



MEMORANDUM

To: Governors' Offices
From: National Governors Association
Date: May 20, 2020
RE: The Defense Production Act & Executive Action Taken in Response to COVID-19

Executive Summary

The [Defense Production Act](#) (DPA) [50 U.S.C. 4501 et seq] grants the president a broad set of authorities to influence domestic industry in the interest of national defense, which defined broadly, includes preparing for and responding to military conflicts, emergency preparedness activities under the Stafford Act, acts of terrorism or continuity of government operations.

President Trump has executed three Executives Orders (EO) and four Presidential Memoranda invoking the DPA in response to the novel coronavirus (COVID-19):

On March 18, the President invoked the DPA via [Executive Order 13909](#): *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*.

- This EO notes that in light of the urgent need for health and medical resources to respond to COVID-19, the Administration finds that the criteria specified under [Section 101 \(b\)](#) of the DPA have been met. Under this section, the President may control the general distribution of specific health and medical resources that are:
 1. scarce and critical, and
 2. cannot “otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”
- The President delegated this authority to the Secretary of Health and Human Services (HHS), which can only be used for health and medical resources needed to respond to the spread of COVID-19 within the United States.

On March 23, the President expanded through a second [Executive Order 13910](#): *Preventing Hoarding of Medical Resources to Respond to the Spread of COVID-19*.

- This EO invokes [Section 102](#) of the DPA to “prevent the hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States.” The Secretary of HHS is required to consult with the Federal Emergency Management Agency (FEMA) administrator in exercising this authority. On March 26, the Department of Health and Human Services [issues designation of scarce COVID-19 resources](#) subject to hoarding prevention measures under the EO.

On March 27, the President further expanded the use of DPA through a third [Executive Order Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19](#).

- This EO allows for the use of Title III under the DPA to guarantee loans, make provisions of purchases and commitments of purchases, in order to expand the manufacturing of scarce medical resources as well as provide for voluntary agreements and plans of action for the private sector. The EO delegates this authority to the Secretary

of Homeland Security (DHS) and the Secretary of Health and Human Services (HHS). The EO also designates the Assistant to the President for Trade and Manufacturing Policy as the National Defense Protection Act Policy Coordinator.

On March 27, the President fully executed the DPA with regards to General Motors Company through Presidential [Memorandum](#) on *Order Under the Defense Production Act Regarding General Motors Company*, specifically for the production of ventilators.

- This Memorandum specifically executes the DPA for General Motors for the production of ventilators.

On April 2, the President expanded to 6 other companies on April 2 via [Memorandum](#) to include: General Electric Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyaire Medical, Inc.

- The memo allows for the full use of the DPA to “facilitate the supply of materials to the appropriate subsidiary or affiliate...for the production of ventilators.”

The President also issued a [Memorandum](#) for 3M Company, invoking all authorities under the DPA to acquire, from any appropriate subsidiary or affiliate of 3M Company, the number of N-95 respirators that the Administrator determines to be appropriate.

On April 3, the President issued a fourth [Memorandum](#) on *Allocating Certain Scarce of Threatened Health and Medical Resources to Domestic Use*, providing authority to the Secretary of Homeland Security to use all authorities under Section 101 of the DPA to allocate designated scarce resources. These include the following:

- N-95 filtering facepiece respirators and other filtering face piece respirators as well as personal protective equipment such as surgical masks and gloves.

The President noted in a [statement](#) that the Memorandum will help to combat the profiteering, hoarding and exportation of scarce health and medical items. However, the Memorandum is not designed to interfere with exportation that is in the “interest of the United States.”

On April 28, the President issued an [Executive Order](#) on *Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19*.

- This EO declares meat processing plants to be “critical infrastructure” in an effort to ensure that facilities around the country remained open to prevent shortages of pork, chicken and other meat products as a result of COVID-19.
- The EO grants the Secretary of Agriculture authority under Section 101 and authorities under Chapter III of the DPA with respect to food supply chain resources.

