

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

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

## Defense Production Act Update— Continued Use Of Authority To Address Developing Challenges

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This BRIEFING PAPER updates BRIEFING PAPERS No. 20-8, *Defense Production Act—Using Authority To Address Emergent Needs* (July 2020),<sup>1</sup> regarding use of the Defense Production Act of 1950 (DPA).<sup>2</sup>

As discussed in this PAPER, the DPA has been used recently in various ways to respond to the COVID-19 pandemic, as well to address other developing supply chain issues. The Government’s recent activities under the statute illustrate its flexibility, explain how it may be used, and, in some instances, highlight its complexity and its limitations to address emergent threats. The statutory authorities are both extensive and complex, as the statute has been amended repeatedly since 1950 in ways that may 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 flexible enough to address future circumstances.

### Background

#### The Defense Production Act

The DPA<sup>3</sup> grants the President “an array of authorities to shape national defense preparedness programs and to take steps to maintain and enhance the domestic industrial base.”<sup>4</sup>

From a historical perspective, the DPA finds its origins in the War Powers Acts of World War II, which dramatically expanded the President’s power to prosecute a war.<sup>5</sup> Enacted on September 8, 1950, the DPA responded to the start of the Korean War and was a component of the mobilization effort in the context of the Cold War.<sup>6</sup> Since 1950, Congress has amended the DPA to broaden its definition beyond military application and expanded coverage to include crises resulting from natural disasters or human-caused events not amounting to an attack on the United States.<sup>7</sup> Over the years, Congress has amended and reauthorized the DPA, with the most recent reauthorization in the National

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Defense Authorization Act for Fiscal Year 2019, which extended DPA authority through September 30, 2025.<sup>8</sup>

The DPA broadly defines the term “national defense” to include “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.”<sup>9</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>10</sup> The term “homeland security,” which was added in 2009,<sup>11</sup> includes efforts “(A) to prevent terrorist attacks within the United States; (B) to 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>12</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>13</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>14</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 (known as “rated orders”), and (2) allocate or control the distribution of materials, services, and facilities to the extent necessary to promote the national defense (known as “allocation”).<sup>15</sup> As discussed below, the expanse of the term “national defense” and the potential degree of intrusion into the civilian market are extremely broad.<sup>16</sup>

Title III of the DPA provides authority to ensure the

timely availability of essential domestic industrial resources to support national defense and homeland security requirements through tailored economic incentives.<sup>17</sup> Authorized incentives include loans,<sup>18</sup> loan guarantees,<sup>19</sup> direct purchases and purchase commitments,<sup>20</sup> and the authority to procure and install equipment in private industrial facilities.<sup>21</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>22</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>23</sup> The President also is authorized to consult 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>24</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>25</sup> Use of these authorities requires at least some lead time and advance planning to reap the benefits intended.

Title VII of the DPA also includes provisions related to the Committee on Foreign Investment in the United States (CFIUS).<sup>26</sup> The CFIUS is an interagency committee that serves the President in overseeing the national security implications of foreign direct investment in the economy.<sup>27</sup> Section 721 of the DPA authorizes the President to suspend or prohibit a transaction, by or with any foreign person, that may result in control of a U.S. business by a foreign person and that may threaten to impair national security.<sup>28</sup> By executive order, the President’s authority has been delegated to the CFIUS, generally giving the committee authority to

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review transactions that may raise national security concerns.<sup>29</sup> We do not discuss recent developments involving CFIUS in this BRIEFING PAPER.

### Implementing Regulations

The Department of Commerce's Defense Priorities and Allocations System (DPAS) regulations, which implement the DPA, are found in the *Code of Federal Regulations* 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 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 on rated order regulations.<sup>30</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>31</sup> As another example, the Federal Emergency Management Agency (FEMA) issued an interim rule on rated orders during the COVID-19 response.<sup>32</sup>

### Practical Considerations

A rated order is a contract or order placed in support of a national defense program, pursuant to § 101(a) of the DPA.<sup>33</sup> Importantly, a rated order takes precedence over all unrated orders when necessary to meet delivery dates specified in the rated order.<sup>34</sup>

Rated orders are common in the aerospace and defense sector and have been for many years.<sup>35</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 do-

mestic manufacturing 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. Perhaps existing authorities require modification or additional flexibility to provide relief in situations involving health and medical resources.

### Historical Usage Of The DPA

DoD has used Title I of the DPA for years to prioritize the supply of products needed to support the production of defense items.<sup>36</sup> DoD has historically 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>37</sup> to fund and manage such activities.

### COVID-19–Related Use Of The DPA

On March 13, 2020, President Donald J. Trump declared that the outbreak of COVID-19 in the United States constituted a national emergency.<sup>38</sup> In the response to the COVID-19 pandemic, the President issued a series of orders and directives involving the DPA.

