

**American Agricultural Law Association  
2020 Annual Conference  
Kansas City, MO**

**General Session Panel Discussion  
“COVID-19 and the Pork Industry: Lessons Learned”  
2:00 pm to 3:00 pm CST - Thursday November 12, 2020**

- **Moderator: Bill Even, CEO, National Pork Board**
- **Panelists:**
  - **Mike Blaser, Attorney, Brown Winick Law Firm**
  - **Mark Dopp, General Counsel, North American Meat Institute**
  - **Michael Formica, General Counsel, National Pork Producers Council**

**I. Contracts and Force Majeure**

Since March, all across the country, agricultural producers, processors, food manufacturers, retail stores, landlords, tenants, lenders, borrowers, and others have pulled out their written contracts to examine the terms, specifically any force majeure clauses.

While many contracts may contain a “force majeure” clause that serves to excuse a party from performing its obligations under the contract for certain reasons that are deemed to be out of the party’s control, there is no standard force majeure provision. To the contrary, each clause is subject to negotiation between the parties. Each contract can be very different.

Because each clause and each contract is different, the precise words that are included in a particular force majeure clause must be examined to determine whether the clause has been triggered in any given situation. Courts have consistently held and explained that whether a force majeure clause serves to excuse a party’s contractual performance is fact specific.<sup>1</sup> Particularly now, practitioners will want to examine force majeure clauses to determine if they address pandemic events, government shutdowns, and other uncontrollable events that could have an impact on a party’s ability to perform.

---

<sup>1</sup> *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App. – Houston -14<sup>th</sup> Dist.] 2004); *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427 (Tex.App.—Amarillo 1993, no writ); *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 282–83 (Tex. App. – Amarillo 1998) (emphasis added); *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018); *Jennie-O Foods, Inc. v. United States*, 580 F. 2d 500, 410 (Ct. Cl. 1978) *SNB Farms, Inc. v. Swift & Co.*, 2003 U.S. Dist. LEXIS 2063 (N.D. Iowa Feb. 7, 2003); *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 1989 US Dist. LEXIS 15036 (1989)

## **II. Property Rights and Trespass Claims**

According to the Department of Homeland Security, the Food and Agriculture Sector accounts for roughly one-fifth of the nation's economic activity, and is recognized as critical to our nation's infrastructure and national security.<sup>2</sup> Because the sector is almost entirely under private ownership, protection of private property rights and strengthening the security of all facilities is of utmost importance. Many swine operations have seen an increase in animal activist activity during the pandemic, including actions that constitute civil or criminal trespass.<sup>3</sup> P

## **III. Employee Wellness and Regulatory Compliance**

Keeping workers safe while still operating a business has been a challenge for employers across all industries during the COVID pandemic. Pork processing plants have been no exception, particularly since the Defense Production Act Executive Order was issued. Processors have been faced with balancing compliance with the executive order and satisfying contractual duties and obligations with partners up and down the supply chain, while also facing general liability issues and questions.

Regarding employee safety and wellness, many regulatory agencies have issued "guidance" documents or "helpful suggestions", but many questions surround the binding nature of any of these apparent recommendations, as compared to new rules. At the same time, in an effort to control the spread of COVID-19, many federal agencies are now weighing in, and in some instances, stepping up regulatory enforcement in new and different areas. Processors must be prepared to comply with all regulatory agencies

## **IV. Supply Chain Challenges**

The pandemic has also brought a keen awareness to the intricacies of the food production supply chain, and the impact that severe, unexpected interruptions can have on the rest of the chain. From a legal standpoint, again, processors are now operating under the Defense Production Act and DPA Executive Order. At the same time, when large numbers of processing plant employees contracted the COVID-19 virus resulting in short-term shut downs of processing facilities, many pork producers were then faced with no place to deliver slaughter-ready animals. This meant that pork producers were left trying to coordinate and minimize emergency depopulation and disposal of healthy animals, while not violating US anti-trust laws. As the nation-wide trade association representing America's hog farmers, the National Pork Producers' Council obtained a waiver, or business review letter, from the US Department of Justice to allow certain communications on this topic. At the time it was issued it was only the 19<sup>th</sup> Business Review Letter issued in 20 years. Four others have issued since then.

---

<sup>2</sup> See CISA, Food and Agriculture Sector, <https://www.cisa.gov/food-and-agriculture-sector>.



**U.S. DEPARTMENT OF JUSTICE**  
Antitrust Division

**MAKAN DELRAHIM**  
Assistant Attorney General

---

Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-2401/(202) 616-2645 (Fax)

May 15, 2020

Martin M. Toto  
White & Case LLP  
1221 Avenue of the Americas  
New York, NY 10020

Re: National Pork Producers Council Business Review Request Pursuant to  
COVID-19 Expedited Procedure

Dear Mr. Toto:

This letter responds to your request, on behalf of the National Pork Producers Council (“NPPC”), for the issuance of a business review letter under the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6. Specifically, the Department understands that NPPC’s request is made under the expedited, temporary review procedure as detailed in the Joint Antitrust Statement Regarding COVID-19 dated March 2020 (“Joint Statement”).<sup>1</sup> As indicated in the Joint Statement, the Department’s statement of its current enforcement intentions as set out in this letter will be in effect for one year from the date of this letter.

In the Joint Statement, the Department indicated its aim to address COVID-19 related requests “addressing public health and safety” within seven days of receiving all necessary information. In a request on May 8, 2020, you sought a statement of the Department’s current antitrust enforcement intentions with respect to (i) NPPC and its members assisting the United States Department of Agriculture (“USDA”) in humanely and efficiently depopulating unmarketable hogs and (ii) NPPC sharing information with its members about best practices for depopulating unmarketable hogs (“Proposed Conduct”).<sup>2</sup>

Your request arises amidst a challenging time in the pork industry. As explained in an Executive Order issued by President Donald J. Trump on April 28, 2020, the closure

---

<sup>1</sup> Dep’t of Justice & Fed. Trade Comm., Joint Antitrust Statement Regarding COVID-19 (Mar. 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> [hereinafter “Joint Statement”].

<sup>2</sup> Letter from Martin M. Toto, National Pork Producers Council, to the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice (May 3, 2020) [hereinafter “Request Letter”] at 5.

of processing facilities has led to a “reduction in some of those facilities’ processing capacity.”<sup>3</sup> The Executive Order addresses bringing those facilities back online, but in the meantime, processing capacity reductions have had impacts up and down the supply chain. Your request explains that those impacts have included some hogs becoming unmarketable due to the inability to process them in a timely manner. As a result, some farmers may need to humanely euthanize unmarketable hogs—a “tragic choice [they] are being forced to make because of COVID-19 closures of pork packing facilities.”<sup>4</sup>

In the midst of these challenges, competition remains critically important to consumers and market participants in the pork and other meat industries, and addressing anticompetitive conduct in these industries is therefore a top priority for the Department. At the same time, it is also important to provide antitrust guidance to hog farmers and others that have been adversely impacted by the current pandemic, especially where they seek to cooperate with the government in beneficial and procompetitive ways. Following an expedited review, the Department can conclude that it does not presently intend to challenge the Proposed Conduct by the NPPC. Based on your representations, most of this conduct will occur at the direction and under the supervision and coordination of the USDA—a government agency—and therefore should not raise concerns under the antitrust laws. Moreover, NPPC’s communication of non-competitively sensitive information to its members, *e.g.*, best practices for depopulating unmarketable hogs, even if not occurring at the direction of and under the supervision and coordination of the USDA, similarly is unlikely to raise concerns. In accordance with the Department’s usual practice, however, it reserves the right to challenge the conduct in the future if it is later revealed to be anticompetitive in purpose or effect.

While for the reasons explained below your Proposed Conduct appears procompetitive, the Department would have serious concerns if industry participants, such as meat processors, engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct.<sup>5</sup> As always, the Department would welcome the NPPC’s assistance, its members, or that of any other industry participant in preventing and identifying violations of the antitrust laws in this critical industry.

## ***I. Background***

The spread of COVID-19 has created unprecedented challenges for industries across America. Major disasters have been declared in all 50 states, more than 1,250,000 Americans have been infected with the virus, and more than 75,000 have died from it.<sup>6</sup>

---

<sup>3</sup> Exec. Order. No. 13,917, 85 Fed. Reg. 26 (April 28, 2020).

<sup>4</sup> Request Letter at 4.

<sup>5</sup> See Joint Statement.

<sup>6</sup> Fed. Emergency Mgmt. Agency, *Disasters*, <https://www.fema.gov/disasters> (last visited May 8, 2020); Johns Hopkins University, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering*, <https://coronavirus.jhu.edu/map.html> (last visited May 8, 2020); see also Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to Lori A. Schechter, McKesson Corp., Jessica L. Mayer, Cardinal Health, Inc., Michael S. Ettinger, Henry Schein, Inc., Alex Liberman, Medline Indus., Inc., & Nicholas J. Pace, Owens & Minor, Inc. (Apr. 4, 2020),

Measures to mitigate the spread of COVID-19, moreover, “have taken a dramatic toll on the United States economy and critical infrastructure.”<sup>7</sup>

The meat and poultry industries are among the industries affected. For example, facilities processing meat, *e.g.*, pork, have been forced to reduce capacity or close entirely, affecting the entire supply chain.<sup>8</sup> As a result of these closures, hog farmers and others who supply Americans with pork are facing unprecedented hardships. In response, President Donald J. Trump issued an Executive Order recognizing that “the continued functioning of the national meat and poultry supply chain” is “critical” to the health and security of Americans.<sup>9</sup> The President therefore directed the Secretary of the USDA, pursuant to the Defense Production Act, to “take all appropriate action . . . to ensure that meat and poultry processors continue operations” and “determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry.”<sup>10</sup>

The USDA’s Animal and Plant Health Inspection Service (“APHIS”) has also recognized that “American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”<sup>11</sup> USDA’s Under Secretary for Marketing and Regulatory Programs is initiating a program to facilitate the depopulation of unmarketable hogs. The Under Secretary has directed APHIS’s National Incident Coordination Center (“NICC”) to carry out activities under the program. APHIS’s NICC will help hog producers “whose animals cannot move to market as a result of processing plant closures” by identifying alternative markets or, “if necessary,” advising “on depopulation and disposal.”<sup>12</sup>

The NPPC is a national association representing pork producers, *i.e.*, hog farmers. Its business review request arises based on the exigent circumstances described above.

## ***II. NPPC’s Efforts to Maintain Pork Supply and Facilitate Depopulation***

The facts set forth in this section regarding NPPC’s Proposed Conduct are based on your representations to the Department, the Department’s discussions with the USDA, and publicly available information.

---

<https://www.justice.gov/atr/page/file/1266511/download> [hereinafter “PPE Distributor BRL”] and Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to John G. Chou, AmerisourceBergen (Apr. 20, 2020), <https://www.justice.gov/atr/page/file/1269911/download> [hereinafter “AmerisourceBergen BRL”].

<sup>7</sup> Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Dep’t of Agric., Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 25, 2020), [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2020/sa-04/meat-processing-coordination-center](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center).

<sup>12</sup> *Id.*

In a normally functioning market, hog producers deliver their hogs to pork packers, *i.e.*, companies that process hogs into pork. Producers sell to packers based on preexisting contracts or on the spot market.<sup>13</sup> As a result of the pandemic and reduced packing capacity, however, hog producers are unable to sell all of their hogs previously raised “just-in-time” for slaughter to packers. Producers also cannot keep these hogs until packing capacity rebounds because when hogs “exceed a certain weight . . . they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants.”<sup>14</sup> This has created “an overwhelming oversupply of live hogs in the United States.”<sup>15</sup> Maintaining unmarketable hogs is expensive and limits farmers’ ability to make space in barns to raise hogs for future supply.<sup>16</sup>

Unable to sell or keep these unmarketable hogs, many farmers plan to “humanely euthanize” them.<sup>17</sup> Hog farmers, however, “generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals.”<sup>18</sup> By contrast, pork packers have the ability to do so. Several packers have even volunteered to help producers with whom they have contracts depopulate their unmarketable hogs.<sup>19</sup> In some areas, though, these services may not be available or packers might be unable to depopulate enough hogs. Producers who sell on the spot market and lack existing contractual relationships with packers may also struggle to depopulate their unmarketable hogs at scale.

In response to these circumstances, NPPC explains that it and its members propose to engage in two categories of conduct.

First, NPPC proposes to work “in conjunction with officials from the USDA” or “relevant state and local governments” to “implement an orderly euthanization and disposal process” and “communicat[e] with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs.”<sup>20</sup> As noted above, one initiative in this area involves APHIS’s NICC. The Department understands from NPPC and USDA that APHIS’s NICC will work with farmers and packers to facilitate hog depopulation and that any coordination among farmers to implement USDA’s policies will happen at the direction and under the supervision of the USDA or state governmental authorities.

---

<sup>13</sup> Some packers are also vertically integrated, meaning they process their own hogs as well.

<sup>14</sup> Request Letter at 4.

<sup>15</sup> *Id.*

<sup>16</sup> Int’l Trade Comm’n, *Pork and Swine Industry & Trade Summary* (Oct. 2014) at 18, [https://www.usitc.gov/publications/332/pork\\_and\\_swine\\_summary\\_its\\_11.pdf](https://www.usitc.gov/publications/332/pork_and_swine_summary_its_11.pdf) (noting that hogs are typically marketable “at 5–6 months of age”).

<sup>17</sup> Request Letter at 4 (“It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.”).

<sup>18</sup> *Id.* at 4-5 (noting the difficulty that individual producers would have depopulating in a humanely and “environmentally responsible manner”).

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

Ultimately, though, each producer will unilaterally decide how many of their hogs to depopulate.

Second, NPPC proposes to help federal and state agencies develop other initiatives “to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers.”<sup>21</sup> The Department’s understanding is that, to the extent NPPC helps implement these initiatives, it would do so at the direction and under the supervision of federal or state agencies, *e.g.*, APHIS’s NICC or State Veterinarians, or that NPPC’s conduct would involve relaying best practices for supply chain management and depopulation, rather than competitively sensitive information, to its members, based on publicly available information or information from federal or state agencies.<sup>22</sup>

### ***III. Legal Framework and Analysis***

#### **a. Collaboration and Cooperation with Federal and State Agencies**

The Department has indicated that it will not challenge conduct aimed at addressing COVID-19 if it is (i) “compelled by an agreement with a federal agency or a clearly defined federal government policy” and (ii) “supervised by a federal agency.”<sup>23</sup>

NPPC and its members, *i.e.*, hog producers, working with APHIS’s NICC fits within this two-part framework.<sup>24</sup> First, while producers may not have a formal agreement with APHIS’s NICC, they “will be acting at [its] direction in the context of a clearly defined federal program” and in furtherance of that program.<sup>25</sup> Second, their actions will be “at the direction and supervision of the USDA.”<sup>26</sup> In particular, while producers will unilaterally decide whether to depopulate their hogs and in what quantities, APHIS’s NICC will tell those producers where they should take those hogs to be depopulated. The Department understands that this conduct is necessary as a result of the situation created by the current pandemic. The Department further understands that the conduct will not be used as a mechanism to depopulate more hogs than necessary, *i.e.*, the conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant

---

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 7.

<sup>23</sup> AmerisourceBergen BRL at 8 (internal brackets omitted); *see also* PPE Distributors BRL at 7 n.30 (“[T]he Department stands ready to work with federal agencies to ensure their efforts promote competition”).

<sup>24</sup> The Department expresses no view on packers sharing of information with APHIS or state governments. The Department does note, however, that “bilateral communication with [a federal agency], as opposed to communication [among competitors], should not raise antitrust concern.” PPE Distributors BRL at 8.

<sup>25</sup> AmerisourceBergen BRL at 8; *see also* Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020) (directing USDA “to determine the proper . . . allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat”).

<sup>26</sup> Request Letter at 7.

capacity. Given the above caveats, the Department is satisfied that this and similar conduct should not raise concerns under the antitrust laws.<sup>27</sup>

#### **b. Collaboration and Cooperation Among Competitors**

Although NPPC represents that much of the Proposed Conduct will be under the direction and supervision of USDA or other government officials, NPPC's request also covers collaborations independent of government involvement.

NPPC also intends to provide its members with "clear and consistent guidance with regard to how producers should dispose of [their hogs]."<sup>28</sup> For example, producers who elect to depopulate their unmarketable hogs without the help of packers must navigate a patchwork of local, state, and federal laws along with other safety and environmental considerations. To the extent NPPC communicates with its members to help USDA, APHIS's NICC, and other agencies, under their direction and supervision, the Department is satisfied that this conduct should not raise concerns under the antitrust laws.<sup>29</sup> Likewise, NPPC sharing information about euthanization methods, protocols, equipment, or processors with its members – even if not at the direction of USDA or another governmental entity – is unlikely to raise concerns under the antitrust laws.<sup>30</sup>

By contrast, the Department would have concerns if industry participants shared competitively sensitive information or otherwise engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct. While your request does not address the communication of competitively sensitive information, we note that further guidance is available in the Antitrust Guidelines for Collaborations Among Competitors issued jointly by the Antitrust Division and the Federal Trade Commission.<sup>31</sup>

#### **IV. Conclusion**

This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and assertions you have provided, as well as the additional qualifications set forth in the letter. It expresses the Department's current enforcement intention in the exercise of its prosecutorial discretion in the context of the

---

<sup>27</sup> In some circumstances, state authorities, *e.g.*, a state veterinarian or animal health authority, may direct producers to specific facilities for depopulating their unmarketable hogs (based on information from USDA or otherwise). The Department would analyze this conduct using the same two-part framework discussed above.

<sup>28</sup> Request Letter at 5.

<sup>29</sup> AmerisourceBergen BRL at 9 (quoting PPEDistributors BRL at 9).

<sup>30</sup> The same is true for NPPC seeking to "help USDA/APHIS, and state and local government representatives develop policies and initiatives" to addressing the effects of COVID-19. Request Letter at 5. *See* AmerisourceBergen BRL at 11–12 (discussing *Noerr-Pennington* immunity).

<sup>31</sup> Fed. Trade Comm'n and U.S. Dep't Of Justice, Antitrust Guidelines for Collaborations Among Competitors at § 2.1 (2000), <https://www.justice.gov/atr/page/file/1098461/download>.



antitrust laws.<sup>32</sup> The letter also reflects the outcome of an expedited, temporary review procedure that is necessarily less thorough than ordinary business review procedures and should not be interpreted as applying to any matter other than the Proposed Conduct as it relates strictly to, or arises directly out of, the COVID-19 pandemic. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 U.S.C. § 50.6, and subject to the limitations and reservations of rights therein. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you have submitted will be made publicly available within thirty days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Makan Delrahim

---

<sup>32</sup> The Department therefore expresses no opinion on whether the Proposed Conduct or other actions by NPPC or its members implicates the Packers and Stockyards Act.

May 8, 2020

**VIA ELECTRONIC DELIVERY**

The Honorable Makan Delrahim  
Assistant Attorney General  
U.S. Department of Justice  
Main Justice Building, Room 3109  
950 Pennsylvania Ave NW  
Washington, DC 20530  
ATR.COVID19@USDOJ.GOV

---

White & Case LLP  
1221 Avenue of the Americas  
New York, NY 10020-1095  
T +1 212 819 8200

[whitecase.com](http://whitecase.com)

**Re: Urgent COVID-19-Related Request for a Business Review Letter**

Dear Mr. Delrahim:

On behalf of the National Pork Producers Council (“NPPC”), its affiliated state associations, and its member hog farmers, we write to seek a Business Review Letter related to the COVID-19 crisis. NPPC wishes to confirm that its efforts to keep pork products available for America’s tables and to facilitate the orderly euthanization of hogs for which there is no market do not violate the antitrust laws.<sup>1</sup> Due to the crisis that hog farmers face in this rapidly changing environment, NPPC respectfully requests that the Antitrust Division issue a favorable response on an expedited basis, pursuant to the Department of Justice and the Federal Trade Commission’s Joint Antitrust Statement Regarding COVID-19 (“March 24 Joint Statement”).

The NPPC is the nation’s leading association for pork producers. Through its national offices in Des Moines, Iowa and Washington, DC, and its 42 affiliated state associations, the NPPC works on behalf of America’s 60,000 hog farmers to ensure that the U.S. pork industry can responsibly provide high-quality pork to consumers. NPPC is funded by investments made through voluntary producer payments. NPPC’s investors, the equivalent of members, include independent hog farmers which vary in size and scope of operation, as well as vertically-integrated pork packing companies who own hogs. Through public-policy outreach, NPPC fights for reasonable legislation and regulations, and protects the livelihood of America’s hog farmers.

---

<sup>1</sup> This letter describes a limited scope of NPPC’s activities related to depopulation of hogs in response to the COVID-19 crisis. The fact that conduct that may be taken by NPPC, its state organizations, or members is not described herein is not an admission that such conduct violates the antitrust (or any other) laws. NPPC, its state organizations, and members reserve all rights and defenses as to all of their conduct. Moreover, NPPC, its state organizations, and members reserve all rights to argue that conduct described herein is legal for reasons not specifically addressed in this letter or in the Antitrust Division’s response to this letter.

The Honorable Makan Delrahim  
May 8, 2020

The current situation is an unprecedented, dire national emergency. The SARS-CoV-2 coronavirus and the disease it causes (“COVID-19”) have impacted all sectors of American industry. The supply of meat and poultry is no exception—the President has determined that meat and poultry are “a scarce and critical material essential to the national defense.”<sup>2</sup> Similarly, the Antitrust Division has recognized that “agriculture is an essential part of the American economy” and “well-functioning agricultural markets are not only a matter of economic efficiency, but a matter of national security and public health.”<sup>3</sup>

On April 28, 2020, President Trump issued an Executive Order, invoking the Defense Production Act of 1950, and delegating broad authority to the Secretary of Agriculture (“USDA”) to respond to the crisis facing the meat and poultry supply chain. (Attachment 1, “April 28 Executive Order”). The President found that, “[i]t is important that processors of beef, pork, and poultry (‘meat and poultry’) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity . . . . Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency.”<sup>4</sup> Accordingly, pursuant to Section 101(b) of the Defense Production Act of 1950, the President delegated to USDA the power to “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.”<sup>5</sup> Relatedly, the April 28 Executive Order directed that the “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.”<sup>6</sup>

Prior to the April 28, 2020 Executive Order, the USDA’s Animal and Plant Health Inspection Service (“APHIS”) issued a statement concerning its work in response to the COVID-19 crisis (Attachment 2, “USDA Statement”).<sup>7</sup> There, the USDA emphasized that, “American

---

<sup>2</sup> Attachment 1, 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, Exec. Order No. 13917, 85 Fed. Reg. 26313 § 1 (2020), <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>; see 50 U.S.C. § 4511(b).

<sup>3</sup> U.S. Dep’t of Justice., *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward* 2 (May 2012) (quoting Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice, *A Shared Vision for American Agricultural Markets* 2 (Mar. 12, 2010)), <https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>.

<sup>4</sup> April 28 Executive Order § 1.

<sup>5</sup> *Id.*

<sup>6</sup> April 28 Executive Order § 2.

<sup>7</sup> Attachment 2, USDA, Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 24, 2020),

The Honorable Makan Delrahim  
May 8, 2020

livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”<sup>8</sup> Among other things, USDA committed to “leading the federal response by working in coordination with the Vice President’s Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on producers” and to “establish[] a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19.”<sup>9</sup>

As discussed more fully below, due to severe capacity restrictions at pork packing plants, NPPC, USDA, and industry analysts understand that the need to euthanize a large number (approximately 700,000 per week) of hogs will be unavoidable.<sup>10</sup> NPPC believes a coordinated industry and governmental response is necessary to ethically and efficiently euthanize as few hogs as possible. Accordingly, NPPC and its members seek a coordinated implementation of an orderly euthanization process that is consistent with legal and ethical requirements.

NPPC appreciates the Antitrust Division’s recognition that responding to the COVID-19 crisis “will require unprecedented cooperation between federal, state, and local governments and among private businesses,” which is a “necessary response to exigent circumstances [to] provide Americans with products or services that might not be available otherwise.”<sup>11</sup> That cooperation between the public and private sectors is necessary to continue feeding the United States and to ensure the humane treatment of its livestock.

## 1. Background

In response to the COVID-19 crisis, a number of large, primary pork packing plants have shut down.<sup>12</sup> Others are operating at severely diminished capacity, both to protect their employees and under threat of sanctions by states and localities.<sup>13</sup> In total, as of April 29, about 44% of pork-

[https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2020/sa-04/meat-processing-coordination-center](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Jacob Bunge & Kirk Maltais, *Pork Industry, USDA Discuss Euthanizing Hogs After Coronavirus Closes Plants*, WALL STREET JOURNAL (Apr. 27, 2020) (“The industry typically slaughters around 510,000 pigs daily for bacon, hams and sausage. Covid-19 outbreaks among plant workers have forced closures of facilities that typically process roughly one-fifth of the daily total, or 105,000 pigs a day, leading to a backup on farms and raising the prospect of having to euthanize them and then render or bury the carcasses.”), <https://www.wsj.com/articles/pork-industry-usda-discuss-euthanizing-hogs-after-coronavirus-closes-plants-11588015611>.

<sup>11</sup> March 24 Joint Statement.

<sup>12</sup> See Jacob Bunge et al., *Grocers Hunt for Meat as Coronavirus Hobbles Beef and Pork Plants*, WALL STREET JOURNAL (Apr. 23, 2020), <https://www.wsj.com/articles/grocers-hunt-meat-as-coronavirus-hobbles-beef-and-pork-plants-11587679833>.

<sup>13</sup> See, e.g., Chauncey Alcorn, *Tyson Will Close Its Biggest Pork Plant After Workers Call Out Sick With Coronavirus*, CNN BUSINESS (Apr. 22, 2020) (quoting CEO of Smithfield Foods stating, “It is impossible to keep our grocery stores stocked if our plants are not running”), <https://www.cnn.com/2020/04/22/business/tyson-pork-plant-iowa-coronavirus/index.html>; Danielle Wiener-Bronner, *One of the Largest Pork Processing Facilities in the US is Closing*

The Honorable Makan Delrahim  
May 8, 2020

processing capacity is offline. The price for hogs has crashed and is projected to remain significantly below average throughout 2020. Hog farmers were projected to lose almost \$5 billion collectively, even before packing facilities began to close.<sup>14</sup> At the current pace, hog farmers, their families, and their communities face grave economic consequences resulting from decreased packer capacity.

The reduced foodservice and restaurant demand for pork products and the limited processing capacity in the pork supply chain have caused an overwhelming oversupply of live hogs in the United States, in turn severely decreasing the value of each hog. Indeed, an economist in the industry notes, “We haven’t seen a situation in our lifetime where the industry has contracted as quickly as we have seen in the last month.”<sup>15</sup> Pork packing companies are exercising the force majeure clauses in their contracts with hog farmers because the sharp reduction in pork plant capacity precludes them from accepting the total number of hogs for which they contracted.

The U.S. pork industry utilizes a just-in-time production system and only hogs of a certain size fit within equipment used on processing plant production lines. Due to the severely decreased national pork packing capacity caused by the pandemic, thousands of hog farmers across the country are unable to send their hogs into the food chain when they reach market weight. As such, there are now hundreds of thousands of hogs across the country that cannot be sold and harvested as they would be in the ordinary course of business absent the pandemic. Moreover, as these hogs continue to grow and exceed a certain weight of about 330 pounds, they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants. With no packing company able to buy such hogs, producers will have little choice but to humanely euthanize and then attempt to dispose of these animals. It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.

The prospect of hog farmers across the country being forced to euthanize thousands of unmarketable hogs poses numerous challenges that will require an urgent response from all levels of government and the industry itself if this crisis is to be handled responsibly. In the ordinary course, hog farmers do not euthanize or dispose of large numbers of hogs. Instead, they sell their hogs to packers who operate facilities that harvest them and distribute the meat in the food supply chain. Thus, hog farmers generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals, and then dispose of them in a manner that mitigates the environmental impact. Hog farmers care passionately about the humane care and treatment of their animals. Yet, none have ever faced a challenge like this before and will require education and guidance regarding methods, protocols, equipment, and processes to humanely euthanize an unprecedented and unexpected number of unmarketable hogs.

---

*Until Further Notice*, CNN BUSINESS (Apr. 13, 2020), <https://www.cnn.com/2020/04/12/business/meat-plant-closures-smithfield/index.html>.

<sup>14</sup> See NATIONAL PORK PRODUCERS COUNCIL, *Hog Farmers Face COVID-19 Financial Crisis* (Apr. 14, 2020), <https://nppc.org/hog-farmers-face-covid-19-financial-crisis/>.

<sup>15</sup> Bunge, *supra* note 12 (quoting Will Sawyer, CoBank Economist).

The Honorable Makan Delrahim  
May 8, 2020

The meat packing industry is in a unique position to offer euthanasia services to producers who have hogs that have grown too large to satisfy processing specifications at existing facilities. Some facilities have already volunteered to help with the process of humanely euthanizing animals. In areas where such facilities are unavailable, it may be necessary to work with veterinarians to develop processes and protocols by which producers who choose to do so can humanely euthanize their unmarketable animals themselves.

Similarly, disposing of thousands of euthanized animals will pose significant challenges. State and local laws may dictate how and where producers can dispose of such animals, as well as what forms of euthanasia may implicate local animal abuse laws. In some situations, producers may be able to safely dispose of animals on their farms, while in others, it may be preferable to utilize off-site locations. Again, regardless of which disposal methods are best in each area, to ensure that animals are disposed of in an environmentally responsible manner, the NPPC, working under the direction and supervision of the USDA and state and local officials, must be prepared to provide clear and consistent guidance with regard to how producers should dispose of these animals. The potential health and safety impact on Americans is real and immediate without an extraordinary response to this crisis.

NPPC believes a coordinated approach to euthanization and disposal among private industry and federal, state, and local governmental officials is necessary to comply with myriad legal and ethical constraints. Uncoordinated euthanasia may also result in too many hogs being euthanized.

## **2. The Proposed Conduct**

NPPC and hog farmers across America are proceeding with two clear goals: (1) to maximize the total number of hogs processed into food for consumers; and (2) to minimize the total number of hogs that must be euthanized or otherwise destroyed because of this crisis. To accomplish these goals, in conjunction with officials from the USDA, relevant state and local governments, the National Pork Board, the American Association of Swine Veterinarians and the Swine Health Information Center, pork packing companies, and guidance from NPPC's antitrust counsel, NPPC and its members seek to collaborate to: (1) assist federal, state, and local authorities to ethically and efficiently depopulate unmarketable hogs; (2) implement an orderly euthanization and disposal process that is consistent with legal and ethical requirements, with NPPC acting as an informational clearinghouse for farmers with respect to non-competitively sensitive information, such as methods, protocols, equipment, processes, and the like; (3) assist USDA/APHIS, and state and local government representatives, in communicating with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs; and (4) help USDA/APHIS, and state and local government representatives develop policies and initiatives designed to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers (collectively, "Proposed Conduct").

NPPC expects that discussions among competitors will include government representatives or be at the direction of government representatives. NPPC does not have any present intention to

The Honorable Makan Delrahim  
May 8, 2020

initiate formalized meetings among hog farmers for the purpose of responding to the COVID-19 crisis, absent government compulsion, direction, or participation.