On May 14, the President issued an [Executive Order](#) on *Delegating Authority under the DEPA to the CEO of the U.S. International Development Finance Corporation to Respond to the COVID-19 Outbreak*. This EO invokes Title III of the DPA for the production of “strategic resources” and to “strengthen any relevant domestic supply chains.

Below you will find additional details related to the above actions.

Executive Branch Actions Pertaining to the Defense Production Act

According to previous Office of Legal Counsel (OLC) determinations out of the Department of Justice, the legal force of presidential memorandum or directives is equivalent to executive orders.¹ As such, OLC has held that there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is not styled as an executive order.²

The following is a delineation of key provisions, relevant statute references, and associated breakdowns of the aforementioned executive orders and memoranda.

The Memorandum on Order Under the Defense Production Act Regarding General Motors Company directs the Secretary of HHS to "use any and all authority available under the Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate." However, such order does not tell us whether the Secretary has determined how many ventilators are needed and appropriate, whether that determination has been made with the input of governors, and on what timeline these questions will be resolved.³

The Executive Order on *Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19* identifies certain delegable authorities for the Secretaries of DHS and HHS. However, the question becomes if, when, how, and where, will these delegated authorities be used.⁴

The Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators provides authorities to the Secretary of Health and Human Services to use any and all authority available under the DPA to facilitate the supply of materials to the appropriate subsidiary or affiliate of the following entities for the production of ventilators: General Electric

¹ <https://fas.org/irp/offdocs/predirective.html>.

² Id.

³ External expert consultation.

⁴ Id.

Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyair Medical, Inc.

The Memorandum on Order Under the Defense Production Act Regarding 3M Company delegates authority to the Secretary of Homeland Security, through the Administrator of the Federal Emergency Management Agency, any and all authority available under the DPA to acquire, from any appropriate subsidiary or affiliate of 3M Company, the number of N-95 respirators that the Administrator determines to be appropriate.

1. Memorandum on Order Under the Defense Production Act Regarding General Motors Company

Key Memorandum Provision(s)	Reference to Relevant Statutes⁵	Initial Key Takeaways
<p>Sec. 2. Presidential Direction to the Secretary of Health and Human Services (Secretary). The Secretary shall use any and all authority available under the Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.</p>	<p>No direct reference to statute; ostensibly, this operational section provides further direction, authorization and/or delegation to Secretary of HHS to utilize 50 U.S.C. § 4511, which authorizes a relevant agency (1) to require that performance under contracts or orders (other than contracts of employment) which the president deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person the president finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.</p>	<p>On March 18, 2020, the White House had previously issued Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19), in which the President delegated to the Secretary of HHS the prioritization and allocation authority under section 101 of the Act with respect to health and medical resources needed to respond to the spread of COVID-19. This follow-up memorandum purports to direct and underscore such delegate authority to HHS to determine the number of ventilators needed and prioritize contracts or orders for the production of ventilators.</p>