During the response to COVID-19, the DPA has been used in various ways, including some with little or no precedent in practice. According to the Congressional Research Service (CRS), before COVID-19, DPA authorities had not been used for public health emergencies (though they had been used for disaster relief).<sup>39</sup>

The July 2020 BRIEFING PAPER discussed, in detail, the National Emergency Declaration and COVID-19-related actions using the DPA priorities and allocations authorities.<sup>40</sup> Since July 2020, the President has issued additional executive orders, which are summarized in the following table and discussed below.

**Recent Executive Orders  
Related To COVID-19 And The DPA**

Action	Date Signed	Title
EO 13944	August 6, 2020	Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States
EO 13987	January 20, 2021	Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security
EO 14001	January 21, 2021	A Sustainable Public Health Supply Chain
EO 14017	February 24, 2021	America's Supply Chains

### Executive Order 13944—Authorizing HHS To Determine Priorities And Allocating Health And Medical Resources

On August 6, 2020, the President issued EO 13944, which was entitled “Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States.”<sup>41</sup> That order included numerous key provisions related to the purchase of medicines and medical supplies. For instance, the order instructed federal agencies to identify vulnerabilities in the supply chain for certain essential medicines, to mobilize domestic manufacturing of certain medical supplies, and to purchase medical supplies produced domestically. Notably, this order instructed the Commissioner of Food and Drugs (FDA Commissioner) to generate a list of essential medicines, medical countermeasures, and their critical inputs that are deemed medically necessary to protect public safety and human health.

As relevant here, EO 13944 directed HHS to use the authority under § 101 of the DPA<sup>42</sup> to prioritize federal contracts or orders for essential medicines, medical countermeasures, or critical inputs over other contracts and orders.<sup>43</sup> And related to this directive, the EO also instructed HHS to use DPA authority to allocate materials, services, and facilities deemed necessary to promote the national defense.<sup>44</sup>

### Executive Order 13987—Establishing The Position Of COVID-19 Response Coordinator As A Direct Report To The President

On January 20, 2021, shortly after being inaugurated, President Joseph R. Biden Jr. issued EO 13987 on the Federal Government’s response to the COVID-19 pandemic.<sup>45</sup> In particular, this order established the positions of Coordinator of the COVID-19 Response and Counselor to the President and the position of the Deputy Coordinator of the COVID-19 Response within the Executive Office of the President. The order directed the COVID-19 Response Coordinator to report directly to the President,

advise and assist federal agencies to respond to the pandemic, coordinate all elements of the response, and perform specific duties as directed by the President. As to the DPA, the order expressly stated that the COVID-19 Response Coordinator’s duties include “coordinating the Federal Government’s efforts to produce, supply, and distribute personal protective equipment, vaccines, tests, and other supplies for the Nation’s COVID-19 response, including through the use of the [DPA].”<sup>46</sup>

### Executive Order 14001—Creating A Sustainable Public Health Supply Chain

On January 21, 2021, the President issued EO 14001 directing immediate actions to secure the supply chain for supplies related to the COVID-19 pandemic.<sup>47</sup> Specifically, the order directs the Secretaries of State, Defense, Homeland Security, and HHS, and the heads of appropriate executive agencies—in coordination with the COVID-19 Response Coordinator—to review the availability of critical materials, treatments, and supplies necessary to respond to the pandemic and to report its findings to the President.

If this review identified a shortfall in pandemic response supplies, the order required federal agencies to “take appropriate action using all available legal authorities, including the [DPA], to fill those shortfalls as soon as practicable by acquiring additional stockpiles, improving distribution systems, building market capacity, or expanding the industrial base.”<sup>48</sup> Further, EO 14001 directed the COVID-19 Response Coordinator to submit recommendations to the President that address, as relevant here, “whether additional use of the [DPA], by the President or agencies exercising delegated authority under the Act, would be helpful.”<sup>49</sup>

### Executive Order 14017—Directing A 100-Day Supply Chain Review

On February 24, 2021, the President issued EO 14017 directing a whole-of-government approach to assessing vulnerabilities in, and strengthening the resilience of, critical supply chains.<sup>50</sup> To advance these goals, the order

required the Secretaries of Commerce, Energy, Defense, and HHS to complete a review of supply chain risks relevant to their respective agencies—such as high capacity batteries, rare earth minerals, and personal protective equipment—and to submit reports to the President. This order also required supply chain assessment reports focused on specific critical sectors (e.g., defense industrial base, information and communications technology) to be completed within one-year.<sup>51</sup>

## Statutory Development—CARES Act And Expansion Of Certain Title III Authorities

On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) became law.<sup>52</sup> Along with various stimulus provisions, the CARES Act enhanced DPA authorities to improve access to critical resources and to protect the capability of industry to respond rapidly to the current emergency.

