

The Defense Production Act: The Obscure Law that Industry and Government Should be Talking About Today (and for the Foreseeable Future)

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As policy-makers and industry look for responses to the COVID-19 crisis, one tool is in plain sight: the Defense Production Act of 1950 (the “DPA”). The DPA, already on the books, is tailor-made for the national effort required to respond to COVID-19. And yesterday, March 18, 2020, the Trump Administration announced it will invoke the DPA. Along with existing Federal acquisition and grant-making authority, we expect the DPA will be used immediately to secure the equipment and supplies needed to combat the virus over the coming months—and given its loan and loan guarantee authorities, the DPA might have an even larger economic impact on industries from healthcare to manufacturing to construction to logistics. This briefing is a primer on the DPA for industry and policy-makers.

Overview of the DPA

Congress first enacted the DPA, 50 U.S.C. §§ 4501 *et seq.*, during the Korean War. The purpose of the DPA is to provide the President with various authorities to regulate private industry to facilitate national defense. In particular, the DPA confers upon the President an “array of authorities to shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.”

The term “national defense” is defined broadly. While “national defense” encompasses traditional military conflicts, critical infrastructure to assist a foreign nation, and, in a relatively recent amendment, “homeland security,” it also includes “emergency preparedness activities” under the Stafford Act (42 U.S.C. §§5195 *et seq.*). The Stafford Act—which is routinely invoked to respond to public health emergencies and was recently invoked by the Trump Administration—defines emergency preparedness as “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by

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the hazard.”

The aegis of “national defense” includes the ability of the government to prioritize its needs over the needs of the private sector and increase supply of materials as it deems necessary. To do so, the government may, among other things, purchase goods and supplies from the private sector, make direct loans and loan guarantees, transfer government equipment, prioritize private production, and incentivize the private sector’s production through subsidies and cash awards. It may also authorize voluntary agreements in private industry, and purchases or make purchase commitments of industrial resources or critical technology items.

Stripped to its core, the DPA has two primary functions: (1) to guarantee public access to goods already being produced in the private sector (i.e., priority and allocation) and (2) to ensure there is an adequate supply of critical items for public use going forward. These functions will be explained in more detail below.

The DPA Is Not Limited to Military Conflict

While the DPA is usually invoked to support traditional “national defense” objectives such as the production of tanks and bombers, it can be used to ameliorate the effects of domestic emergencies. For example, the DPA was used to allow the U.S. Army Corps of Engineers to prioritize contracts to support the Greater New Orleans Hurricane and Storm Damage Risk Reduction System that was created to protect southern Louisiana from future flooding after Hurricane Katrina in 2005. Even earlier, the DPA was used by the Department of Energy to ensure California utilities retained a sufficient supply of natural gas to avoid the threat of electrical blackouts in 2001. More recently, the Federal Emergency Management Agency made use of the DPA during the 2017 disaster season to prioritize contracts for food and bottled water, pre-manufactured housing units, and the restoration of electrical transmission and distribution systems in Puerto Rico. In other words, the DPA has been used in many contexts to authorize various federal agencies, and not just the Department of Defense, to bolster America’s “national defense” as broadly defined under the DPA. COVID-19, and the national response to it, is surely within the “national defense.”

How the Administration Might Use the DPA to Respond to COVID-19

The specifics of the Trump Administration’s future use of the DPA are still unclear. But what is clear is the President has broad authority to craft and implement **solutions** with private industry under the DPA. Presumably in the coming days and weeks, the Administration will use or consider using the DPA to ensure access to critical healthcare equipment and facilities. We envision the medical device, manufacturing, construction, logistics, food production, and transportation sectors will all be affected. Further, the ability to offer loans and loan guarantees might affect the financial services and banking sectors. Industry should anticipate outreach from the government, understand the DPA’s options and the Administration’s specific proposals (when they come), and have proposals ready to deploy to maintain the “national defense” and best utilize the DPA’s

provisions.

For example, the government could back loans to finance the construction of new COVID-19 medical facilities. Or the government could loan directly funds to construct the same facility. The government could also incentivize the production of PPE and medical supplies, through loans, subsidies, or direct purchases. The DPA could be—and should be—central to the response to immediate COVID-19 shortages (e.g., hospital beds, medical supplies, ventilators) but also part of the longer term solution to maintaining economic security and stability for the United States.

DPA FAQs

Several questions may come to mind regarding this old but little known law. Below are some answers to common questions to guide the reader's understanding of how this law may be used to aid the nation's response to COVID-19.

1. **What is the scope of the DPA—i.e., how does the DPA define “national defense”?**

Broadly. Under the DPA, “[t]he term ‘national defense’ means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 et seq.] and critical infrastructure protection and restoration.” 50 U.S.C. § 4552(14). If necessary, Congress could of course amend this definition to further extend the reach of the DPA to address issues of national importance.

2. **Who has the authority to implement the DPA powers under the Act?**

The President is afforded the authority to implement powers under the DPA. Under Executive Order 13603, *National Defense Resource Preparedness*, issued in 2012, however, the President has delegated his authority to department and agency heads. While such authority is most frequently used by, and commonly associated with, the Department of Defense (DOD), the President has delegated his authority to numerous other executive departments and agencies, including the Department of Agriculture, the Department of Energy, the Department of Health and Human Services, the Department of Transportation, and the Department of Commerce.