To aid in your review of this request, we provide the following scenario as an example of the type of collaboration hog farmers may rely on to respond to this crisis as quickly and efficiently as possible:<sup>16</sup>

- (a) To aid farmers in their unprecedented need to depopulate large numbers of hogs, NPPC is assisting its state organizations, state governments, and farmers in identifying sources of euthanasia equipment and is participating in discussions regarding the organization of centralized euthanasia and disposal stations. This process includes disseminating projections as to the number of hogs those facilities may handle each day. NPPC and its members may seek to collaborate to discuss the most orderly and efficient euthanization process.

NPPC commits to follow several safeguards to assure antitrust compliance:

- (a) Decisions to euthanize hogs in response to the COVID-19 crisis will be made unilaterally by individual farmers;
- (b) NPPC will not facilitate any coordination or discussion of prices between NPPC members, and will prohibit any discussion of prices at meetings involving competitors;
- (c) NPPC and hog farmers will not use any collaboration to engage in COVID-19 profiteering;
- (d) The Proposed Conduct will be limited to the time period necessary to respond to the COVID-19 crisis.

NPPC commits to follow these safeguards at all times and will work with the Antitrust Division to ensure necessary oversight. Importantly, the Proposed Conduct will be limited in duration and scope—it will only occur as long as COVID-19 substantially impairs pork-processing capacity. NPPC hopes and anticipates that this current COVID-19 situation will only last for approximately up to six months, depending on the duration of the ongoing pandemic. Due to the fast-moving and ever-changing nature of the COVID-19 crisis, the nature of the assistance the NPPC may be required to provide to help hog farmers responsibly address the crisis is continuing to evolve in real time. Thus, the Antitrust Division's review of the NPPC's behavior may require flexibility on the part of the Antitrust Division and the NPPC.

### **3. Analysis**

NPPC believes the Proposed Conduct does not violate the antitrust laws. First, much of the Proposed Conduct will simply not raise antitrust concerns at all, as it will relate to non-competitively sensitive issues, such as medical and technical information, availability of

---

<sup>16</sup> This is not an exhaustive list of possible activities, but merely an example of the type of activities contemplated.

The Honorable Makan Delrahim  
May 8, 2020

euthanization services, legal and ethical requirements for euthanization, health and safety information, and the like. To the extent that discussions involving competitors get into competitively sensitive topics, the Proposed Conduct is legal as (1) conduct compelled by or taken to assist a federal agency and state authorities; and (2) a pro-competitive competitor collaboration.

- (a) First, as the Antitrust Division recently affirmed, “Conduct by federal agencies is not subject to scrutiny under the antitrust laws. Courts have extended this immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) a federal agency supervises the conduct. The Department will not challenge conduct that satisfies this standard in responding to the COVID-19 pandemic and its aftermath.”<sup>17</sup> Moreover, “[c]ollaboration among competitors in aid of a federal agency, even if it does not satisfy the standard described above, may still offer unique benefits and therefore be consistent with the antitrust laws.”<sup>18</sup> Similarly, the state action doctrine immunizes activity that is “clearly articulated and affirmatively expressed as state policy,” and (2) “actively supervised” by the state.<sup>19</sup> NPPC intends to undertake the Proposed Conduct pursuant to the April 28 Executive Order, and at the direction and supervision of the USDA and state and local government officials.<sup>20</sup> In addition, the Proposed Conduct will serve the unique pro-competitive benefit of increasing marketable supply and decreasing the number of destroyed hogs. Thus, the Proposed Conduct qualifies for antitrust immunity.
- (b) Second, the Proposed Conduct is a bona fide pro-competitive competitor collaboration.<sup>21</sup> The Antitrust Division has recognized the pro-competitive nature of competitor collaborations that are designed to increase market output, and achieve efficiencies.<sup>22</sup> The Proposed Conduct and any ancillary collaborations are purposefully designed to achieve the long-term pro-competitive purpose of maintaining an adequate pork supply in the U.S. market during the COVID-19 crisis. The need to euthanize a large number of surplus hogs is unfortunately inevitable. By definition, however, hogs to be euthanized will be those that are unmarketable to processors and have little value. Thus, the Proposed Conduct will not result in the reduction of marketable supply. Moreover, implementing an

<sup>17</sup> Letter from Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice, to Lori A. Schechter, McKesson Corporation, et al. (Apr. 4, 2020), <https://www.justice.gov/atr/page/file/1266511/download>.

<sup>18</sup> *Id.* (citing Letter from J. Mark Gidley, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Stuart M. Pape, Patton, Boggs & Blow (Jan. 14, 1993)).

<sup>19</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

<sup>20</sup> See Letter from Lori A. Schechter, McKesson Corporation, et al., to Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice (Mar. 30, 2020) (outlining similar safeguards), <https://www.justice.gov/atr/page/file/1266516/download>.

<sup>21</sup> Such collaborations are subject to the rule of reason. See Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 8–9 (Apr. 2000), <https://www.justice.gov/atr/page/file/1098461/download>.

<sup>22</sup> See *id.* at 6.



The Honorable Makan Delrahim  
May 8, 2020

orderly euthanization process through an NPPC-government collaboration will avoid inefficient and potentially unnecessary euthanizations by farmers, who do not specialize in euthanizing large numbers of hogs. Thus, the Proposed Conduct is likely to increase market efficiencies by reducing waste and allowing farmers to focus on their core competencies. Finally, the Proposed Conduct is a “necessary response to exigent circumstances” to “provide Americans with products . . . that [will] not be available otherwise.”<sup>23</sup>

#### 4. Conclusion

Hog farms are critical infrastructure and keeping pork products available for the public is a national security issue. Hog farmers and the pork industry are in a disastrous situation caused by circumstances completely beyond their control. The Proposed Conduct would be carried out pursuant to government direction and supervision and be limited in scope and duration. We therefore request an expedited Business Review Letter confirming that the Antitrust Division has no present intention to bring an enforcement action against the Proposed Conduct.

Sincerely,



Martin M. Toto  
David E. Bond  
Sean M. Sigillito

Enclosures

cc: The Honorable George Ervin “Sonny” Perdue, III  
Secretary, U.S. Department of Agriculture

Neil Dierks  
Chief Executive Officer  
National Pork Producers Council

---

<sup>23</sup> March 24 Joint Statement.

# **ATTACHMENT 1**

EXECUTIVE ORDERS

# 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

LAND & AGRICULTURE

Issued on: April 28, 2020



By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the “Act”), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Policy. The 2019 novel (new) coronavirus known as SARS-CoV-2, the virus causing outbreaks of the disease COVID-19, has significantly disrupted the lives of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak), I declared that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of COVID-19. The COVID-19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure.

It is important that processors of beef, pork, and poultry (“meat and poultry”) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity. In addition, recent actions in some

States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled “Meat and Poultry Processing Workers and Employers” providing for the safe operation of such facilities.

Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency. Given the high volume of meat and poultry processed by many facilities, any unnecessary closures can quickly have a large effect on the food supply chain. For example, closure of a single large beef processing facility can result in the loss of over 10 million individual servings of beef in a single day. Similarly, under established supply chains, closure of a single meat or poultry processing facility can severely disrupt the supply of protein to an entire grocery store chain.

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).

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 (50 U.S.C. 4554, 4555, 4556, 4559, 4560), is delegated to the Secretary of Agriculture with respect to food supply chain resources, including meat and poultry, during the national emergency caused by the outbreak of COVID-19 within the United States.

(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.

(c) The Secretary of Agriculture shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

April 28, 2020.

# **ATTACHMENT 2**

# **USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures**

American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states. USDA is leading the federal response by working in coordination with the Vice President's Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on producers. We will continue to seek solutions to ensure the continuity of operations and return to production as quickly, safely and as health considerations allow at these critical facilities.

While this work continues, the USDA's Animal and Plant Health Inspection Service (APHIS) is establishing a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19. Going forward, APHIS' Coordination Center, State Veterinarians, and other state officials will be assisting to help identify potential alternative markets if a producer is unable to move animals, and if necessary, advise and assist on depopulation and disposal methods.

Additionally, APHIS will mobilize and deploy assets of the National Veterinary Stockpile as needed and secure the services of contractors that can supply additional equipment, personnel, and services, much as it did during the large-scale Highly Pathogenic Avian Influenza emergency in 2015.

Additionally, the USDA's Natural Resources and Conservation Service (NRCS) will be providing state level technical assistance to producers and will provide cost share assistance under the Environmental Quality Incentives Program (EQIP) in line with program guidelines for disposal.

#

# Best Practices for Controlling COVID-19 in Small Business Meat Processors in Nebraska

Dennis E. Burson, Extension Meat Specialist  
Elizabeth Boyle, Extension Meat Specialist, Kansas State University  
Gary Sullivan, Associate Professor Meat Science

## Reviewers

Risto Rautiainen, Professor, Department of Environmental, Agricultural & Occupational Health, College of Public Health, UNMC  
Nicole Carritt, Director, Rural Health Initiatives, Office of Academic Affairs, UNMC

There is no evidence that COVID-19 is transmitted through food consumption, including meat. In general, respiratory illnesses are not transmitted via food or food packaging.

However, with the increasing illnesses of COVID-19 in Nebraska, plants should consider implementing “Best Practices” to avoid transmission from one employee to another. A prevention program should be built around reducing exposure of your employees to the transmission of the virus.

## Action Steps

1. Your workers need to be aware of COVID-19 symptoms. The CDC has signage and videos on their web site.
  - a. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>
2. Request that your employees report illness to the manager and then exclude employees from the workplace if they have symptoms of COVID-19.
3. Conduct a wellness check each day. Ask if employees have a fever and consider taking a temperature of each employee.
4. Continue to reinforce these above practices to your workers and provide all employees with refresher training on food hygiene principles and practices.
5. Minimize the risk of transmission by implementing the following practices.

\*Implementation of some practices may not be easy in meat processing workplace environments.

## Implementation Practices to Reduce Risk

### *Have workers wear Personal Protective Equipment (PPE)*

1. Wear face masks.
  - a. If you cannot obtain disposable medical masks, use a cotton cloth mask. Launder the face masks in hot water (155 degrees F) and machine dry.
  - b. Cotton cloth needs to be changed frequently (no standard definition, but at least once or twice each day).
2. Wear disposal gloves.
  - a. Maintain hand washing procedures, even when wearing gloves.
  - b. Change gloves frequently.
  - c. Avoid touching mouth and eyes when wearing gloves.
3. Wear frocks, hairnets, and protective head gear.
  - a. Clean and laundered clothing is not considered a transfer vector for COVID-19.

### *Establish spacing of employees in the work area and break rooms.*

1. The recommendation from CDC is 6 feet apart.
2. World Health Organization says 1 meter (3.4 feet) for work environment.
3. Consider separate duties to improve employee spacing in your processing facility. One example is to designate a processing area or a room for a fewer number of employees.
4. Consider staggering workstations so employees do not face each other.
5. If possible, consider split shifts to reduce the number



of employees in the plant at one time. Also, sanitize touch points between shifts.

6. If employees need to work close to each other, then face masks and face shields should be considered.

*Wash hands, even if using gloves.*

Follow the guidelines from CDC

<https://www.cdc.gov/healthywater/hygiene/hand/handwashing.html>

Wash hands:

1. Before, during, and after preparing food.
2. Before and after treating a cut or wound.
3. After using the toilet.
4. After blowing your nose, coughing, or sneezing.
5. After touching an animal or animal waste.
6. After touching garbage.
7. After removing items dropped on the processing floor.
8. After touching common touch points used by customers (for example: sales counters, grocery baskets or carts, refrigeration doors, door handles, etc.).

*Handling customer sales and purchases.*

1. Keep customers out of the processing area. Post signs at entrances to retail and processing areas informing customers of access procedures.
2. If customers are allowed in a retail area, minimize the number of customers in your operation at one time to ensure adequate spacing. Require customers that are not feeling well or have traveled to locations with high infection rates to contact you by phone to make delivery arrangements.
3. If you deliver products to customers practice the following.
  - a. Notify your customers to place orders in advance and deliver the orders at curbside or the front door.
  - b. Maintain spacing as described above with the customer.
  - c. Do not shake hands.
  - d. Employees should wear a mask and gloves for delivery of orders to customers.
4. Frequently sanitize the touch points in the retail area where customers or other employees will touch the same surface.
  - a. Use sanitizer at the strength recommended by the manufacturer.
  - b. Most sanitizers used in food production should be effective. C for effectiveness at this web site: <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>

*For employees that eat in your facility.*

1. Practice handwashing before and after eating.
2. Practice sanitation of common touch point surfaces.
  - a. Lunch table and chairs.
  - b. Microwave ovens.
  - c. Counters.
  - d. Refrigerator handles.
  - e. Sinks and faucet handles.
  - f. Door handles.
  - g. Telephones.
3. Practice personal spacing described above.

*Standard cleaning and sanitation.*

1. Use normal daily cleaning and sanitation procedures for the production areas in your facility.
2. Increase the frequency of cleaning and sanitation for touch areas either in the production area or outside of the production area in your facility.
  - a. Common tools like brooms, squeegees, scrapers, or hand tools should be sanitized after each use, especially between two separate users.
  - b. Less common touch area includes doorknobs, light switches, handles, desk, phones, keyboards and more.
3. The virus is not more resistant than the bacteria you are trying to control with sanitation. Use the EPA website above to double check effectiveness of the sanitizer you normally use.

*If an employee becomes sick and tests positive for COVID-19 or has symptoms associated with COVID-19, take the following steps.*

1. If the employee is at work when COVID-19 symptoms occur, send the employee home.
2. If the employee is at home, do not allow employee to return to work until they are in compliance with return-to-work policies, preferably in line with CDC guidance.
3. Develop a return to work policy. A good example is: Employees may return to work only when they have been fever-free for at least 72 hours (without the use of fever-reducing medication) AND other symptoms have improved AND at least 7 days have passed since symptoms first appeared if no testing occurred OR if employee was tested, they have been fever-free for at least 72 hours (without the use of fever-reducing medication) AND other symptoms have improved AND have received two negative tests in a row, 24 hours apart.
4. If an employee reports the illness at work, then clean and sanitize all work touch points in the employee

work area. In addition, consider shutting down processing operations for additional cleaning and sanitation of all areas in the facility using the standard cleaning and sanitation described above.

5. If you can isolate the work area for each employee, then clean and sanitize that area and you may be able to continue operations.
6. Remember, many infected people show no symptoms but still shed COVID-19. In addition infected individuals will shed COVID-19 before symptoms appear.
7. Inform appropriate government authorities.
  - a. County Health Departments and your local food inspector.
  - b. Nebraska Department of Health & Human Services or the appropriate agency for your state.
  - c. Nebraska Department of Agriculture, Food Safety & Consumer Protection or the appropriate agency for your state.
  - d. USDA Food Safety and Inspection Service.

Most of this information was gathered from a webinar conducted by the World Health Organization (WHO). “EPI-WIN COVID-19: How to Ensure and Maintain Food Supply and How to Protect Workers in the Food Industry and at Retail” Dr. Peter Ben Embarek, Food Safety Expert and WHO Unit Head, and Professor Alan Riley, University College of Dublin and former CEO of the Food Safety Authority of Ireland. April 3, 2020.

The WHO has interim guidance on COVID-19 and food safety for food business at: [https://apps.who.int/iris/bitstream/handle/10665/331705/WHO-2019-nCoV-Food\\_Safety-2020.1-eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/331705/WHO-2019-nCoV-Food_Safety-2020.1-eng.pdf).

In addition information from the North American Meat Institute (NAMI) was reviewed and information adapted for smaller business meat and poultry processing businesses. (Food Industry Recommended Protocols When Employee/Customer Tests Positive for COVID- 19)

<https://www.meatinstitute.org/index.php?ht=d/sp/i/164447/pid/164447>)

This is an abbreviated list of suggestions for “Best Practices”. If the Federal government or your State implements requirements that exceed these guidelines, then use their recommendations for your facility with employees and customers.

Operations at several Meat Processing Plants have been affected by employee illnesses from COVID-19, and many have shut down to make additional corrections. In the Midwest states, reporting of increased illness and death is occurring. Predictions also indicate the peak of illnesses and deaths will occur at a later date in the Midwest than in other locations in the United States.

# Employee Health and Food Safety Checklist for Human and Animal Food Operations During the COVID-19 Pandemic



## Food and Drug Administration (FDA) and Occupational Safety and Health Administration (OSHA)

Purpose: The Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA) are providing this checklist for FDA-regulated human and animal food operations to use when assessing operations during the COVID-19 pandemic, especially when re-starting<sup>1</sup> operations after a shut down or when reassessing operations because of changes due to the COVID-19 public health emergency caused by the virus SARS-CoV-2. Some or all of this checklist may be useful to persons growing, harvesting, packing, manufacturing, processing, or holding human and animal food regulated by FDA. This includes produce, seafood, milk, eggs, grains, game meat, and other raw materials or ingredients, as well as their resulting human or animal food products<sup>2</sup>. This checklist is not exhaustive of all things human and animal food operations may do for employee health and food safety during the COVID-19 pandemic and can be used in conjunction with additional information from the Centers for Disease Control and Prevention (CDC), OSHA, and other federal, state, local, tribal, and territorial authorities. Not all of the items are relevant to all types of food operations; there is additional sector-specific information available e.g., guidance from CDC and the U.S. Department of Labor for [Agriculture Workers and Employers](#) [5], [Seafood Processing Workers \(developed in consultation with FDA\)](#) [6], and [Meat and Poultry Processing Workers and Employers](#) [7]. Some human and animal food operations producing food subject to FDA regulations are located in foreign countries, though these operations are not subject to OSHA requirements discussed in this document.<sup>3</sup> This checklist provides information useful for foreign facilities that manufacture, process, pack, or hold food for consumption in the United States.

## Employee Health and Social Distancing Checklist

This checklist includes considerations for employee health, screening, and operation configuration for social distancing to prevent or minimize the spread of COVID-19. More information about what practices or steps might be appropriate within your operation can be found in FDA's document titled ["What to Do if You Have COVID-19 Confirmed Positive or Exposed Workers in Your Food Production, Storage, or Distribution Operations Regulated by FDA"](#) [8], as well as in the [CDC and OSHA guidance for manufacturing workers and employers](#) [9], [agriculture workers and employers](#) [5], [seafood processing workers and employers](#) [6], and [meat and poultry processing workers and employers](#) [7].

1. If you are resuming operations after a shutdown, guidance on reopening is available from entities such as CDC and OSHA [1,2,3, 4].
2. Animal food means food for animals other than man and includes pet food, animal feed, and raw materials and ingredients [21 CFR 507.3].
3. The OSH Act covers most private sector employers and their workers, in addition to some public sector employers and workers, in the 50 states and certain territories and jurisdictions under federal authority. Those jurisdictions include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Northern Mariana Islands, Wake Island, Johnston Island, and the Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act.

## Employee Health

Ensuring employees remain healthy is key to maintaining continuity of operations and, under the Occupational Safety and Health Act of 1970, employers must provide a safe and healthful working environment free of serious recognized safety and health hazards. If you have an on-site occupational health (OH) service or OH consultant, please seek their advice for managing your workforce health during the COVID-19 pandemic. Any employee who has COVID-19, regardless of whether the employee has signs and/or symptoms, should be isolated away from the facility, [per CDC and OSHA recommendations](#) [9]. Employers should consider the following questions when assessing operations during the COVID-19 pandemic.

### General:

- Have you developed a [COVID-19 assessment and control plan](#)<sup>4</sup>, as recommended by CDC and OSHA [9]?
- Have you identified a workplace coordinator to coordinate COVID-19 employee health and social distancing activities, as recommended for such a plan?
- Have you provided employees a clear point of contact (e.g., the workplace COVID-19 coordinator) to (1) report [symptoms or illness](#) [11] and (2) consult with when an employee who has been sick with COVID-19 symptoms meets the CDC [criteria to end a home isolation period](#) [12]?
- Have you established practices to assess employee health and minimize the spread of COVID-19 in accordance with recommendations from federal agencies such as [CDC](#), [FDA](#), [OSHA](#), and any applicable state, local, tribal and/or territorial authorities?
- Do these practices cover:
  - assessing employee health (e.g., assessing [symptoms](#)) prior to and/or upon arrival to work;
  - what to do when an employee is symptomatic (has symptoms of COVID-19) or has tested positive for the virus that causes COVID-19;
  - what to do when an employee has been exposed to co-workers or other people (e.g., family or friends) who have symptoms consistent with COVID-19 or who have tested positive for the virus that causes COVID-19;
  - practices to protect workers at [increased risk of severe illness](#), such as older adults and people of any age with a chronic medical condition (addressed based on consultation with occupational medicine and human resource professionals) [9]?
- Have you reached out to state and/or local public health officials and occupational safety and health professionals to establish ongoing communications to make sure you are getting relevant and up-to-date information concerning COVID-19 [9]?

4. CDC has developed a [Manufacturing Facility Assessment Toolkit](#) that includes a facility assessment checklist intended for use by facility management and/or occupational safety and health professionals to assess a facility's COVID-19 control plan and determine whether control measures in place align with CDC/OSHA guidance [10].

**Facilities:**

- Have you ensured that the work environment is generally free of recognized safety and health hazards, e.g., [as described by OSHA](#) [13]?
- Particularly when re-starting operations after a shut down, have you taken steps to ensure the temporary shutdown or reduced operation of a facility, including reductions in normal water use, have not created hazards, including those related to [mold](#) in the facility and [Legionella](#) in water systems, for returning occupants [2]?

**For all personnel:**

- Have personnel (workers and supervisors) been provided basic COVID-19 infection prevention information and training in a language and at a literacy level they understand, as [recommended by CDC and OSHA](#) [9]?
- Have you posted flyers (e.g., by lockers, in break rooms) with [simplified messages in multiple languages](#) that use infographics to facilitate employee understanding of COVID-19 infection control practices [9]?
- Have you displayed simple posters in the languages that are common in the worker population that encourage staying home when sick (or after testing positive for the virus that causes COVID-19), cough and sneeze etiquette, and proper hand hygiene practices, [as recommended by CDC and OSHA](#) [9]?
- Have you considered using [CDC videos on COVID-19](#) [14] to provide prevention information to your workers?
- Have you made available enough facilities (e.g., handwashing stations), materials (e.g., soap, paper towels, hand sanitizer with at least 60 percent alcohol), and trash receptacles (preferably no-touch) so workers can implement [CDC- and OSHA-recommended handwashing practices](#) [15] and, to the extent feasible, social distancing while implementing hygiene practices [9]?
- Have you enhanced (i.e., increased the scope and frequency of) cleaning and disinfecting (using disinfectants [from EPA's list of disinfectants for use against SARS-CoV-2](#) [16]) of frequently touched surfaces such as timeclocks, door handles, faucets, control panels, vending machine touchpads, and handles on refrigerators and microwave ovens in break rooms, [as recommended by CDC and OSHA](#) [9]?
- Have you reduced the surfaces that employees touch by adding “no touch” features to otherwise frequently touched surfaces, such as clock in/out stations, hand sanitizer stations, doors, trash cans, and faucets, where feasible [9]?
- Do you have procedures for [social distancing as described by CDC and OSHA](#)[9]?
- Have you done an assessment to determine whether [personal protective equipment](#) (PPE) is necessary to protect workers [9]?

<input type="checkbox"/>	Do you have procedures for when and how to wear <a href="#">face masks or cloth face coverings as described in FDA's fact sheets</a> [17] and <a href="#">by CDC</a> <sup>5</sup> [18], or PPE (such as <a href="#">respirators</a> and face shields) as recommended by <a href="#">CDC and OSHA</a> [9], and policies for complying with applicable religious accommodation laws?
<input type="checkbox"/>	If practices include the use of PPE and/or <a href="#">masks/cloth face coverings</a> , or changes to these uses, have you provided training on proper wearing, removal, and cleaning (if applicable) of PPE and face coverings, <a href="#">as recommended by CDC and OSHA</a> [9]?
<input type="checkbox"/>	Have you analyzed your sick leave policies as described by CDC and OSHA to make sure that ill workers, including asymptomatic workers infected with SARS-CoV-2, are not in the workplace and to ensure employees are not penalized for taking sick leave if they have COVID-19 [9]?
<input type="checkbox"/>	Does your plan consider whether you are able to offer vulnerable workers (older adults and people of any age who have <a href="#">certain underlying medical conditions</a> [19]) <a href="#">roles that minimize their contact with others</a> [20]? <ul style="list-style-type: none"> <li>• Have you consulted the <a href="#">Equal Employment Opportunity Commission's guidance</a> regarding compliance with the Americans with Disabilities Act during the pandemic [21]?</li> </ul>
<input type="checkbox"/>	Do your procedures include situations in which you provide shared transportation to workers, e.g., between establishments or to the fields, when appropriate [5]? As recommended by CDC and OSHA [5, 6, 9], if shared transportation such as carpooling or using company shuttle vehicles is a necessity for workers: <ul style="list-style-type: none"> <li>• Have you limited the number of people per vehicle to provide as much space as feasible between riders (which may mean using more vehicles or making more frequent trips)?</li> <li>• Is everyone in the vehicle required to wear a mask or face covering and use hand sanitizer on entry/exit?</li> <li>• Are windows open to increase air flow, when feasible?</li> <li>• Are commonly touched surfaces, such as door handles, handrails, and seatbelt buckles, cleaned and disinfected after each carpool or shuttle trip?</li> <li>• Have you provided workers with information on how to protect themselves when using shared transportation [22]?</li> </ul>
<input type="checkbox"/>	If workers live in <a href="#">shared/communal housing</a> facilities (e.g., seasonal farm workers) have you developed measures on COVID-19 infection prevention, including personal preventive measures and approaches for social distancing (particularly in shared rooms such as kitchens, bathrooms, and sleeping quarters), as described by CDC [5, 6, 23]?

5. CDC recommends wearing cloth face coverings as a protective measure in addition to social distancing (i.e., staying at least 6 feet away from others), and notes that they may be especially important when social distancing is not possible or feasible based on working conditions [9].

**For persons who are symptomatic or develop symptoms at work:**

- Are procedures in place that require symptomatic workers to stay home or go home if they develop symptoms during the work day [6, 9]?
- Are procedures in place to physically isolate a symptomatic person from others, including identifying a designated isolation area, prior to the sick person being transported from the facility [9, 20]?
- Are procedures in place to provide alternate transportation in a manner that does not expose others if an employee that develops symptoms arrived via shared transportation [5]?
- Are procedures in place to collect information about the sick person's contacts (up to 2 days prior to symptom onset) to identify other workers who could be considered exposed (e.g., people who were in close contact with [less than 6 feet from] the symptomatic worker for at least 15 minutes)? (A close contact is defined in CDC's [Public Health Guidance for Community-Related Exposure](#) [24].)
- Are procedures in place to inform fellow workers of their possible exposure to COVID-19 when a sick person is confirmed infected (maintaining confidentiality as required by the [Americans with Disabilities Act](#) [20, 21])?
- Do your procedures instruct exposed workers about how to proceed based on the [CDC Public Health Guidance for Community-Related Exposure](#) [24]?
- Do you have workers' home contact information to facilitate contact about health status and/or sharing information about their potential contact with a symptomatic or diagnosed individual?
- Do you have procedures to [clean and disinfect](#) surfaces using disinfectants [from EPA's list of disinfectants for use against SARS-CoV-2](#) [16] in all areas used by a sick person, as recommended by CDC [25]?
  - Do these procedures include closing off areas used by the sick person (before cleaning and disinfecting) for at least 24 hours whenever feasible, and opening outside doors and windows to increase air circulation in the area [\(as recommended by CDC\)](#)?
  - Do these procedures include measures to protect the person doing the cleaning, such as wearing skin protection and, where needed, eye protection for potential splash hazards [1]?
  - Do the measures address cleaning and disinfecting the vehicles in which the sick person arrived at and departed from work, when feasible [5]?
- Do you know how to contact your [state, local, tribal, and/or territorial health department](#) [26] should you have questions or suspect an outbreak in your operation?

## Employee Exposure Investigation & Testing

Have you decided how you will determine when an employee should be tested for COVID-19? This is an important consideration for your COVID-19 assessment and control plan. CDC provides a summary of considerations and current recommendations regarding SARS-CoV-2 testing in its [Overview of Testing for SARS-CoV-2](#) [27]. In addition, CDC has developed two additional guidance documents on testing: (1) “[SARS-CoV-2 Testing Strategy: Considerations for Non-Healthcare Workplaces](#)” [28], which presents considerations for use of a strategy and categories of people for SARS-CoV-2 testing; and (2) “[Testing Strategy for Coronavirus \(COVID-19\) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case is Identified](#)” [29], which presents options for testing strategies for exposed coworkers for use when public health organizations and employers determine testing is needed to help support existing disease prevention measures. A strategy aimed at reducing introduction of SARS-CoV-2 into the work setting through early identification could reduce the risk of widespread transmission. CDC has recommended [guidelines for testing for asymptomatic individuals](#) without known or suspected SARS-CoV-2 exposure for early identification in special settings [27, 28]. High-density critical infrastructure workplaces, such as food processing facilities where continuity of operations is a high priority, are settings for which these approaches could be considered.

Note that CDC advises that [critical infrastructure workers may be permitted to continue work](#) at their regular duties following potential exposure to COVID-19 [30], provided they remain asymptomatic and [additional precautions](#) are implemented to protect themselves, their coworkers, and the community, including continued screening for symptoms [20, 30]. However, if tested, their results must be negative for them to continue working (see CDC’s [Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#) [30]). These additional precautions are necessary because those exposed to individuals with COVID-19 may develop [symptoms of the disease](#) anywhere from 2–14 days later (or may be infected but remain asymptomatic, shed virus, and transmit SARS-CoV-2 to other individuals). [CDC recommends](#) that, for critical infrastructure workers who have had an exposure to COVID-19 but remain asymptomatic, employers measure employees’ temperatures and assess symptoms prior to their starting work [30]. [CDC also recommends](#) that exposed employees wear a face mask or employer-approved cloth face coverings (these are [described by FDA](#) [17]) at all times while in the workplace for 14 days after last exposure and practice social distancing. [According to CDC](#), as long as the employee doesn’t have a fever or symptoms, they should self-monitor for symptoms and fever under the supervision of their employer’s occupational health program. In addition, any employee who becomes sick during their work shift should immediately be sent home and/or seek further care from a healthcare provider [30].

- Does your COVID-19 assessment and control plan include procedures to identify [close contacts](#) of those exposed to a person with confirmed COVID-19 through case investigation and [contact tracing](#), typically conducted by state or local health departments [31]?



- Do you have a procedure for establishing priority for testing (for example, [CDC's tiered approach](#)) based on an assessment of risk in the workplace and other factors, such as high rates of COVID-19 transmission in the surrounding community or workers' households [29]?
- Does your COVID-19 assessment and control plan include procedures for [workers who have had an exposure](#) [30]?
- Does your plan provide for exposed workers (i.e., workers who have had close contact with a person confirmed as positive for COVID-19) that are asymptomatic to be pre-screened and to self-monitor daily for onset of symptoms related to COVID-19, as [CDC recommends](#) [30]?
- Does your plan include procedures for when to test workers, as described by CDC [27, 28 29,]?
- Does your plan address the specific procedures for testing workers (e.g., the type of test, who will conduct the tests, and where they will be conducted) when testing is warranted, and what actions might be taken based on test results? (If you have a worker that has been confirmed as positive for COVID-19, consult with your local health agency and/or CDC for current recommendations on using test-based strategies as part of your strategy to identify and/or prevent workplace transmission.)
- Do you have procedures for reintegration of workers who have tested positive for COVID-19, including those workers who have remained asymptomatic, as described in CDC's interim guidance titled "[Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings](#)" and "[Duration of Isolation and Precautions for Adults with COVID-19](#)"<sup>6, 7</sup> [12, 32]?

