) in-transit merchandise, *i.e.*, shipments in transit through the United States with a foreign shipper and consignee.<sup>106</sup>



## Liability Under Title I

To prevent hoarding, Title I, § 102 of the DPA prohibits accumulation of materials designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation.<sup>107</sup> The DPA provides that no person shall accumulate such materials (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices.<sup>108</sup>

The DPA imposes criminal liability upon any person who “willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of” Title I of the DPA “or any rule, regulation, or order thereunder.”<sup>109</sup> The DPA provides for a fine of up to \$10,000 or imprisonment for up to a year.<sup>110</sup>

In April 2020, the Department of Justice announced that it had charged a New York man with hoarding and price gouging of PPE.<sup>111</sup>

## Title III—DOD Funding For COVID-19 Response Efforts

On April 11, 2020, DOD announced that it had exercised its authority under Title III of the DPA by providing funding to bolster production of N95 respirators in light of the COVID-19 pandemic.<sup>112</sup> On April 21, DOD provided additional detail regarding the use of DPA Title III and the contracts awarded.<sup>113</sup> The funds were provided to 3M (\$76 million), O&M Halyward (\$29 million), and Honeywell (\$27.4 million). This was the first use of the DPA Title III authority as part of the COVID-19 response.

On April 29, 2020, DOD announced Title III funding of more than \$75 million for establishment of a swab production facility in Maine to increase production capacity by 20 million units per month.<sup>114</sup>

According to the Congressional Research Service, on May 30, 2020, DOD reversed plans to allocate 75% of the Title III DPA funds appropriated for health resources under the CARES Act and instead allocated \$688 million for defense industrial base investments.<sup>115</sup> In May through July 2020, DOD announced a number of exer-

cises of its authority under Title III of the DPA. These included (1) \$138 million for support of COVID-19 vaccine supply chain development and (2) \$2.2 million to Hollingsworth and Vose Company to increase N95 ventilator and filter production.<sup>116</sup> DOD also announced projects totaling hundreds of millions of dollars for various aspects of the defense industrial base.<sup>117</sup> For example, Title III funding was provided for domestic shipbuilding and domestic aviation.<sup>118</sup> Title III funding also was applied to rare earth metals and domestic electronics industrial bases.<sup>119</sup>

On June 22, 2020, DOD and the DFC signed a memorandum of understanding under which the DFC would support lending activities under DOD’s Title III program.<sup>120</sup>

On July 28, 2020, the DFC announced that it had signed a letter of interest to provide a \$765 million loan to Eastman Kodak Company (Kodak) to support the launch of Kodak Pharmaceuticals, a new arm of the company that will produce critical pharmaceutical components for generic drugs.<sup>121</sup> This arm will produce key starting materials and active pharmaceutical ingredients. According to the DFC’s statement, Americans consume approximately 40% of the world’s supply of bulk components used to produce generic pharmaceuticals, but only 10% of these materials are manufactured in the United States.<sup>122</sup> The DFC loan would fund startup costs to repurpose and expand Kodak’s existing facilities in New York and Minnesota.<sup>123</sup>

The response to COVID-19 illustrates how materials that normally are commercially available may become critical to the national defense. As noted above, during the response to COVID-19, masks, swabs, and PPE used in large quantities every day in medical facilities across the United States suddenly became scarce and, as such, essential to the national defense. DOD’s use of DPA Title III authority provided immediate support.

## Title VII—Additional Authorities To Inform & Support DPA Action

Title VII of the DPA contains tools and authorities that initiated in advance and with careful thought can enhance the ability of Government and industry to mobilize quickly. The time to employ these authorities

is not in the teeth of an emergency; rather, their use should be informed by past emergencies, the response to them, and the current state of industry in the country to become better prepared for the inevitable future threats, *i.e.*, equipping the nation to respond quickly and effectively. The authorities are broad, but require informed planning to be effective.

### Understanding The Industrial Base

Under § 705 of the DPA,<sup>124</sup> the President has broad authority to collect information such that the capabilities of the nation and industry to respond in an emergency are understood. The President may obtain information by regulation, subpoena, or testimony as “necessary or appropriate” in his discretion to enforcement of the statute.<sup>125</sup> This authority has been delegated to the Secretary of Commerce in EO 13603 of March 12, 2012.<sup>126</sup> The Secretary of Commerce is directed to perform analyses to assess the capabilities of the industrial base to support the national defense, including developing policy recommendations to improve the international competitiveness of specific domestic industries and their abilities to meet national defense program needs.<sup>127</sup> Although this authority is very broad, it has been mostly used in connection with “industrial base assessments.”