⁵ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

2. Executive Order on Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19

Key Executive Order Provision(s)	Reference to Relevant Statutes ⁶	Initial Key Takeaways
<p>Sec. 2. Delegation of Authority Under Title III of the Act. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID-19 within the United States, the authority of the President conferred by sections 301, 302, and 303 of the Act (50 U.S.C. 4531, 4532, and 4533), and the authority to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).</p>	<p>50 U.S.C. 4531 (a)-(d), among other sections, includes: (a)Expediting production and deliveries or services; (1) Authorized activities...to reduce current or projected shortfalls of industrial resources, critical technology items, or essential materials needed for national defense purposes, subject to such regulations as the President may prescribe, the President may authorize a guaranteeing agency to provide guarantees of loans by private institutions for the purpose of financing any contractor, subcontractor, provider of critical infrastructure, or other person in support of production capabilities or supplies that are deemed by the guaranteeing agency to be necessary to create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.</p> <p>50 U.S.C. 4532: (a)-(d) deals with loan authority, conditions of loans, limitations on loans, aggregate loan amounts, relating efforts to (a) reduce current or projected shortfalls of industrial resources, critical technology items, or materials essential for the national defense, the President may make provision for loans to private business enterprises (including nonprofit research corporations and providers of critical infrastructure) for the creation, maintenance, expansion, protection, or restoration of capacity, the</p>	<p><i>Key potential takeaways include:</i></p> <p>Secretaries of DHS and HHS are delegated authority to provide guarantees of loans by private institutions to finance and support production capabilities of key supplies</p> <p>Such loans can go to private business enterprises (including nonprofit research corporations and providers of critical infrastructure)</p> <p>Agencies can make provisions to proceed with purchases of or commitments to purchase an industrial resource or a critical technology item or support the development of critical and strategic materials</p> <p>Such agencies are delegated authority to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support.</p> <p>Outlines the role of the Article III district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or any rule, including civil actions or criminal proceedings.</p>

⁶ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals.

50 U.S.C. 4533 (a)-(g): includes language (a) to create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, the President may make provision—(A)for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale; (B)for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials; (C)for the development of production capabilities; and (D)for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies—

(i)from Government-sponsored research and development to commercial applications; and (ii)from commercial research and development to national defense applications.

50 U.S.C. 4554 (a)-(b): includes language on the President may prescribe such regulations and issue such orders as the President may determine to be appropriate to carry out this chapter

50 U.S.C. 4555 (a)-(e): includes language such as the President shall be entitled, while this chapter is in effect and for a period of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of,

	<p>and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this chapter and the regulations or orders issued thereunder. The authority of the President under this section includes the authority to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense.</p> <p>50 U.S.C. 4556 (a)-(b): addresses jurisdiction of courts; injunctions; venue; process; effect of termination of provisions, including the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or any rule, regulation, order, or subpoena thereunder, and of all civil actions under this chapter to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, order, or subpoena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred.</p> <p>50 U.S.C. 4560 (a)-(g): has language on employment of personnel; appointment policies; nucleus executive reserve; use of confidential information by employees; printing and distribution of reports</p>	
<p>Sec. 2. Delegation of Authority Under Title III of the Act. (b) Secretary of Health and Human Services and the Secretary of Homeland Security may each use the authority under sections 301, 302, and 303 of the Act, in consultation with the Secretary of Defense and the</p>	<p>50 U.S.C. 4531: see prior reference in this chart.</p> <p>50 U.S.C. 4532: see prior reference in this chart.</p>	<p>In consultation with the Sec. of Defense and other statutory agencies, the Secretaries of DHS and HHS can provide guarantees of loans by private institutions to finance and support production capabilities of key supplies in response to private business enterprises (including</p>

<p>heads of other executive departments and agencies as he deems appropriate, to respond to the spread of COVID-19.</p>	<p>50 U.S.C. 4533: see prior reference in this chart.</p>	<p>nonprofit research corporations and providers of critical infrastructure). Such agencies can make provisions to proceed with purchases of or commitments to purchase an industrial resource or a critical technology item or support the development of critical and strategic materials.</p>
<p>Sec. 2. Delegation of Authority Under Title III of the Act. (c) To provide additional authority to respond to the national emergency I declared in Proclamation 9994, the requirements of section 301(a)(2), section 301(d)(1)(A), and section 303(a)(1) through (a)(6) of the Act are waived during the period of that national emergency.</p>	<p>50 U.S.C. 4531: see prior reference in this chart.</p> <p>50 U.S.C. 4533: see prior reference in this chart.</p>	
<p>Sec. 2. Delegation of Authority Under Title III of the Act. (d) Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 302(d)(2)(B) of the Act a proposed determination that any specific loan is necessary to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.</p>	<p>50 U.S.C. 4532: see prior reference in this chart.</p>	<p>Secretaries of DHS and HHS can submit to the President for approval that a specific loan is necessary to avert an industrial resource or critical technology shortfall that would severely impair national defense capability.</p>
<p>Sec. 3. Delegation of Authority Under Title VII of the Act. (a) Notwithstanding Executive Order 13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID-19 within the United States, the authority of the President conferred by section 708(c)(1) and (d) of the Act. The Secretary of Health and Human Services shall provide to the Secretary of Homeland Security notice of any use of such delegated authority. (b) The delegation made in this section is made upon the condition that the Secretary of Health and Human Services or the Secretary of</p>	<p>50 U.S.C. § 2158: pertinent language includes</p> <p>708(c)(1) details such as (c) Prerequisites for Agreements and Plans of Action; Delegation of Authority to Presidential Designees: 1) Upon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs, the President may 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.</p>	<p>Subject to notifications and consultations, the Secretaries of DHS and HHS can use delegated authority to identify voluntary agreements and plans of action to help with COVID-19 response, materials, etc.</p>