3. **What kind of specific relief can the President or his delegate authorize under the DPA?**

Loan Guarantees (Section 301) - The President may designate any Federal Agency or Federal reserve bank to guarantee private loans to finance a contractor, subcontractor, provider of critical infrastructure, or any other person to engaged in an Authorized Activity, which supports production of supplies or capabilities to address a national emergency. A loan guaranteed under Section 301 will bear a reasonable interest rate, to be determined by the Treasury Secretary based on the average yields of the outstanding obligations of the Treasury. There are four qualifying criteria for a guarantee: (1) the activity to be financed must support an essential product, industrial resource, technology, or material, essential to the national effort; (2) the guarantee must be reasonably necessary to secure private financing; (3) a guarantee must be the most cost effective, expedient, and practical alternative to support that activity; and (4) the applicant and pledged security must provide a reasonable assurance of repayment of the loan. The security may either be 20% of the principal of the loan or a performance bond, insurance, collateral, or any other security acceptable to the Federal Agency.

Loans (Section 302) - The President may authorize loans to private business enterprises for many activities to support the national defense, including but not limited to production of essential goods, expansion and protection of industrial capacity, development of technology, and exploitation of natural resources. A loan under Section 302 will bear a reasonable interest rate, to be determined by the Treasury Secretary based on the current average yields of the outstanding obligations of the Treasury. The security required for a loan authorized under Section 302 are less stringent than that of a loan guarantee. A prospective borrower must demonstrate only reasonable assurance of repayment.

Purchases (Section 303(a)) – The President may make provision to purchase or commit to purchasing for Government use or resale any resource or technology that is essential to “national defense” and that, absent such purchase or commitment to purchase, would not be reasonably expected to provide for national defense in a timely manner.

Subsidies to Producers (Section 303(c)) – The President has broad authority to subsidize any domestically produced resources to ensure continued supply, maximized production, and stable prices for such resources.

Government Procurement (Section 303(e)(a)) – The President may authorize the purchase and installation of any equipment, facilities, processes or improvements to government-owned facilities.

Private Use of Government Equipment (Section 303(e)(b)) – The President may authorize the purchase and installation of new equipment in privately owned facilities.

Government Improvement of Private Facilities (Section 303(e)(c), (d)) – The President may authorize the improvement or modification of privately owned facilities in conjunction with any of the President’s actions under Section 301, 302, or 303. The President may also provide for the sale or transfer of any government-owned equipment to the owner of a privately owned facility.

4. **How is this paid?**

The Defense Production Act Fund, established by the Act, is a separate fund at the Treasury Department used carry out the provisions and purposes of the DPA. Loans and loan guarantees are funded by congressional appropriations.

5. **What is the DPA’s “priority” system?**

The President is authorized to require that contracts or orders essential to national defense take priority over all other contracts or orders, and to require essential contracts and orders be accepted before any other contract or order. This applies to “any other contract or order” except for employment contracts. Under the DPA, the Defense Priorities and Allocations System institutes a rating system for contracts and purchase orders, with the highest priority contracts labeled “DX.” The next priority is “DO” contracts, and then unrated contracts.

6. **What is the DPA’s “allocation” system?**

The President may allocate materials, services, resources, and facilities in whatever manner the President deems necessary to national defense. Allocation authority of private resources has not been used since the Cold War.

7. **What industries are covered?**

The broad definitions of critical technology, services, materials, and facilities, together with the broad definition of “national defense,” means that the DPA covers virtually every industry engaged in production, rendering of healthcare or logistics or construction services, or exploitation of natural resources in the United States.

8. **Does the DPA provide any protections for private-sector partners?**

Yes. Certain coordinated efforts authorized by the DPA between traditional competitors are exempt from anti-trust laws, *i.e.*, where agreements between competing private industry interests could generally be subject to legal sanction under anti-trust statutes or contract law, agreements under the Act are not. The DPA also

provides for judicial review in the district courts, and private persons may also have limited indemnification from prioritizing federal orders. Indemnification, however, extends only to shield a contractor from liability arising as a consequence of re-prioritization. It does not shield the contractor from all potential liability resulting from the contract.

9. Is this the nationalization of private industry?

No, it is an opportunity for the private sector to partner with the public sector—not unlike the goal of public/private partnerships—to help the government address the nation’s needs in times of crisis. Although the DPA has its roots at a time when President Truman nationalized the steel industry to avert a steel worker’s strike, the President’s actions were deemed unconstitutional and several titles of the DPA were thereafter terminated by Congress. The titles that remain in the DPA serve as useful tools for collaboration between private industry and the government.

10. When does the DPA terminate, if ever?

The DPA has been reauthorized over 50 times since its enactment in 1950, with the last reauthorization occurring in 2019 by Section 1791 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (P.L. 115-232). This latest reauthorization extending the termination of nearly all DPA authorities by six years to September 30, 2025. Some DPA authorities, like the Exon-Florio Amendment (which established government review of the acquisition of U.S. companies by foreigners) and the DPA’s anti-trust protections for certain voluntary industry agreements, have been made permanent by Congress.

Additional Resources:

Finally, additional resources are available online that describe the DPA, and it is certain additional resources will become available in the future as this law is used to combat COVID-19. For now, readers may want to consult:

- The text of the DPA and the statute are available here:
 - https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final_defense_production_act_091030.pdf
 - <https://www.law.cornell.edu/uscode/text/50/chapter-55>
- FEMA’s Overview of the DPA, available at <https://www.fema.gov/defense-production-act-overview>
- Congressional Research Service, The Defense Production Act of 1950, History, Authorities, and Considerations for Congress (March 2, 2020), available at <https://fas.org/sqp/crs/natsec/R43767.pdf>