These assessments are performed by the Bureau of Industry and Security, Office of Technology Evaluation (OTE), which includes experts from the private sector and other Government agencies in its assessments. According to OTE, its goal is to enable both the private sector and Government agencies to monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities. Reports go to DOD, Congress, and industry associations. A review of recent assessments shows that they are currently focused on matters such as Air Force Industrial Supply Chain Assessment (2021) and U.S. Software Integration in Infrastructure Network Systems Assessment (2020). Recently completed assessments included U.S. Integrated Circuit Design and Manufacturing Industry Assessment (2019); Air Force C-17 Supply Chain Impact Assessment (2018); U.S. Footwear and Textile and Apparel Assessments (both in 2017); Bare Printed Circuit Card Industry Assessment (2017); and Strategic Materials Assessments in 2016.<sup>128</sup> Neither medical nor health

care assessments have been included on the list since a 2011 DHS Assessment of the Impact of Foreign Sourcing on Health Related Infrastructure.

By EO 13922 of May 14, 2020, the DFC CEO also was delegated authority under § 705 to obtain information.<sup>129</sup>

The approach to obtaining industry information requires careful thought and planning. The assessments to date have focused on critical areas to support the national defense. The COVID-19 pandemic demonstrates an urgent need for healthcare and medical resources to receive greater attention to assist in preparing for and responding to such emergencies.

### Voluntary Agreements & Action Plans— Protection From The Antitrust Laws

DPA § 708 provides protection from the antitrust laws in certain circumstances in support of the national defense.<sup>130</sup> This section provides authority for the President to “consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense.”<sup>131</sup> That consultation process must be preceded by and rest on a presidential determination that “conditions exist which may pose a direct threat to the national defense or its preparedness programs.”<sup>132</sup> Assuming that the consultative process produces an approach or plan of action, the President (or other delegated official) may approve and proceed with the agreement or plan.<sup>133</sup> The statute provides a defense to participants in voluntary agreements or action plans for civil or criminal antitrust actions that may be brought against them.<sup>134</sup> These agreements are limited to specific circumstances and do not confer blanket immunity.

DPA § 708(c) provides two circumstances—both of which are subject to monitoring by the Attorney General and the Chairman of the Federal Trade Commission (FTC).<sup>135</sup>

In the first circumstance under subsection (c)(2),<sup>136</sup> the President or a Senate-confirmed designee (for example, the Secretary of HHS or Defense), may consult with representatives of industry for the purpose of form-

ing voluntary agreements and plans of action “to help provide for the national defense.” However, 10 days before those conversations can be initiated by a designee, the designee must consult with the Attorney General and the FTC and obtain approval from both. Using this approach, the designee must promulgate rules that incorporate “standards and procedures” for a voluntary agreement or plan of action—subject to consultation with the Attorney General and the Chair of the FTC and approval by the Attorney General. The rulemaking procedure must follow the required Administrative Procedure Act (5 U.S.C.A. § 553) notice, timing and meeting requirements. A voluntary agreement produced by this process must be sent to the Attorney General, the FTC Chair, and Congress.<sup>137</sup> Assuming that all necessary approvals are obtained, the agreement will be in place for five years and can be renewed for a subsequent five years.<sup>138</sup>

In the second circumstance, under subsection (c)(3),<sup>139</sup> if the President (non-delegable) determines that a “specific voluntary agreement or plan of action” is necessary “to meet national defense requirements resulting from an event that degrades or destroys critical infrastructure,” his designee is not required to consult with the Attorney General of the FTC, but the President must publish a rule consistent with the 5 U.S.C.A. § 553 requirements as “soon as is practicable under the circumstances.”<sup>140</sup> This authority provides for action more quickly. The definition of a “specific voluntary agreement or plan of action” is within the discretion of the President.<sup>141</sup>

The statute does not expressly provide for antitrust protections in the case of a pandemic such as COVID-19 in the manner in which it addresses critical infrastructure. This is another example of the ways in which the statute, while providing important authorities, also is specific such that forward-thinking attention is necessary to prepare for new threats to national security.<sup>142</sup>