<p>Homeland Security consult with the Attorney General and with the Federal Trade Commission, and obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission, as required by section 708(c)(2) of the Act, except when such consultation is waived under subsection (c) of section 3 of this order and section 708(c)(3) of the Act.</p>	<p>708(c)(2): The authority granted to the President in paragraph (1) and subsection (d) may be delegated by him (A) to individuals who are appointed by and with the advice and consent of the Senate, or are holding offices to which they have been appointed by and with the advice and consent of the Senate, (B) upon the condition that such individuals consult with the Attorney General and with the Federal Trade Commission not less than ten days before consulting with any persons under paragraph (1), and (C) upon the condition that such individuals obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission, to consult under paragraph (1).</p> <p>708(c)(3): (3) Upon a determination by the President, on a nondelegable basis, that a specific voluntary agreement or plan of action is necessary to meet national defense requirements resulting from an event that degrades or destroys a critical infrastructure—</p> <p>708 (d) Advisory Committees; Establishment; Applicable Provisions; Membership; Notice and Participation in Meetings; Verbatim Transcript; Availability to Public</p>	
<p>Sec. 3. Delegation of Authority Under Title VII of the Act. (c) The Secretary of Health and Human Services and the Secretary of Homeland Security are each authorized to submit for my approval under section 708(c)(3) of the Act any proposed determination that any specific voluntary agreement or plan of action is necessary to meet national defense requirements resulting from an event that degrades or destroys critical infrastructure.</p>	<p>50 U.S.C. § 2158: see prior reference in this chart.</p>	<p>Subject to notifications and consultations, the Secretaries of DHS and HHS can submit proposed determinations regarding voluntary agreements and plans of action to help with COVID-19 response, materials, etc. to the President for approval.</p>
<p>Sec. 4. Additional Delegations. (a) Notwithstanding Executive Order</p>	<p>50 U.S.C. 4517 (a)-(b): pertinent language includes the President’s...</p>	<p>Secretaries of DHS and HHS are delegated authorities to provide</p>

<p>13603, the Secretary of Health and Human Services and the Secretary of Homeland Security are each delegated, with respect to responding to the spread of COVID-19 within the United States, the authority of the President conferred by section 107 of the Act (50 U.S.C. 4517).</p>	<p>ability to... provide appropriate incentives to develop, maintain, modernize, restore, and expand the productive capacities 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...critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.</p>	<p>incentives for the development, production, etc. to address critical items (e.g. components, technical items, materials, and industrial resources)</p>
<p>Sec. 4. Additional Delegations. (b) In addition to the delegations of authority in Executive Order 13909 and Executive Order 13910, the authority of the President conferred by sections 101 and 102 of the Act (50 U.S.C. 4511, 4512) is delegated to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of COVID-19 within the United States.</p>	<p>50 U.S. Code § 4511 (a)-(d): pertinent language includes The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.</p> <p>50 U.S. Code § 4512: in order to prevent hoarding, no person shall accumulate (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, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation.</p>	<p>The Secretary of DHS is delegated authority to require performance under contracts, priority rate contracts or orders, and to allocate materials (and services and facilities) with respect to health and medical resources needed to respond to the spread of COVID-19 within the United States. This is a significant authority but, as advised by experts, the question becomes if, when, how, and where, will this delegated authority (and others referenced here) will be used.</p>
<p>Sec. 4. Additional Delegations. (c) The Secretary of Homeland Security may use the authority under section</p>	<p>50 U.S. Code § 4511 (a)-(d): for section 101, please see the previous section.</p>	<p>The Secretary of DHS is delegated authority to address proper nationwide priorities and allocation of</p>

