

# President Announces First Exercise of Executive Order Under Defense Production Act for COVID-19 Response

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On March 20, 2020, President Trump announced the first exercise of the Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19, which authorizes the Secretary of Health and Human Services to direct private sector production of goods and resources in response to the Coronavirus (COVID-19) pandemic.

## In Depth

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On March 18, 2020, President Trump issued an [Executive Order \(EO\) on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19](#). The EO relies largely on the authority granted to the president by the Defense Production Act of 1950, as amended (50 USC 4501 *et seq.*) (DPA) and seeks to “ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19.” The EO emphasizes that “it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the Nation’s healthcare system and others that need them most at this time.”

On March 20, 2020, President Trump announced that the federal government had begun to use the Defense Production Act pursuant to the EO to direct US companies to produce emergency supplies of protective masks for health workers caring for COVID-19 patients.

## The Defense Production Act of 1950

The DPA was enacted during the Korean war and grants the president the authority, in the interest of national defense, to direct what the private sector produces. Once DPA is invoked, federal agencies can use [DPA’s authorities](#) to direct the domestic industrial base to produce essential goods and materials necessary for the national defense.

Historically, presidents have invoked the DPA to authorize the US Department of Defense to make requests of private companies. Congress has amended the DPA to broaden the law’s scope beyond military readiness to include goods and materials necessary to enable the United States to recover and respond to natural hazards and other national emergencies.

DPA considerations relevant to the current crisis include:

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- *Title I Priorities and Allocations:* Grants the president the authority to require the private sector to prioritize and accept contracts for materials and services as necessary to promote the national defense.
  - *Title III Expansion of Productive Capacity and Supply:* Grants the president the authority to incentivize (through loans, loan guarantees, direct purchases and purchase commitments) the domestic industrial base to expand the production and supply of critical materials and goods. This title also authorizes the government to procure and install equipment in private industrial facilities.
  - *Title VII General Provisions:* Grants the president the authority to establish voluntary agreements with private industry; the authority to block proposed or pending foreign corporate mergers, acquisitions or takeovers that threaten national security; and the authority to employ persons of outstanding experience and ability and to establish a volunteer pool of industry executives who could be called to government service in the interest of the national defense.

The most recent EO is not the first time President Trump has invoked the power of the DPA. In summer 2019, relying on the authorities granted by the DPA, the [President directed the Department of Defense](#) to develop and purchase equipment to increase the production of rare-earth magnets used in electronics to counteract anticipated efforts by China to restrict exports.

## **EO on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19**

The March 18, 2020, EO delegates to the Secretary of the US Department Health and Human Services (HHS) the authority to “issue such orders and adopt and revise appropriate rules and regulations as may be necessary” 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 respond to the spread of COVID-19 within the United States.

The EO directs that the “Secretary of Health and Human Services may use the authority under section 101 of the [DPA] to determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.”

## **Challenges to Industry**

The EO includes a broad delegation of authority to HHS to take action in response to COVID-19. Despite the president’s recent tweets, organizations should closely monitor HHS’s potential control of commercial production of resources that HHS deems necessary. Organizations should also be aware of the monetary incentives and assistance programs that could be made available through Title III if the EO is exercised.

Companies in the supply chain for personal protective equipment, ventilators, respirators and other shortage areas related to COVID-19 prevention, diagnosis or treatment should be particularly aware of the potential for HHS to exercise its authority in the near future. Organizations should monitor administration and HHS communications regarding any exercise of the EO’s authority over the following weeks and months.

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