### The Potential For A Nucleus Executive Reserve

DPA § 710 authorizes a “Nucleus Executive Reserve,”<sup>143</sup> which is commonly referred to as the National Defense Executive Reserve (NDER).<sup>144</sup> The statute provides for establishment and training of an executive

reserve of individuals from the private sector (or Government who are not full-time federal employees) who would serve in executive positions in Government during the periods of a national defense emergency. Training would be provided for their position in the event that they were called to serve. Under EO 13603 of March 12, 2012,<sup>145</sup> any federal department or agency may create an NDER and provide training. There are no such units currently. Active use of such units would require a declaration by the Secretary of DHS to the effect that an emergency affecting the national defense exists and that an NDER is necessary to the emergency functions of the agency.<sup>146</sup>

As with other Title VII authorities discussed above, use of NDERs likely would involve early and active engagement to recruit and train such individuals. The COVID-19 pandemic response is an example of a situation where outside expertise from industry may have provided resources not available within the Government. As the emergency response develops or means for addressing potential future events are considered, the NDER authority may provide additional expertise.

By EO 13922, the DFC CEO also was authorized to use the authorities of § 710<sup>147</sup> to obtain expertise and personnel as needed.

## Guidelines

These *Guidelines* are intended to assist you in understanding the Government’s use of the DPA to respond to emergent needs in the light of the current national emergency caused by COVID-19. They are not, however, a substitute for professional representation in any specific situation.

**1. Training:** Companies should ascertain if they have received a rated order. The rating will be either a DX or DO designation. Company personnel need training to be able timely to ascertain whether the order should be accepted or may be rejected, as well as to ensure that accepted orders are given the requisite priority.

**2. Supply Chain:** DPA requirements concerning rated orders flow through the supply chain. In placing orders with suppliers, contractors must be attentive to the rating for contracts supported by their suppliers to ensure

the appropriate rating is included in the subcontract or purchase order with the relevant vendor.

**3. Force:** Under the DPA, the Government has shown an increased willingness to use the Act to compel production by companies. Typically, the Government will seek to encourage a company to accept orders rather than try to mandate that the company do so. If necessary, however, the Government has authority to require a company to provide supplies or materials if it is capable of doing so. The Government also may direct allocations of necessary supplies or materials when deemed necessary.

**4. Flexibility:** The DPA is flexible. It is not limited to rated orders. The Government may allocate resources, make investments to increase production capacity, or take other steps to bolster the national defense, broadly defined. Companies should review these authorities to determine if their use would aid production or distribution of critical resources or technologies.

**5. Risk:** The Government may prosecute actions such as price gouging or hoarding under the DPA. As with all contractual relationships with the Government, companies doing business with the Government (directly or indirectly through other companies) also must be attendant to the risk of violations of the civil False Claims Act.

**6. Enhancement:** Title III funding may be used to build or enhance capacity. Companies should ascertain whether they have capability to expand capacity to meet the needs of national defense as such projects may be eligible for Title III support in the form of loans, loan guarantees, purchase commitments, or purchases. For example, purchase commitments can encourage companies to make their own investments in facilities. Companies must be mindful of compliance requirements associated with these instruments.

**7. National Defense:** Prior to COVID-19, the DPA definition of “national defense” included emergency preparedness efforts. COVID-19 highlighted that this definition can be expansive in effect and scope. Rather than limited to a geographical area, such as an area affected by a hurricane, it can be nationwide in scope and lasting in duration. Commercial supplies may be critical to the national defense.

**8. Cooperation:** The DPA confers immunity from antitrust liability for collaboration among industry with the Government.

## ENDNOTES:

<sup>1</sup>Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C.A. § 4501 et seq.).

<sup>2</sup>Efron & Ebert, “Defense Priorities & Allocations System,” 01-12 Briefing Papers 9 (Nov. 2001).

<sup>3</sup>50 U.S.C.A. § 4501 et seq.

<sup>4</sup>50 U.S.C.A. § 4502(a)(4).

<sup>5</sup>50 U.S.C.A. § 4552(14).

<sup>6</sup>50 U.S.C.A. § 4552(14).

<sup>7</sup>See Defense Production Act Reauthorization of 2009, Pub. L. No. 111-67, § 8, 123 Stat. 2006, 2017 (2009).

<sup>8</sup>50 U.S.C.A. § 4552(11).

<sup>9</sup>50 U.S.C.A. § 4511.

<sup>10</sup>50 U.S.C.A. § 4511(b).

<sup>11</sup>50 U.S.C.A. § 4511(a).

<sup>12</sup>Section 101(c) authorizes the President to require allocation of or priority performance under contracts for materials, equipment, and services needed to maximize domestic energy production if he makes certain findings with regard to, for example, energy exploration, production, transportation, distribution, and conservation. 50 U.S.C.A. § 4511(c).