101 of the Act to determine, in consultation with the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of health and medical resources, including by		health and medical resources, including by controlling the distribution of such materials.
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3. Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators

Key Memorandum Provision(s)	Reference to Relevant Statutes ⁷	Initial Key Takeaways
<p>Sec. 2. Presidential Direction to the Secretary of Health and Human Services (Secretary). The Secretary, in consultation with the Secretary of Homeland Security, shall use any and all authority available under the Act to facilitate the supply of materials to the appropriate subsidiary or affiliate of the following entities for the production of ventilators: General Electric Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyaire Medical, Inc.</p>	<p>50 U.S.C. 4501</p>	<p>The Presidential memorandum provides the Secretary of HHS, consulting with the Secretary of DHS, to use “any and all authority available under the Act,” to facilitate the supply of materials to all six explicitly referenced companies, as well as any of their subsidiary or affiliate supply chain partners, to produce ventilators.</p> <p>In other words, this memorandum can be read in a more expansive fashion (“shall use any and all authority under the Act”), such that full impact of the Defense Production Act is now available for use by HHS for identifying, procuring, and/or leveraging new or existing contracts or allocations with respect to materials for producing ventilators with the companies identified and any of their existing subsidiaries or affiliates or supply chain partners. Such powers may include, but not are limited to: performance under contracts, priority rate contracts or orders, and to allocate materials; incentives for the development, production, etc. to address critical items (e.g. components, technical items, materials, and industrial resources); voluntary agreements and plans of action; guarantees of loans by private institutions to finance and support production capabilities of key supplies; provide guarantees of loans by private institutions to finance and support production capabilities of key</p>

⁷ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

		<p>supplies; make provisions to proceed with purchases of or commitments to purchase an industrial resource or a critical technology item or support the development of critical and strategic materials; and obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support.</p> <p>This is a significant authority but, as advised by experts, the question becomes if, when, how, and where, will this delegated authority (and others referenced here) will be used.</p>
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4. The Memorandum on Order Under the Defense Production Act Regarding 3M Company

Key Memorandum Provision(s)	Reference to Relevant Statutes ⁸	Initial Key Takeaways
<p>Sec. 2. Presidential Direction to the Secretary of Homeland Security (Secretary). The Secretary, through the Administrator of the Federal Emergency Management Agency (Administrator), shall use any and all authority available under the Act to acquire, from any appropriate subsidiary or affiliate of 3M Company, the number of N-95 respirators that the Administrator determines to be appropriate.</p>	<p>50 U.S.C. 4501</p>	<p>The Presidential memorandum provides the Secretary of DHS, through the FEMA Administrator, is provided “any and all authority” under the DPA to acquire from 3M subsidiaries or affiliates, the N-95 respirators that FEMA has determined to be needed.</p> <p>In other words, this memorandum can be read in an expansive fashion (“shall use any and all authority under the Act”), such that full impact of the Defense Production Act is now available for use by DHS, and by extension, the FEMA Administrator, for identifying, procuring, and/or leveraging new or existing contracts or allocations with respect to materials for producing N-95 respirators with 3M and any of their existing subsidiaries or affiliates or supply chain partners. Such powers may include, but not are limited to: performance under contracts, priority rate contracts or orders, and to allocate materials; incentives for the development, production, etc. to address critical items (e.g. components, technical items, materials, and industrial resources); voluntary agreements and plans of action; guarantees of loans by private institutions to finance and support production capabilities of key supplies; provide guarantees of loans by private institutions to finance and support production capabilities of key supplies; make provisions to proceed</p>