For instance, the CARES Act also waived certain restrictions on the use of particular Title III DPA authorities, some for a two-year period,<sup>53</sup> and others for a one-year period, beginning on the date of enactment.<sup>54</sup> The July 2020 BRIEFING PAPER extensively discussed the various DPA-related waivers granted by the CARES Act.<sup>55</sup>

The CARES Act also 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.<sup>56</sup> (The DPA, of course, also can be used to prioritize acquisition of necessary equipment, supplies, and resources with existing DoD funds).

According to a December 2021 GAO report, DoD used approximately \$200 million for medical supplies, \$100 million for a loan program managed by the U.S. Development Finance Corporation, and the remainder to “offset financial distress in the defense industrial base.”<sup>57</sup> This same GAO report stated that as of September 30, 2021, HHS also used approximately \$2.9 billion in funding for domestic production investments, based on authority in the Coronavirus Preparedness and Response Supplemental Appropriations Act,

2020<sup>58</sup> and the Paycheck Protection Program and Health Care Enhancement Act.<sup>59</sup>

The American Rescue Plan Act of 2021 appropriated \$10 billion to support the use of the DPA for medical supplies.<sup>60</sup> Specifically, the American Rescue Plan Act provided this funding to carry out Titles I, III, and VII of the DPA, and stated that these amounts must generally “be used for the purchase, production (including the construction, repair, and retrofitting of government-owned or private facilities as necessary), or distribution of medical supplies and equipment (including durable medical equipment) related to combating the COVID-19 pandemic.”<sup>61</sup>

## Non-COVID-19-Related Use Of The DPA

In late 2021 and throughout 2022, the President has invoked the authorities of the DPA several times for purposes not directly related to the COVID-19 pandemic. Specifically, the President issued a series of Presidential Determinations invoking DPA authority as to various aspects of the nation’s industrial base. The President’s invocation of the DPA may be viewed within the context of strategic and critical material supply chain concerns.<sup>62</sup>

Many of the President’s recent actions exercise authority under § 303 of the DPA. This section allows the President to incentivize the domestic industrial base to expand the production and supply of critical materials and goods.<sup>63</sup> Under this authority, the President may:

- Direct purchases and purchase commitments of industrial resources or critical technology items for use or resale;
- Encourage exploration, development, and mining of critical and strategic materials, and other material;
- Initiate development of productive capacity; and
- Order increased use of certain emerging technologies.<sup>64</sup>

The President’s recent, non-COVID-19-related DPA actions are summarized in the following table and discussed below.

**Presidential Determinations  
Related To The DPA**

Action	Date Signed	Title
Determination No. 2022-07	December 21, 2021	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, [on Shipbuilding]
Determination No. 2022-11	March 31, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, [on Large-Capacity Batteries]
Determination No. 2022-13	May 18, 2022	Delegating Authority Under the Defense Production Act To Ensure an Adequate Supply of Infant Formula
Determination No. 2022-15	June 6, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Solar Photovoltaic Modules and Module Components
Determination No. 2022-16	June 6, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Insulation
Determination No. 2022-17	June 6, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals
Determination No. 2022-18	June 6, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Electric Heat Pumps
Determination No. 2022-19	June 6, 2022	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Transformers and Electric Grid Components
Determination No. 2023-05	March 1, 2023	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Airbreathing Engines, Advanced Avionics Position Navigation and Guidance Systems, and Constituent Materials for Hypersonic Systems
Determination 2023-06	March 27, 2023	Presidential Determination Pursuant to § 303 of the Defense Production Act of 1950, as amended, on Printed Circuit Boards and Advanced Packaging Production Capability

**Presidential Determination No. 2022-07—DPA  
§ 303 Authorization For Virginia Class Submarines**

On December 21, 2021, the President issued Presidential Determination No. 2022-07 under the authority of § 303 of the DPA making findings related to shipbuilding.<sup>65</sup> In particular, under § 303(a)(5) of the DPA,<sup>66</sup> the President determined that the shipbuilding industrial base in support of Virginia Class attack submarine production was essential to the national defense. The President further determined that without action under § 303 of the DPA, U.S. industry cannot reasonably be expected to provide the shipbuilding capability in a timely manner and that actions under this section of the DPA are “necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability.”<sup>67</sup> Finally, pursuant to § 303(a)(7)(B) of the DPA,<sup>68</sup> the President waived the requirements of § 303(a)(1)–(a)(6) of the DPA<sup>69</sup> for purposes of expanding the domestic production capability for the supply chains related to the Virginia Class submarine.