## Work Environment Configuration

The configuration of the work environment can help mitigate the risk of spread of COVID-19 among workers.

- Have you identified and addressed conditions where social distancing may be compromised, such as: near timeclocks; in hallways; at handwash stations, entrances and exits, vending machines, and microwaves; and in cafeterias, restrooms, common areas/breakrooms, and outdoor gathering areas?
- Can you configure the work environment in your operation so that the workers are spaced at least 6 feet apart, wherever feasible? For example, as described in [CDC and OSHA guidance](#),
  - Can you modify the alignment of work stations (e.g., for [harvesting](#) [5] or [along production lines](#) [9]) so that workers are at least 6 feet apart in all directions (e.g., side-to-side and when facing one another)?

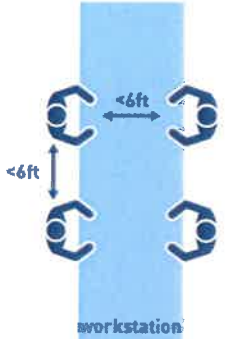
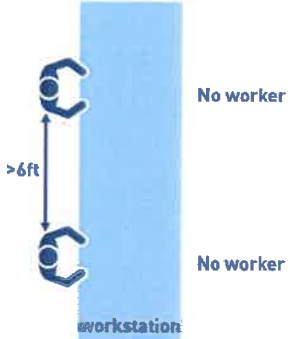
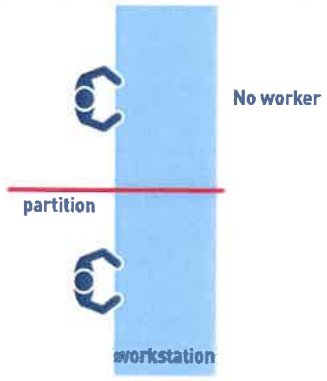
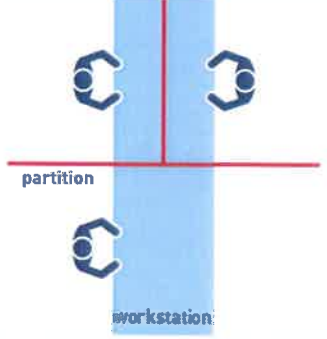
6. According to CDC, evidence supports a symptom-based strategy to determine when to discontinue home isolation or precautions. For persons who are severely immunocompromised, a test-based strategy could be considered in consultation with infectious diseases experts. For all others, a test-based strategy is no longer recommended except to discontinue isolation or precautions earlier than would occur under the symptom-based strategy [28].

7. CDC recommends that for most persons with COVID-19 illness, isolation and precautions can generally be discontinued 10 days after symptom onset and resolution of fever for at least 24 hours, without the use of fever-reducing medications, and with improvement of other symptoms [32].

<input type="checkbox"/>	<ul style="list-style-type: none"><li>• Can the workstations be modified to achieve an ideal alignment in which workers do not directly face one another?</li><li>• If it is not feasible to maintain a 6-foot distance between workers, can you use physical barriers, such as plexiglass or other impermeable, easily cleanable, dividers or partitions, to separate workers from each other?</li><li>• Can you provide unidirectional paths through the operation, where feasible, including stairs, hallways, and cafeterias, to reduce contact in narrow areas?</li><li>• Is it feasible to use floor markings to show proper distancing and floor traffic directions?</li></ul>
<input type="checkbox"/>	Can you consult with a heating, <a href="#">ventilation</a> , and air conditioning engineer to ensure adequate ventilation and/or adjust ventilation in work areas to help increase circulation of outdoor air as much as feasible to minimize workers' potential exposure without compromising food safety [9, 20]?
<input type="checkbox"/>	If pedestal fans or hard-mounted fans are used in the facility, can you take steps to minimize air from fans blowing from one worker directly at another worker, as <a href="#">recommended by CDC and OSHA</a> [9]?
<input type="checkbox"/>	Have you removed personal cooling fans from the workplace to reduce the potential spread of any respiratory droplets, as <a href="#">recommended by CDC and OSHA</a> ? <ul style="list-style-type: none"><li>• Have you accounted for the effect of this change on workers' risk of <a href="#">heat illness</a> [37]?</li></ul>
<input type="checkbox"/>	Have you adopted practices to encourage social distancing outside of production areas (e.g., entry at the operation, break rooms, restrooms, locker rooms, changing rooms, and other areas where people may congregate or form lines)? For example, as <a href="#">recommended by CDC and OSHA</a> : <ul style="list-style-type: none"><li>• Can you remove or rearrange chairs and tables, or add partitions to tables, in breakrooms and other areas workers may frequent to increase worker separation?</li><li>• Can you identify alternative areas to accommodate overflow volume, such as training and conference rooms, or use outside tents for break and lunch areas?</li></ul>
<input type="checkbox"/>	Can you adopt personnel practices that limit the exposure of individuals to other individuals by, for example, staggering work times, staggering break times, assigning the same personnel to the same shift, or placing farmworkers residing together in the same workgroups ("cohorting" workers), as recommended by CDC and OSHA [5, 9]?
<input type="checkbox"/>	Have you provided instructions for work configuration or social distancing in common languages, using infographics to facilitate employee understanding, and at a literacy level appropriate for your personnel, as <a href="#">recommended by CDC and OSHA</a> [9]?

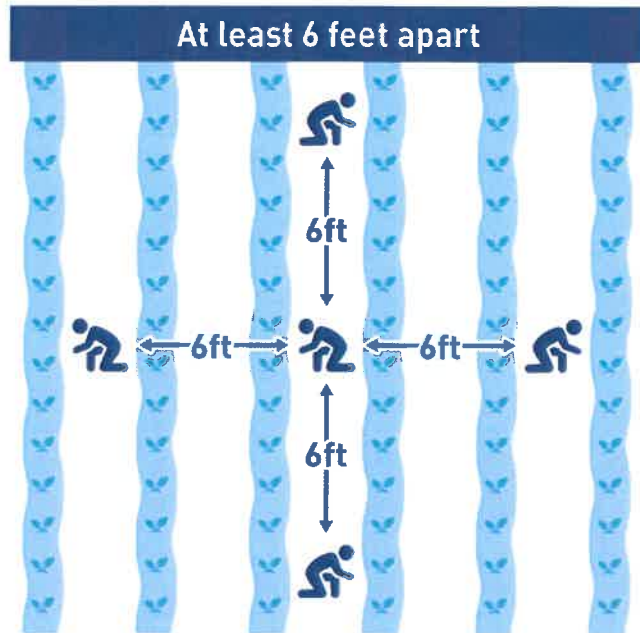
### Work Space Configuration Examples

The following diagram, [based on one developed by OSHA \[9\]](#), is one example of a way to align workstations (e.g., manufacturing/processing lines, sorting operations, packing lines) to include social distancing practices. You may have to make adjustments based on your particular establishment/operation layout.

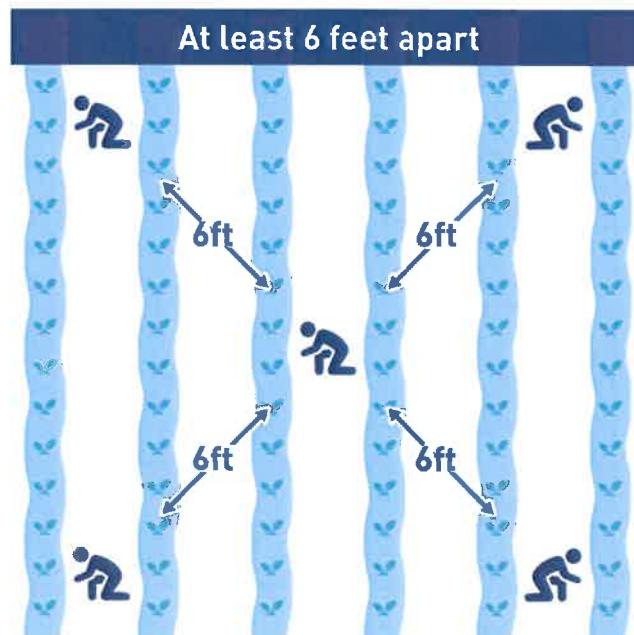
How to align workstations, if feasible	
<p><b>Not Protective</b>– Workers are within six feet of one another (without a partition), including at side-by-side and/or facing workstations.</p>	 <p>workstation</p>
<p><b>Good</b> – Workers are spaced at least six feet apart, not facing one another. Another setup may be used to achieve similar distancing between workers.</p>	 <p>workstation</p>
<p><b>Good</b> – Physical barriers, such as partitions, separate workers from each other.</p>	 <p>partition</p> <p>workstation</p>
<p><b>Good</b> – Physical barriers, such as partitions, separate workers from each other, including where workers need to perform tasks in tandem across from one another.</p>	 <p>partition</p> <p>workstation</p>

Similarly, examples of ways to create social distancing during operations in fields (e.g., harvesting, weeding) are shown below.

**A. Good**



**B. Good**



## Food Safety Checklist

Currently there is no evidence of food or food packaging being associated with transmission of COVID-19. However, according to [CDC and OSHA](#), the work environments—processing lines and other areas in busy plants where workers have close contact with coworkers and supervisors—may contribute substantially to potential worker exposures [9]. This checklist provides questions for human and animal food operations to consider when re-starting operations after a shut down or when reassessing operations to make changes due to COVID-19. It includes questions intended to help you consider potential impacts of changes, such as those to personnel, suppliers, and incoming ingredients, on your food safety or Hazard Analysis and Critical Control Points (HACCP) plan, as well as current good manufacturing practices (CGMPs).

Some of these questions may not be applicable to operations such as those growing, harvesting, or packing raw agricultural commodities (e.g., produce, grains, milk, or eggs). However, these questions may still assist those types of operations in thinking through disruptions to their operations that may have food safety implications.

### Food Safety or HACCP Plan

For operations required to have a food safety plan under 21 CFR Part 117 or Part 507 (Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls) or a HACCP plan (i.e., 21 CFR Part 123 (Seafood) and 21 CFR Part 120 (Juice)), your plan is key to ensuring you are producing and handling food safely. Some FDA regulations require firms to evaluate whether changes have an impact on the safety of the food they produce. For example, 21 CFR §§117.170(b)(1) and 507.50(b)(1) require a reanalysis of the food safety plan as a whole, or the applicable portion of the food safety plan, whenever a significant change in the activities conducted at a facility creates a reasonable potential for a new hazard or creates a significant increase in a previously identified hazard; 21 CFR §123.8(a)(1) requires a reassessment of the adequacy of the HACCP plan whenever any changes occur that could affect the hazard analysis or alter the HACCP plan in any way; and 21 CFR §120.11(b) requires validation that the HACCP plan is adequate to control food hazards that are reasonably likely to occur whenever any changes in the process occur that could affect the hazard analysis or alter the HACCP plan in any way.

- |                          |  |
|--------------------------|--|
| <input type="checkbox"/> | Have there been changes to your ingredient suppliers or ingredients that may require you to consider new hazards, or reconsider your evaluation of your hazards, and whether you need to make changes as a result?   |
| <input type="checkbox"/> | Have there been any changes to the food products you make and/or your customers that would require you to consider whether there are new hazards, or reconsider your evaluation of your hazards, and whether you need to make changes as a result?                           |
| <input type="checkbox"/> | Have there been changes to your operations or processes that require changes to your procedures or the timing of your procedures? For example, do changes to the frequency of shifts or number of personnel impact control measures, monitoring, or verification procedures? |

## Personnel

Your personnel are key to carrying out safe food manufacturing, processing, packing, and holding. Certain FDA regulations require that individuals be qualified to perform their assigned duties (e.g., 21 CFR §§117.4, 507.4) and that individuals that develop food safety plans and HACCP plans have specific knowledge obtained through experience or an FDA-recognized training curriculum (21 CFR §§ 117.180, 507.53, 120.13, 123.10).

- Have there been changes to who performs key roles and responsibilities that impact food safety, such as the Preventive Controls Qualified Individual, HACCP-trained individual, or persons who perform monitoring, verification, or other duties?
- Have you planned how to operate and produce safe food with a reduced workforce if employees are sick? Do you have backups if your key people are unable to come to work?
- Have there been personnel changes, such as new personnel or personnel serving in different roles, that require training in food hygiene and food safety (as required by 21 CFR §§117.4 and 507.4), or other training to ensure that personnel are qualified to perform their job duties?
- Have there been changes in operations (e.g., assigning additional activities to an employee to reduce personnel in an area) or procedures (e.g., increased frequency of handwashing and hand sanitizing) that require training, as necessary to produce clean and safe food and to ensure individuals are qualified to perform their job duties?

## Suppliers and Incoming Ingredients

Your incoming ingredients and the food safety practices of your suppliers are an important part of food safety at your operation.

- Do you need to reconsider your incoming ingredient or receiving procedures to address changes to your suppliers or incoming ingredients? For example, do new ingredients or ingredients from different suppliers have a different look or label that needs to be reviewed during receiving to ensure the correct ingredient has been received, and, as appropriate, received from an approved supplier (as required by 21 CFR §§117.420 and 507.120)?
- Do you need to reconsider your formulation, ingredient addition or substitution, batching, and/or mixing procedures to account for the use of different ingredients, or ingredients with different concentrations?
- Do you need to implement new supplier controls, or make changes to your existing supplier controls (e.g., when needed for compliance with subpart G of 21 CFR Part 117 or subpart E of 21 CFR Part 507)? For example, do you need to temporarily approve new suppliers?

- If you are temporarily suspending onsite audits of your supplier, what other verification activities do you need to implement to ensure your incoming ingredients are safe? For audits related to FDA's preventive controls requirements for human and animal food, see [Temporary Policy Regarding Preventive Controls and FSVP Food Supplier Verification Onsite Audit Requirements During the COVID-19 Public Health Emergency](#) [33].
- For human food facilities:* Do you need to consider/reconsider practices or procedures related to addressing allergens with current good manufacturing practices (CGMPs) or preventive controls in 21 CFR Part 117 because of changes to your suppliers or ingredients?
- For animal food facilities:* Do you need to consider/reconsider practices or procedures related to addressing nutrient toxicities or deficiencies with CGMPs or preventive controls in 21 CFR Part 507 because of changes to your suppliers or ingredients?

### Current Good Manufacturing Practice (CGMP) Requirements

Your CGMPs provide basic sanitation and food safety protections to ensure food is not contaminated or adulterated.

- Personnel (21 CFR §§ 117.10 and 507.14):* Have you reviewed your procedures to determine if you need to modify instructions or increase the frequency of employee handwashing and hand sanitizing?
- Plants and Grounds (21 CFR §§ 117.20 and 507.17):*
- If you are reopening operations, have you reviewed your plants and grounds to ensure that buildings and areas surrounding buildings are appropriately maintained to protect against the contamination of human and animal food? For example, have you reviewed structures and roofs for holes that may cause leaks or allow for the entrance of pests and reviewed surrounding grounds for pest harborages?
  - Are services or vendors you typically use to maintain your plants and grounds operational and actively providing services, or do you need to consider alternative ways to maintain your plant and grounds?
  - Are the persons providing services able to conduct their activities while following appropriate COVID-19 infection prevention procedures?
- Pest Control (21 CFR §§ 117.35 and 507.19):*
- Are services or vendors you typically use for pest control operational and actively providing services, or do you need to make alternative arrangements for pest control?
  - If you are resuming operations, have you performed a walkthrough of your operation to check traps or bait stations and look for other evidence of active pest infestation and taken any necessary steps to remove or exclude pests from your operation?
- Water and Plumbing (21 CFR §§ 117.37 and 507.20):* If you are resuming operations after a prolonged closure, have you performed a [review of your water and plumbing](#) to ensure that it is functional prior to beginning operations [2]? For example, have you checked water temperature and pressure, flushed lines if needed, checked plumbing for potential leaks, checked ice manufacturing equipment, and checked that water treatment systems are operational?

- Sanitary Facilities (21 CFR §§ 117.37 and 507.20):*
- Do you need to increase the number of handwashing stations and hand sanitizer stations to ensure more frequent handwashing/hand sanitizing by employees?
  - Is installing touchless handwashing sinks, soap dispensers, sanitizer dispensers, paper towel dispensers, or trash receptacles feasible?
- Sanitation (21 CFR §§ 117.35 and 507.19):*
- Do you have the necessary cleaning, sanitizing<sup>8</sup>, and [disinfection](#)<sup>9</sup> supplies to restart or continue your operations?
  - Do you need to identify alternatives to your usual sanitation chemicals (e.g., to use a disinfectant for high-touch surfaces where you previously used a sanitizer)?
  - Do you need to make changes to your cleaning, sanitizing, and disinfecting procedures for certain areas or to the frequency of conducting them (e.g., see CDC's [Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes](#) [1])? For example:
    - Are you using products that meet EPA's criteria for use against SARS-CoV-2 (i.e., [Disinfectants for Use Against SARS-CoV-2](#) [16]) where necessary (e.g., for high-touch surfaces) and are they appropriate for the surface? (Check the product label guidelines for if and where these disinfectant products are safe and recommended for use in food manufacturing areas or food establishments.)
    - Do you have or need to use different cleaning, sanitizing, or disinfecting products (approved for food surface contact when used on them) that require different mixing procedures or concentrations?
    - Do you need updated instructions/training for the use of new cleaning, sanitizing, or disinfecting chemicals?
    - Do you need to perform cleaning, sanitizing, and disinfection of certain areas/surfaces more frequently?
    - Do you need to clean, sanitize, and disinfect additional surfaces? For example, have you considered, [as recommended by CDC and OSHA](#) [9], cleaning and disinfecting non-food contact surfaces such as equipment controls, wall switches, hand rails, door pulls, tools, plastic partitions, and other frequently-touched surfaces that may not impact food safety, but may be important to minimize the spread of COVID-19?

8. FDA defines "sanitize" for purposes of 21 CFR Part 117 as "to adequately treat cleaned surfaces by a process that is effective in destroying vegetative cells of pathogens, and in substantially reducing numbers of other undesirable microorganisms, but without adversely affecting the product or its safety for the consumer" (21 CFR §117.3). EPA indicates that sanitizers are used to reduce, but not necessarily eliminate, microorganisms from the inanimate environment to levels considered safe as determined by public health codes or regulations [34]. Sanitizing may be accomplished by proper use of a sanitizer or a disinfectant (since disinfectants are more effective than sanitizers [35]).
9. EPA indicates that disinfectants are used on nonliving surfaces and objects to destroy or irreversibly inactivate infectious fungi and bacteria but not necessarily their spores [34]. According to EPA [35], surface disinfectant products are subject to more rigorous EPA testing requirements and must clear a higher bar for effectiveness than surface sanitizing products. There are no sanitizer-only products with approved virus claims. For this reason, sanitizer-only products do not qualify for inclusion on EPA's [List N: Disinfectants for Use Against SARS-CoV-2](#) [16]. There are many products registered with EPA as both sanitizers and disinfectants because they have been tested using both standards. These products are eligible for inclusion on EPA's List N because of their disinfectant claims [35].



<input type="checkbox"/>	<p><i>Equipment and Utensils (21 CFR §§ 117.40 and 507.22):</i></p> <ul style="list-style-type: none"> <li>• Do you have enough utensils and tools to ensure employees do not need to share them during work shifts, or have a plan to regularly clean and disinfect utensils and tools between uses, <a href="#">as recommended by CDC and OSHA</a> [9]?</li> <li>• Is your equipment operating properly to resume operations? For example, have you checked that coolers, freezers, conveyors, ovens, extruders, and other equipment important to food safety are operating as intended and in compliance with 21 CFR §§ 117.40 and 507.22? For facilities with ammonia refrigeration systems that may have been shut down, have you performed a pre-start up safety review as required by 29 CFR 1910.119(i) (OSHA's standard "<a href="#">Process safety management of highly hazardous chemicals</a>" [36])?</li> </ul>
<input type="checkbox"/>	<p><i>Processes and Controls (21 CFR §§ 117.80 and 507.25):</i> Do you need to adjust your processes or controls because of changes to your operations, including because of changes in the number of people involved in specific operations?</p>
<input type="checkbox"/>	<p><i>Warehousing and Distribution (21 CFR §§ 117.93, 507.27, and 507.28):</i></p> <ul style="list-style-type: none"> <li>• Are there delays in shipping that could impact the safety of your food, especially for refrigerated or frozen food? Do you have procedures to address delays or problems with your supply chain, contingency plans for the holding or storage of products, and instructions for situations that could affect the product safety of perishable foods?</li> <li>• If distributing in bulk, are there any changes to your shipping vessels that could introduce contaminants?</li> <li>• Do new employees or contractors need to be trained on adequate clean out procedures for bulk containers or shipping vessels?</li> </ul>

## Disclaimer

This checklist is not a standard or regulation, and it creates no new legal obligations. It describes existing recommendations as well as mandatory safety and health standards. The checklist is intended to assist employers in providing a safe and healthful workplace. The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

## Resources

- [1] CDC: [Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes](#)
- [2] CDC: [Guidance for Reopening Buildings After Prolonged Shutdown or Reduced Operation](#)
- [3] OSHA: [Guidance on Returning to Work](#)
- [4] OSHA: [Guidance on Preparing Workplaces for COVID-19](#)
- [5] Interim Guidance from CDC and the U.S. Department of Labor: [Agriculture Workers and Employers](#)
- [6] Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA).

- Developed in consultation with the Food and Drug Administration (FDA):  
[Protecting Seafood Processing Workers from COVID-19](#)
- [7] Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA):  
[Meat and Poultry Processing Workers and Employers](#)
- [8] FDA: [What to Do If You Have a COVID-19 Confirmed Positive Worker or Workers Who Have Been Exposed to a Confirmed Case of COVID-19](#)
- [9] Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA):  
[Manufacturing Workers and Employers](#)
- [10] CDC: [Manufacturing Facility Assessment Toolkit](#)
- [11] CDC: [Symptoms of Coronavirus](#)
- [12] CDC Interim Guidance:  
[Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings](#)
- [13] OSHA: [Recommended Practices for Safety and Health Programs. Hazard Identification and Assessment](#)
- [14] CDC: [Covid-19 Videos](#)
- [15] CDC: [When and How to Wash Your Hands](#)
- [16] EPA: [List N: Disinfectants for Use Against SARS-CoV-2 \(COVID-19\)](#)
- [17] FDA: [Use of Respirators, Facemasks, and Cloth Face Coverings in the Food and Agriculture Sector During Coronavirus Disease \(COVID-19\) Pandemic](#)
- [18] CDC: [Use of Masks to Help Slow the Spread of COVID-19](#)
- [19] CDC: [People with Certain Medical Conditions](#)
- [20] CDC: [Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 \(COVID-19\), May 2020](#)
- [21] U.S. Equal Employment Opportunity Commission:  
[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)
- [22] CDC: [Protect Yourself When Using Transportation](#)
- [23] CDC: [Shared and Congregate Housing](#)
- [24] CDC: [Public Health Guidance for Community-Related Exposure](#)
- [25] CDC: [Cleaning and Disinfecting Your Facility](#)
- [26] CDC: [Health Department Directories](#)
- [27] CDC: [Overview of Testing for SARS-CoV-2](#)
- [28] CDC: [SARS-CoV-2 Testing Strategy: Considerations for Non-Healthcare Workplaces](#)
- [29] CDC: [Testing Strategy for Coronavirus \(COVID-19\) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case Is Identified](#)
- [30] CDC: [Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#)
- [31] CDC: [Interim Guidance on Developing a COVID-19 Case Investigation & Contact Tracing Plan: Overview](#)
- [32] CDC: [Duration of Isolation and Precautions for Adults with COVID-19](#)
- [33] FDA: [Temporary Policy Regarding Preventive Controls and FSVP Food Supplier Verification Onsite Audit Requirements During the COVID-19 Public Health Emergency](#)
- [34] EPA: [What are Antimicrobial Pesticides?](#)
- [35] EPA: [What's the difference between products that disinfect, sanitize and clean surfaces?](#)
- [36] OSHA: [1910.119 - Process safety management of highly hazardous chemicals.](#)
- [37] OSHA: [Water. Rest. Shade. Keep Workers Safe in the Heat](#)

## Guidance for Small/Medium Meat Processors Related to COVID-19

<sup>1</sup>Center for Meat Safety & Quality, Department of Animal Sciences, Colorado State University

**What is COVID-19?** The Centers for Disease Control and Prevention (CDC) defines COVID-19 as a respiratory illness caused by a new virus called SARS-CoV-2. To the latest information, the virus spreads in the following ways:

- Between people who are in close contact (within 6 ft/2 m)
- Direct contact with respiratory droplets produced from an infected person through coughing, sneezing or talking
- It is possible to get infected by touching a surface that has the virus on it and then touching your mouth, nose, or eyes

**What are the symptoms of COVID-19?** Symptoms that may appear 2-14 days after virus infection includes:

- Cough and shortness of breath or difficulty breathing

Or **at least 2** of these symptoms:

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>▪ New loss of taste or smell</li> <li>▪ Fever</li> <li>▪ Sore throat</li> </ul> | <ul style="list-style-type: none"> <li>▪ Chills/Repeated shaking with chills</li> <li>▪ Muscle pain</li> <li>▪ Headache</li> </ul> |
|--|--|

Recent studies indicate that PEOPLE WHO ARE NOT showing symptoms CAN SPREAD THE VIRUS, so maintaining the distance between workers IS VERY IMPORTANT.

**Why do we need to be careful in meat facilities?** Meat processing workers often work close to one another and, workers could be in close contact (less than 6 ft/2 m) when clocking in or out, during breaks, or in locker/changing rooms. These contacts sometimes are for long shifts; for example, 8 to 12 h shifts, and continued contact with potentially infected people increases the risk of getting sick.

Since workers usually are less than 6 ft apart, they could be exposed to the virus through respiratory droplets in the air, for example, when an infected person coughs or sneezes. Exposure could occur from contact with contaminated surfaces (the virus can survive on plastic and stainless steel for up to 72 h and less than 24 h on cardboard), such as tools, workstations, door handles, or break room tables.

Infection with this virus could jeopardize the facility operations and the health of all workers, so, [STOP THE SPREAD](#)

### What can we do to PREVENT IT?

- Develop and use protocol for employee screening and monitoring strategies:
  1. Questionnaire to detect if any employees or anyone in their household are experiencing symptoms
  2. Temperature checks (100.4°F/38°C or higher)
- Develop, implement, and instruct practices for social distancing:
  1. Maintain at least 6 ft/2 m of distance between each other whenever possible
  2. Avoid personal contact: shaking hands, etc.
  3. Wear a Face Covering. This is especially important when social distancing (6 ft/2 m) is not possible
  4. Refresh staff on proper hand-washing, including glove practices and avoiding touching your face
  5. If possible, add barriers to workstations between workers
  6. Stagger breaks with small groups, so not all workers go together, and social distance is possible
  7. If possible, manage different work teams by day or shifts; to minimize the spread of the virus
- Clean and disinfect surfaces, tools, and equipment frequently, at least as often as workers change workstations or move to a new set of tools. Remember to follow the contact time for disinfecting. [EPA-registered disinfectants](#)

[Here](#) you can find several useful formats to customize. More resources [here](#).

If you think you are sick, PLEASE STAY AT HOME, call a healthcare provider and let your supervisor know.

Sara V. Gonzalez-Sanchez<sup>1</sup>, Robert J. Delmore<sup>1</sup>, Mahesh N. Nair<sup>2</sup>, and J. Brad Morgan<sup>1</sup>

# Recommendations for Meat Processors to PREVENT COVID-19

❑ Develop and use protocol for employee screening and monitoring strategies:

**1**

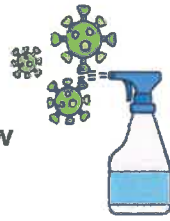
fever, dry cough, shortness of breath, aches and pains, loss of smell, headache, hemoptysis, diarrhea, fatigue, sore throat, runny nose, chest pain

**2**

Temperature checks  
100.4°F/38°C or higher

Questionnaire to detect if any employee is experiencing symptoms

❑ Clean and disinfect surfaces, tools, and equipment at least as often as workers change workstations or move to a new set of tools!



❑ Develop, implement and instruct practices for working safely:

**1**

SOCIAL DISTANCING  
6 ft/2 m whenever possible

**2**

Use face covering

**3**

WASH YOUR HANDS  
Regularly for at least 20 s

**4**

Stagger breaks with small groups

**5**

Avoid touching your face and personal contact like shaking hands

**6**

Avoid touching your face and personal contact like shaking hands

**7**

No worker  
Add barrier to workstations between workers

**8**

Manage different work teams by day or shift

# Meat and Poultry Processing Facilities:

## Key Strategies to Prevent COVID-19 Infection among Employees

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

Employers should assess their workplace for factors that might increase the risk of spreading COVID-19. Develop a health and safety plan using the following prevention guidance. Reach out frequently to [state](#) and/or [local](#) public health officials and occupational safety and health professionals to get relevant and up-to-date information concerning COVID-19 in your area.

- **Keep employees at least 6 feet away from each other as much as possible (encourage social distancing).** Use physical barriers or partitions, reduce staffing, or modify workstations or work procedures to increase the distance between employees. Add additional clock in/out stations, space out chairs in break rooms, and add outside tents for breaks.



- **Encourage sick employees to stay home.** Develop policies that allow sick employees to stay at home without loss of incentives. Ensure employees are aware of and understand these policies. Work with occupational medicine professionals to develop policies for workers who may be at increased risk related to COVID-19.



- **Increase frequency of cleaning and disinfection and make sure there is adequate ventilation in shared spaces.** [Clean and disinfect](#) tools or other equipment at least as often as employees change workstations. Disinfect frequently touched surfaces in workspaces, break rooms, and shuttle buses or vans if used, at the end of each shift, or more frequently. Redirect or remove fans to prevent air from blowing directly from one worker to another. If fans are removed, employers should take steps to prevent [heat hazards](#).



- **Encourage employees to practice [social distancing](#).** Stagger break times and arrival and departure times. Place visual reminders (floor markings and signs) where employees might gather, including work areas, break areas, locker rooms, halls or corridors, and entrances and exit areas. Encourage employees to avoid carpooling to and from work. If carpooling is necessary, limit the number of people per vehicle as much as possible. This may require using more vehicles. Encourage employees in a shared van or car space to [wear cloth face coverings](#).

- **Screen employees for potential COVID-19 symptoms before they enter the workplace.** Consult with state and local health officials and occupational medicine professionals on screening procedures. Send employees with symptoms home immediately, encourage them to self-isolate at home (if possible), and contact a healthcare provider. Provide information on when they can return to work.

- **Consider providing cloth face coverings and/or face shields.** Ensure face coverings are worn properly (snugly over the nose and mouth). Provide washable coverings with multiple layers of fabric. Replace when wet, dirty, or contaminated. Face coverings are not a substitute for recommended or required PPE such as respirators or medical facemasks. Train employees on how to put on and take off PPE without contaminating themselves. Clean and disinfect face shields after each shift if used. Make sure face shields extend past the chin and wrap around the sides of the face.