⁸ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

		<p>with purchases of or commitments to purchase an industrial resource or a critical technology item or support the development of critical and strategic materials; and obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support.</p> <p>This is a significant authority but, as advised by experts, the question becomes if, when, how, and where, will this delegated authority (and others referenced here) will be used.</p>
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5. Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use

Key Memorandum Provision(s)	Reference to Relevant Statutes ⁹	Initial Key Takeaways
<p>Sec. 2. Presidential Direction to the Secretary of Homeland Security. The Secretary of Homeland Security, through the Administrator of the Federal Emergency Management Agency, in consultation with the Secretary of Health and Human Services, shall use any and all authority available under section 101 of the Act to allocate to domestic use, as appropriate, the following scarce or threatened materials designated by the Secretary of Health and Human Services under section 102 of the Act:</p> <p>(a) N-95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates;</p> <p>(b) Other Filtering Facepiece Respirators (e.g., those designated as N99, N100, R95, R99, R100, or P95, P99, P100), including single-use, disposable half-mask respiratory protective devices that cover the user’s airway (nose and mouth) and offer protection from particulate materials at an N95 filtration efficiency level per 42 CFR 84.181;</p> <p>(c) Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges;</p>	<p>50 U.S. Code § 4511 (a)-(d): see prior reference in this chart.</p> <p>50 U.S. Code § 4512: see prior reference in this chart.</p>	<p>The Secretary of DHS, through the FEMA Administrator, is delegated authority to allocate for domestic use the following materials that the Secretary of HHS designates as scarce or threatened:</p> <ul style="list-style-type: none"> - N-95 Filtering Facepiece Respirators - Other Filtering Facepiece Respirators - Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges - PPE surgical masks - PPE gloves or surgical gloves <p>This is a significant authority but, as advised by experts, the question becomes if, when, how, and where, will this delegated authority (and others referenced here) will be used.</p>

⁹ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

<p>(d) PPE surgical masks, including masks that cover the user's nose and mouth and provide a physical barrier to fluids and particulate materials; and</p> <p>(e) PPE gloves or surgical gloves, including those defined at 21 CFR 880.6250 (exam gloves) and 878.4460 (surgical gloves) and such gloves intended</p>		
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9. Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19

Key Executive Order Provision(s)	Reference to Relevant Statutes¹⁰	Initial Key Takeaways
<p>Section 1. Policy. Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. Under the delegation of authority provided in this order, the Secretary of Agriculture may identify additional specific food supply chain resources that meet the criteria of section 101(b).</p>	<p>50 U.S.C. 4511(b), as noted on pages 5 and 11 of this memorandum, addresses the following: (b) Critical and strategic materials. The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.</p>	<p>Similar to other presidential actions through the Defense Production Act, the use of 50 U.S.C. 4511(b) delegates authority to the Secretary of Agriculture to use their authority to address meat and poultry processing operations, as well as any future specific food supply chain resources that the Secretary identifies as meeting threshold criteria pursuant to 50 U.S.C. 4511(b)(1)-(2).</p>
<p>Sec. 2. Ensuring the Continued Supply of Meat and Poultry. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the authority of the President to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code, is delegated to the Secretary of Agriculture with respect to food supply chain resources including meat and poultry...</p>	<p>As described on page 7 onwards: 50 U.S.C. 4554 (a)-(b): includes language on the President may prescribe such regulations and issue such orders as the President may determine to be appropriate to carry out this chapter 50 U.S.C. 4555 (a)-(e): includes language such as the President shall be entitled, while this chapter is in effect and for a period of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of...</p>	<p>Such section delegates presidential authorities associated with a number of provisions to the Secretary of Agriculture which include obtaining information from relevant food supply chain entities; Article III jurisdiction; administrative law implications, etc.</p>