**Presidential Determination No. 2022-11—DPA  
§ 303 Authorization For Large-Capacity Batteries**

On March 31, 2022, the President issued Presidential Determination No. 2022-11, again invoking authorities under § 303 of the DPA.<sup>70</sup> In this determination, the President directed DoD to strengthen the U.S. domestic industrial base for large-capacity batteries used in “the automotive, e-mobility, and stationary storage sectors.”<sup>71</sup> To support this

action, the Presidential Determination states that the production of large-capacity batteries “is essential to our national security and the development and preservation of domestic critical infrastructure.”<sup>72</sup> And like the DPA § 303 authorization related to shipbuilding, the President expressly waived the requirements of § 303(a)(1)–(a)(6),<sup>73</sup> by invoking the authority of § 303(a)(7)(B).<sup>74</sup> Such a waiver could, for example, allow DoD to execute contracts without regard to the general prohibition on the Government reselling purchased commodities below certain prices.<sup>75</sup>

**Presidential Determination No. 2022-13—DPA  
§ 101 Authority To Address Infant Formula Supply  
Chain Shortages**

On May 18, 2022, as part of a broader response to a domestic shortage of infant formula, the President issued Presidential Determination No. 2022-13 delegating certain authority under § 101 of the DPA to the Secretary of HHS to ensure the availability of infant formula.<sup>76</sup> First, the President established that the “national infant formula supply chain” was “critical infrastructure that is essential to the national defense, including to public health and safety.”<sup>77</sup> Next, invoking § 101(b) of the DPA,<sup>78</sup> the President determined that the ingredients necessary to manufacture infant formula were scarce and critical materials essential to the national defense, and that the requirements for such materials could not otherwise be met absent a significant dislocation of the civilian market’s normal distribution of such materials.<sup>79</sup>

Based on these required determinations, the President delegated DPA Title I authorities to the HHS Secretary with respect to *all* health resources, including the ingredients necessary to manufacture infant formula.<sup>80</sup> Thus, the HHS Secretary now has the authority to require entities to prioritize and accept Government contract for materials and services and to allocate or control the general distribution of materials, services, and facilities as necessary.

On May 22, 2022, several days after issuance of Presidential Determination 2022-13, the Office of the President announced that the HHS Secretary authorized two infant formula priority orders.<sup>81</sup> These priority orders granted two manufacturers (i.e., Abbot Nutrition and Reckitt) the authority to place prioritized order for raw materials and consumables used in the production of infant formula.

Presidential Determinations No. 2022-15, 2022-16, 2022-17, 2022-18, 2022-19—DPA § 303 Authorizations For The Energy Sector

On June 6, 2022, again relying on the authority under § 303 of the DPA, the President issued Presidential Determination No. 2022-15 related to the industrial base for the energy sector.<sup>82</sup> The President made the following required determination under § 303: (1) solar photovoltaic modules and module components are an industrial resource, material, or critical technology item essential to the national defense; (2) without presidential action under § 303 of the DPA, U.S. industry cannot reasonably be expected to provide the capability for the needed industrial resource, material, or critical technology item in a timely manner; and (3) purchases, purchase commitments, or other action pursuant to § 303 of the DPA are the most cost effective, expedient, and practical alternative method for meeting the need.<sup>83</sup> Here, as with the determinations involving Virginia Class submarines and large-capacity batteries, the President also waived the requirements of DPA § 303(a)(1)–(a)(6)<sup>84</sup> to expand domestic production capability for photovoltaic modules and module components.

Also on June 6, 2022, the President issued these other four Presidential Determinations involving the industrial base for the energy sector:

- Presidential Determination 2022-16 (Insulation);<sup>85</sup>
- Presidential Determination 2022-17 (Electrolyzers, Fuel Cells, and Platinum Group Metals);<sup>86</sup>
- Presidential Determination 2022-18 (Electric Heat Pumps);<sup>87</sup> and

- Presidential Determination 2022-19 (Transformers and Electric Power Grid Components)<sup>88</sup>

In each instance, the President made the determinations required by § 303 of the DPA as related to items in question (e.g., insulation or electric heat pumps). In this regard, for each category of item, the President stated that “action to expand the domestic production” of that item was “necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability.” And to allow for maximum flexibility in expanding domestic production capability, in each of the Presidential Determinations, the President once again waived the requirements of DPA § 303(a)(1)–(a)(6)<sup>89</sup> related to the industrial base for the energy sector.