<sup>13</sup>50 U.S.C.A. §§ 4531–4534.

<sup>14</sup>50 U.S.C.A. § 4531.

<sup>15</sup>50 U.S.C.A. § 4532.

<sup>16</sup>50 U.S.C.A. § 4533(a).

<sup>17</sup>50 U.S.C.A. § 4533(e).

<sup>18</sup>50 U.S.C.A. §§ 4551–4568.

<sup>19</sup>50 U.S.C.A. § 4555; see <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments>.

<sup>20</sup>50 U.S.C.A. § 4558.

<sup>21</sup>50 U.S.C.A. § 4560(e).

<sup>22</sup>50 U.S.C.A. § 4565.

<sup>23</sup>Cong. Research Serv. Report R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress 8 (Mar. 2, 2020).

<sup>24</sup>45 C.F.R. pt. 101.

<sup>25</sup>85 Fed. Reg. 28500 (May 13, 2020). The regulations can be found at 44 C.F.R. Part 333.

<sup>26</sup>Cong. Research Serv., R43767, The Defense Pro-

duction Act of 1950: History, Authorities, and Considerations for Congress 8 (Mar. 2, 2020).

<sup>27</sup>Efron & Ebert, “Defense Priorities & Allocations System,” 01-12 Briefing Papers 9 (Nov. 2001).

<sup>28</sup><https://www.businessdefense.gov/DPA-Title-III/Overview>.

<sup>29</sup>Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

<sup>30</sup>Cong. Research Serv. Insight IN11231, The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations 2 (Mar. 18, 2020).

<sup>31</sup>Exec. Order No. 13909 (Mar. 18, 2020), published at 85 Fed. Reg. 16227 (Mar. 23, 2020).

<sup>32</sup>50 U.S.C.A. § 4511(b).

<sup>33</sup>Exec. Order No. 13910 (Mar. 23, 2020), published at 85 Fed. Reg. 17001 (Mar. 26, 2020).

<sup>34</sup>50 U.S.C.A. § 4512.

<sup>35</sup>Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

<sup>36</sup>Exec. Order No. 13911 (Mar. 27, 2020), published at 85 Fed. Reg. 18403 (Apr. 1, 2020).

<sup>37</sup>Presidential Memorandum on Order Under the Defense Production Act Regarding General Motors Company (Mar. 27, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>.

<sup>38</sup>15 C.F.R. § 700.13(c).

<sup>39</sup>See, e.g., Hennigan, “Inside Trump’s Coronavirus Theatrics on War Powers, Ventilators and GM,” Time (Mar. 31, 2020), <https://time.com/5813277/trump-emergency-powers-gm-coronavirus-theatrics/>.

<sup>40</sup>Id.

<sup>41</sup>Korosec, “GM Delivers First Ventilators Under 30,000-Unit Government Contract,” TechCrunch (Apr. 17, 2020), <https://techcrunch.com/2020/04/17/gm-delivers-first-ventilators-under-30000-unit-government-contract/>. According to published reports, Ford Motor Company also engaged in production of ventilators in conjunction with GE Healthcare. Ford, which according to news sources was building a simpler ventilator for emergency use, did not receive a DPA order. Albergotti & Siddiqui, “Ford and GM Are Undertaking a Warlike Effort To Produce Ventilators. It May Fall Short and Come Too Late,” Wash. Post. (Apr. 4, 2020), <https://www.washingtonpost.com/business/2020/04/04/ventilator-s-coronavirus-ford-gm/>.

<sup>42</sup>Presidential 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/>; see 50 U.S.C.A. § 4511(b).

<sup>43</sup>Presidential Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators (Apr. 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators/>.

<sup>44</sup>Exec. Order No. 13917 (Apr. 28, 2020), published at 85 Fed. Reg. 26313 (May 1, 2020).

<sup>45</sup>50 U.S.C.A. § 4511(b).

<sup>46</sup><https://www.osha.gov/news/newsreleases/national/04262020>.

<sup>47</sup><https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

<sup>48</sup><https://www.dol.gov/newsroom/releases/osha/osh-a20200428-1>.

<sup>49</sup>Pub. L. No. 116-136.

<sup>50</sup>Pub. L. No. 116-136, div. B, tit. III.

<sup>51</sup>Pub. L. No. 116-136, div. B, tit. III.

<sup>52</sup>50 U.S.C.A. § 4531.

<sup>53</sup>50 U.S.C.A. § 4531(a)(3)(A).