¹ For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

	<p>50 U.S.C. 4556 (a)-(b): addresses jurisdiction of courts; injunctions; venue; process; effect of termination of provisions...</p> <p>50 U.S.C. 4559 (a-b): (a) Exemption from Administrative Procedure Act; (b) Opportunity for notice and comment; (c) Public comment on procurement regulations</p> <p>50 U.S.C. 4560 (a)-(g): has language on employment of personnel; appointment policies; nucleus executive reserve...</p>	
<p>(b) Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, 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 guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.</p>	<p>50 U.S. Code § 4511 (a)-(d): pertinent language includes...The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.</p>	<p>This section, which has been leveraged through other presidential executive orders and/or memorandum, authorizes the Secretary of Agriculture to address performance under contracts or orders, including prioritizing and acceptance, as well as determining allocations necessary or appropriate with respect to materials, services, and facilities associated with supply of met and poultry.</p>

10. Executive Order on Delegating Authority Under the DPA to the CEO of the U.S. International Development Finance Corporation to Respond to the COVID-19 Outbreak

Key Executive Order Provision(s)	Reference to Relevant Statutes ²	Initial Key Takeaways
<p>Sec 2...the Chief Executive Officer of the United States International Development Finance Corporation (DFC) is delegated the authority of the President conferred by sections 302 and 303 of the Act (50 U.S.C. 4532 and 4533), and the authority to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560).</p>	<p>50 U.S.C. 4532: see prior reference in this chart. 50 U.S.C. 4533: see prior reference in this chart. 50 U.S.C. 4554: see prior reference in this chart. 50 U.S.C. 4555: see prior reference in this chart. 50 U.S.C. 4556: see prior reference in this chart. 50 U.S.C. 4560: see prior reference in this chart.</p>	<p>With this order, the President delegates authority to the CEO of the US International Development Finance Corporation (DFC) to address loan issues, domestic industrial base capabilities, critical and strategic materials, and production capabilities. Additional authority to issue regulations, orders, and obtain reports and records of specific companies. Such delegation also denotes jurisdiction of courts and employment of personnel, etc.</p>

² For text containing laws in effect in April 2020, please see: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4501&num=0&edition=prelim>. Given that the Defense Production Act has been amended over 50 times, any inadvertent errors on exact statutory citations are the mistakes of the authors of the memorandum. However, the full powers of the Defense Production Act cited in this memorandum have been maintained through generations of amendments and/or reauthorizations.

<p>b) The Chief Executive Officer of the DFC may use the authority under sections 302 and 303 of the Act, in consultation with the Secretary of Defense, the Secretary of Health and Human Services, the Secretary of Homeland Security, and the heads of other agencies as he deems appropriate, for the domestic production of strategic resources needed to respond to the COVID-19 outbreak, or to strengthen any relevant domestic supply chains.</p> <p>(c) The loan authority delegated by this order is limited to loans that create, maintain, protect, expand, or restore domestic industrial base capabilities supporting:</p> <p>(i) the national response and recovery to the COVID-19 outbreak; or</p> <p>(ii) the resiliency of any relevant domestic supply chains.</p>	<p>50 U.S.C. 4532: see prior reference in this chart.</p> <p>50 U.S.C. 4533: see prior reference in this chart.</p>	<p>The CEO of DFC may utilize delegated authorities to address the domestic production of strategic resources needed to respond to the COVID-19 outbreak, or to strengthen any relevant domestic supply chains through the following mechanisms:</p> <ol style="list-style-type: none"> 1) Use of loan authority, conditions of loans, limitations on loans, aggregate loan amounts; and 2) The ability to create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale; for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials; and development of production capabilities.
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