Presidential Determination No. 2023-05—DPA § 303 Authorizations For Airbreathing Engines, Advanced Avionics Position Navigation And Guidance Systems, And Constituent Materials For Hypersonic Systems

On March 1, 2023, the President issued Presidential Determination No. 2023-05, authorizing the use of DPA Title III authorities to address the nation’s domestic hypersonics industrial base.<sup>90</sup> First, the President determined that airbreathing engines, advanced avionics position navigations and guidance systems, and constituent materials for hypersonic systems were essential to the national defense. Then, under the authority of DPA § 303(a)(7)(B),<sup>91</sup> the President waived the requirements of § 303(a)(1)–(a)(6).<sup>92</sup> As the basis for this waiver, the President found such action to expand the domestic production capability for these supply chains necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability.<sup>93</sup>

This action should be viewed in the larger context of the Government’s attempts to address perceived vulnerabilities in defense-critical supply chains. Indeed, kinetic capabilities—including those for hypersonic systems—were one of the key focus areas in EO 14017, “America’s Supply Chains” (discussed above).<sup>94</sup>

Presidential Determination No. 2023-06—DPA § 303 Authorizations For Printed Circuit Boards And Advanced Packaging Production Capability

On March 27, 2023, the President issued Presidential Determination No. 2023-06,<sup>95</sup> which authorized the use of DPA Title III authorities to ramp up domestic printed circuit board production and the advanced packaging industrial base.<sup>96</sup>

Specifically, the President determined that without action under § 303 of the DPA, the United States industry cannot reasonably be expected to provide these critical technology items—i.e., printed circuit boards and advanced packaging—in a timely manner.<sup>97</sup>

This determination allows federal agencies, such as DoD, to leverage DPA Title III incentives, including purchases and purchase commitments, to support the printed circuit board and advanced packaging industrial base. And like the determination made earlier in March 2023 related to hyper-sonics, this step by the President should be seen in the greater framework of the Government’s response to weaknesses in defense-critical supply chains, particularly those identified by EO 14017.

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

Title VII of the DPA<sup>98</sup> contains tools and authorities that, if 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 midst of an emergency, but rather, their use should be informed by past emergencies, responses to them, and the current state of industry to become better prepared for the inevitable future threats—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>99</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 enforce the statute.<sup>100</sup> This authority has been delegated to the Secretary of Commerce in EO 13603 of March 16, 2012.<sup>101</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>102</sup> Although this authority is 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 work. 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 the Air Force Industrial Supply Chain Assessment (2021) and the U.S. Software Integration in Infrastructure Network Systems Assessment (2020). Recently completed assessments included the Assessment of the Critical Supply Chains Supporting the U.S. Information and Communications Technology Industry (2022); the U.S. Integrated Circuit Design and Manufacturing Industry Assessment (2019); the Air Force C-17 Supply Chain Impact Assessment (2018); the U.S. Footwear and Textile and Apparel Assessments (both in 2017); the Bare Printed Circuit Card Industry Assessment (2017); and the Strategic Materials Assessments (2016).<sup>103</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.<sup>104</sup>

By EO 13922 of May 14, 2020, the Chief Executive Officer of the United States International Development Finance Corporation (DFC CEO) also was delegated authority under § 705 to obtain information.<sup>105</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. For instance, the COVID-19 pandemic highlighted urgent need for healthcare and medical resources to receive greater attention to assist in preparing for and responding to such emergencies.

### Voluntary Agreements And 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>106</sup> This section authorizes 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>107</sup> That consultation process must follow and rest on a presidential determination that “conditions exist which may pose a direct threat to the national defense or its preparedness programs.”<sup>108</sup> Assuming that the consul-

tative process produces an approach or plan of action, the President (or other delegated official) may approve and proceed with the agreement or plan.<sup>109</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>110</sup> These agreements are limited to specific circumstances and do not confer blanket immunity.

Section 708(c) of the DPA provides two circumstances—both of which are subject to monitoring by the Attorney General and the Chairman of the Federal Trade Commission.<sup>111</sup>

In the first circumstance under § 708(c)(2),<sup>112</sup> the President or a Senate-confirmed designee (for example, the Secretary of HHS or Defense), may consult representatives of industry to form 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 the Attorney General and 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 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>113</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>114</sup>

In the second circumstance under § 708(c)(3),<sup>115</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 need not consult the Attorney General or FTC, but the President must publish a rule consistent with the 5 U.S.C.A. § 553 requirements as “soon as practicable under the circumstances.”<sup>116</sup> This authority provides for expedited action. The definition of a “specific voluntary agreement or plan of action” is within the discretion of the President.<sup>117</sup>

Of note, the statute does not expressly provide for antitrust protections during a pandemic, such as COVID-19, as it does for critical infrastructure. This is another example of the ways in which the statute, while providing important authorities, is also specific such that forward-thinking atten-

tion is necessary to prepare for new threats to national security.<sup>118</sup>

### The Potential For A Nucleus Executive Reserve

DPA § 710 authorizes a “Nucleus Executive Reserve,”<sup>119</sup> which is commonly referred to as the National Defense Executive Reserve (NDER).<sup>120</sup> The statute provides for establishing and training 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 if they were called to serve. Under Executive Order 13603 of March 16, 2012,<sup>121</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>122</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. Indeed, the COVID-19 pandemic response is an example of a situation in which outside expertise from industry may have provided resources not available within 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 of May 14, 2020, the DFC CEO also was authorized to use the authorities of § 710<sup>123</sup> to obtain expertise and personnel as needed.<sup>124</sup>