<sup>54</sup>Pub. L. No. 116-136, div. B, tit. III.

<sup>55</sup>50 U.S.C.A. § 4532(a).

<sup>56</sup>50 U.S.C.A. § 4532(c)(1).

<sup>57</sup>Pub. L. No. 116-136, div. B, tit. III.

<sup>58</sup>Pub. L. No. 116-136, § 4017.

<sup>59</sup>50 U.S.C.A. § 4533(a)(1).

<sup>60</sup>50 U.S.C.A. § 4533(a)(6)(C).

<sup>61</sup>Pub. L. No. 116-136, § 4017.

<sup>62</sup>50 U.S.C.A. § 4534.

<sup>63</sup>50 U.S.C.A. § 4534(e).

<sup>64</sup>Pub. L. No. 116-136, § 4017.

<sup>65</sup>50 U.S.C.A. § 4532(d)(1).

<sup>66</sup>Pub. L. No. 116-136, § 4017.

<sup>67</sup>50 U.S.C.A. § 4533(a)(6)(B); Pub. L. No. 116-136, § 4017.

<sup>68</sup>Exec. Order No. 13911 (Apr. 1, 2020), published at 85 Fed. Reg. 18403 (Mar. 27, 2020).

<sup>69</sup>50 U.S.C.A. § 4531.

<sup>70</sup>50 U.S.C.A. § 4532.

<sup>71</sup>50 U.S.C.A. § 4533.

<sup>72</sup>50 U.S.C.A. § 4531(a)(2).

<sup>73</sup>50 U.S.C.A. § 4531(d)(1)(A).

<sup>74</sup>50 U.S.C.A. § 4533(a)(1)–(a)(6).

<sup>75</sup>50 U.S.C.A. § 4532(d)(2)(B).

<sup>76</sup>50 U.S.C.A. § 4517.

<sup>77</sup>50 U.S.C.A. § 4517(a).

<sup>78</sup>50 U.S.C.A. § 4517(b)(1).

<sup>79</sup>50 U.S.C.A. § 4517(b)(2).

<sup>80</sup>50 U.S.C.A. §§ 4511, 4512.

<sup>81</sup>Exec. Order No. 13922 (May 14, 2020), published at 85 Fed. Reg. 30583 (May 19, 2020); see 50 U.S.C.A. §§ 4532, 4533.

<sup>82</sup>Available at <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>.

<sup>83</sup>Available at <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>.

<sup>84</sup>2 U.S.C.A. § 661 et seq.

<sup>85</sup>85 Fed. Reg. 20195 (Apr. 10, 2020) (adding 44 C.F.R. pt. 328, effective Apr. 7, 2020 until Aug. 10, 2020).

<sup>86</sup>50 U.S.C.A. § 4511.

<sup>87</sup>50 U.S.C.A. § 4554.

<sup>88</sup>Exec. Order No. 13909 (Mar. 18, 2020), published at 85 Fed. Reg. 16227 (Mar. 23, 2020).

<sup>89</sup>Exec. Order No. 13910 (Mar. 23, 2020), published at 85 Fed. Reg. 17001 (Mar. 26, 2020).

<sup>90</sup>Exec. Order No. 13911 (Mar. 27, 2020), published at 85 Fed. Reg. 18403 (Apr. 1, 2020).

<sup>91</sup>85 Fed. Reg. at 20196.

<sup>92</sup>44 C.F.R. § 328.101(b).

<sup>93</sup>44 C.F.R. § 328.102(a).

<sup>94</sup>44 C.F.R. § 328.103(a).

<sup>95</sup>44 C.F.R. § 328.102(b).

<sup>96</sup>44 C.F.R. § 328.102(c).

<sup>97</sup>44 C.F.R. § 328.102(d)(1).

<sup>98</sup>44 C.F.R. § 328.102(d)(1).

<sup>99</sup>44 C.F.R. § 328.102(d)(1).

<sup>100</sup>44 C.F.R. § 328.102(d)(1).

<sup>101</sup>44 C.F.R. § 328.102(d)(2).

<sup>102</sup>85 Fed. Reg. 22021 (Apr. 21, 2020).

<sup>103</sup>85 Fed. Reg. at 22022.

<sup>104</sup>85 Fed. Reg. at 22023.

<sup>105</sup>85 Fed. Reg. at 22023.

<sup>106</sup>85 Fed. Reg. at 22024.

<sup>107</sup>50 U.S.C.A. § 4512.

<sup>108</sup>50 U.S.C.A. § 4512.