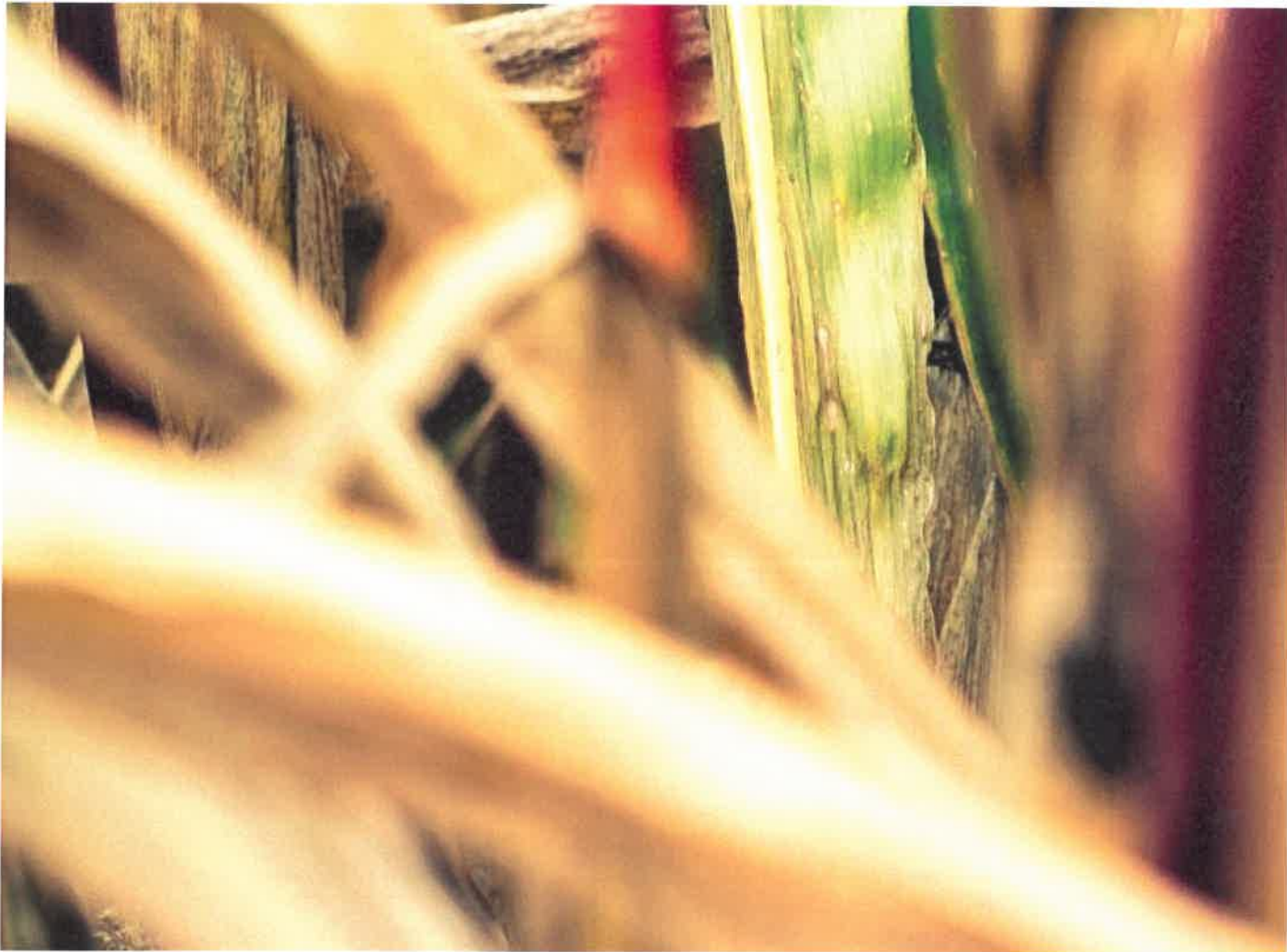
- **Promote proper [hand hygiene](#).** Provide access to running water, soap, paper towels, and trash cans (no-touch trash cans if available). Have employees [wash hands](#) for at least 20 seconds. Place hand washing or hand sanitizer stations in multiple locations. Provide alcohol-based hand sanitizer that contains at least 60% alcohol.



- **Educate and train employees and supervisors on how they can reduce the spread of COVID-19.** Cover topics like [staying home when sick](#), [social distancing](#), how to wear [cloth face coverings](#), and proper [hand hygiene](#). Provide materials in an easy to understand format and in appropriate languages. CDC has [posters](#) available for download.



# [Drake University Agricultural Law Center](#)



- [About](#)
- [Media](#)
- [Resources](#)
- [Events](#)
- [Our Voice](#)

[Leave a Comment](#)

Posted on April 20, 2020

## **Coronavirus & Contracts: What Did We Agree To?**

by [Jennie Zwagerman](#)

Jennifer Zwagerman, Amber S. Miller, and Kate Dudding<sup>[\*]</sup>

## I. Introduction

All across the country, agricultural producers, processors, food manufacturers, retail stores, landlords, tenants, lenders, borrowers, and others are pulling out their written contracts and examining the terms. What, if any, terms address how operations may change or must continue in this current global pandemic? What should you be thinking about if a buyer or supplier contacts you about canceling your contract?

The focus of this writing is to highlight what are often thought of by parties as “boilerplate” language, including *force majeure* clauses and other terms that are often included in contracts, yet not always understood or defined in the legal sense. The goal is to provide some insight into what to look for and what certain clauses in a contract mean, particularly today, in light of stay-at-home orders, business closures, market uncertainty, and designation of agriculture and food production as essential services. If you have a specific concern related to a contract or pandemic-related contract issues, we recommend contacting a lawyer to discuss your specific situation.

## II. Force majeure

A common question being asked these days is, does your contract have a force majeure clause, and if so, when or how can it be triggered to relieve a party of its obligation to perform under the contract and not be subject to a breach of contract lawsuit?

First, it’s important to note that while many contracts may contain a “force majeure” clause that serves to excuse a party from performing its obligations under the contract for certain reasons that are deemed to be out of the party’s control, there is no standard force majeure provision. To the contrary, each clause is subject to negotiation between the parties. Each contract can be very different.

Because each clause and each contract is different, the precise words that are included in a particular force majeure clause must be examined to determine whether the clause has been triggered in any given situation. Courts have consistently held and explained that whether a force majeure clause serves to excuse a party’s contractual performance is fact specific.<sup>[1]</sup>

There are typically three elements to asserting force majeure: 1) the force majeure event was beyond the reasonable control of the affected party, 2) affected party’s ability to perform was directly prevented by the intervening force majeure event, and 3) the affected party took all reasonable measures to avoid the force majeure event and tried to perform its obligations under contract.

While each force majeure clause is different, there are certain phrases or words that are commonly found in a force majeure clause. Courts have analyzed these phrases or words in

order to determine their meaning in the force majeure context. Contract terms and court interpretations vary, but we address a few examples here.

### *Act of God*

A common phrase found within many force majeure provisions is “Act of God”. Some force majeure clauses go on to specifically describe what is meant by an Act of God, while others are silent on what the term means. Again, while each clause and state law governing the dispute may lead to different results, many courts have limited this phrase to mean only those situations that were caused by forces of nature, such as a hurricane, wildfire, or tornado.<sup>[2]</sup>

### *Epidemic, Pandemic, or National Emergency*

Today, all parties are examining the force majeure clauses in their agreements to see if the clause includes any specific language regarding “epidemic, pandemic, or national event or emergency”. If the provision is included, even in today’s global pandemic, it is important to note that the entire force majeure clause must be read and analyzed to determine if the clause is, in fact, triggered simply because this language is included.

### *Impossible, Impracticable, Frustration of Purpose*

The terms “impossible”, “impracticable”, or “frustration of purpose” are also commonly included in force majeure clauses, and, in some instances, a contract may be drafted in such a way that a section on “Impossibility”, “Impracticability”, or “Frustration of Purpose” is included in the contract, in addition to the force majeure provision. Court interpretations of these terms vary greatly. In the context of impossibility of performance, courts have generally been consistent that economic burdens are not enough to claim a force majeure defense. Some courts have expressly held that impracticality or economic loss or burden is not enough to use force majeure as a reason for not performing under the contract.<sup>[3]</sup> However, there are also some courts who have indicated that if a drop in demand is due to some “major, unpredictable event” or “unforeseen contingency which alters the essential nature of the performance”, or “all means of performance are commercially senseless”, then it *might* be a force majeure event that excuses a party from performing its contractual duties.<sup>[4]</sup>

### *Government Action or Order*

Many force majeure clauses also contain a provision that serves to excuse a party’s performance if a government action or order is the reason the party can’t meet its contractual obligation.<sup>[5]</sup> Today, many are questioning if governmental restrictions, shut downs, or stay at home orders that result in businesses closing serve to excuse parties from fulfilling their contractual obligations.

### *Catchall Provision*

In some force majeure clauses, a “catchall” provision is also included, such as “any other reason or any other event beyond such party’s control.” While tempting to point to this provision as one



that would excuse a party's performance for literally "any reason", it is important to remember that courts have examined these types of provisions in contractual and force majeure disputes and the interpretations can vary widely. Many courts have held that the catchall provisions are limited to the types of events that were specifically listed and described in the force majeure clause immediately preceding the catch-all. [6]

### **III. Notice**

If a "force majeure event" has occurred, most force majeure clauses will require the party seeking to use force majeure as an excuse to not perform under the contract to provide the other party with notice of its intent to do so. It is important to examine a force majeure clause to see if a notice provision is included, and to strictly comply with the notice terms.[7] If no specific time for notice is provided in a contract, courts tend to view a "reasonable" time as sufficient.[8] Failure to provide notice as the contract requires can turn what is otherwise a force majeure event into a finding that non-performance of the contract was a breach of agreement.[9]

### **IV. Causation**

It is also very important to note that in order to relieve a party of its contractual obligation, a "force majeure event" (if it occurs and was included in the contract) must be the cause of the party's inability to perform.[10] Put another way, assume a contract contains the term "pandemic" in the force majeure clause. The current Covid-19 situation does not automatically mean that the parties to that contract with the word pandemic in it can claim "force majeure" and be relieved of the contractual obligations to perform. Any claimed event of force majeure must be the cause of the party's inability to perform.

### **V. Impact of Essential Services Designation in the Food and Ag Space**

Today, as it relates to the coronavirus pandemic and the changing commercial and social landscape, a major exception to the shelter in place and stay at home orders that have been issued by governmental authorities across the country is the continued operation of "essential services". On March 19, 2020 the Department of Homeland Security identified the specific industries that are considered "essential" (available at <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>). While the CISA list is only advisory in nature, it has been utilized by state and local authorities in defining which industries and workers are deemed "essential", and therefore allowed to continue to stay open and operate.

When we analyze contracts and whether a force majeure clause serves to excuse a party's non-performance, one question that arises for essential industries such as agriculture and food is what impact, if any, does the "essential" designation have on subsequent attempts to invoke a force majeure clause and purported impossibility of performance?

While many contracting parties may look to a "government action" provision in a force majeure clause to prove that performance is now impossible due to a shelter in place or stay at home order, does an essential services designation, and the implied government requirement that an

essential business stay open and operate, come into play in a party's effort to force performance of the agreement?

But, notwithstanding the essential services designation, many of those industries (e.g., livestock production, oil and gas production) are nevertheless currently faced with erratic commodity markets and access to capital problems, which again raises the question of whether a party's performance has been rendered impossible or impracticable and is excused due to force majeure.

## **VI. Termination Clause**

Beyond the issue of force majeure and whether a party can use it as a reason to excuse performance, it is important to remember that most contracts include language allowing one or both of the parties to terminate the contract for a variety of reasons, including breach, a decision to contract elsewhere after a period of time, or for no reason at all with proper notice. Termination provisions almost uniformly require a set period of notice, such as 30 or 60 or 90 days, to allow for parties to make alternative arrangements.

Most contracts that include termination clauses will not allow for immediate termination without notice pursuant to that particular provision. Instead, most parties will need to look for alternative provisions within the contract, such as force majeure or temporary inability, that allow for immediate termination. In other cases, a party may assume the risk and simply breach a contract by terminating or refusing to perform, hoping that a recognized defense of breach might excuse its non-performance. This however, is a risky endeavor, as legal excuses for breach are essentially based upon a limited set of hard-to-prove circumstances that largely claim a contract was never valid in the first place.

## **VII. Assignment**

Another option to be considered by parties to a contract whose performance may be uncertain due to a variety of factors is whether that contract can be assigned to another party that can and will perform. Many contracts include language regarding an "assignment". Assignment of a contract is a process in which one party transfers its roles, rights, and obligations under a contract to a third party. Essentially, someone else takes on the original party's role in a contract.

If your contract does not say anything about assignment, the general rule is that a party has the power to transfer contractual rights and obligations unless the contract specifically says otherwise. In short, the rule here is look at your contract to determine your rights and those of the other party when it comes to assignment. It is possible that the other party may be able to transfer its rights under the contract to a third party without providing notice to you in advance, requiring you to work with that third party to satisfy your obligations. Most contracts do require a producer to receive notice of an assignment, but that does not always mean that you have to be able to consent, or that you need to be provided that notice in advance of the assignment. If a contract is assigned to a third party, all the obligations and responsibilities and terms remain the same.

## **VIII. Dispute Resolution**

In addition to terms governing parties' performance and establishing permissible reasons for non-performance, most contracts will also have terms that dictate how a dispute over some portion of that contract is to be resolved. In legal parlance, what do the "dispute resolution" terms say? Have the parties agreed to waive a trial by jury? Did the parties agree to arbitrate all claims? If yes, was a particular arbitration system or set of rules adopted, i.e, AAA or a trade association arbitration panel? Did the parties agree to mediate all claims in lieu of, or in advance of, any arbitration?

If your contract requires a specific process, it is important to ensure that you determine what is required and what rules guide your claim. One thing that is important to note is that a formal dispute over a contract is not a quick process. Arbitration, negotiations, mediation, or litigation, all require a process that can take months, if not years, to reach a resolution. If this formal dispute process is your only option, it remains important to continue to seek arrangements to minimize your losses and determine new options or partners. In most situations, formal dispute resolution is a last resort. In situations that are unprecedented, uncertain, and difficult for all, it may be in everyone's best interest if parties can work together to agree upon modifications, temporary or otherwise, to a contract and avoid termination. This may be an optimistic goal, but it is generally in everyone's best interests to avoid litigation, to maintain relationships, and to keep a strong and adequate agricultural supply chain. While circumstances are going to be different for everyone, the ability to negotiate, collaborate, and compromise may end in a better result in the long, and short, term.

## **IX. Conclusion**

The COVID-19 outbreak is changing and evolving rapidly. Parties to a contract should review their contracts carefully in order to fully understand their rights and obligations, and consult with an attorney to discuss specific questions, concerns, and applicable state laws.

---

[\*] Jennifer Zwagerman, Director, Drake Agricultural Law Center, Drake University School of Law, Des Moines, Iowa; Amber S. Miller, Partner, Crenshaw Dupree & Milam, Lubbock, Texas; Kate Dudding, Law Student, Drake University School of Law, Des Moines, Iowa

The authors prepared this paper in April 2020, and it is intended for educational purposes only; nothing herein creates an attorney-client relationship. The information provided should not be a substitute for legal advice addressing your fact specific issues by an attorney licensed in your state.

---

[1] *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2004, no pet.); *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 282–83 (Tex. App. — Amarillo 1998, reh'g overruled).

[2] *See, e.g., McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App. – Amarillo 2003, pet. denied); *United States v. Winstar Corp.*, 518 U.S. 839, 905–907 (1996).

[3] *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018); *Jennie-O Foods, Inc. v. United States*, 580 F. 2d 500, 410 (Ct. Cl. 1978); *Nora Springs Cooperative Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976).

[4] *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018); *Jennie-O Foods, Inc. v. United States*, 580 F. 2d 500, 410 (Ct. Cl. 1978); *Int’l Elecs. Corp. v. United States*, 227 Ct.Cl. 208, 646 F.2d 496, 510 (1981).

[5] *American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Board*, 586 N.W.2d 325, 334–36 (Iowa 1998); *OWBR, LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214 (D. Hawaii 2003).

[6] *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App. – Houston 1<sup>st</sup> Dist.] 2018, pet. denied).

[7] *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 1989 US Dist. LEXIS 15036 (1989); *United States v. Sunoco, Inc.*, 2007 U.S. Dist. LEXIS 41435 (2007).

[8] *Savine Corp. v. ONG Western, Inc.*, 725 F.Supp. 1157 (1989)

[9] *SNB Farms, Inc. v. Swift & Co.*, 2003 U.S. Dist. LEXIS 2063 (N.D. Iowa Feb. 7, 2003).

[10] *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App. – Houston 1<sup>st</sup> Dist.] 2018, pet. denied).

Category: [Uncategorized](#) Tags: [agriculture](#), [contract](#), [coronavirus](#), [covid](#), [food](#), [force majeure](#)

← [Spring Updates](#)

[Spotlight on the News: Drowning in zucchini and other vegetables? Panic buy too many canned goods? Order too much food for an event?](#) →





Copyright © 2020 · All Rights Reserved · Drake University Agricultural Law Center

Swell Lite from [Organic Themes](#) · [RSS Feed](#)

# Meat and Poultry Processing Employees

Things you can do at work and at home to protect from COVID-19

Accessible version: <https://www.cdc.gov/coronavirus/2019-ncov/community/organization/meat-poultry-processing-workers-employers.html>



## STAY HOME if you are sick.

- Stay in one room and away from other people in your home as much as you can.
- Talk with a doctor and your supervisor about [when you can return to work](#).

## Symptoms to watch for:

- Fever
- Cough
- Shortness of breath or difficulty breathing
- Chills
- Muscle pain
- New loss of taste or smell
- Sore throat



## Try to keep 6 feet away from other people at work and in public.

- Avoid being close to others in locker rooms, break areas, hallways, and at entrances and exits.
- Keep apart from others while talking.
- Do not share drinks or food with coworkers.



## Wear a [cloth face covering](#) over your mouth and nose while in the workplace or in public.

- Wear your covering snugly, but comfortably, against the sides of your face.
- When taking off your covering, try not to touch your eyes, nose, or mouth, and then wash your hands right away.
- Wash or replace the face covering after use.
- Replace the face covering when it is wet or dirty.
- Try to keep 6 feet away from others even if you are wearing a cloth face covering.
- Continue to wear the personal protective equipment (PPE) required for your normal job.



[cdc.gov/coronavirus](https://www.cdc.gov/coronavirus)



**Do not touch your eyes, nose, or mouth:**

- With unwashed hands
- While wearing gloves
- While adjusting or removing your face covering or safety glasses

---

**Wash your hands with soap and water for at least 20 seconds or use an alcohol-based hand sanitizer that contains at least 60% alcohol:**



- Before and after work shifts and breaks
- After blowing your nose, coughing, or sneezing
- After using the toilet
- Before eating
- Before and after preparing food
- After putting on, touching, or removing cloth face coverings



**Cover your coughs and sneezes.**

- Cover your mouth and nose with a tissue or the inside of your elbow.
- Throw used tissues in the garbage.
- Wash your hands or use hand-sanitizer right after sneezing or coughing.



## COLLEGE OF AGRICULTURE & NATURAL RESOURCES

DEPARTMENT OF AGRICULTURAL AND  
RESOURCE ECONOMICS

Goering, P., Thilmany, E., and Suri, M.

Extension Specialist, AREC, [lgoering@umd.edu](mailto:lgoering@umd.edu); Research Assistant, AREC, [thilmany@umd.edu](mailto:thilmany@umd.edu); and Faculty Specialist, AREC, [msuri1@umd.edu](mailto:msuri1@umd.edu)

### Force Majeure Clauses: What Are They and Do They Apply in Issues Caused by COVID19?

*The article is not a substitute for legal advice.*

2020 has been a challenging year with the global economic shutdown from COVID-19 leading to disruptions in many industries. Agriculture has had its fair share of disruptions from this global pandemic. Such disruptions have raised questions for many of you about your contracts to supply farm products to businesses, such as restaurants or schools, that no longer need those products due to shutdowns. You may also have issues finding labor to help move products to customers. Contracts between suppliers and customers often include provisions called force majeure clauses. These clauses allow one or both parties in a contract to excuse the performance, in this case, the fulfillment, of the contract in certain situations.

#### Force Majeure Clause

Force majeure is a French term meaning a superior force. These clauses may kick in when unforeseeable actions or events occur which prevent fulfilling the contract. These unforeseen actions do not have to be caused by people, leading to the alternative name for these clauses: "Act of God" clauses. Force majeure clauses often lay out the extreme, yet possible, unforeseeable actions that will allow a party to excuse the fulfillment of the contract. Such extreme events may include epidemics, pandemics, flooding, famine, acts of war or terrorism, changes in government regulations or laws that make the agreement illegal, and other similar events. The clause may also contain a catchall provision to include other activities that may become extreme over time and prevent performance.

For example, a farmer supplies a restaurant with leafy greens. The contract between the farmer

and the restaurant may include the following language as the force majeure clause:

*This contract is subject to force majeure, and is contingent on strikes, accidents, Acts of God, weather conditions, epidemics, inability to secure labor, fire regulations or restrictions imposed by any government or governmental agency, or other delays beyond the control of the parties (Williston and Lord, 2020).*

#### Force Majeure and COVID-19

What happens if either of the parties (the farmer or the buyer) stops fulfilling their end of this contract because of COVID-19 using this clause? If one party invokes the force majeure clause and the other party agrees that the clause is applicable, the contract will be canceled or suspended until both parties can fulfill the contract or come together to write a new agreement. This may be immediate or may happen after the virus outbreak comes to an end.

But if one party does not agree that the force majeure clause applies to the situation, that party can pursue legal action for breach of contract. How will the court decide if the force majeure clause can be invoked if the parties disagree?

The answer depends on how the court interprets the provisions of the contract. Courts typically apply these clauses based on the specific language of the force majeure clause in the contract. Since that specific language is what the parties agreed to, the courts will rarely add words not included in the written contract. In the example



above, the parties included the term “epidemic” in the list of unforeseeable actions and therefore, COVID-19 should be a covered event excusing the performance of the contract.

What if the word “epidemic” was missing from the list? In the above example, the phrases “regulations or restrictions imposed by any government or governmental agency” or “other delays beyond the control of the parties” might be enough to excuse one of the parties from performing their portion of the contract. But this will depend on how a court interprets that language in the clause. It’s important to note that the force majeure clause applies only in cases of legal and/or physical constraints, not for economic reasons. If a party takes the other party to court over a canceled or unfulfilled contract, the court would look at the specific wording of your contract to determine if the failure to perform is allowable under the force majeure clause. Courts will look at the ordinary (dictionary) definitions of the words used in the clause. If you are considering using the force majeure clause, check with an attorney who has an understanding of the specific contract to determine if the current situation applies to the clause as written in the contract. That attorney will be in the best position to determine if you can invoke the force majeure clause, which may prevent legal battles in the future if the other party is unhappy with the decision.

### **What Should You Be Doing?**

Take a look at your contract to see if it includes a force majeure clause. If it does, try to determine whether the clause covers the COVID-19 pandemic and/or the governmental restrictions due to COVID-19. Even if you are able to fulfill your portion of the contract, it may help with risk management in the future to see if the other party or parties have the option of invoking a force majeure clause. This can help you be prepared in case a buyer invokes the clause.

If you cannot fulfill your end of the contract due to the extreme event imposing a legal or physical restraint, you should let the other party know promptly that you are invoking the force majeure clause of your contract. You cannot invoke force majeure for an economic restraint.

Closures or changes in service based on State rules would be examples of a potential legal restraint preventing performance. For example, an order by the Governor to close restaurants for dine-in service could cause a restaurant to cancel supply contracts if the restaurant is unable to convert its business into a carryout service. Milk processors may look at canceling supply contracts because schools and other institutions that are closed due to State guidance are no longer purchasing milk. Economic constraints cannot lead to applying the force majeure clause. For example, due to the drop in milk prices, a processor may try to get out of paying contractually obliged prices by canceling existing contracts. Since this would be an economic restraint and not a legal or physical restraint, the processor could not use a force majeure clause to cancel the contract.

### **Conclusion**

Take a moment to review your existing contracts and determine any of them include a force majeure clause. If there is a force majeure clause in one or more of your contracts, talk to an attorney to determine a) what the specific language used means for your current situation, and b) what could happen if one of the parties does not perform under the contract. This pandemic is a stressful time for many of us and poses new challenges. Understanding your contracts and working with an attorney can help you manage potential legal and financial risks in this uncertain time.

### **References**

Williston and Lord, *5A Williston on Contracts 4th Forms* § 77F:3 (2020).

## Additional Resources Covering Force Majeure and COVID-19

Fryer, Stephanie Bradley, *Ask Stephanie: Should I update my Contracts in Response to COVID-19?*, Rincker Ag Law Blog (Mar. 20, 2020) available at <https://rinckerlaw.com/ask-stephanie-update-contracts-response-covid-19/>

Bradley, a food, farm, and family lawyer, looks to COVID-19 as a time to review contracts and potentially update force majeure to include epidemics and pandemics. Bradley states: "There is not a standard clause used in all contracts so the specific terms will vary from document to document."

Schroeder, Brianna J., *COVID19 & Force Majeure in Agricultural Contracts*, Schroeder Ag Law Blog (Mar. 26, 2020), available at: <https://www.aglaw.us/schroeder-ag-law-blog/2020/3/26/covid19-amp-force-majeure-in-agricultural-contracts>

Brianna Schroeder digs into agriculture contracts and discusses the potential for COVID-19 to qualify as force majeure in the scope of food production: "Livestock growers have contracts with integrators. Egg processors have supply agreements with farms. Trucking companies have contracts with grain businesses. Produce farms have agreements with farmers' markets ... A force majeure provision might provide either party with a way to avoid

penalties for failing to perform—but it depends on the specific language used in the contract."

Schroeder, Lee R., *Legal-Ease: Force majeure: legally unforeseen and uncontrollable acts of God*, The Lima News (Mar. 21, 2020), available at: <https://www.limaohio.com/top-stories/403408/legal-ease-force-majeure-legally-unforeseen-and-uncontrollable-acts-of-god>

Guest columnist and northwest Ohio lawyer, Lee R. Schroeder, delves into the "Act of God" that is COVID-19. Explaining, "Most contracts of any sophistication will include provisions that essentially say, 'If the world falls apart for some unforeseen reason that we cannot control before the goods or services are provided, this is how we will handle that situation.'"

Van Voris, Bob, *When God Appears in Contracts, That's 'Force Majeure': Quick Take*, Bloomberg (Feb. 6, 2020) available at: <https://www.bloomberg.com/news/articles/2020-02-06/when-god-appears-in-contracts-that-s-force-majeure-quicktake>

From Bloomberg News, a quick read that defines force majeure and explores its application in contracts during coronavirus. "The closures and other unexpected disruptions that have accompanied the spread of the virus bear 'all the hallmarks of force majeure,' said Dallas-based lawyer Beth Petronio."

UNIVERSITY OF  
MARYLAND  
EXTENSION



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE

UNIVERSITY OF  
MARYLAND  
EXTENSION



The Agriculture Law Education Initiative (ALEI) is a collaboration of the Francis King Carey School of Law at the University of Maryland, Baltimore (UMB); the College of Agriculture & Natural Resources at the University of Maryland, College Park (UMCP); and the School of Agricultural and Natural Sciences at the University of Maryland Eastern Shore. ALEI is an initiative of the University of Maryland: *MPowering the State*. ALEI is a signature program of the University of Maryland Extension.

Website: [www.umaglaw.org](http://www.umaglaw.org)

Twitter: @MdAgLaw

Facebook: [www.facebook.com/MdAgLaw](http://www.facebook.com/MdAgLaw)

Email: [umaglaw@umd.edu](mailto:umaglaw@umd.edu)

# The Defense Production Act of 1950, Before Passage of P.L. 113-172

Updated August 25, 2014

**Congressional Research Service**

<https://crsreports.congress.gov>

R43118

## Summary

The Defense Production Act (DPA) of 1950 (P.L. 81-774, 50 U.S.C. Appx §2061 et seq.), as amended, confers upon the President a broad set of authorities to influence domestic industry in the interest of national defense. The authorities can be used across the federal government to shape the domestic industrial base so that, when called upon, it is capable of providing essential materials and goods needed for the national defense.

Though initially passed in response to the Korean War, the DPA is historically based on the War Powers Acts of World War II. Gradually, Congress has expanded the term *national defense*, as defined in the DPA, so that it now includes activities related to homeland security and domestic emergency management. The scope of DPA authorities extends beyond shaping U.S. military preparedness and capabilities, as the authorities may also be used to enhance and support domestic preparedness, response, and recovery from natural hazards, terrorist attacks, and other national emergencies.

The current authorities of the DPA include, but are not limited to:

- **Title I: Priorities and Allocations**, which allows the President to require persons (including businesses and corporations) to prioritize and accept contracts for materials and services as necessary to promote the national defense.
- **Title III: Expansion of Productive Capacity and Supply**, which allows the President to incentivize the domestic industrial base to expand the production and supply of critical materials and goods. Authorized incentives include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities.
- **Title VII: General Provisions**, which includes key definitions for the DPA and several distinct authorities, including 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 authorities of the DPA are generally afforded to the President in statute. The President, in turn, has delegated these authorities to department and agency heads in Executive Order 13603, *National Defense Resource Preparedness*, issued in 2012. While the authorities are most frequently used by, and commonly associated with, the Department of Defense, they can be, and have been, used by numerous other executive departments and agencies. The DPA lies within the jurisdiction of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.

Nearly all DPA authorities will terminate on September 30, 2014, though a few, such as the Exon-Florio Amendment (which established government review of the acquisition of U.S. companies by foreigners) and anti-trust protections for certain voluntary industry agreements, have been made permanent. Since 1950, the DPA has been reauthorized over 50 times, though significant authorities were terminated from the original law in 1953. Congress last reauthorized the DPA in 2009 (P.L. 111-67, the Defense Production Act Reauthorization of 2009). This reauthorization amended some of the current DPA authorities and extended the termination of the act by five years.

H.R. 4809, as passed by the House under suspension of the rules on July 29, 2014, would reauthorize the DPA until September 30, 2019. Among other changes, H.R. 4809 would reform the purpose and structure of the Defense Production Act Committee (DPAC), emphasize an existing rulemaking requirement for Title I priorities and allocations authority, and restore several limitations on the President's Title III authorities that were removed in the Defense Production Act Reauthorization of 2009. The bill would also authorize appropriations for the carrying out of the provisions and purposes of this act in the amount of \$133 million every fiscal year beginning in FY2015.