### Guidelines

These *Guidelines* are intended to assist you in understanding the Government’s use of the DPA to respond to emergent needs caused by the COVID-19 pandemic, as well to address other developing supply chain issues. 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.<sup>125</sup> Company personnel need training to be able to timely ascertain whether the order should be accepted or may be rejected, as well as to ensure that accepted orders are given the requisite priority. In this regard, be-

tween priority ratings, a DX rated order takes precedence over all DO rated orders.<sup>126</sup>

**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. Mandate:** 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 whether 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.<sup>127</sup> As with all contractual relationships with the Government, companies doing business with the Government (directly or indirectly through other companies) also must be attentive to the importance of accuracy in communications with and representations made to the Government and the risk of civil False Claims Act exposure.

**6. Enhancement:** DPA 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>Dowd, Lévasseur & Madsen, “Defense Production Act—Using Authority To Address Emergent Needs,” 20-8 Briefing Papers 1 (July 2020).

<sup>2</sup>Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C.A. § 4501 et seq.).

<sup>3</sup>Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C.A. § 4501 et seq.).

<sup>4</sup>50 U.S.C.A. § 4502(a)(4).

<sup>5</sup>Cong. Research Serv. Report R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress 2 (Mar. 2, 2020).

<sup>6</sup>Id.

<sup>7</sup>U.S. Gov’t Accountability Off., GAO–22–105380, COVID-19: Agencies Are Taking Steps To Improve Future Use of Defense Production Act Authorities 3–4 (Dec. 2021); see 64 GC ¶ 14(e).

<sup>8</sup>Pub. L. No. 115-32, § 1791, 132 Stat. 1636, 2238 (2018).

<sup>9</sup>50 U.S.C.A. § 4552(14).

<sup>10</sup>50 U.S.C.A. § 4552(14); see 42 U.S.C.A. § 5121 et seq.

<sup>11</sup>See Defense Production Act Reauthorization of 2009, Pub. L. No. 111–67, § 8, 123 Stat. 2006, 2017 (2009).

<sup>12</sup>50 U.S.C.A. § 4552(11).

<sup>13</sup>50 U.S.C.A. § 4511.

<sup>14</sup>50 U.S.C.A. § 4511(b).

<sup>15</sup>50 U.S.C.A. § 4511(a).

<sup>16</sup>Section 101(c) authorizes the President to require allocation of or priority performance of 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>17</sup>50 U.S.C.A. §§ 4531–4534.

<sup>18</sup>50 U.S.C.A. § 4532.

<sup>19</sup>50 U.S.C.A. § 4531.

<sup>20</sup>50 U.S.C.A. § 4533(a).

<sup>21</sup>50 U.S.C.A. § 4533(e).

<sup>22</sup>50 U.S.C.A. §§ 4551–4568.

<sup>23</sup>50 U.S.C.A. § 4555; see <https://www.bis.doc.gov/inde>

[x.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments.](#)

<sup>24</sup>50 U.S.C.A. § 4558.

<sup>25</sup>50 U.S.C.A. § 4560(e) (“nucleus executive reserve”).

<sup>26</sup>50 U.S.C.A. § 4565.

<sup>27</sup>Cong. Research Serv. Report RL33388, The Committee on Foreign Investment in the United States 1 (Feb. 26, 2020).

<sup>28</sup>50 U.S.C.A. § 4565.

<sup>29</sup>Exec. Order No. 11858 (May 7, 1975), published at 40 Fed. Reg. 20263 (May 9, 1975).

<sup>30</sup>Cong. Research Serv. Report R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress, at 8 (Mar. 2, 2020).

<sup>31</sup>45 C.F.R. pt. 101.

<sup>32</sup>85 Fed. Reg. 28500 (May 13, 2020). The regulations can be found at 44 C.F.R. Part 333.

<sup>33</sup>50 U.S.C.A. § 4511(a).

<sup>34</sup>50 U.S.C.A. § 4511(a).

<sup>35</sup>Cong. Research Serv. Report R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress 8 (Mar. 2, 2020).

<sup>36</sup>For a detailed discussion, see Efron & Ebert, “Defense Priorities & Allocations System,” 01-12 Briefing Papers 9 (Nov. 2001).

<sup>37</sup> <https://www.businessdefense.gov/>.

<sup>38</sup>Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>39</sup>Cong. Research Serv. Insight IN11231, The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations 2 (Mar. 18, 2020).

<sup>40</sup>Dowd, Levasseur & Madsen, “Defense Production Act—Using Authority To Address Emergent Needs,” 20-8 Briefing Papers 1 (July 2020).