<sup>109</sup>50 U.S.C.A. § 4513.

<sup>110</sup>50 U.S.C.A. § 4513.

<sup>111</sup> <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0#:~:text=On%20March%2018%2C%202020%2C%20in,them%20or%20sell%20them%20for.>

<sup>112</sup> <https://www.defense.gov/Newsroom/Releases/Release/Article/2146692/first-dod-defense-production-act-title-3-covid-19-project.>

<sup>113</sup> <https://www.defense.gov/Newsroom/Releases/Release/Article/2158351/dod-details-133-million-defense-production-act-title-3-covid-19-project.>

<sup>114</sup> <https://www.defense.gov/Newsroom/Releases/Release/Article/2170355/dod-details-75-million-defense-production-act-title-3-puritan-contract.>

<sup>115</sup>Cong. Research Serv. Insight IN11470, Defense Production Act (DPA): Recent Developments in Response to COVID-19, at 1 (July 27, 2020).

<sup>116</sup>Id. at 2.

<sup>117</sup>Id.; see also <https://www.defense.gov/Newsroom/Releases/Release/Article/2214497/dod-announces-135-million-in-defense-production-act-title-3-covid-19-actions.>

<sup>118</sup> <https://www.defense.gov/Newsroom/Releases/Release/Article/2226346/dod-announces-187-million-in-defense-production-act-title-iii-covid-19-actions.>

<sup>119</sup> <https://www.defense.gov/Newsroom/Releases/Release/Article/2287490/dod-announces-773-million-in-defense-production-act-title-iii-covid-19-actions.>

<sup>120</sup>Cong. Research Serv. Insight IN11470, at 1.

<sup>121</sup> <https://www.dfc.gov/media/press-releases/dfc-sign-letter-interest-investment-kodaks-expansion-pharmaceuticals.>

<sup>122</sup>Id.

<sup>123</sup>Id.

<sup>124</sup>50 U.S.C.A. § 4555.

<sup>125</sup>50 U.S.C.A. § 4555(a).

<sup>126</sup>Exec. Order No. 13603 (Mar. 16, 2012), 77 Fed. Reg. 16651 (Mar. 22, 2012).

<sup>127</sup>Exec. Order No. 13603 (Mar. 16, 2012), 77 Fed. Reg. 16651 (Mar. 22, 2012).

<sup>128</sup>See <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments.>

<sup>129</sup>Exec. Order No. 13922 (May 14, 2020), published at 85 Fed. Reg. 30583 (May 19, 2020).

<sup>130</sup>50 U.S.C.A. § 4558.

<sup>131</sup>50 U.S.C.A. § 4558(c)(1).

<sup>132</sup>50 U.S.C.A. § 4558(c)(1). The consultation process is described in the statute at DPA § 708 (d) and (e). 50 U.S.C.A. § 4558 (d) & (e).

<sup>133</sup>50 U.S.C.A. § 4558(f).

<sup>134</sup>50 U.S.C.A. § 4558(j).

<sup>135</sup>50 U.S.C.A. § 4558(c).

<sup>136</sup>50 U.S.C.A. § 4558(c)(2).

<sup>137</sup>50 U.S.C.A. § 4558(e).

<sup>138</sup>50 U.S.C.A. § 4558(f)(2).

<sup>139</sup>50 U.S.C.A. § 4558(c)(3).

<sup>140</sup>50 U.S.C.A. § 4558(c)(3)(B).

<sup>141</sup>50 U.S.C.A. § 4558(c)(3).

<sup>142</sup>Other provisions beyond the scope of this Briefing Paper bear on the Government's ability to respond to health and medical emergencies. In 2006, Congress passed the Pandemic and All-Hazards Preparedness Act.

It creates an antitrust exemption for companies collaborating on "the development of . . . a qualified pandemic or epidemic product." 42 U.S.C.A. § 247d-7f. The law expires in 2023.

<sup>143</sup>50 U.S.C.A. § 4560(e).

<sup>144</sup>The NDER dates back to 1956, when President Eisenhower used the DPA authority and issued EO 10660 establishing a National Defense Executive Reserve.

<sup>145</sup>Exec. Order No. 13603, § 501(c) (Mar. 16, 2012), 77 Fed. Reg. 16651 (Mar. 22, 2012).

<sup>146</sup>Exec. Order No. 13603, § 501(e) (Mar. 16, 2012), 77 Fed. Reg. 16651 (Mar. 22, 2012).

<sup>147</sup>50 U.S.C.A. § 4560.

# BRIEFING PAPERS