## Contents

Introduction .....	1
History of the DPA .....	1
Origin .....	1
Committee Jurisdiction .....	3
History of DPA Reauthorizations .....	3
Major Authorities of the DPA.....	4
General Scope of the DPA.....	4
Authorities under Title I of the DPA .....	6
Priorities and Allocations Authority.....	6
Title I and Energy .....	9
Authorities Under Title III of the DPA.....	10
Loan Guarantees and Direct Loans.....	10
Purchase, Purchase Commitments, and Installation of Equipment.....	12
Delegation of Section 301, 302, and 303 Authorities in E.O. 13603 .....	14
Use of Title III Authorities .....	14
Defense Production Act Fund .....	15
Authorities Under Title VII of the DPA .....	16
Special Preference for Small Businesses .....	16
Definitions of Key Terms in the DPA .....	16
Industrial Base Assessments .....	17
Voluntary Agreements.....	17
Nucleus Executive Reserve.....	19
Authorization of Appropriations .....	19
Committee on Foreign Investment in the United States .....	19
Defense Production Act Committee.....	20
Impact of Offsets Report.....	21
Issues for Congress .....	21
Reauthorization of the DPA in the 113 <sup>th</sup> Congress .....	21
H.R. 4809 .....	24
Considerations for Amending the Defense Production Act of 1950 .....	26
Declaration of Policy .....	26
Definitions .....	27
Appropriations to the DPA Fund.....	27
Considerations for Oversight of Ongoing DPA Activities .....	27
Expand Reporting or Notification Requirements.....	27
Rulemaking Requirements.....	28
Amend Authority Delegations .....	28

## Tables

Table 1. Appropriations to the DPA Fund Since FY2010, in Millions .....	15
Table A-1. Additional Resources by Defense Production Act Subject .....	29

Table A-2. Substantive Provisions of the Defense Production Act, Related Portions of  
Executive Order 13603, and Associated Regulations..... 30  
Table A-3. Delegation of Priorities and Allocations Authorities to Cabinet Secretaries ..... 33  
Table A-4. Chronology of Laws Reauthorizing the Defense Production Act of 1950 ..... 35

## **Appendixes**

Appendix. Additional Resources and Summary Tables ..... 29

## **Contacts**

Author Information..... 36

## Introduction

The Defense Production Act of 1950, as amended (DPA),<sup>1</sup> provides the President a broad set of authorities to ensure that domestic industry can meet national defense requirements. In the DPA, Congress has found that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States.”<sup>2</sup> Through the DPA, the President can, among other activities, prioritize contracts for goods and services, and offer incentives within the domestic market to enhance the production and supply of critical materials and technologies when necessary for national defense. Since 1950, the DPA has been reauthorized over 50 times by Congress, most recently in 2009.<sup>3</sup> The majority of DPA authorities will expire on September 30, 2014, unless reauthorized.

This report examines some of the extensive history of the DPA, focusing primarily on its creation and most recent legislative reauthorization. This report also discusses the foremost active authorities of the DPA. Nevertheless, this report is not intended to evaluate all authorities of the DPA comprehensively. In discussing the major authorities of the DPA, this report explains how those authorities may have changed as a result of the most recent reauthorization of the law (P.L. 111-67, the Defense Production Act Reauthorization of 2009, henceforth referred to as “Reauthorization of 2009”).<sup>4</sup> This report also identifies relevant delegations of the President’s DPA authorities made in Executive Order (E.O.) 13603, *National Defense Resources Preparedness*.<sup>5</sup> Finally, this report provides a brief overview of issues relevant to Congress and tracks legislation in the 113<sup>th</sup> Congress to reauthorize the DPA. H.R. 4809 was reported out of the Committee on Financial Services in the House of Representatives on June 11, 2014. If enacted, H.R. 4809 would reauthorize the DPA for five years and would reform other provisions, as discussed later in the report. The report also discusses congressional considerations for expanding, restricting, or otherwise modifying the authorities provided by the DPA, either in conjunction with or separate from a reauthorization.

## History of the DPA

### Origin

The DPA was inspired by the First and Second War Powers Acts of 1941 and 1942, which gave the executive branch broad authority to regulate industry during World War II.<sup>6</sup> Much of this

<sup>1</sup> 50 U.S.C. Appx. §§2061 *et seq.*

<sup>2</sup> 50 U.S.C. Appx. §2062(a)(1); Section 2(a)(1) of the DPA.

<sup>3</sup> Congress reauthorized the DPA when it enacted the Defense Production Act Reauthorization of 2009, P.L. 111-67, 123 Stat. 2006-2022.

<sup>4</sup> These changes are discussed at length in this report, but are summarized in Table A-2 of the Appendix.

<sup>5</sup> Executive Order 13603, “National Defense Resource Preparedness,” 77 *Federal Register* 16651, March 22, 2012.

<sup>6</sup> First War Powers Act, 1941 (H.R. 6233, P.L. 77-354, 55 Stat. 838), and Second War Powers Act, 1942 (S. 2208, P.L. 77-507, 56 Stat. 176). The first of these statutes conferred considerable emergency power on the President to reorganize the executive branch, to enter into contracts and make payments on them, and to regulate “trade with the enemy.” The second act expanded the powers of the Interstate Commerce Commission to improve the efficiency of transportation of war materials; expanded an existing authority for military departments to acquire private property by condemnation, purchase, donation, or other transfer; permitted the Secretaries of War and the Navy to place orders and contracts and the President to give such contracts priority over all deliveries for private accounts or for export; and gave the President the authority to require acceptance of and performance under these contracts and to allocate materials and facilities for



authority lapsed at the end of that war, but the beginning of the Cold War with the Soviet Union in the late 1940s and the North Korean invasion of South Korea in June of 1950 caused the Truman Administration to reconsider the need for stronger executive authority in the interest of national defense.<sup>7</sup>

A number of factors encouraged President Truman to propose such legislation. Both the armed services and the defense industry supporting the nation's effort during World War II had demobilized during the late 1940s after the cessation of hostilities. With the return of peace, the Administration cut back military expenditures significantly. President Truman accentuated these cuts by placing heavy reliance on atomic weapons to provide for the nation's defense.<sup>8</sup> The perceived power of the atomic arsenal justified, in the eyes of the Administration, substantial cuts in expensive, manpower-intensive conventional military capabilities. This enabled the President to propose and Congress to pass much-reduced defense appropriations.

In addition, the nation had recently experienced substantial economic and industrial turmoil. Demand for housing and consumer products, unleashed by the expiration of wartime economic controls, precipitated a series of postwar labor strikes. These reached their height in 1946 in a nationwide shutdown of passenger and freight rail service, leading President Truman to threaten to seize control of the railways and draft striking rail workers into the Armed Forces, placing them under military discipline. Though the presidential threats were never carried out, the strike served to illustrate the economic context in which the nation approached the Korean War.<sup>9</sup>

The original DPA, enacted on September 8, 1950, granted broad authority to the President to control national economic policy.<sup>10</sup> Containing seven separate titles, the DPA allowed the President, among other powers, to demand that manufacturers give priority to defense production, to requisition materials and property, to expand government and private defense production capacity, to ration consumer goods, to fix wage and price ceilings, to force settlement of some labor disputes, to control consumer credit and regulate real estate construction credit and loans, to

---

their fulfillment. The act also empowered the President to obtain information, records, and reports sufficient to enforce the provisions of the act and clarified existing law on the amount of compensation required if property was requisitioned for defense purposes. The act also included provisions relating to free postage for members of the military services, naturalization of persons serving in the armed forces, acceptance of conditional gifts to further the war program, metal content of coinage, inspection and audit of war contractors, and the gathering and assessment of war information by the Department of Commerce.

<sup>7</sup> In a message sent to Congress at the outbreak of war in Korea in mid-1950, President Truman stated that the United States and the United Nations were responding to a military invasion of the Republic of Korea by forces from north of the 38<sup>th</sup> parallel, that the nation urgently needed additional military manpower, supplies, and equipment, and that the nation's military and economic preparedness were inseparable. He urged Congress to pass legislation that would guarantee the prompt supply of adequate quantities of needed military and civilian goods, including measures to help compensate for manufacturing demand growth caused by military expansion. For more history of the DPA, see U.S. Congress, House Banking and the Currency, *Defense Production Act of 1950*, report to accompany H.R. 9176, 81<sup>st</sup> Cong., 2<sup>nd</sup> sess., July 28, 1950, H.Rept. 81-2759 (Washington: GPO, 1950), p. 1.

<sup>8</sup> Examples of the many studies of the impact of atomic weaponry on U.S. strategic thought during the initial years of the Cold War may be found in Edmund Beard, *Developing the ICBM: A Study in Bureaucratic Politics* (New York: Columbia University Press, 1976), pp. 34-35; Bernard Brodie, *Strategy in the Missile Age* (Princeton: Princeton University Press, 1959), pp. 107-144; Harland B. Moulton, "American Strategic Power: Two Decades of Nuclear Strategy and Weapon Systems, 1945-1965" (Ph. D. dissertation, University of Minnesota, 1969), pp. 1-14. A more recent general examination of the development of military strategy during the Truman Administration forms the basis of Patrick W. Steele, "Strategic Air Warfare and Nuclear Strategy: The Formulation of Military Policy in the Truman Administration, 1945-1950" (Ph. D. dissertation, Marquette University, 2010).

<sup>9</sup> See, for example, Robert W. Ruth, "Truman Denies He Gave Ike Order to Take Over in 1946 Railroad Strike," *The Baltimore Sun*, September 19, 1952, p. 1.

<sup>10</sup> P.L. 81-774, 64 Stat. 798.

provide certain antitrust protections to industry, and to establish a voluntary reserve of private sector executives who would be available for emergency federal employment.

Four of the seven titles (Titles II, IV, V, and VI), which were those related to requisitioning, rationing, wage and price fixing, labor disputes, and credit controls and regulation, terminated in 1953 when Congress allowed them to lapse.<sup>11</sup>

## **Committee Jurisdiction**

Though commonly associated with industrial production for the Department of Defense (DOD), the DPA currently lies within the jurisdiction of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs. Prior to 1975, House rules did not permit simultaneous referral of bills to two or more committees. Precedents in both chambers did not allow divided or joint referrals, regardless of bill content. Instead, bills were assigned to committees based on the preponderance of their subject matter. Because much of the President's proposal dealt with economic policy, what became the Defense Production Act was assigned in 1950 to the House and Senate Committees on Banking and Currency (their successors are the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs). Although the parts of the act dealing with the requisitioning of materials, wages and prices, labor, and credit are no longer in force, these committees have retained jurisdiction.

In addition to the standing committees of jurisdiction, the original statute created a Joint Committee on Defense Production. This committee was composed of selected members from the standing Committees on Banking and Currency of the Senate and House. This committee was intended to review the programs established by the DPA and advise the standing committees whenever they drafted legislation on the subject. The Joint Committee has not existed, in effect, since 1977 when salaries and expenses for the committee were last funded,<sup>12</sup> although the provision in the DPA establishing the Joint Committee on Defense Production was only officially repealed in 1992.<sup>13</sup>

## **History of DPA Reauthorizations**

The DPA has been amended and reauthorized numerous times since its original enactment. Most notably, with the passage and enactment of P.L. 85-95, Congress reauthorized Titles I, III, and VII while allowing Titles II, IV, V, and VI of the DPA to expire in 1953.<sup>14</sup> The Defense Production Act, like the War Power Acts that preceded it, included a sunset provision that has required periodic reauthorization and offered the opportunity for amendment. Congress passed the DPA in 1950 and has thus far reauthorized it 51 times, including many short-term "stop-gap" extensions.<sup>15</sup> From time to time, the DPA has expired without Congress passing a law reauthorizing and extending the termination date of the DPA. However, in such circumstances, Congress has often ultimately passed a law retroactively setting the effective date for the law to

---

<sup>11</sup> P.L. 83-95, 67 Stat. 129. P.L. 83-95 permitted the termination of Titles II and VI as of June 30, 1953, and Titles IV and V to terminate as of April 30, 1953.

<sup>12</sup> Although in 1977 Congress extended the 1950 Act through September 30, 1979 (P.L. 95-37), no appropriation for salaries and expenses of the Joint Committee was made for FY1978. The last appropriation for salaries and expenses for the Joint Committee was made in P.L. 94-440.

<sup>13</sup> Section 153 of the Defense Production Act Amendments of 1992 (P.L. 102-558, 106 Stat. 4219).

<sup>14</sup> Act of June 30, 1953, Defense Production Act Amendments of 1953 (S. 1080, P.L. 83-95).

<sup>15</sup> See **Table A-4** in the Appendix for a full chronology of reauthorizations.

the previous expiration date. Most notably, for example, the DPA expired on October 20, 1990, and was not reauthorized until August 17, 1991. However, upon passage of P.L. 102-99, the effective date of the law was set to October 20, 1990.

The DPA was most recently reauthorized by the 111<sup>th</sup> Congress. Senators Christopher Dodd and Richard Shelby, who were the chairman and ranking Member of the U.S. Senate Committee on Banking, Housing, and Urban Affairs in the 111<sup>th</sup> Congress, introduced S. 1677, the Defense Production Act Reauthorization of 2009, on September 16, 2009. The bill passed both chambers of Congress by September 23, 2009, and was signed into law by the President as P.L. 111-67 on September 30, 2009.<sup>16</sup>

Most of the authorities of the DPA would have terminated on the day that the reauthorization was signed into law. The Reauthorization of 2009 extended the majority of DPA authorities until September 30, 2014, at which time they will be terminated unless reauthorized once again. For more on the potential termination of DPA authorities after September 30, 2014, see the “Reauthorization of the DPA in the 113th Congress” section in this report.

## Major Authorities of the DPA

This section provides summaries of the major authorities granted to the President in the three remaining active Titles of DPA.<sup>17</sup> Each summary describes how the DPA authorities are delegated to Cabinet officials or other offices of the U.S. government in the recently issued Executive Order (E.O.) 13603, *National Defense Resource Preparedness*.<sup>18</sup> The section highlights substantive changes made to these authorities in the Defense Production Act Reauthorization of 2009 (Reauthorization of 2009).<sup>19</sup> This portion of the report identifies substantive changes contained in the Reauthorization of 2009 and E.O. 13603. It is not intended to comprehensively evaluate all authorities in the DPA. The information provided below is reviewed in **Table A-2** in the Appendix for select provisions of the DPA. **Table A-1** also provides a list of additional materials, information, and resources on various topics of the DPA that may be of use to Congress.

## General Scope of the DPA

The DPA provides the President an “array of authorities to shape *national defense* preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.”<sup>20</sup> [Italics added.] DPA authorities are tied to the definition of *national defense*, as the use of any major DPA authority must be interpreted to promote, support, or otherwise be deemed needed or essential for the national defense.<sup>21</sup> *National defense* is defined in the statute as

<sup>16</sup> The bill was introduced and passed by unanimous consent in the Senate on September 16, 2009. The House passed the bill under the suspension of the rules procedure by voice vote on September 23, 2009.

<sup>17</sup> Titles I, III, and VII. The remaining Titles of the DPA (II, IV, V, and VI) terminated in 1953, but were officially repealed in the Reauthorization of 2009.

<sup>18</sup> Executive Order 13603, “National Defense Resource Preparedness,” 77 *Federal Register* 16651, March 22, 2012. E.O. 13603 replaced the previous E.O. 12919 on National Defense Industrial Resource Preparedness, which had been issued by President William J. Clinton on June 3, 1994. See Executive Order 12919, “National Defense Industrial Resources Preparedness,” 59 *Federal Register* 29525, June 7, 1994.

<sup>19</sup> P.L. 111-67, Defense Production Act Reauthorization of 2009.

<sup>20</sup> 50 U.S.C. Appx. §2062(a)(4); Section 2(a)(4) of the DPA (emphasis added).

<sup>21</sup> There are various ties to national defense throughout the DPA. Some examples: Title I, Section 101 priorities and allocations authority requires the President to deem action as “necessary or appropriate to promote the national

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.<sup>22</sup>

Further reference can be made to Title VI of the Stafford Act for a definition of “emergency preparedness” activities. It states that emergency preparedness:

means 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 the hazard.<sup>23</sup>

Therefore, the use of DPA authorities extends beyond shaping U.S. military preparedness and capabilities, as the authorities may also be used to enhance and support domestic preparedness, response, and recovery from hazards, terrorist attacks, and other national emergencies, among other purposes.

In its original 1950 form, the DPA defined *national defense* as “the operations and activities of the armed forces, the Atomic Energy Commission, or any other department or agency directly or indirectly and substantially concerned with the national defense...”<sup>24</sup> Over the many reauthorizations and amendments to the DPA, Congress has gradually expanded the scope of the definition of national defense, and did so again in 2009.<sup>25</sup> At that time, Congress included critical infrastructure assistance to any foreign nation and added homeland security to the definition.<sup>26</sup> For more on the other definition changes to the DPA in the Reauthorization of 2009, see the section “Definitions of Key Terms in the DPA” of this report.

The DPA also includes a full statement of policy and congressional findings, as set forth in the “Declaration of Policy.”<sup>27</sup> In 2009, Congress amended the declaration of policy by expanding the text to explicitly list natural disasters and terrorist attacks as being part of the national defense.<sup>28</sup>

---

defense” (50 U.S.C. Appx. §2071(a)); Title III authorities can be used when “essential for the national defense” (50 U.S.C. Appx. §§2091(a), 2092(a), 2093(a)); and Title VII voluntary agreement authority requires that the use helps “provide for the national defense” (50 U.S.C. Appx. §2158(c)(1)).

<sup>22</sup> 50 U.S.C. Appx. §2152(14); Section 702(14) of the DPA.

<sup>23</sup> 42 U.S.C. §5195(a)(3)

<sup>24</sup> See Section 702(d) of P.L. 81-774.

<sup>25</sup> For further discussion of the evolution of the definition of national defense, see The National Infrastructure Advisory Council, *Framework for Dealing with Disasters and Related Interdependencies: Final Report and Recommendations*, Appendix G: The Defense Production Act, Washington, DC, July 14, 2009, pp. 41-42, at [http://www.dhs.gov/xlibrary/assets/niac/niac\\_framework\\_dealing\\_with\\_disasters.pdf](http://www.dhs.gov/xlibrary/assets/niac/niac_framework_dealing_with_disasters.pdf).

<sup>26</sup> 123 Stat. 2017, Section 8 of P.L. 111-67. Both “critical infrastructure” and “homeland security” are defined in Section 702 of the DPA, 50 U.S.C. Appx. §2152.

<sup>27</sup> 50 U.S.C. Appx. §2062; Section 2 of the DPA. This section comprises congressional findings, Section 2(a), and a statement of policy of the United States, Section 2(b).

<sup>28</sup> For instance, in Section 2(a)(1), Congress now finds that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to *prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States*”. [Italics added.] Additionally, the Reauthorization of 2009 added Section 2(b)(5), which states “authorities under this Act [50 U.S.C. App. §§2061-2171] should be used to reduce the vulnerability of the United States to terrorist attacks, and to minimize the damage and assist in the recovery from terrorist attacks that occur in the United States.” 123 Stat. 2007, Section 3 of

The declaration was also amended to include “biomass” and “more efficient energy storage and distribution technologies” as forms of renewable energy to augment domestic energy supplies to further assure the adequate maintenance of the domestic industrial base.<sup>29</sup> The Reauthorization of 2009 also often reordered or slightly reworded various clauses.

## Authorities under Title I of the DPA

### Priorities and Allocations Authority

Section 101(a) of Title I of the DPA states:

The President is 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.<sup>30</sup>

The *priority* performance authority allows the federal government to ensure the timely availability of critical materials, equipment, and services produced in the private market in the interest of national defense, and to receive those materials, equipment, and services through contracts before any other competing interest.<sup>31</sup> Under the language of the DPA, a *person* (including corporations, as defined in statute)<sup>32</sup> is required to accept prioritized contracts/orders,<sup>33</sup> though regulations implementing Title I authorities provide practical exemptions to this mandate. The limited allowances for when a person is required to or may optionally reject a prioritized order can be superseded by the direction of the implementing federal department.<sup>34</sup> In executing a contract under the DPA, a contractor is not liable for actions taken to comply with governing

---

P.L. 111-67.

<sup>29</sup> In the 2009 reauthorization of the DPA, an existing provision in the declaration of policy was amended to state that “to further assure the adequate maintenance of the domestic industrial base, to the maximum extent possible, domestic energy supplies should be augmented through reliance on renewable energy sources (including solar, geothermal, wind, and biomass sources), *more efficient energy storage and distribution technologies*, and energy conservation measures” [italics added for new text]. See 123 Stat. 2007, Section 3 of P.L. 111-67 and the current 50 U.S.C. Appx. §2062(a)(6); Section 2(a)(6) of the DPA.

In other words, under this declaration of policy, Congress has found that it is in the interest of national defense preparedness that the government assure some level capacity exists in the domestic industrial base to produce and provide renewable energy sources, including from biomass sources.

<sup>30</sup> 50 U.S.C. Appx. §2071(a); Section 101(a) of the DPA.

<sup>31</sup> As noted in regulations for Title I authorities, especially 15 C.F.R. §700.1(b), this priority authority is broader than similar priority authorities provided in other statutes including Section 18 of the Selective Service Act of 1948 (50 U.S.C. Appx. §468).

<sup>32</sup> 50 U.S.C. Appx. §2152(15), Section 702(15) of the DPA, defines person as “individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.”

<sup>33</sup> Contracts and “rated orders” have the same meaning in the regulations on Title I authorities, see, for example, the definition for “rated order” provided by 15 C.F.R. §700.8.

<sup>34</sup> See, for example, the regulations establishing standards and procedures for the use of the Secretaries’ of Commerce, Energy, and Transportation delegated authorities under Title I of the DPA (15 C.F.R. §700.13, 10 C.F.R. §217.33, and 49 C.F.R. §33.33, respectively). These regulations explain the circumstances a person may reject a prioritized contract, though these conditions are limited by the clause “Unless otherwise directed by the [implementing department].”

rules, regulations, and orders (e.g., prioritization requirements), including any rules, regulations, or orders later declared legally invalid.<sup>35</sup> The government can also prioritize the performance of contracts between two private parties, such as a contract between a prime contractor and a subcontractor, if needed to fulfill a priority contract and promote the national defense.<sup>36</sup>

Title I also allows the President to *allocate* or control the general distribution of materials, services, and facilities. Allocation authority relates historically to the controlled materials programs of World War II, when the distribution of critical materials and resources had to be managed to maximize the production of goods needed in the war effort.<sup>37</sup> This authority is rarely used today, and is currently only implemented for the Civil Reserve Air Fleet (CRAF) program, under which the DOD may augment its airlift capability with civilian aircraft during a national defense related crisis.<sup>38</sup>

There are several notable restrictions to the priorities and allocation authority. For example, it cannot be used for contracts of employment.<sup>39</sup> Additionally, unless authorized by a joint resolution of Congress, the authority cannot be used for wage or price controls. Private persons are not required to assist in the production or development of chemical or biological weapons unless directly authorized by the President or a Cabinet secretary.<sup>40</sup>

### *Determinations and Delegations*

In statute, Title I priorities and allocation authority can only be used to “promote national defense.” In E.O. 13603, the President further constrains that authority so that it “may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense” by either the Secretary of Defense, the Secretary of Homeland Security, or the Secretary of Energy, depending on the issue involved.<sup>41</sup> Once a program is

<sup>35</sup> 50 U.S.C. Appx. §2157; Section 707 of the DPA. Immunity under this provision is limited, and does not confer blanket tort immunity to a contractor for liability to injured third parties. Also, carrying out a contract according to its terms does not necessarily entitle a contractor to be indemnified by the government when the resulting product injures third parties, absent an indemnification clause in the contract. *Hercules v. United States*, 516 U.S. 417 (1996).

<sup>36</sup> See, for example, 15 C.F.R. §700.3(d).

<sup>37</sup> See further explanation of allocation authority in 15 C.F.R. §700.30(a)(2). In a proposed rulemaking that would revise current regulations issued by the Department of Commerce with regards to priorities and allocations authority, the proposed definition of allocation is: “The control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.” See Department of Commerce, “Revisions to Defense Priorities and Allocations System Regulations,” 79 *Federal Register* 5332, January 31, 2014.

<sup>38</sup> Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, August 2011, p. 9. For more on the CRAF program, see <http://www.dot.gov/ost/oiser/craf.htm>.

<sup>39</sup> This restriction is written as a parenthetical in Section 101(a)(1), but is an important constraint on Title I priorities authority.

<sup>40</sup> 50 U.S.C. Appx. §2074; Section 104 of the DPA. It should be noted that development and production of chemical weapons and biological weapons are prohibited by the Chemical Weapons Convention (CWC) and the Biological Weapons Convention (BWC), respectively. The United States is a state party to both of these international treaties and is legally bound by their obligations and prohibitions.

<sup>41</sup> See Section 202 of E.O. 13603. Determinations are made

- (a) by the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities;
- (b) by the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities;
- and (c) by the Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

In practice, some determination authority has been further re-delegated within the executive branch. An example of a

determined to promote the national defense, other Secretaries who have been delegated the priorities and allocation authority can use their authority for those pre-designated program purposes.

E.O. 13603 provides for the delegation of the President's priorities and allocation authority to six different Cabinet Secretaries based upon their areas of expertise in different resource and material sectors. These resource areas are further defined in Section 801 of E.O. 13603. The delegation to the Cabinet Secretaries in E.O. 13603 did not differ from the earlier executive order, though the definitions of their assigned resource areas did change somewhat. **Table A-3** in the Appendix summarizes this delegation of priorities and allocation authority.

### ***How Priorities and Allocations Changed in the Reauthorization of 2009 and E.O. 13603***

The statutory language providing Section 101(a) priorities and allocation authority has existed, unaltered, since the original enactment of the DPA.<sup>42</sup> However, in the Reauthorization of 2009, Congress added a rulemaking requirement to the statute. Congress mandated that all Cabinet Secretaries delegated priorities and allocation authority establish standards and procedures for its use. The statute further encourages these rules to be consistent and unified in nature, a recommendation made by the Government Accountability Office and endorsed by the reauthorization bill's principal sponsor.<sup>43</sup>

The necessary rules were required to be issued within 270 days from bill enactment, or the end of June 2010. Of the six departments delegated authority, three (Commerce, Energy, and Transportation) had issued final rules as of June 10, 2014. Though it has been periodically updated to conform to evolving practices and DPA statute, the Department of Commerce's (DOC's) rule establishing the Defense Priorities and Allocations System (DPAS) has existed in its current basic format since 1984.<sup>44</sup> DOC is currently updating the DPAS to account for the Reauthorization of 2009.<sup>45</sup> The Department of Agriculture has also issued a proposed rule. The Departments of Defense and Health and Human Services have not yet released rules in proposed or final form.<sup>46</sup>

---

written determination, issued by the Department of Homeland Security through FEMA, can be found at <http://www.fema.gov/pdf/about/programs/dpa/signed-program-determinations-100506.pdf>.

<sup>42</sup> See Section 101 of P.L. 81-774.

<sup>43</sup> See 50 U.S.C. Appx. §2071(d); Section 101(d) of the DPA and U.S. Government Accountability Office, *Defense Production Act: Agencies Lack Policies and Guidance for Use of Key Authorities*, GAO-08-854, June 2008, at <http://www.gao.gov/products/GAO-08-854>. Sen. Christopher Dodd, "Defense Production Act Reauthorization of 2009," Senate consideration of S. 1677, *Congressional Record*, September 16, 2009, p. S9480.

<sup>44</sup> For original rulemaking of the Defense Priorities and Allocations System, see Department of Commerce, "Defense Priorities and Allocations System," 49 *Federal Register* 30412, July 30, 1984. Prior to the DPAS, DOC maintained a "Defense Materials System" and a "Defense Priorities System" that were superseded by the DPAS.

<sup>45</sup> DOC has twice proposed to revise its DPAS rule in accordance with the Reauthorization of 2009. It first proposed a rulemaking that would revise this existing regulation in June of 2010, but this proposal was never finalized. See Department of Commerce, "Revisions to Defense Priorities and Allocations System Regulations," 75 *Federal Register* 32122, June 7, 2010. However, on January 31, 2014, the DOC replaced this proposal with another, different proposed revision. As noted in the current proposed rulemaking, the original "June 2010 proposed rule would have substantially reorganized the format of the DPAS. This [current] proposed rule would largely retain the existing format." See Department of Commerce, "Revisions to Defense Priorities and Allocations System Regulations," 79 *Federal Register* 5353, January 31, 2014.

<sup>46</sup> The Department of Agriculture has a proposed rulemaking that has not been finalized, see Department of Agriculture, "Agriculture Priorities and Allocations System," 76 *Federal Register* 29084, May 19, 2011. The

## Examples of Use

The allocation authority has rarely been used by the government, but the authority to prioritize contracts is routinely employed by the DOD. In a typical year, DOD will assign a DPA priority to more than 300,000 contracts, representing more than 20% of the nearly 1.5 million contracts reported by the department and its subordinate military departments, agencies, and offices for FY2012.<sup>47</sup> These prioritized contracts are typically issued under the DOC's delegated authority with respect to materials, services, and facilities, including construction materials, and under its regulations guiding the use of this authority.<sup>48</sup> Some notable examples of DOD's use of Title I priorities authority include supporting the development of the Integrated Ballistic Missile Defense System and Mine Resistant Ambush Protected (MRAP) Vehicles.<sup>49</sup> While the priorities authority is used far less frequently by other departments and agencies, it has been used for both the prevention of terrorism and natural disaster preparedness. For example, the Federal Bureau of Investigation has prioritized contracts in support of the Terrorist Screening Center program and the U.S. Army Corps of Engineers prioritized contracts in support of the Greater New Orleans Hurricane and Storm Damage Risk Reduction System program.<sup>50</sup>

## Title I and Energy

Title I also contains several provisions related to domestic energy. Section 101(c) authorizes the President to allocate and prioritize contracts for materials, equipment, and services to maximize domestic energy supplies in certain circumstances.<sup>51</sup> This authority was used by the Department of Energy to ensure that emergency supplies of natural gas continued to flow to California utilities, helping to avoid threatened electrical blackouts in early 2001.<sup>52</sup> However, Section 105 of the DPA restricts its authorities from being used to ration the end-use of gasoline without the approval of Congress.

Section 106 of Title I, as amended, also designates *energy* as a *strategic and critical material*.<sup>53</sup> This designation enables other authorities in the DPA, especially Title III authorities discussed

---

Department of Energy issued a final rule codified in 10 C.F.R. Part 217, see Department of Energy, "Energy Priorities and Allocations System Regulations," 75 *Federal Register* 41405, July 16, 2010. The Department of Transportation issued a final rule codified in 49 C.F.R. Part 33, see Department of Transportation, "Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act," 77 *Federal Register* 59793, October 1, 2012. The Administration has reported that new rules are being prepared by the Department of Agriculture and the Department of Health and Human Services, but did not mention the development of a rule by the Department of Defense. See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, March 31, 2013, p. 4.

<sup>47</sup> Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, August 2011, p. 7. Total contract data for FY2012 compiled from USASpending.gov on May 17, 2013.

<sup>48</sup> *Ibid.* DOD has been re-delegated authority by DOC to use their regulations and authorities for Title I priorities authority.

<sup>49</sup> There are two levels of priority rating provided in DPAS regulations. The "DO" rating is lower than a "DX" rating. For a discussion of the different priority ratings, see 15 C.F.R. §700.11. DOD, as a matter of practice, includes a DO rating on most commercial contracts. Only select programs may receive a "DX" rating. For a current list of "DX" rated programs, see [http://www.bis.doc.gov/dpas/pdfdocs/list\\_of\\_dx\\_approved\\_programs.pdf](http://www.bis.doc.gov/dpas/pdfdocs/list_of_dx_approved_programs.pdf).

<sup>50</sup> Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, August 2011, p. 8.

<sup>51</sup> 50 U.S.C. Appx. §2071(c); Section 101(c) of the DPA.

<sup>52</sup> For discussion on how DPA was used in this situation, see U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *California Energy Crisis and Use of the Defense Production Act*, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., February 9, 2001, S. Hrg. 107-215 (Washington: GPO, 2001).