<sup>41</sup>Exec. Order No. 13944 (Aug. 6, 2020), published at 85 Fed. Reg. 49929 (Aug. 14, 2020).

<sup>42</sup>50 U.S.C.A. § 4511.

<sup>43</sup>Issued by the President on March 18, 2020, 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. Exec. Order No. 13909 (Mar. 18, 2020), published at 85 Fed. Reg. 16227 (Mar. 23, 2020).

<sup>44</sup>85 Fed. Reg. at 49932.

<sup>45</sup>Exec. Order No. 13987 (Jan. 20, 2021), published at 86 Fed. Reg. 7019 (Jan. 25, 2021).

<sup>46</sup>86 Fed. Reg. 7019.

<sup>47</sup>Exec. Order No. 14001 (Jan. 21, 2021), published at

86 Fed. Reg. 7219 (Jan. 26, 2021).

<sup>48</sup>86 Fed. Reg. 7219.

<sup>49</sup>86 Fed. Reg. at 7220.

<sup>50</sup>Exec. Order No. 14017 (Feb. 24, 2021), published at 86 Fed. Reg. 11849 (Mar. 1, 2021).

<sup>51</sup>86 Fed. Reg. at 11850–51.

<sup>52</sup>Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

<sup>53</sup>Pub. L. No. 116-136, div. B, tit. III.

<sup>54</sup>Pub. L. No. 116-136, § 4017.

<sup>55</sup>Dowd, Levasseur & Madsen, “Defense Production Act—Using Authority To Address Emergent Needs,” 20-8 Briefing Papers 1 (July 2020).

<sup>56</sup>Pub. L. No. 116-136, div. B, title III.

<sup>57</sup>U.S. Gov’t Accountability Off., GAO–22–105380, COVID–19: Agencies Are Taking Steps To Improve Future Use of Defense Production Act Authorities 2, n.3 (Dec. 2021); see 64 GC ¶ 14(e).

<sup>58</sup>Pub. L. No. 116-123, 134 Stat. 146 (2020).

<sup>59</sup>Pub. L. No. 116-139, 134 Stat. 620 (2020).

<sup>60</sup>Pub. L. No. 117-2, title III, § 3101, 135 Stat. 4, 53 (2021).

<sup>61</sup>Pub. L. No. 117-2, title III, § 3101.

<sup>62</sup>Cong. Research Serv. In Brief R47124, 2022 Invocation of the Defense Production Act for Large-Capacity Batteries, “Summary” (May 27, 2022).

<sup>63</sup>Section 303(a)(1)(A)–(D) of the DPA; 50 U.S.C.A. § 4533(a)(1)(A)–(D).

<sup>64</sup>50 U.S.C.A. § 4533(a)(1)(A)–(D); see Cong. Research Serv. In Brief R47124, 2022 Invocation of the Defense Production Act for Large-Capacity Batteries 3 (May 27, 2022).

<sup>65</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended (Dec. 21, 2021), published at 86 Fed. Reg. 73587 (Dec. 27, 2021).

<sup>66</sup>50 U.S.C.A. § 4533(a)(5).

<sup>67</sup>86 Fed. Reg. 73587.

<sup>68</sup>50 U.S.C.A. § 4533(a)(7)(B).

<sup>69</sup>50 U.S.C.A. § 4533(a)(1)–(6).

<sup>70</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended (Mar. 31, 2022), published at 87 Fed. Reg. 19775 (Apr. 6, 2022).

<sup>71</sup>87 Fed. Reg. at 19776.

<sup>72</sup>87 Fed. Reg. 19775.

<sup>73</sup>50 U.S.C.A. § 4533(a)(1)–(6).

<sup>74</sup>50 U.S.C.A. § 4533(a)(7)(B).

<sup>75</sup>Cong. Research Serv. In Brief R47124, 2022 Invocation of the Defense Production Act for Large-Capacity Batteries 5 (May 27, 2022) (citing DPA § 303(a)(3); 50 U.S.C.A. § 4533(a)(3)).

<sup>76</sup>Delegating Authority under the Defense Production Act To Ensure an Adequate Supply of Infant Formula (May

18, 2022), published at 87 Fed. Reg. 31357 (May 24, 2022).

<sup>77</sup>87 Fed. Reg. 31357.

<sup>78</sup>50 U.S.C.A. § 4511(b).

<sup>79</sup>87 Fed. Reg. 31357.

<sup>80</sup>87 Fed. Reg. 31357.

<sup>81</sup>President Biden Announces First Two Infant Formula Defense Production Act Authorizations (May 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/22/president-biden-announces-first-two-infant-formula-defense-production-act-authorizations/>.

<sup>82</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Solar Photovoltaic Modules and Module Components (June 6, 2022), published at 87 Fed. Reg. 35071 (June 9, 2022).