<sup>53</sup> 50 U.S.C. Appx. §2076; Section 106 of the DPA.



below, to be used for policy decisions related to energy. However, prior to the Reauthorization of 2009, the DPA did *not* grant any new direct or indirect authority to the President to “engage in the production of energy in any manner whatsoever (such as oil and gas exploration and development, or any energy facility construction), except as expressly provided in sections 305 and 306 [50 U.S.C. App. §§2095 and 2096] for synthetic fuel production.”<sup>54</sup> This restriction designating “energy” as “strategic and critical material” was deleted in Section 5 of the Reauthorization of 2009.<sup>55</sup> With that restriction eliminated, the specific exemption for synthetic fuel production became unnecessary, so the Reauthorization of 2009 also repealed several sections on the production of synthetic fuel.<sup>56</sup> The issue of synthetic fuel production and the use of the DPA for energy production has an extensive history that is beyond the scope of this report.<sup>57</sup>

## Authorities Under Title III of the DPA

Title III authorities are intended to help ensure that the nation has an adequate supply of, or the ability to produce, essential materials and goods necessary for the national defense. Using Title III authorities, the President may provide appropriate financial incentives to develop, maintain, modernize, restore, and expand the production capacity of domestic sources for critical components, critical technology items, materials, and industrial resources essential for the execution of the national security strategy of the United States.<sup>58</sup> The President is also directed to use Title III authorities to ensure that critical components, 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.<sup>59</sup> In the Reauthorization of 2009, Congress amended and replaced the full text of Title III, though the core purpose and content of the authorities remain principally the same.<sup>60</sup> From an administrative standpoint, language was updated throughout Title III to comply with more modern legislative style and structure.

## Loan Guarantees and Direct Loans

Sections 301 and 302 of Title III of the DPA authorize the President to issue loan guarantees and direct loans to reduce current or projected shortfalls of industrial resources, critical technology items, or essential materials needed for national defense purposes.<sup>61</sup> Loan guarantees and direct loans can be issued to private businesses to help them create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.<sup>62</sup> A direct loan is

<sup>54</sup> See the former 50 U.S.C. Appx. §2076(2) [2006 edition]

<sup>55</sup> 123 Stat. 2009.

<sup>56</sup> See 50 U.S.C. Appx. §2095 to §2098 [2006 edition]; the former sections 306, 307, and 308 of the DPA.

<sup>57</sup> In brief, these DPA authorities supported the Synthetic Fuels Corporation, established in P.L. 96-294. Language rescinding most of the Synthetic Fuels Corporation funding was included in the FY1986 continuing appropriations resolution (H.J.Res. 465, P.L. 99-190).

<sup>58</sup> 50 U.S.C. Appx. §2077; Section 107(a) of the DPA. Many of these terms are defined further in 50 U.S.C. Appx. §2152.

<sup>59</sup> 50 U.S.C. Appx. §2077; Section 107(b)(1) of the DPA.

<sup>60</sup> 123 Stat. 2010-2017.

<sup>61</sup> 50 U.S.C. Appx. §2091(a)(1). The beginning of 50 U.S.C. Appx. §2092(a) includes the same basic text as §2091(a)(1).

<sup>62</sup> *Ibid.*

a loan from the federal government to another government or private sector borrower that requires repayment, with or without interest. A loan guarantee allows the federal government to guarantee a loan made by a non-federal lender to a non-federal borrower, either by pledging to pay back all or part of the loan in the instance that the borrower is unable to do so.<sup>63</sup> These authorities, for instance, could be used to provide a loan, or to guarantee a loan, to a defense contractor that is responsible for the provision of critical services essential to the national defense when credit is otherwise unavailable in the private market.

### *How Loan Authority Changed in the Reauthorization of 2009*

According to Senator Christopher J. Dodd of Connecticut, the reauthorization bill's principal sponsor, the loan authorities provided in Sections 301 and 302 were updated in order to comply with the Federal Credit Reform Act of 1990.<sup>64</sup> In general, these changes increased restrictions on the use of the authority by the President. For example, prior to the Reauthorization of 2009, Section 301 and 302 authorized the President to make loans and loan guarantees if an "industrial resource shortfall," which the direct loan or loan guarantee was intended to correct, had been identified in the President's annual budget submission to Congress (or amendment to the submission).<sup>65</sup> Since reauthorization, the budget authority for guarantees and direct loans must be specifically included in appropriations passed by Congress and enacted by the President before they can be issued.<sup>66</sup> Both before and after 2009, the President is allowed to waive the majority of restrictions on use of this authority during periods of national emergency declared by the President or Congress.<sup>67</sup>

Except in declared national emergencies, this statute also requires the President to determine that loan guarantees or direct loans meet a number of conditions before issuance. Perhaps most importantly, one of the conditions in using the loan authority is that the loan or loan guarantee is the most cost-effective, expedient, and practical alternative method for meeting the need.<sup>68</sup> Prior to the reauthorization, the President had been required to determine that the ability of domestic industrial sources to produce a good or service was insufficient to meet the combined projected defense and non-defense demand.<sup>69</sup> In other words, the President had been required to determine that there was an insufficient supply of a good before issuing a loan guarantee or direct loan. The Reauthorization of 2009 removed this requirement, but expanded the determination requirements for guarantee and direct loans to include provisions that may help ensure that the loan is repaid by the recipient.<sup>70</sup> For example, the President is now required to determine that there is "reasonable assurance" that a recipient of a loan or loan guarantee will be able to repay the loan.<sup>71</sup>

<sup>63</sup> For more on direct loans and loan guarantees, see CRS Report R42632, *Budgetary Treatment of Federal Credit (Direct Loans and Loan Guarantees): Concepts, History, and Issues for Congress*.

<sup>64</sup> Sen. Christopher Dodd, "Defense Production Act Reauthorization of 2009," Senate consideration of S. 1677, *Congressional Record*, September 16, 2009, p. S9481.

<sup>65</sup> See former 50 U.S.C. Appx. §2091(e)(1)(A) and 50 U.S.C. Appx. §2092(c)(1) [2006 edition].

<sup>66</sup> 50 U.S.C. Appx. §2091(a)(3) and 50 U.S.C. Appx. §2092(c).

<sup>67</sup> See former 50 U.S.C. Appx. §2091(a)(3) and 50 U.S.C. Appx. §2092(b)(2) [2006 edition]; and current 50 U.S.C. Appx. §2091(a)(2) and 50 U.S.C. Appx. §2092(b)(2).

<sup>68</sup> 50 U.S.C. Appx. §2091(a)(2)(C) and 50 U.S.C. Appx. §2092(b)(2)(C).

<sup>69</sup> See former 50 U.S.C. Appx. §2091(a)(3)(D) and 50 U.S.C. Appx. §2092(b)(2)(D) [2006 edition].

<sup>70</sup> The Reauthorization of 2009 added 50 U.S.C. Appx. §§2091(a)(2)(D), (E), and (F) and 50 U.S.C. Appx. §§2092(b)(2)(D) and (E); which are Sections 301(a)(2)(D), (E), and (F) and Sections 302(b)(2)(D) and (E) of the DPA, respectively.

<sup>71</sup> See 50 U.S.C. Appx. §2091(a)(2)(D), Section 301(a)(2)(D) of the DPA.

## Purchase, Purchase Commitments, and Installation of Equipment

Section 303 of Title III grants the President an array of authorities to create, maintain, protect, expand, or restore domestic industrial base capabilities essential to the national defense.<sup>72</sup> These authorities include, but are not limited to:

- purchasing or making purchase commitments of industrial resources or critical technology items;<sup>73</sup>
- making subsidized payments for domestically produced materials; and<sup>74</sup>
- installing and purchasing equipment for industrial facilities to expand their productive capacity.<sup>75</sup>

In general, Section 303 authorities can be used by the President to provide incentives for domestic private industry to produce and supply critical goods that are necessary for the national defense. The scope of Section 303 authorities allows for these incentives to be structured in a number of ways, including direct purchases or subsidies of such goods.

### *Determination and Notification of an Industrial Base Shortfall*

Prior to using Section 303 authorities, the law requires the President to determine that there is a “domestic industrial base shortfall” for a particular industrial resource, material, or critical technology item that threatens the national defense.<sup>76</sup> This determination includes finding that the industry of the United States cannot reasonably be expected to provide the capability for the good in a timely manner.<sup>77</sup> The President is required to notify the committees of jurisdiction when such a determination is made and give the committees 30 days to comment if the cost of actions to remedy the shortfall is expected to exceed \$50 million.<sup>78</sup> The President is authorized to waive the determination and notification provisions in periods of national emergency or in situations that the President, on a non-delegable basis, determines the industrial base shortfall would severely impair national defense.<sup>79</sup>

### *How Section 303 Authority Changed in the Reauthorization of 2009*

#### **Expansion of Authorities**

Section 303(a)(1) of DPA provides an “In general” list of actions the President may take in order to meet the needs of the national defense. In the Reauthorization of 2009, Congress clarified the President’s authority in Section 303(a)(1) to specifically state that the authorities may be used to

<sup>72</sup> 50 U.S.C. Appx. §2093, Section 303 of the DPA.

<sup>73</sup> 50 U.S.C. Appx. §2093(a), Section 303(a)(1)(A) of the DPA. The terms “critical technology item” and “industry resource” are further defined in 50 U.S.C. Appx. §2152, Section 702 of the DPA.

<sup>74</sup> 50 U.S.C. Appx. §2093(c), Section 303(c) of the DPA.

<sup>75</sup> 50 U.S.C. Appx. §2093(e), Section 303(e) of the DPA.

<sup>76</sup> The President delegated authority to make these determinations to the “head of each agency engage[d] in procurement for national defense” in Section 305(b) of E.O. 13603. Section 303(a)(5) of the DPA states that an “industrial base shortfall” exists when domestic industry “cannot be reasonably expected to provide the capability for the need.”

<sup>77</sup> 50 U.S.C. Appx. §2093(a)(5)(B), Section 303(a)(5)(B) of the DPA.

<sup>78</sup> 50 U.S.C. Appx. §2093(a)(6), Section 303(a)(6) of the DPA

<sup>79</sup> 50 U.S.C. Appx. §2093(a)(7), Section 303(a)(7) of the DPA.

“create, maintain, protect, expand, or restart domestic industrial base capabilities.”<sup>80</sup> Previously, this section only stated that the authorities could “assist in carrying out the objectives” of the DPA.<sup>81</sup> More significantly, the Reauthorization of 2009 also expanded the list of authorized actions in the Section 303(a)(1) subsection to include providing for the “development of production capabilities” and “for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies.”<sup>82</sup>

Likewise, Section 303(e) has long authorized the President to enhance productive capacity by directly procuring and installing manufacturing equipment in both government and privately owned industrial facilities. In the reauthorization, this authority was expanded to allow the President to provide for the modification or expansion of privately owned facilities, as well as the ability to sell and transfer equipment to privately owned industrial facilities.<sup>83</sup> In addition, the statute now requires that the owner of an industrial facility receiving equipment from this subsection of authorities indemnify the federal government from certain liability claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.<sup>84</sup>

#### Determination and Notification Requirements

While the Reauthorization of 2009 tightened restrictions on the use of Sections 301 and 302, it appears to have eased the use of Section 303 authorities. In order to use Section 303 authorities the President is required to make a determination that there is a “domestic industrial base shortfall” of a particular good before initiating action under the section. Prior to being struck from the statute by the 2009 reauthorization, the President’s determination requirement under this section also included the conditions that

purchases, purchase commitments, or other action pursuant to this section are the most cost effective, expedient, and practical alternative method for meeting the need; and

the combination of the United States national defense demand and foreseeable nondefense demand for the industrial resource or critical technology item is not less than the output of domestic industrial capability, as determined by the President, including the output to be established through the purchase, purchase commitment, or other action.<sup>85</sup>

However, these two conditions were struck from the statute in the Reauthorization of 2009. In addition, the law previously contained a limitation on the amount of money that could be spent on actions to rectify a domestic industrial base shortfall. Prior to 2009, the actions that would cause aggregate spending in excess of \$50 million needed to be specifically authorized by law.<sup>86</sup> This was changed in the reauthorization, and the President is now allowed to initiate actions in

<sup>80</sup> 50 U.S.C. Appx. §2093(a)(1), Section 303(a)(1) of the DPA

<sup>81</sup> See the former 50 U.S.C. Appx §2093(a)(1) [2006 Edition], what was 303(a)(1) of the DPA.

<sup>82</sup> 50 U.S.C. Appx. §§2093(a)(1)(C) and (D), Section 303(a)(1)(C) and (D) of the DPA; 123 Stat 2014.

<sup>83</sup> 50 U.S.C. Appx. §§2093(e)(1)(C) and (D), Section 303(e)(1)(C) and (D) of the DPA.

<sup>84</sup> Specifically, 50 U.S.C. Appx. §2093(e)(2), Section 303(e)(2) of the DPA requires owners to waive claims against the United States under Section 107 or 113 of CERCLA. For more on these liabilities, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, by David M. Bearden.

<sup>85</sup> See former 50 U.S.C. Appx §§2093(a)(5)(C) and (D) [2006 Edition]. They were deleted from law in Section 7 of P.L. 111-67, 123 Stat. 2014.

<sup>86</sup> See former 50 U.S.C. Appx §§2093(a)(6)(C) [2006 Edition].

aggregate of over \$50 million after a waiting period of 30 days following notification to the committees of jurisdiction.<sup>87</sup>

### Delegation of Section 301, 302, and 303 Authorities in E.O. 13603

In E.O. 13603, the “head of each agency engaged in procurement for national defense” is delegated the majority of the authorities of Sections 301, 302, and 303 of Title III of the DPA.<sup>88</sup> These agencies are specifically identified in E.O. 13603.<sup>89</sup> This delegation includes the ability to make all determinations not explicitly cited in the statute as being nondelegable.<sup>90</sup> However, this delegation does not include the authority to encourage the exploration, development, and mining of strategic and critical materials and other materials. This authority is provided to the President in the statute, and is delegated only to the Secretaries of Defense and the Interior.<sup>91</sup>

E.O. 13603 offers a level of uniformity and clarity to the delegation of Title III authorities that was absent from previous executive orders. Under an earlier executive order that implemented the pre-2009 DPA, authorities had been delegated through a similar definition process, but were additionally tied to another executive order. The additional step of referring to another executive order for delegations was eliminated in E.O. 13603.<sup>92</sup>

### Use of Title III Authorities

According to the Defense Production Act Committee, the federal government has not used the loan authorities provided in Section 301 or Section 302 of Title III in more than 30 years. Rather, current projects are initiated under Section 303 of Title III of the DPA.<sup>93</sup> There are approximately 28 current Title III research or procurement projects that are “focused on ensuring future U.S. production capabilities and maintaining U.S. technological leadership in critical markets.”<sup>94</sup> Examples include a “Lithium Ion Battery Production for Space Applications” and a “Lightweight Ammunition Production Initiative.”<sup>95</sup> These examples, like many other Title III projects, are meant to establish a domestic capacity to produce these advanced technologies deemed essential for national defense.

<sup>87</sup> 50 U.S.C. Appx §§2093(a)(6)(B), Section 303(a)(6)(B) of the DPA.

<sup>88</sup> See Sections 301, 302, 303, 304, and 305 of E.O. 13603.

<sup>89</sup> Section 801(h) of E.O. 13603 states “the heads of the Departments of State, Justice, the Interior, and Homeland Security, the Office of the Director of National Intelligence, the Central Intelligence Agency, the National Aeronautics and Space Administration, the General Services Administration, and all other agencies with authority delegated under section 201 of this order.” Under Section 201 of the executive order, the additional agencies are the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, and Transportation.

<sup>90</sup> Section 305 of E.O. 13603. The only determination not delegable is 50 U.S.C. Appx. §2093(a)(7)(B), Section 303(a)(7)(B) of the DPA. This determination allows the President, on a non-delegable basis, to waive requirements in Section 303(a)(1)-(6) on the use of those authorities.

<sup>91</sup> In statute, see 50 U.S.C. Appx. §2093(a)(1)(B); Section 303(a)(1)(B) of the DPA. The authority is delegated in Section 306 of E.O. 13603. The Secretary of Interior is delegated this authority in consultation with the Secretary of Defense, as the National Defense Stockpile Manager.

<sup>92</sup> See the definition for “head of each agency engaged in procurement for national defense” in Section 802(h) of E.O. 12919, which had been issued on June 3, 1994.

<sup>93</sup> Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, August 2011, p. 10. For a current list of all DPA Title III projects, see [http://www.dpatitle3.com/dpa\\_db/](http://www.dpatitle3.com/dpa_db/).

<sup>94</sup> *Ibid.*

<sup>95</sup> See [http://www.dpatitle3.com/dpa\\_db/project.php?id=67](http://www.dpatitle3.com/dpa_db/project.php?id=67) and [http://www.dpatitle3.com/dpa\\_db/project.php?id=66](http://www.dpatitle3.com/dpa_db/project.php?id=66), respectively.

## Defense Production Act Fund

The DPA contains a blanket authorization of appropriations needed to carry out all of its provisions and purposes.<sup>96</sup> Title III of the DPA also establishes a Treasury account, the Defense Production Act Fund, that is available to carry out all of the provisions and purposes of Title III. The monies in the DPA Fund are available until expended. The DPA Fund is also used to collect all proceeds from DPA activities under Title III, such as the resale of DPA-procured commodities or products.<sup>97</sup> However, the balance in the DPA Fund at the end of any fiscal year cannot exceed \$750 million, excluding monies appropriated for that fiscal year or obligated amounts.<sup>98</sup> The only substantive change made to the DPA Fund in the Reauthorization of 2009 was to increase this allowable annual balance for the Fund from \$400 million to \$750 million.<sup>99</sup> **Table 1** provides the appropriations to the DPA Fund between FY2010 and FY2014. It is possible for appropriations to the DPA Fund to be made in any of the bills providing funding to the numerous agencies delegated Title III authorities.<sup>100</sup> However, all recent direct appropriations to the DPA Fund have come from appropriation bills for the Department of Defense (or the relevant division of an omnibus appropriations bill). Distinctively, as noted in **Table 1**, in FY2014, the Department of Energy has been authorized to transfer up to \$45 million to the DPA Fund from the overall appropriation to another account.<sup>101</sup>

**Table 1. Appropriations to the DPA Fund Since FY2010, in Millions**

Fiscal Year	Law	Appropriation Amount
2010	P.L. 111-118, 123 Stat. 3422	\$150.7
2011	P.L. 112-10, 125 Stat. 51	\$34.3
2012	P.L. 112-74, 125 Stat. 800	\$170.0
2013	P.L. 113-6, 127 Stat. 291	\$223.5
2014	P.L. 113-76, 128 Stat. 98	\$60.1 <sup>a</sup>

**Source:** CRS analysis of appropriation acts. Dollars rounded to the nearest hundred thousand. These figures may not account for transfers or other obligations to the DPA Fund and may not reflect adjustments to appropriations required by recently enacted legislation.

- a. P.L. 113-76, 128 Stat. 165, also authorizes the Department of Energy to transfer up to \$45 million to the DPA Fund from the overall appropriation of \$1,912 million for the Energy Efficiency and Renewable Energy account.

<sup>96</sup> 50 U.S.C. Appx. §2161; Section 711 of the DPA. This section will terminate on September 14, 2014, unless reauthorized.

<sup>97</sup> 50 U.S.C. Appx. §2094; Section 304 of the DPA.

<sup>98</sup> 50 U.S.C. Appx. §2094(e); Section 304(e) of the DPA. The obligation of funds is defined in the DOD Financial Management Regulation as an “amount representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same, or a future, period.” Office of the Comptroller, Department of Defense, *Financial Management Regulation*, DOD 7000.14-R, Washington, DC, December 2008, p. Glossary-21.

<sup>99</sup> 123 Stat. 2017.

<sup>100</sup> See footnote 89 for an explanation and full list of the delegated agencies with Title III authorities.

<sup>101</sup> In its FY2014 President’s budget request, DOE stated the \$45 million would be used to support a joint DOD-Navy, DOE, and USDA memorandum of agreement to support the construction of commercial-scale biofuels production facilities that can produce drop-in, hydrocarbon biofuels. For more information on the memorandum of understanding, see CRS Report R42859, *DOD Alternative Fuels: Policy, Initiatives and Legislative Activity*, by Katherine Blakeley, and CRS Report R42568, *The Navy Biofuel Initiative Under the Defense Production Act*, by Anthony Andrews et al.

The President is also required to designate a “Fund manager” to carry out general accounting functions for the fund.<sup>102</sup> The Secretary of Defense has been delegated this responsibility in E.O. 13603.<sup>103</sup> As the Fund Manager, the Secretary of Defense (or official to whom the authority is delegated) is responsible for the financial accounting of the fund, but does not necessarily have decision-making authority over the use of the fund. The designation of a Fund Manager did not change from E.O. 12919, as amended.

## Authorities Under Title VII of the DPA

Title VII of the DPA contains an assorted mix of provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Significant provisions of Title VII, and how they have changed under the Reauthorization of 2009 or how delegations of the authority changed with the issuance of E.O. 13603, are summarized here.

### Special Preference for Small Businesses

There are two provisions in the DPA directing the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 of Title VII reiterates<sup>104</sup> and expands upon a requirement in Section 108 of Title I directing the President to “accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor.”<sup>105</sup> These provisions were not amended in the Reauthorization of 2009, nor did the delegation of the authority change in E.O. 13603.

### Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.<sup>106</sup> Though *national defense* is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.<sup>107</sup> Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, and the Reauthorization of 2009 was no exception.<sup>108</sup> Most notably, Congress added a definition for *homeland security* to place it within

<sup>102</sup> 50 U.S.C. Appx. §2094(f); Section 304(f) of the DPA.

<sup>103</sup> Section 309 of E.O. 13603.

<sup>104</sup> 50 U.S.C. Appx. §2151; Section 701 of the DPA.

<sup>105</sup> 50 U.S.C. Appx. §2078; Section 108(a) of the DPA.

<sup>106</sup> The original law provided five definitions, including a definition of “national defense.” See Section 702 of P.L. 81-774.

<sup>107</sup> In total, there are 17 terms defined in law in 50 U.S.C. Appx. §2152, and 13 additional definitions in Section 801 of E.O. 13603.

<sup>108</sup> 123 Stat 2017-2018. Congress amended, in addition to the definition of *national defense*, the existing definitions of *critical component*, *critical technology*, *domestic industrial base*, *industrial resources*, and *services*. Congress struck the definitions for *critical industry for national security*, *essential weapon system*, and *small business concern owned and controlled by socially and economically disadvantaged individuals*. Congress added the definitions *guaranteeing agency* and *homeland security*.

the context of *national defense*.<sup>109</sup> Likewise, in issuing E.O. 13603, supplementary definitions were amended, added, and removed definitions that had been listed in E.O. 12919, as amended.<sup>110</sup>

### Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and thereby need to obtain extensive information from private industries. Therefore, under Section 705 of the DPA, the President may “by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA].”<sup>111</sup> This authority has been delegated to the Secretary of Commerce in E.O. 13603.<sup>112</sup> Though this authority has many potential implications and uses, it is most commonly associated with what the DOC’s Bureau of Industry and Security calls “industrial base assessments.”<sup>113</sup> These assessments are often conducted in coordination with the Departments of Defense and Homeland Security, as well as the private sector, to “monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities.”<sup>114</sup> The statute includes a requirement that the President issue regulations to insure that the authority is used only after “the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency.”<sup>115</sup> However, no such regulation has been issued by the executive branch.

### Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA 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>116</sup> The President must determine that a “condition exists which may pose a direct threat to the national defense or its preparedness programs”<sup>117</sup> prior to engaging in the extensive consultation process. Following the consultation process, the President or appropriate

<sup>109</sup> 50 U.S.C. Appx. §2152(11). *Homeland security* means 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>110</sup> By comparison to Section 901 of E.O. 12919, as amended, Section 801 of E.O. 13603 altered the definitions *civil transportation*, *energy*, *food resources*, *food resource facilities*, *head of each agency engaged in procurement for the national defense*, *health resources*, and *water resources*. Section 801 of E.O. 13603 added the definitions *national defense* (same meaning as in statute), *offsets*, and *special priorities assistance*. It removed the definitions of *heads of other appropriate Federal departments and agencies*, and *metals and minerals*.

<sup>111</sup> 50 U.S.C. Appx. §2155(a); Section 705(a) of the DPA.

<sup>112</sup> Generally, see Section 104(d) of E.O. 13603.

<sup>113</sup> For examples of some publically available industrial base assessments, see the agency’s website at <http://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments>.

<sup>114</sup> *Ibid.*

<sup>115</sup> 50 U.S.C. Appx. §2155(a); Section 705(a) of the DPA.

<sup>116</sup> 50 U.S.C. Appx. §2158(c)(1); Section 708(c)(1) of the DPA.

<sup>117</sup> *Ibid.* The consultation process is described in 50 U.S.C. Appx. §§2158(d) and (e); Section 708(d) and (e) of the DPA.



delegate may approve and commence the agreement or plan of action.<sup>118</sup> Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.<sup>119</sup>

- Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to “enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes,” among other examples.<sup>120</sup> The Maritime Administration of the Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as “VISA”) and the Voluntary Tanker Agreement.<sup>121</sup> These agreements are established to ensure that the maritime industry can respond to the mobilization and transportation requirements of the Department of Defense.
- There were two substantive changes to this voluntary agreement authority in the Reauthorization of 2009.<sup>122</sup> First, in most circumstances, an individual with delegated authority must consult with the Attorney General or the Federal Trade Commission prior to finalizing the voluntary agreement. The revised statute now permits the finalization of a voluntary agreement without consultation with the Attorney General or Federal Trade Commission if the President determines, on a nondelegable basis, that it is needed to meet national defense requirements in the wake of a disaster that destroys or degrades critical infrastructure.<sup>123</sup> Second, the reauthorization extended the maximum term length for each voluntary agreement, once it is established, from two years to five years.<sup>124</sup>

The delegation of voluntary agreement authority did not change substantively with the issuance of E.O. 13603.<sup>125</sup> However, E.O. 13603 includes an explicit requirement that the Department of Homeland Security issue regulations on voluntary agreements in accordance with DPA statute.<sup>126</sup>

<sup>118</sup> 50 U.S.C. Appx. §2158(f); Section 708(f) of the DPA.

<sup>119</sup> 50 U.S.C. Appx. §2158, Section 708 of the DPA provides a legal defense to parties of voluntary agreements or plans of action that can be used in civil suits or criminal actions brought against them under anti-trust laws (§2158(j)) or for breach of contract (§2158(o)). These exemptions do not grant them blanket immunity from these laws.

<sup>120</sup> The National Infrastructure Advisory Council, *Framework for Dealing with Disasters and Related Interdependencies: Final Report and Recommendations*, Appendix G: The Defense Production Act, Washington, DC, July 14, 2009, p. 45, at [http://www.dhs.gov/xlibrary/assets/niac/niac\\_framework\\_dealing\\_with\\_disasters.pdf](http://www.dhs.gov/xlibrary/assets/niac/niac_framework_dealing_with_disasters.pdf).

<sup>121</sup> Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, August 2011, p. 10.

<sup>122</sup> 123 Stat. 2018-2019.

<sup>123</sup> See 123 Stat. 2018 and 50 U.S.C. Appx. §2158(c)(3); Section 708(c)(3) of the DPA. In a report released before the DPA reauthorization in 2009, the National Infrastructure Advisory Council (NIAC) suggested that the voluntary agreement authority could be especially useful for recovering privately owned critical infrastructure following a terrorist attack or natural disaster. However, NIAC was concerned that some of the restrictions for creating a voluntary agreement would unnecessarily delay using the authority following a major disaster. See The National Infrastructure Advisory Council, *Framework for Dealing with Disasters and Related Interdependencies: Final Report and Recommendations*, Appendix G: The Defense Production Act, Washington, DC, July 14, 2009, p. 48, at [http://www.dhs.gov/xlibrary/assets/niac/niac\\_framework\\_dealing\\_with\\_disasters.pdf](http://www.dhs.gov/xlibrary/assets/niac/niac_framework_dealing_with_disasters.pdf).

<sup>124</sup> 123 Stat. 2018. See 50 U.S.C. Appx. §2158(e)(2); Section 708(e)(2) of the DPA.

<sup>125</sup> Section 401 of E.O. 13603.

<sup>126</sup> The legal requirement for the regulations can be found at 50 U.S.C. Appx. §2158(e). FEMA’s regulations can be found at 44 C.F.R. Part 332.

## Nucleus Executive Reserve

In Title VII of the DPA, the President is authorized to establish a volunteer body of industry executives, the “Nucleus Executive Reserve,” or more frequently called the National Defense Executive Reserve (NDER).<sup>127</sup> The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.<sup>128</sup> The Reauthorization of 2009 amended the statute by removing a clause that allowed the President to grant some exemptions to criminal statutes to NDER participants.<sup>129</sup>

The head of any governmental department or agency may establish a unit of the NDER and train its members.<sup>130</sup> No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that “an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency.”<sup>131</sup>

## Authorization of Appropriations

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.<sup>132</sup> The only regular annual appropriation for the purposes of the DPA is made in the Department of Defense appropriations bill to the DPA Fund, though appropriations could be made in other bills.<sup>133</sup> Prior to the Reauthorization of 2009, Section 711 contained a separate provision authorizing appropriations within a defined time period for Title III specifically.<sup>134</sup> However, this separate provision was removed in 2009. Arguably, this separate authorization was redundant with the overall authorization of appropriation.

## Committee on Foreign Investment in the United States

Another section of Title VII grants the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such

---

<sup>127</sup> 50 U.S.C. Appx. §2160(e); Section 710(e) of the DPA.

<sup>128</sup> President Dwight D. Eisenhower created the NDER in 1956 by issuing E.O. 10660 under the authorities granted in Title VII. It has served as a vehicle for training highly qualified private industry executives in war production mobilization should the nation be faced with the need to place the nation’s industrial base on a war footing. This program was inspired by the experiences of the War Industries Board of World War I and the War Production Board of World War II, when corporate executives were brought into government service, often with little or no compensation, to organize the nation’s industries for war production. For background on the origins and operation of the War Industries Board, see Paul A. C. Koistinen, “The ‘Industrial-Military Complex’ in Historical Perspective: World War I,” *The Business History Review*, Vol. 41, No. 4 (Winter, 1967), pp. 378-403; and Robert D. Cuff, “A ‘Dollar-a-Year Man’ in Government: George N. Peek and the War Industries Board,” *The Business History Review*, vol. 41, no. 4 (Winter, 1967), pp. 404-420.

<sup>129</sup> 123 Stat 2019.

<sup>130</sup> Section 501(c) in E.O. 13603.

<sup>131</sup> Section 501(e) in E.O. 13603.

<sup>132</sup> 50 U.S.C. Appx §2161

<sup>133</sup> See **Table 1** above for a list of recent appropriations.

<sup>134</sup> See the former 50 U.S.C. Appx §2161(b) [2006 Edition], what was Section 711(b) of the DPA.

actions.<sup>135</sup> The statute empowers the President to suspend these actions for any period he considers appropriate, or to prohibit transactions found to threaten impairment of national security. This is the so-called Exon-Florio Amendment, which designated a pre-existing interagency body, the Committee on Foreign Investment in the United States (CFIUS) chaired by the Secretary of the Treasury, as the entity through which the President acts.<sup>136</sup> For example, CFIUS reviews resulted in President George H. W. Bush ordering the China National Aero-Technology Import & Export Corporation to divest itself of Seattle-based MAMCO Manufacturing in 1990 and in the approval by President George W. Bush of the acquisition of IBM's personal computer and laptop division by Chinese-owned Lenovo in 2005. Various CFIUS authorities are delegated by the President in E.O. 11858, *Foreign Investment in the United States*, originally issued in 1975, not in E.O. 13603.<sup>137</sup> The Reauthorization of 2009 did not amend this authority.

### Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body established by the 2009 reauthorization of the DPA.<sup>138</sup> The DPAC was created to advise the President regarding the effective use of DPA authorities. Comments made by Representative Melvin Watt during floor consideration of the 2009 bill suggest that part of the legislative intent in creating the DPAC may have been to elevate the policy discussions on the DPA to a Cabinet-level body.<sup>139</sup> Congress exempted the DPAC from the requirements of the Federal Advisory Committee Act.<sup>140</sup>

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.<sup>141</sup> The DPA also requires the President to designate one of the members as Chairperson of the DPAC. President Obama has appointed the Secretaries of Homeland Security and Defense to serve as the Chairperson on an annually rotating basis.<sup>142</sup> The President is also required to appoint an Executive Director to the DPAC to support the Chairperson as needed. The current Executive Director is the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy. The only statutory responsibility of the DPAC is to provide an annual report that reviews the current use of DPA authorities, and provides recommendations for improving DPA implementation in the government or for amending DPA

<sup>135</sup> 50 U.S.C. Appx §2170; Section 721 of the DPA.

<sup>136</sup> For more on CFIUS, see CRS Report RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*, by James K. Jackson.

<sup>137</sup> See Executive Order 11858, "Foreign Investment in the United States," 40 *Federal Register* 20263, May 7, 1975.

<sup>138</sup> See 123 Stat. 2019-2020 for the creation of the DPAC in statute. The DPAC is now authorized in Section 722 of the DPA, 50 U.S.C. Appx. §2171. The DPAC website is at <http://www.acq.osd.mil/mibp/dpac.html>.

<sup>139</sup> Rep. Melvin Watt, "Defense Production Act Reauthorization of 2009," House consideration of S. 1677, *Congressional Record*, September 23, 2009, pp. H9817-H9818; and Sen. Christopher Dodd, "Defense Production Act Reauthorization of 2009," Senate consideration of S. 1677, *Congressional Record*, September 16, 2009, p. S9480.

<sup>140</sup> 50 U.S.C. Appx. §2171(e); Section 722(e) of the DPA. For more on the Federal Advisory Committee Act, see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy Ginsberg.

<sup>141</sup> Section 701 of E.O. 13603.

<sup>142</sup> Presidential Documents, "Designating the Chairperson of the Defense Production Act," 75 *Federal Register* 32087, June 7, 2010. This relationship between the Secretaries of Homeland Security and Defense is supported by a memorandum of agreement, available at <http://www.acq.osd.mil/mibp/resources.html>. The Secretary of Homeland Security served as the first Chairperson, from April 1, 2010, to March 31, 2011; the Secretary of Defense then served from April 1, 2011 to March 31, 2012, and so forth.

statute.<sup>143</sup> This report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services. The first annual DPAC report, for the calendar year 2010, was submitted in August of 2011. The reports for calendar years 2011 and 2012 were combined and submitted to Congress on March 31, 2013. As of January 31, 2014, a DPAC report for the calendar year 2013 was not available to CRS.

### **Impact of Offsets Report**

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses “offsets” in the government or commercial sales of defense materials.<sup>144</sup> The Reauthorization of 2009 moved this reporting provision to Title VII from Title III.<sup>145</sup> The reporting provision did not change substantively in the move to Title VII.

## **Issues for Congress**

### **Reauthorization of the DPA in the 113<sup>th</sup> Congress**

All DPA authorities in Titles I, III, and VII are scheduled to terminate on September 30, 2014, with the exception of four sections.<sup>146</sup> As explained in Section 717 of the DPA, the sections that are exempt from termination are:

- 50 U.S.C. Appx. §2074, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
- 50 U.S.C. Appx. §2157, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
- 50 U.S.C. Appx. §2158, Section 708 of the DPA that provides for the establishment of voluntary agreements; and

<sup>143</sup> 50 U.S.C. Appx. §2171(d); Section 722(d) of the DPA.

<sup>144</sup> Offsets are defined in Section 801(k) of E.O. 13603. Offsets can be direct, where offsetting sales of goods and services are related to the military export sale being contracted, or indirect, where they are not. This report is prepared by the Department of Commerce Bureau of Industry and Security (BIS) and is posted online at <http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/offsets/default.htm>.

<sup>145</sup> 123 Stat. 2020. The reporting requirement moved to Section 723 from Section 309 of the DPA; to the current 50 U.S.C. Appx. §2171 from the former 50 U.S.C. Appx. §2099 [2006 Edition].

<sup>146</sup> 123 Stat. 2006; 50 U.S.C. Appx. §2166.

- 50 U.S.C. Appx. §2170, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

In addition, Section 717(c) provides that any termination of sections of the DPA “shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act” prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2014, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.<sup>147</sup>

If the DPA were to expire, there are other permanently authorized authorities that may serve as a partial substitute for the Title I priorities and allocations authority. Most prominently, Section 18 of the Selective Service Act of 1948 allows the President to place orders with any person for “articles and materials” and require that person to “give precedence” to that order above all others in the interest of national security.<sup>148</sup> However, as has been discussed in congressional testimony by executive branch officials,<sup>149</sup> this Selective Service Act authority is more limited than the DPA’s priorities and allocations authority in that it only applies to orders of materials intended for the armed forces or atomic energy programs (instead of the broad *national defense* definition of the DPA), and that it does not offer liability protection for recipients of the prioritized orders (as is offered by Section 707 of the DPA).<sup>150</sup> Additionally, through two more statutes, the President is authorized *only* in a time of war or when war is “imminent” to place priority orders for supplies necessary for the armed forces, or even assume full or partial control of factories producing such items, so long as persons are justly compensated for their loss.<sup>151</sup>

Frequently, Congress has elected to reauthorize the DPA by extending the termination date provided in Section 717 for a limited period, such as a year, without making significant amendments to the overall statute.<sup>152</sup> In other circumstances, Congress has reauthorized the law by extending the Section 717 date for several years while also amending the other provisions of the law.<sup>153</sup> In either circumstance, reauthorizations have typically been presented as discrete bills, though on occasion the DPA has been reauthorized through a provision in a larger legislative

<sup>147</sup> 50 U.S.C. Appx. §2155(a); Section 705(a) of the DPA. Thus, under current law, Section 705 authority would expire on September 30, 2016.

<sup>148</sup> 50 U.S.C. Appx. §468. The law calls for the President to consult with the defunct “National Security Resources Board” whose functions with this regard were abolished, see 50 U.S.C. Appx. §468, note.

<sup>149</sup> For example, see the testimony of Eric L. Hirschhorn, Under Secretary for Industry and Security, Department of Commerce, in U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Oversight of the Defense Production Act: Issues and Opportunities for Reauthorization*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., July 16, 2013, S. Hrg. 113-66 (Washington: GPO, 2013), pp. 8-9.

<sup>150</sup> There are many other potential differences between the DPA’s Title I authority and the Selective Service Act authority, including that the latter requires the President to notify Congressional committees and wait up to 60 days before issuing prioritized orders in excess of \$25 million.

<sup>151</sup> See both 10 U.S.C. §2538 and 50 U.S.C. §82. President George H. W. Bush delegated these authorities, and the aforementioned Selective Service Act authority, in Executive Order 12742, “National Security Industrial Responsiveness,” 56 *Federal Register* 1079, January 10, 1991. The delegations of authority are similar to those made for DPA Title I authorities in E.O. 13603. Of historical note, E.O. 12742 was released during a period of time when the DPA was not reauthorized and the nation was in the midst of the first Gulf War.

<sup>152</sup> For examples, see P.L. 110-367, P.L. 106-363, or P.L. 102-193.

<sup>153</sup> For examples, see P.L. 111-67, P.L. 108-195, or P.L. 102-558.

vehicle such as the National Defense Authorization Act.<sup>154</sup> For a chronology of all laws reauthorizing the DPA since inception, see **Table A-4**.

The laws discussed above reauthorized the DPA by explicitly amending the termination clause in Section 717.<sup>155</sup> It may also be possible to implicitly extend the DPA termination clause by appropriating funds for carrying out the provisions of the DPA that would be available after the termination date had been reached. For example, if appropriations for FY2015 were enacted which did not explicitly amend Section 717, but provided funds for activities conducted pursuant to the expiring provisions of the DPA, it is likely that this FY2015 appropriation would be read as implicitly suspending the September 30, 2014, termination date for the duration of the appropriated funds. Finding an implicit suspension would avoid creating a situation in which Congress would have made a meaningless appropriation of funds for purposes that cannot be fulfilled.<sup>156</sup> In addition to a full-year FY2015 spending law, an implicit suspension of the termination date could also arise in the context of a shorter-term continuing resolution.<sup>157</sup> However, in previous instances where a continuing resolution did not provide funds, either in the text of the resolution itself or as incorporated by reference, specifically for a program that would expire, no implicit suspension of that expiration date was found.<sup>158</sup>

The rationale for finding an implicit suspension of the termination clause appears to be strongest in scenarios where Congress appropriates funding that would not become available until after the termination date would have elapsed. For example, in the situation described in the previous paragraph, the hypothetical funding provided in a full-year FY2015 appropriation or a continuing resolution would become available at the beginning of FY2015, after the DPA provisions had sunset at the end of FY2014. The argument for implicit suspension of the termination date is not as strong where appropriations for DPA activities precede the termination date but the availability of those funds extend beyond it. For example, appropriations for DPA activities in preceding fiscal years are typically “available until expended.”<sup>159</sup> As “no-year” money, that temporal availability of those funds would theoretically extend beyond the termination date. However, GAO has previously opined that, in the case of a termination of authority, “no new obligations may be incurred after the termination date as a charge against the agency’s appropriation even if funds remain from an appropriation made available to the agency prior to the termination date.”<sup>160</sup>

<sup>154</sup> For example, the DPA was reauthorized for a year by a provision in Section 1072 of P.L. 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.

<sup>155</sup> This discussion of potential implicit suspension of the termination date due resulting from appropriations was written by Edward C. Liu and Rodney M. Perry in the American Law Division of CRS.

<sup>156</sup> 71 Comp. Gen. 378 (1992) (finding that termination of U.S. Commission on Civil Rights at the end of FY1991 was suspended by continuing resolution that appropriated funds for FY1992 under the same terms as FY1991 appropriations law which provided funds specifically for the Commission).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Consortium Venture Corp. v. U.S.*, 5 Cl. Ct. 47 (1984), *aff’d mem.*, 765 F.2d 163 (Fed. Cir. 1985).

<sup>159</sup> See, for example, P.L. 113-76, 128 Stat. 98.

<sup>160</sup> 71 Comp. Gen. at n.7. It might be argued that the second clause of Section 717(a) permits no-year funds to be used beyond the termination date by stating that “all authority extended under title III ... shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriations Acts.” This qualification first appeared in 1975, and appears to have been added in order to prevent “backdoor financing” that would not be controlled through the regular appropriations process. 121 Cong. Rec. 36616 (Nov. 14, 1975) (statement of Rep. Thomas W. L. Ashley). There is no indication in the legislative history that this clause was intended to create an exception to the termination clause that would allow Title III to continue beyond that date.

## H.R. 4809

H.R. 4809 passed the House under suspension of the rules on July 29, 2014. If enacted, Section 1 of the bill would reauthorize the expiring provisions of the DPA for five years, from September 30, 2014, to September 30, 2019. The remaining sections of the bill would reform existing provisions of the DPA.

Section 2 of the bill would make several revisions to the Defense Production Act Committee (DPAC), which was established in the Reauthorization of 2009 and is currently authorized in Section 722 of the DPA. First, Section 2 would restate the general purpose of the DPAC. Originally, the committee was created to advise the President on the effective use of the full scope of authorities of the act. The bill would instead redirect this to coordination and planning for the use of Title I priorities and allocations authority within the executive branch.<sup>161</sup> Notably, this proposed change would likely result in the abolishment of several “industrial capability assessment study groups” created under DPAC authority.<sup>162</sup> Second, Section 2 would supersede the rotating chair system for the DPAC, which was established by presidential memorandum. Under the existing procedure, the Secretary of Defense and Secretary of Homeland Security rotate annually in the DPAC chair.<sup>163</sup> Instead, the bill would direct the President to appoint as chair the “head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act.” As currently established in E.O. 13603 delegations, the Secretary of Homeland Security appears to be the most likely chair-designate, but the language of the proposed bill could allow the President to appoint another Secretary.<sup>164</sup> Third, Section 2 of the bill would require the chair to appoint a person to coordinate all committee activities. Finally, Section 2 of the bill would revise the annual reporting requirements of the DPAC to emphasize Title I priority and allocation authority and to require the report to include updated copies of Title I-related rules.

Section 3 of the bill accentuates the Title I rulemaking requirement first directed in the Reauthorization of 2009 by requiring delegated agencies with Title I authority to issue and annually review their final rules. Of the six departments to which the President delegated Title I authority, only three (Commerce, Energy, and Transportation) had issued final rules as of June 10, 2014. The Departments of Agriculture, Defense, and Health and Human Services have not yet completed final rules.<sup>165</sup>

<sup>161</sup> For more on the DPAC, see the section entitled “Defense Production Act Committee” of the report.

<sup>162</sup> For more on these study groups, see the DPAC website at <http://www.acq.osd.mil/mibp/dpac.html>.

<sup>163</sup> See Presidential Documents, “Designating the Chairperson of the Defense Production Act,” 75 *Federal Register* 32087, June 7, 2010.

<sup>164</sup> See Section 104(b)(2) of E.O. 13603, which includes as one of the responsibilities of the Secretary of Homeland Security to “provide for the central coordination of the plans and programs incident to authorities and functions delegated under this order ...”

<sup>165</sup> For more on this rulemaking requirement, see the section entitled “How Priorities and Allocations Changed in the Reauthorization of 2009 and E.O. 13603” of the report. The Department of Agriculture has a proposed rulemaking that has not been finalized, see Department of Agriculture, “Agriculture Priorities and Allocations System,” 76 *Federal Register* 29084, May 19, 2011. The Department of Energy issued a final rule codified in 10 C.F.R. Part 217, see Department of Energy, “Energy Priorities and Allocations System Regulations,” 75 *Federal Register* 41405, July 16, 2010. The Department of Transportation issued a final rule codified in 49 C.F.R. Part 33, see Department of Transportation, “Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act,” 77 *Federal Register* 59793, October 1, 2012. The Administration has reported that new rules are being prepared by the Department of Agriculture and the Department of Health and Human Services, but did not mention the development of a rule by the Department of Defense. See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, March 31, 2013, p. 4.

Section 4 of the bill would revise the Title III, Section 303 authority of the DPA.<sup>166</sup> First, Section 4(a) of the bill would require the President, on a non-delegable basis, to provide written explanatory materials on how actions taken under Section 303 would meet several presidential determinations required by law (that the actions are essential to the national defense and that sufficient commercial production and supply of the good would otherwise not be available). Current law allows these determinations to be delegated beyond the President. In recent practice, the Under Secretary of Defense for Acquisition, Technology, and Logistics has been responsible for making these determinations and for submitting signed explanatory materials to the committees of jurisdiction.<sup>167</sup> Section 4(a) would also reinstate two provisions, with minor revisions, that were removed from the law in the Reauthorization of 2009. In addition to the existing conditions in Section 303(a)(5) of the DPA that must be determined to be met before using Section 303 authorities, the President would be required to determine that the actions taken are “the most cost effective, expedient, and practical alternative method for meeting the need.”<sup>168</sup>

Further, Section 4(a) of the bill would reinstate another deleted provision. That provision required that, should the aggregate cost of planned actions taken to address an industrial base shortfall under Section 303 exceed \$50 million, those actions must first be authorized by an act of Congress. This monetary limitation on action was removed from law in the Reauthorization of 2009 and replaced with a general notification to the committees of jurisdiction for projects estimated to cost more than \$50 million.<sup>169</sup> The proposed revision would require the President to both notify the committees of jurisdiction and obtain authorization in an act of Congress before taking actions in excess of \$50 million to address a manufacturing capacity or supply shortfall.

Section 4(b) of the bill would retroactively exempt any existing Title III project (i.e., one that has already been determined to meet requirements of the law) from the requirements of the proposed Section 4(a). In other words, if actions to address a shortfall for any existing project do not exceed \$50 million currently, but ultimately do so in the future, that project would not require direct authorization from Congress.

In their totality, the revisions made by Section 4 of the bill, if enacted, may partially limit exiting Section 303 authority. For example, if the bill is enacted as currently written, Congress would be able to refuse authorization to new Title III projects and actions that would push the aggregate cost above the \$50 million threshold. However, the President would retain the ability to waive these requirements in periods of national emergency or if the actions are necessary to avert a shortfall that would severely impair national defense capability.<sup>170</sup>

---

<sup>166</sup> For more on this authority, see the section entitled “Purchase, Purchase Commitments, and Installation of Equipment” of the report.

<sup>167</sup> The Under Secretary of Defense for Acquisition, Technology, and Logistics is delegated this responsibility by the Secretary of Defense in DOD Directive 4400.01E, Defense Production Act Programs, September 14, 2007, at <http://www.dtic.mil/whs/directives/corres/pdf/440001p.pdf>.

<sup>168</sup> This requirement previously existed in law at Section 303(a)(5)(C) of the DPA, the former 50 U.S.C. Appx. §2093(a)(5)(C) [2006 edition].

<sup>169</sup> This limitation previously existed in law at Section 303(a)(6)(C) of the DPA, the former 50 U.S.C. Appx. §2093(a)(6)(C) [2006 edition]. Generally, few Title III projects exceed the \$50 million threshold, and current projects average about \$20.7 million per contract. An example of a past authorization made by Congress for Title III actions exceeding \$50 million, to correct a shortfall for high-purity beryllium metal, can be found in §842 of P.L. 111-84, the National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2418.

<sup>170</sup> See §303(a)(7) of the DPA, 50 U.S.C. Appx. §2093(a)(7).



Section 5 of the bill would revise the existing “such sums as necessary” authorization of appropriations found in Section 711 of Title VII of the DPA.<sup>171</sup> Instead, the bill would authorize the appropriation of \$133 million per fiscal year, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act. Past appropriations to the DPA Fund are listed in **Table 1**, which shows that the annual average direct appropriation to the DPA Fund between FY2010 and FY2014 was \$127.7 million,<sup>172</sup> with a high of \$223.5 million in FY2013 and a low of \$34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended.

## Considerations for Amending the Defense Production Act of 1950

In conjunction with or separate from a reauthorization bill, Congress could amend the DPA in order to extend, expand, restrict, or otherwise clarify the powers granted to the President in the DPA. For example, Congress could eliminate certain authorities altogether, such as the Section 710(e) authority underpinning the National Defense Executive Reserve. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense.<sup>173</sup> In addition to addressing the specific authorities granted in Title I, Title III, and Title VII of the DPA, Congress may also consider other amendments to the DPA.

### Declaration of Policy

The “Declaration of Policy” in the DPA describes the general intentions of the authorities it confers to the President. One option for Congress is to amend this section of the statute in order to expand, restrict, or clarify the overall purpose of the authorities. For instance, Congress could include further discussion on the specific circumstances under which it finds DPA authorities are appropriate for use by the President. Though this section serves as a guide for the overall use of DPA authorities, changes to the Declaration of Policy may not fully endow or deny the President’s authorities covered in the titles of the DPA without also amending the DPA’s other provisions.

Rather than passing legislation to amend the text of the DPA, Congress could adopt a resolution clarifying the purpose of the DPA authorities. For example, one such resolution introduced in the 112<sup>th</sup> Congress, H.Con.Res. 110, states that it is the “Sense of Congress” that the DPA should not be used to “confiscate personal or private property, to force conscription into the Armed Forces on the American people, to force civilians to engage in labor against their will or without compensation, or to force private businesses to relinquish goods or services without

---

<sup>171</sup> 50 U.S.C. Appx §2161.

<sup>172</sup> This average figure increases by \$9 million to \$136.72 if one includes the \$45 million authorized transfer from the overall appropriation of \$1,912 million for the Department of Energy’s Energy Efficiency and Renewable Energy account in FY2014.

<sup>173</sup> For example, Congress may consider creating new authorities to address specific concerns relating to production and security of cyber-related infrastructure and assets necessary for the national defense. The Homeland Security Studies and Analysis Institute has suggested that DPA authorities, especially Section 303 authorities, might be helpful in addressing cybersecurity threats, though the legality of such action remains unknown. See Homeland Security Studies and Analysis Institute, *An Analysis of the Primary Authorities Supporting and Governing the Efforts of the Department of Homeland Security to Secure the Cyberspace of the United States*, Arlington, VA, May 24, 2011, p. 28, at <http://www.homelandsecurity.org/docs/reports/MHF-and-EG-Analysis-of-authorities-supporting-efforts-of-DHS-to-secure-cyberspace-2011.pdf>.

compensation.” However, “Sense of Congress” resolutions of this nature do not carry the force of law.<sup>174</sup>

## Definitions

Congress may wish to amend the definitions of key terms found in the DPA to shape the scope and use of the authorities, especially the definition of *national defense*. As an example, Congress could amend the definition of national defense to remove *space* from the definition, and as a result the President may be less able to use DPA authorities to support space-related projects.<sup>175</sup> On the other hand, for example, Congress could amend the definition of *national defense* to specifically include counter-narcotics, cybersecurity, or organized crime. Doing so would more explicitly enable the use of DPA authorities to address these homeland security and national defense concerns.

## Appropriations to the DPA Fund

Congress could increase or reduce future appropriations to the DPA Fund to manage the scope of Title III projects initiated by the President (see **Table 1** for appropriations to the DPA Fund since FY2010). Use of the DPA Fund, however, is specific to Title III. Therefore, adjusting appropriations to the DPA Fund is unlikely to have an effect on the President’s ability to exercise his authorities under the other titles of the DPA, unless Congress writes specific language in the appropriations statute changing the nature of the Fund itself or authorizing its use beyond a specific title. Within the scope of a reauthorization bill, Congress may wish to reintroduce of a separate provision in Section 711 of the DPA authorizing only certain appropriation amounts over a given time period for Title III or other DPA authorities.<sup>176</sup> Likewise, Congress may wish to direct the usage of such funds more specifically, such as has been done recently in relation to advanced drop-in biofuels.<sup>177</sup>

## Considerations for Oversight of Ongoing DPA Activities

### Expand Reporting or Notification Requirements

Congress might be satisfied with the existing scope and use of DPA authorities by the President, but may wish to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities in certain circumstances. For example, Congress may wish for the President to notify Congress (or the committees of jurisdiction) when the priorities and allocations authority is used on a contract over a certain dollar amount. Congress might also consider expanding the existing reporting requirements of Defense Production Act Committee (DPAC), to include semi-annual updates on the recent use of authorities or explanations about controversial determinations. Thus far, the

<sup>174</sup> For more on this issue, see CRS Report 98-825, “Sense of Resolutions and Provisions, by Christopher M. Davis.

<sup>175</sup> For the definition of national defense, see 50 U.S.C. Appx. §2152(14); Section 702(14) of the DPA.

<sup>176</sup> For example, appropriations for Title I could be authorized for only one year, but for Title III for five, and vice versa. See the “Authorization of Appropriations” section of this report for more.

<sup>177</sup> Section 315, P.L. 112-239, National Defense Authorization Act for Fiscal Year 2013. For more on this topic, see CRS Report R42859, *DOD Alternative Fuels: Policy, Initiatives and Legislative Activity*.

DPAC has failed to regularly submit an annual report on time to the committees of jurisdiction, which may be limiting the ability of Congress to oversee the use of the DPA.

Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees. Additionally, Congress may consider reestablishing a select committee with a similar purpose as the Joint Committee on Defense Production that was repealed in 1992 by Congress.<sup>178</sup>

### **Rulemaking Requirements**

In the Reauthorization of 2009, Congress required agencies with delegated priorities and allocations authority under Title I of the DPA to issue final rules creating standards and procedures for the use of the authority. Similarly, a rulemaking requirement exists for the voluntary agreement authority in Title VII.<sup>179</sup> Congress may wish to review the compliance with these existing rulemaking requirements, and potentially expand them for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities.

### **Amend Authority Delegations**

Congress may consider limiting the use of certain DPA authorities to specific departments and agencies. To do so, Congress could amend the President's delegation of DPA authorities, superseding those made in E.O. 13603, by amending the statute to assign specific authorities to individual Cabinet Secretaries as opposed to the President. Further, Congress could expand the use of the legislative clause "on a nondelegable basis" to ensure that the authority is not delegated beyond the person identified in the statute.<sup>180</sup> In considering these options, Congress may determine that the use of some authorities by certain agencies is appropriate and necessary for the national defense, but not for others.

---

<sup>178</sup> P.L. 102-558, 106 Stat. 4219. This committee was intended to review the programs established by the DPA, and advise the standing committees in their legislation on the subject.

<sup>179</sup> 50 U.S.C. Appx. §2158(e); Section 708(e) of the DPA. This rule is established in 44 C.F.R. Part 332.

<sup>180</sup> For an example of this clause, see 50 U.S.C. Appx. §2158(c)(3); Section 708(c)(3) of the DPA.

## Appendix. Additional Resources and Summary Tables

There are many government-sponsored websites, reports, and guides that discuss various aspects of the Defense Production Act in depth that may be of interest to Congress. **Table A-1** provides a list of some of these resources.

**Table A-1. Additional Resources by Defense Production Act Subject**

DPA Subject	Additional Resources
<b>General Information on DPA Authorities</b>	<p>DPAC website at <a href="http://www.acq.osd.mil/mibp/dpac.html">http://www.acq.osd.mil/mibp/dpac.html</a>.</p> <p>FEMA website on the DPA at <a href="http://www.fema.gov/defense-production-act-program-division">http://www.fema.gov/defense-production-act-program-division</a>.</p> <p>U.S. Government Accountability Office, <i>Defense Production Act: Agencies Lack Policies and Guidance for Use of Key Authorities</i>, GAO-08-854, June 2008, at <a href="http://www.gao.gov/products/GAO-08-854">http://www.gao.gov/products/GAO-08-854</a>.</p> <p>The National Infrastructure Advisory Council, <i>Framework for Dealing with Disasters and Related Interdependencies: Final Report and Recommendations</i>, Appendix G: The Defense Production Act, Washington, DC, July 14, 2009, pp. 40-49, at <a href="http://www.dhs.gov/xlibrary/assets/niac/niac_framework_dealing_with_disasters.pdf">http://www.dhs.gov/xlibrary/assets/niac/niac_framework_dealing_with_disasters.pdf</a>.</p>
<b>Title I: Priorities and Allocations</b>	<p>Department of Commerce "Defense Priorities and Allocations System" website at <a href="http://www.bis.doc.gov/dpas/default.htm">http://www.bis.doc.gov/dpas/default.htm</a>.</p> <p>Department of Defense, <i>Priorities and Allocations Manual</i>, 4400.1-M, Washington, DC, February 21, 2002, at <a href="http://www.acq.osd.mil/mibp/docs/44001m.pdf">http://www.acq.osd.mil/mibp/docs/44001m.pdf</a>.</p>
<b>Title III: Authorities and Projects</b>	<p>Website with listing and description of Title III projects at <a href="http://www.dpatitle3.com/dpa_db/">http://www.dpatitle3.com/dpa_db/</a>.</p> <p>A 2012 brochure produced by the Department of Defense on Title III projects at <a href="http://dpatitle3.com/Title_III%202012%20Brochure.pdf">http://dpatitle3.com/Title_III%202012%20Brochure.pdf</a>.</p>
<b>Committee on Foreign Investment in the United States (CFIUS)</b>	<p>Department of Treasury CFIUS website at <a href="http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx">http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx</a>.</p> <p>CRS Report RL33388, <i>The Committee on Foreign Investment in the United States (CFIUS)</i>, by James K. Jackson.</p>
<b>Impact of Offsets in Defense Trade</b>	<p>Department of Commerce website on offsets at <a href="http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/offsets/default.htm">http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/offsets/default.htm</a>.</p>

Source: CRS.

**Table A-2. Substantive Provisions of the Defense Production Act,  
Related Portions of Executive Order 13603, and Associated Regulations**

<b>Authority and DPA Statute</b>	<b>Related Portions of Executive Order 13603<sup>a</sup></b>	<b>Regulations or Guiding Documents</b>	<b>Summary of How the Authority Changed in the Reauthorization of 2009</b>	<b>Example of Use of Authority</b>
<b>Declaration of Policy;</b> Section 2 of the DPA, 50 U.S.C. Appx. §2062	Sections 101, 102, and 103	Not applicable	Expanded the "Statement of Policy" to specifically advocate the use of the DPA in domestic preparedness and responses to terrorist attacks and natural hazards.	Not applicable
<b>Priorities and Allocations;</b> Title I of the DPA, 50 U.S.C. Appx. §2071	Part II	10 C.F.R. Part 217, 15 C.F.R. Part 700 and 49 C.F.R. Part 33. More regulations are being proposed under the Reauthorization of 2009. <sup>b</sup>	Required a rulemaking by all federal departments and agencies delegated Title I authorities within 270 days of enactment.	Priority contracts have been issued to support the Integrated Ballistic Missile Defense System. <sup>c</sup>
<b>Loan Guarantees;</b> Section 301 and 302 of Title III of the DPA, 50 U.S.C. Appx. §§2091 and 2092	Part III	Not applicable	Updated authorities to comply with the Federal Credit Reform Act by mandating that loans and loan guarantees are appropriated by Congress before issuance.  Amended the factors for determining if a guarantee or loan is needed for national defense.  Limited the authority of the President to waive requirements on how the guarantees and loans can be used and issued.	According to the DPAC, none in recent history.
<b>Purchases, Purchase Commitments, and Installation of Equipment;</b> Section 303 of Title III of the DPA, 50 U.S.C. Appx. §2093	Part III	Not applicable	Expanded some Section 303 authorities and amended the notification and determination requirements prior to use of authorities.	"Lithium Ion Space Battery Production Initiative," which involved remodeling a facility and the purchase and installation of equipment to create "a viable domestic source of spacecraft-quality rechargeable Lithium Ion (Li Ion) cells and the critical materials required to produce these cells." <sup>d</sup>

Authority and DPA Statute	Related Portions of Executive Order 13603 <sup>a</sup>	Regulations or Guiding Documents	Summary of How the Authority Changed in the Reauthorization of 2009	Example of Use of Authority
Definitions; Section 702 of the DPA, 50 U.S.C. Appx. §2152	Section 802	Not applicable	<p>Amended the definitions: "national defense," "critical component," "critical technology," "domestic industrial base," "industrial resources," and "services."</p> <p>Revoked the definitions "critical industry for national security," "essential weapon system," and "small business concern owned and controlled by socially and economically disadvantaged individuals."</p> <p>Added the definitions "guaranteeing agency" and "homeland security."</p>	Not applicable
Voluntary Agreements; Section 708 of the DPA, 50 U.S.C. Appx. §2158	Part IV	44 C.F.R. Part 332	<p>Created an exemption from some prerequisites to establish a voluntary agreement when the President determines a voluntary agreement is needed to meet national defense requirements following a disaster that destroys or degrades critical infrastructure.<sup>e</sup></p> <p>Extended the term of voluntary agreements from 2 to 5 years before they need to be renewed.</p>	Voluntary Intermodal Sealift Agreement (VISA) managed by the Maritime Administration in the U.S. Department of Transportation. <sup>f</sup>
National Defense Executive Reserve (NDER); Section 710 of the DPA, 50 U.S.C. Appx. §2160	Part V	Interim Guidance for the NDER Program <sup>g</sup>	Removed a provision that allowed the President to grant some exemptions to criminal statutes to participants in the NDER.	Not applicable
Committee on Foreign Investment in the United States (CFIUS); Section 721 of the DPA, 50 U.S.C. Appx. §2170	Executive Order 11858: Foreign Investment in the United States, as amended.	31 C.F.R. Part 800, as amended	No changes were made.	See CRS Report RL33388, <i>The Committee on Foreign Investment in the United States (CFIUS)</i> , by James K. Jackson.