<sup>83</sup>87 Fed. Reg. 35071.

<sup>84</sup>50 U.S.C.A. § 4533(a)(1)–(6).

<sup>85</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Insulation (June 6, 2022), published at 87 Fed. Reg. 35073 (June 9, 2022).

<sup>86</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act (DPA) of 1950, as Amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals (June 6, 2022), published at 87 Fed. Reg. 35075 (June 9, 2022).

<sup>87</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act (DPA) of 1950, as Amended, on Electric Heat Pumps (June 6, 2022), published at 87 Fed. Reg. 35077 (June 9, 2022).

<sup>88</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act (DPA) of 1950, as Amended, on Transformers and Electric Power Grid Components (June 6, 2022), published at 87 Fed. Reg. 35079 (June 9, 2022).

<sup>89</sup>50 U.S.C.A. § 4533(a)(1)–(6).

<sup>90</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act (DPA) of 1950, as Amended, on Airbreathing Engines, Advanced Avionics Position Navigation and Guidance Systems, and Constituent Materials for Hypersonic Systems. (Mar. 1, 2023), published at 88 Fed. Reg. 13657 (Mar. 6, 2023).

<sup>91</sup>50 U.S.C.A. § 4533(a)(7)(B).

<sup>92</sup>50 U.S.C.A. § 4533(a)(1)–(6).

<sup>93</sup>88 Fed. Reg. 13657.

<sup>94</sup>Exec. Order No. 14017 (Feb. 24, 2021), published at 86 Fed. Reg. 11849 (Mar. 1, 2021).

<sup>95</sup>Presidential Determination Pursuant to Section 303 of the Defense Production Act (DPA) of 1950, as Amended, on Printed Circuit Boards and Advanced Packaging Production Capability (Mar. 27, 2023), published at 88 Fed. Reg. 19545 (Mar. 31, 2023).

<sup>96</sup>Printed circuit boards are critical components in virtually all electronics used in the national defense, economic, environmental, energy, and healthcare management sectors. Advanced packaging allows multiple devices to be pack-

aged and mounted on a single electronic device.

<sup>97</sup>88 Fed. Reg. 19545.

<sup>98</sup>50 U.S.C.A. §§ 4551–4568.

<sup>99</sup>50 U.S.C.A. § 4555.

<sup>100</sup>50 U.S.C.A. § 4555(a).

<sup>101</sup>Exec. Order No. 13603 (Mar. 16, 2012), published at 77 Fed. Reg. 16651 (Mar. 22, 2012).

<sup>102</sup>77 Fed. Reg. at 16652.

<sup>103</sup>See <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments>.

<sup>104</sup>See <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments>.

<sup>105</sup> Exec. Order No. 13922 (May 14, 2020), published at 85 Fed. Reg. 30583 (May 19, 2020).

<sup>106</sup>50 U.S.C.A. § 4558.

<sup>107</sup>50 U.S.C.A. § 4558(c)(1).

<sup>108</sup>50 U.S.C.A. § 4558(c)(1); see 50 U.S.C.A. § 4558(d) & (e) (describing consultation process).

<sup>109</sup>50 U.S.C.A. § 4558(f).

<sup>110</sup>50 U.S.C.A. § 4558(j).

<sup>111</sup>50 U.S.C.A. § 4558(c).

<sup>112</sup>50 U.S.C.A. § 4558(c)(2).

<sup>113</sup>50 U.S.C.A. § 4558(e).

<sup>114</sup>50 U.S.C.A. § 4558(f)(2).

<sup>115</sup>50 U.S.C.A. § 4558(c)(3).

<sup>116</sup>50 U.S.C.A. § 4558(c)(3)(B).

<sup>117</sup>50 U.S.C.A. § 4558(c)(3).

<sup>118</sup>Other provisions beyond the scope of this 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>119</sup>50 U.S.C.A. § 4560(e).

<sup>120</sup>See Exec. Order No. 10660 (Feb. 15, 1956), published at 21 Fed. Reg. 1117 (Feb. 18, 1956) (establishing an NDER).

<sup>121</sup>Exec. Order No. 13603(c), § 501(c) (Mar. 16, 2012), published at 77 Fed. Reg. 16651, 16656 (Mar. 22, 2012).

<sup>122</sup>Exec. Order No. 13603, § 501(e), 77 Fed. Reg. at 16656.

<sup>123</sup>50 U.S.C.A. § 4560.

<sup>124</sup>Exec. Order No. 13922 (May 14, 2020), published at 85 Fed. Reg. 30583 (May 19, 2020).

<sup>125</sup>15 C.F.R. § 700.11(a)(1).

<sup>126</sup>15 C.F.R. § 700.11(a)(2).

<sup>127</sup>50 U.S.C.A. § 4513.

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