Authority and DPA Statute	Related Portions of Executive Order 13603 <sup>a</sup>	Regulations or Guiding Documents	Summary of How the Authority Changed in the Reauthorization of 2009	Example of Use of Authority
<b>Defense Production Act Committee (DPAC);</b> Section 722 of the DPA, 50 U.S.C. Appx. §2171	Part VII	Presidential Memorandum Designating the Chairperson of the Committee; Charter of the DPAC; MOU between DHS and DOD on their shared responsibilities to support the DPAC. <sup>h</sup>	The DPAC is a new federal government interagency body established by the Reauthorization of 2009.	The DPAC has established four different "study groups" to assess industrial capabilities necessary for the national defense, and another study group to develop recommendations for improving the DPA via legislation or regulation. <sup>i</sup>

**Source:** CRS analysis of E.O. 13603 and 50 U.S.C. Appx. §2061 et seq. and information from available resources.

Notes:

- a. Unless otherwise noted, provisions cited are found in E.O. 13603.
- b. See footnote 46 for additional information.
- c. For more examples, see Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Washington, DC, August 2011, p. 8.
- d. See specifically [http://www.dpatitle3.com/dpa\\_db/project.php?id=67](http://www.dpatitle3.com/dpa_db/project.php?id=67). For a current list of all DPA Title III projects, see [http://www.dpatitle3.com/dpa\\_db/](http://www.dpatitle3.com/dpa_db/).
- e. 50 U.S.C. Appx. §2158(c)(3); Section 708(c)(3) of the DPA.
- f. For more, see approval of the VISA program in the *Federal Register* at Maritime Administration, "Voluntary Intermodal Sealift Agreement," 75 *Federal Register* 14245, March 24, 2010. See also [http://www.marad.dot.gov/ships\\_shipping\\_landing\\_page/national\\_security/vol\\_intermodal\\_sealift\\_agreement/vol\\_intermodal\\_sealift\\_agreement.htm](http://www.marad.dot.gov/ships_shipping_landing_page/national_security/vol_intermodal_sealift_agreement/vol_intermodal_sealift_agreement.htm).
- g. Federal Emergency Management Agency, *The National Defense Executive Reserve: Policies and Procedures Manual*, Washington, DC, June 20, 2007, at <http://www.fema.gov/library/viewRecord.do?id=3606>.
- h. These documents are available for download at <http://www.acq.osd.mil/mibp/resources.html>.
- i. See <http://www.acq.osd.mil/mibp/dpac.html>. Part of the policy of the United States, as provided in Section 2(b)(1) of the DPA, is to "continuously assess the capability of the domestic industrial base to satisfy production requirements under both peacetime and emergency conditions, specifically evaluating the availability of adequate production sources, including subcontractors and suppliers, materials, skilled labor, and professional and technical personnel."

**Table A-3. Delegation of Priorities and Allocations Authorities to Cabinet Secretaries**

Cabinet Secretary	Delegated Area of Authority in E.O. 13603 <sup>a</sup>	Definitions in E.O. 13603 <sup>b</sup>
Secretary of Agriculture	Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer	<p>“Farm equipment” means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.</p> <p>“Fertilizer” means any product or combination of products that contain one or more of the elements nitrogen, phosphorus, and potassium for use as a plant nutrient.</p> <p>“Food resources” means all commodities and products (simple, mixed, or compound), or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. “Food resources” also means potable water packaged in commercially marketable containers, all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.</p> <p>“Food resource facilities” means plants, machinery, vehicles (including on farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).</p>
Secretary of Energy	All forms of energy	<p>“Energy” means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquefaction, and coal gasification), solar, wind, other types of renewable energy, atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.</p>
Secretary of Health and Human Services	Health resources	<p>“Health resources” means drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.</p>
Secretary of Transportation	All forms of civil transportation	<p>“Civil transportation” includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. “Civil transportation” also shall include direction, control, and coordination of civil transportation capacity regardless of ownership. “Civil transportation” shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly.</p>
Secretary of Defense	Water resources	<p>“Water resources” means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements, except “water resources” does not include usable water that qualifies as “food resources.”</p>



---

Cabinet Secretary	Delegated Area of Authority in E.O. 13603 <sup>a</sup>	Definitions in E.O. 13603 <sup>b</sup>
Secretary of Commerce	All other materials, services, and facilities, including construction materials	Materials, services, and facilities are all defined in statute; see 50 U.S.C. Appx. §§2152(13), (16), and (8), respectively.

---

**Source:** CRS analysis of E.O. 13603 and 50 U.S.C. Appx. §§2061 et seq.

**Notes:**

- a. See Section 201(a)(1) to (6) of E.O. 13603.
- b. These definitions are found in Section 802 of E.O. 13603.

**Table A-4. Chronology of Laws Reauthorizing the Defense Production Act of 1950**

<b>Public Law and Statutes at Large Citation, and Date of Approval</b>	<b>General Expiration Date<sup>a</sup></b>
P.L. 81-774, 64 Stat. 798, September 8, 1950	June 30, 1951
P.L. 82-69, 65 Stat. 110, June 30, 1951	July 31, 1951
P.L. 82-96, 65 Stat. 131, July 31, 1951	June 30, 1952
P.L. 82-429, 66 Stat. 296, June 30, 1952	June 30, 1953
P.L. 83-95, 67 Stat. 129, June 30, 1953 <sup>b</sup>	June 30, 1955 <sup>b</sup>
P.L. 84-119, 69 Stat. 225, June 30, 1955	July 31, 1955
P.L. 84-295, 69 Stat. 580, August 9, 1955	June 30, 1956
P.L. 84-632, 70 Stat. 408, June 29, 1956	June 30, 1958
P.L. 85-471, 72 Stat. 241, June 28, 1958	June 30, 1960
P.L. 86-560, 74 Stat. 282, June 30, 1960	June 30, 1962
P.L. 87-505, 76 Stat. 112, June 28, 1962	June 30, 1964
P.L. 88-343, 78 Stat. 235, June 30, 1964	June 30, 1966
P.L. 89-482, 80 Stat. 235, June 30, 1966	June 30, 1968
P.L. 90-370, 82 Stat. 279, July 1, 1968	June 30, 1970
P.L. 91-300, 84 Stat. 367, June 30, 1970	July 30, 1970
P.L. 91-371, 84 Stat. 694, August 1, 1970	August 15, 1970
P.L. 91-379, 84 Stat. 796, August 15, 1970	June 30, 1972
P.L. 92-325, 86 Stat. 390, June 30, 1972	June 30, 1974
P.L. 93-323, 88 Stat. 280, June 30, 1974	July 30, 1974
P.L. 93-367, 88 Stat. 419, August 7, 1974	September 30, 1974
P.L. 93-426, 88 Stat. 1166, September 30, 1974	June 30, 1975
P.L. 94-42, 89 Stat. 232, June 28, 1975	September 30, 1975
P.L. 94-100, 89 Stat. 483, October 1, 1975	November 30, 1975
P.L. 94-152, 89 Stat. 810, December 16, 1975	September 30, 1977
P.L. 95-37, 91 Stat. 178, June 1, 1977	September 30, 1979
P.L. 96-77, 93 Stat. 588, September 29, 1979	January 28, 1980
P.L. 96-188, 94 Stat. 3, January 28, 1980	March 28, 1980
P.L. 96-225, 94 Stat. 310, April 3, 1980	May 27, 1980
P.L. 96-250, 94 Stat. 371, May 26, 1980	August 27, 1980
P.L. 96-294, 94 Stat. 611, June 30, 1980	September 30, 1981
P.L. 97-47, 95 Stat. 954, September 30, 1981	September 30, 1982
P.L. 97-336, 96 Stat. 1630, October 15, 1982	March 31, 1983
P.L. 98-12, 97 Stat. 53, March 29, 1983	September 30, 1983
P.L. 98-181, 97 Stat. 1267, November 30, 1983	March 30, 1984
P.L. 98-265, 98 Stat. 149, April 17, 1984	September 30, 1986
P.L. 99-441, 100 Stat. 1117, October 3, 1986	September 30, 1989

Public Law and Statutes at Large Citation, and Date of Approval	General Expiration Date <sup>a</sup>
P.L. 101-137, 103 Stat. 824, November 3, 1989	August 10, 1990
P.L. 101-351, 104 Stat. 404, August 9, 1990	September 30, 1990
P.L. 101-407, 104 Stat. 882, October 4, 1990	October 5, 1990
P.L. 101-411, 104 Stat. 893, October 6, 1990	October 20, 1990
P.L. 102-99, 105 Stat. 487, August 17, 1991	September 30, 1991
P.L. 102-193, 105 Stat. 1593, December 6, 1991	March 1, 1992
P.L. 102-558, 106 Stat. 4198, October 28, 1992	September 30, 1995
P.L. 104-64, 109 Stat. 689, December 18, 1995	September 30, 1998
P.L. 105-261, 112 Stat. 2137, October 17, 1998	September 30, 1999
P.L. 106-65, 113 Stat. 769, October 5, 1999	September 30, 2000
P.L. 106-363, 114 Stat. 1407, October 27, 2000	September 30, 2001
P.L. 107-47, 115 Stat. 260, October 5, 2001	September 30, 2003
P.L. 108-195, 117 Stat. 2892, December 17, 2003	September 30, 2008
P.L. 110-367, 122 Stat. 4026, October 8, 2008	September 30, 2009
P.L. 111-67, 123 Stat. 2006, September 30, 2009	September 30, 2014

**Source:** CRS.

**Notes:** This table does not include all laws that amended the DPA, only those that altered the termination date of the act, currently codified at 50 U.S.C Appx. §2166, Section 717 of the DPA.

- a. Not all provisions of the DPA may have expired on each given date, as the law has frequently offered an evolving set of exceptions to the termination of DPA authorities. For example, as discussed in the "Reauthorization of the DPA" section of this report, currently the majority of DPA authorities will terminate on September 30, 2014, with the exception of four sections.
- b. P.L. 83-95 permitted the termination of Titles 2 and 6 as of June 30, 1953, and Titles IV and V to terminate as of April 30, 1953.
- c. The termination of authorization from October 20, 1990, to August 17, 1991, is the longest period on record since inception. However, in Section 7 of P.L. 102-99, Congress set the effective date of the passage to October 20, 1990, thus technically authorizing the DPA through this time period.

## Author Information

Jared T. Brown  
Analyst in Emergency Management and Homeland  
Security Policy

Daniel H. Else  
Specialist in National Defense

---

## **Disclaimer**

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.



# The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations

Updated March 18, 2020

As the coronavirus (COVID-19) pandemic evolves, the United States faces [drug](#) and [medical supply](#) scarcities due to disrupted [supply chains](#) and increased demand. In response, the President may exercise emergency authorities under the Defense Production Act of 1950 (DPA; [50 U.S.C. §§4501 et seq.](#)) to address supply shortages and economic development impacts. During a [press conference](#) on March 18, 2020, the President indicated that he would invoke the DPA to address domestic [essential goods and materials shortages](#) caused by the pandemic. This Insight considers the various DPA authorities that may be used going forward and explores potential policy considerations for Congress.

For more information on the health and epidemiological aspects of COVID-19, see CRS Report R46219, *Overview of U.S. Domestic Response to Coronavirus Disease 2019 (COVID-19)* and CRS In Focus IF11421, *COVID-19: Global Implications and Responses*.

## DPA Provisions and Recent Use

The DPA confers broad presidential authorities to mobilize domestic industry in service of the *national defense*, defined in statute as various military activities and “homeland security, stockpiling, space, and any directly related activity” ([50 U.S.C. §4552](#)) including emergency preparedness activities under the Stafford Act, which has been used for public health emergencies. Many of these authorities are delegated to executive agencies under [Executive Order 13603](#).

Current DPA authorities include, but are not limited to:

- **Title I: Priorities and Allocations**, which allows the President to require persons (including businesses and corporations) to (1) prioritize and accept government contracts for materials and services, and (2) allocate or control the general distribution of materials, services, and facilities as necessary to promote the national defense. Title I prioritization authorities are regularly utilized by the [Department of Defense](#) (DOD) to acquire critical

Congressional Research Service

<https://crsreports.congress.gov>

IN11231

military capabilities and less frequently by the Department of Homeland Security (DHS) for disaster response and preparedness needs. The allocations authority has not been invoked since the Cold War, such as to promote energy development in 1974.

- **Title III: Expansion of Productive Capacity and Supply**, which allows the President to provide economic incentives to secure domestic industrial capabilities essential to meet national defense and homeland security requirements. DPA Title III is specifically intended to “create, maintain, protect, expand, or restore domestic industrial base capabilities” (50 U.S.C. §4533). Authorized incentives include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities. DOD regularly utilizes Title III authorities and operates a standing DPA Title III program funded by annual congressional appropriations.
- **Title VII: General Provisions**, which includes key definitions and other distinct authorities. These provisions grant 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.

For a more in-depth discussion of DPA authorities, see CRS Report R43767, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*.

## DPA Authorities and COVID-19

As the DPA’s definition of national defense encompasses homeland security issues, DPA authorities extend to public health emergencies—prior to the COVID-19 pandemic, however, they had not been employed for such purposes. Following the invocation of DPA by the President, DPA authorities could be employed to address concerns over medical supplies shortages due to the COVID-19 pandemic.

### Case Study: Using DPA to Expand Medical Protective Gear Production

As an example of how DPA authorities may be exercised, consider the availability of personal protective equipment (PPE), such as respirator masks, amid the pandemic. Reported PPE shortages may be due to significantly increased consumer demand related to the pandemic itself, and supply chain disruptions resulting from containment measures in China and elsewhere.

Under Title I, the President could prioritize domestic production of PPE to ensure sufficient national stockpiles, and allocate them according to the needs of the emergency. Under Title III, the federal government could use authorized incentives to expand domestic capacity for PPE manufacturing to meet the needs of the emergency. Under Title VII, the President could establish voluntary agreements with private industry—which might normally be subject to anti-trust statutes—to coordinate industry PPE production.

### Policy Implications for Congress

Numerous Members of Congress have engaged the Administration to advocate for the use of DPA to secure an adequate supply of essential supplies and materials, such as PPE, medical supplies and devices (e.g., ventilators), and diagnostic testing supplies.

The President [declared](#) a national emergency on March 13, 2020. Following the invocation of DPA by the President on March 18, 2020, in addition to Congress's inherent oversight authority, the DPA statute outlines several specific congressional equities:

1. Title I authorities can only be used for wage and price controls if accompanied by a joint resolution of Congress ([50 U.S.C. §4514](#)). This could be applicable, in this case, in the production and sale of PPE, drug treatments or vaccines, or other necessary goods; it would require coordination between the Administration and Congress.
2. Budget authority for Title III direct loans and guarantees must be specifically included in an appropriations act passed by Congress ([50 U.S.C. §4531](#)).
3. Title III projects that cumulatively cost more than \$50 million must be authorized by an act of Congress; the President is required to notify the committees of jurisdiction (the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs), and to provide 30 days for comment ([50 U.S.C. §4533](#)). A large-scale effort to expand outbreak-related production capacity may require sums far greater than \$50 million.

The DPA also confers broad waivers to its Title III requirements:

During a period of national emergency declared by Congress or the President; or upon determination by the President, on a nondelegable basis, that action is necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability. ([50 U.S.C. §4531\(d\)\(1\)\(B\)](#))

Another area of possible congressional interest is DPA funding, which is appropriated annually. The FY2020 appropriation to the DPA fund was \$64.4 million; the [President's FY2021 budget](#) requested \$182 million for the DPA fund (p. 276). DPA appropriations could also be made as part of a supplemental appropriations package, if the DPA fund is exhausted, and/or to provide resources for other DPA authorities.

## Author Information

Michael H. Cecire  
Analyst in Intergovernmental Relations and Economic  
Development Policy

Heidi M. Peters  
Analyst in U.S. Defense Acquisition Policy

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However,

as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.





# COVID-19: Industrial Mobilization and Defense Production Act (DPA) Implementation

March 25, 2020

On March 18, President Trump issued [Executive Order 13909](#), *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, which announced the President's invocation of the [Defense Production Act of 1950](#) (DPA) in response to the COVID-19 pandemic. The administration [has yet to publicly provide direction](#) to the private sector under this authority.

This Insight considers possible future DPA implementation processes, industrial mobilization, and congressional considerations concerning the COVID-19 pandemic, and is a companion to CRS Insight [IN11231](#). See CRS Report [R43767](#) for a more in-depth discussion of DPA history and authorities. For additional related resources, see the CRS Coronavirus Disease 2019 homepage.

## Overview of DPA Powers in EO 13909

Executive Order 13909 (E.O. 13909), issued on March 18, 2020, in response to reported [critical shortages of medical equipment and supplies](#), is organized into three sections:

- Section 1, *Policy and Findings*, announces the invocation of DPA authorities on the basis of the national security risk posed by the COVID-19 pandemic with the finding that current resources are insufficient to the task without the emergency authorities provided by the DPA.
- Section 2, *Priorities and Allocation of Medical Resources*, activates DPA Title I prioritization and allocation authorities, and provides for the Secretary of Health and Human Services (HHS), in consultation with the Secretary of Commerce and other executive agency heads, to exercise their use and issue additional guidelines and regulations as needed.
- Section 3, *General Provisions*, includes general provisions applicable to carrying out the executive order.

**Congressional Research Service**

<https://crsreports.congress.gov>

IN11280

The activation of DPA Title I prioritization and allocation authorities by E.O. 13909 represents the first time in the modern era that the DPA has been invoked and activated for the purposes of national industrial mobilization in response to a domestic threat (the COVID-19 pandemic).

## Executing DPA Authorities in E.O. 13909

The DPA provides the chief executive with various emergency powers that may be made available if invoked, but it is generally silent on the means by which those powers may be activated and implemented.

E.O. 13909 expresses the President's determination to invoke DPA emergency powers, and provides a general framework by which the relevant authorities may be activated and implemented. However, the executive order does not prescribe how those powers may be exercised, organized, or measured. Although the President may publicize his intentions with regard to DPA invocations in an executive order, he is not obligated to do so. For example, in July 2019, a [Presidential Determination was issued](#) in a memorandum to the Secretary of Defense invoking DPA Title III to expand productive capacity of rare earth metals.

Although invoking DPA authorities makes those powers available to the President, they are not necessarily exercised except at the chief executive's discretion. To this end, E.O. 13909 provides for the HHS Secretary to determine appropriate measures to making use of the prioritization and allocation authorities. The delegation of authority to the HHS Secretary is consistent with [E.O. 13603](#), *National Defense Resources Preparedness*, in which HHS is delegated Title I authorities with respect to health resources.

Implementation of DPA Title I authorities is governed by the [Federal Priorities and Allocations System](#) (FPAS), which is a body of [five regulations](#) that establishes standards and procedures for five executive agencies' separate resource jurisdictions as delegated in E.O. 13603 (the Department of Defense, the sixth agency, only manages priority and allocations orders related to water resources). Accordingly, HHS [Health Resources Priority and Allocations System](#) (HRPAS) frames implementation of Title I authorities with respect to health resources. However, E.O. 13909 does not direct the immediate use of HRPAS, nor does it provide a process to inform its employment.

## Policy Considerations for Industrial Mobilization

The decision to invoke, activate, and implement DPA authorities—and how that process occurs—is at the President's discretion. Even after invoking and activating DPA authorities, the [President may ultimately choose not to implement](#) them, or to do so piecemeal. Although the DPA statute does provide [certain congressional equities](#), the President may waive most of them, with the exception of the ability to set price and wage controls under Title I. However, Congress may enact laws, provide or deny funding, or provide guidance to signal intent, broaden oversight, and provide additional mechanisms for effecting a robust industrial response to the COVID-19 pandemic.

- To signal intent, Members may issue letters to the President and introduce resolutions calling for the activation and implementation of certain DPA authorities. Congress may also consider supplemental appropriations to the DPA Fund, an account generally used to support Title III activities, with directives that it be used for the implementation of specific DPA authorities and purposes during the COVID-19 pandemic response.
- Congress may advise, or otherwise encourage, the administration to make use of other DPA authorities, such as Title III, which provides financial incentives and other mechanisms to expand productive capacity; and Title VII, which provides for the establishment of industry coordination mechanisms and advisory bodies in carrying out other DPA activities.
- Congress may seek to broaden reporting requirements to include reporting by HHS (and other relevant executive agencies) with regard to the use of DPA authorities in response to the COVID-19 pandemic. Separately, Congress may expand congressional reporting requirements given to the Defense Production Act Committee (DPAC)—a [multi-agency body](#) that advises the President on the use of DPA authorities and issues an [annual report to Congress](#)—and/or the Office of the Deputy Assistant Secretary of Defense for Industrial Policy, which maintains a [standing Title III program](#) and issues an [annual industrial capabilities report](#) to Congress.
- Congress may seek to recreate wartime capabilities of emergency industrial mobilization within the executive branch. For example, the [Office of Defense Mobilization](#) was created in 1950 ([E.O. 10193](#)) under DPA authority and was tasked with implementing and coordinating industrial mobilization during the Korean War.

Additionally, consistent with the President’s statements [promoting state-level action](#), Congress may seek to appropriate block grants to states and other units of government to provide local industries with financial incentives to retool, retrofit, or expand productive capacity in response to the COVID-19 pandemic. This may be accomplished as an extension of DPA authorities or provided independently.

## Author Information

Michael H. Cecire  
Analyst in Intergovernmental Relations and Economic  
Development Policy

Heidi M. Peters  
Analyst in U.S. Defense Acquisition Policy

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However,

---

as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.



# The Defense Production Act (DPA) and the COVID-19 Pandemic: Recent Developments and Policy Considerations

April 15, 2020

In response to the COVID-19 pandemic, the Administration invoked the [Defense Production Act of 1950](#) (DPA) on multiple occasions to facilitate the manufacture and distribution of medical equipment and supplies. The full extent of DPA implementation is unclear—to date, there have been six public announcements describing official DPA implementation actions.

This Insight describes recent DPA actions and reported implementation with regard to the COVID-19 pandemic, and discusses policy considerations for Congress. It is intended as a companion to CRS Insights [IN11280](#) and [IN11231](#). See CRS Report [R43767](#) for a more in-depth discussion of DPA history and authorities.

For additional related resources, see the CRS Coronavirus Disease 2019 homepage.

## Recent DPA Actions

As of April 15, the Administration has issued three DPA-related executive orders and four memoranda (in chronological order):

- E.O. [13909](#), *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19* (March 18), delegated authority to the Health and Human Services (HHS) Secretary for making use of DPA Title I prioritization and allocation authorities to respond to the pandemic;
- E.O. [13910](#), *Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19* (March 23), delegated authority to the HHS Secretary, in coordination with FEMA, to effect anti-hoarding actions using DPA Title I and data collection under Title VII authorities; and
- E.O. [13911](#), *Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources to Respond to the Spread of COVID-19* (March 27), delegated authority to the HHS and the Homeland Security (DHS) secretaries,

Congressional Research Service

<https://crsreports.congress.gov>

IN11337

allowing each to make use of DPA Title III for issuing financial incentives to expand productive capacity, and coordinate industry under the Title VII voluntary agreements provision.

Four COVID-19-related memoranda direct the implementation of DPA authorities (in chronological order):

- *Memorandum on Order Under the Defense Production Act Regarding General Motors Company* (March 27) directs HHS to use DPA Title I authorities to compel General Motors (GM) to produce ventilators.
- *Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators* (April 2) directs HHS, in consultation with DHS, to make use of all DPA authorities to effect ventilator production by “the appropriate affiliate or subsidiary” of: General Electric Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyair Medical, Inc.
- *Memorandum on Order Under the Defense Production Act Regarding 3M Company* (April 2) directs the DHS secretary, through FEMA, to employ DPA authorities to acquire N95 respirators from any 3M “subsidiary or affiliate.”
- *Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use* (April 3) provides for the DHS secretary, through FEMA and in consultation with HHS, to “allocate for domestic use” (under DPA Title I) health and medical resources.

## Implementation of DPA Authorities

As of April 15, the Administration has publicized four DPA-related production actions:

1. A \$489.4 million HHS [contract](#) (April 8) with GM for 6,132 ventilators to be delivered to the Strategic National Stockpile by June 1, and 30,000 ventilators by August. HHS noted it was the first DPA-rated contract issued in response to the COVID-19 emergency (i.e., using Title I priority-rated orders through the [Health Priorities and Allocations System](#)).
2. A \$646.7 million HHS [contract](#) (April 8) with Philips for 2,500 ventilators to be delivered to the Strategic National Stockpile by the end of May, and 43,000 ventilators by December. HHS announced it as the second Title I prioritization action.
3. The Department of Defense (DOD) [announced plans](#) to use [Title III authorities](#) (April 11) through a \$133 million investment dedicated to increasing domestic production capacity for N95 masks.
4. Contracts [totaling \\$533.2 million](#) (April 13) with General Electric, Hill-Rom, Medtronic, ResMed, and Vyair for 31,416 ventilators using DPA Title I authorities. Two other non-DPA contracts were simultaneously announced.

In addition, the Administration publicized two non-production related DPA actions:

5. The Department of Justice announced [an arrest](#) (March 30) and the [seizure and redistribution](#) of hoarded medical supplies (April 2), pursuant to the HHS [Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures](#), issued per E.O. 13910; and
6. FEMA, as DHS’s [delegate](#) for DPA authorities, in coordination with Customs and Border Protection, [released guidance](#) (April 10) on the use of DPA to allocate specified scarce

medical supplies—per the President’s April 3 [memorandum](#)—exclusively [for domestic use](#) and “may not be exported” without FEMA’s authorization.

## Policy Considerations

DPA authorities have not been exercised in response to major national crises in the modern era. Generally, they were employed tactically by a single agency (usually DOD) in response to discrete requirements or projects. Similarly, the Administration implementation pattern and [stated position to date](#) frames the DPA primarily as an instrument to compel voluntary action from industry, rather than as a strategic platform for industry coordination.

While recent DPA actions could suggest a broader approach, coordination responsibility for DPA implementation is not publicly established, and appears fragmented among at least four federal agencies:

- HHS and FEMA each have DPA leadership responsibilities under various presidential directives;
- Trade Advisor Peter Navarro, a member of the White House Coronavirus Task Force, [was named](#) DPA coordinator; and
- DOD, given its long-standing DPA experience (usually in military, non-emergency contexts), is also a [locus](#) of DPA authority.

Although FEMA is the statutory lead agency for national emergency response, this does not necessarily extend to DPA. No single agency or interagency body appears to maintain a dedicated staff and authority to coordinate government-wide DPA implementation in emergencies. Public reporting and congressional oversight of DPA activities is fragmented and irregular.

In response, Congress may wish to consider the following policy alternatives:

- Emphasize the DPA as a means of orchestrating broad industry mobilization through public signaling, industry outreach, and/or legislation;
- Assign government-wide authority for DPA coordination and implementation in emergency situations to a single permanently staffed office with interagency support, such as within FEMA or through an expansion of the [DPA Committee](#); and
- Provide any eventual DPA office with the relevant resources to respond to the current and future crises, and the authority to incorporate DPA into federal contingency planning and to collect information and perform timely reporting (annual and regularized interim reporting) on DPA authorities used during and outside of crisis situations.

## Author Information

Michael H. Cecire  
Analyst in Intergovernmental Relations and Economic  
Development Policy

Heidi M. Peters  
Analyst in U.S. Defense Acquisition Policy

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.





# COVID-19: Defense Production Act (DPA) Developments and Issues for Congress

Updated May 15, 2020

The White House is employing the [Defense Production Act of 1950](#) (DPA) in response to the Coronavirus Disease 2019 (COVID-19) pandemic to facilitate the production and availability of essential goods, supplies, and services. This Insight considers recent DPA actions and associated policy considerations for Congress. It is a companion to CRS Insights IN11337, IN11280, and IN11231. See CRS Report R43767 for a more in-depth discussion of DPA history and authorities.

## New DPA Actions in Response to COVID-19

Since April 15, eight DPA actions have been made public:

- According to Federal Procurement Data System (FPDS) [COVID-19 records](#), the Federal Emergency Management Agency (FEMA) issued four DPA priority-rated orders to the 3M company for N95 respirators on April 16, April 21, and April 28, per an [April 2 White House memorandum](#). FEMA announced the DPA priority-rated orders for N95 respirators from 3M on [April 14](#).
- On [April 20](#), the Department of Defense (DOD) announced it set aside \$750 million of \$1 billion in new DPA Title III appropriations for health resources, with \$250 million reserved for defense industrial base investments.
- On April 21, DOD announced a [\\$133 million Title III investment](#) in N95 respirator production, per a previous [April 11 announcement](#).
- The Department of Justice (DOJ) [charged a New York resident](#) on April 24, and [two individuals](#) on April 28, with violating DPA anti-hoarding/price-gouging provisions.
- On April 28, President Trump issued [Executive Order \(E.O.\) 13917](#) directing the Department of Agriculture (USDA) to exercise DPA authorities to address [meat processing plant closures](#), and any other food supply chain issues, due to the pandemic.
- On [April 29](#), DOD announced \$75 million in DPA Title III investments to increase nasal swab production, per the President's [April 19 DPA invocation](#).

Congressional Research Service

<https://crsreports.congress.gov>

IN11387

- On May 5, pursuant to E.O. 13917, the USDA [publicized letters](#) to [state governors](#) and [meat processing plants](#), directing plants to continue or resume operations utilizing [COVID-19 meat processing guidelines](#) developed on April 28 by the Centers for Disease Control and Prevention (CDC) and the Department of Labor’s Occupational Safety and Health Administration (OSHA).
- On May 14, the President [issued a new E.O.](#) delegating DPA Title III authority to the International Development Finance Corporation (DFC) in response to the pandemic.

These actions were made publicly available, but may not be exhaustive. There are no statutory reporting requirements for DPA actions.

## DPA Issues for Congress

The Administration has employed the DPA selectively, focusing on individual companies (e.g., GM, 3M) or industry sub-sectors (e.g., meat processing). There have been sporadic DPA efforts, and an opaque process, in response to complaints from Congress and some governors regarding ongoing shortages of [personal protective equipment](#), [testing supplies](#), and other such resources. The Administration’s announced actions have primarily framed the DPA as a coercive instrument (the President called the DPA a “[tremendous hammer](#)”) with relatively narrow application.

Recent DPA actions present a number of issues that may be of interest to Congress:

- Control over the statutory DPA Title III account, the DPA Fund, is a potential issue. Currently, Title III appropriations are made to the DPA Purchases (DPAP) account, which serves the DPA Fund’s [statutory role](#)—a fund for Title III activities that does not expire (a “no-year” fund), capped at \$750 million annually. According to Section 304 of the statute, and Section 309 of [E.O. 13603](#), DOD manages the DPA Fund, which is available to support Title III activities across government. However, according to some congressional offices, certain DOD officials interpret DPAP appropriations—including the \$1 billion appropriated in the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#)—as available at DOD’s sole discretion. Being the fund manager and possessing the only standing Title III program in government, the DPA Fund has functioned as an exclusive DOD account despite being technically available to other agencies. As a result, notwithstanding its statutory and administratively-defined role, DOD may require further guidance to perform its custodial obligations to make DPAP funds available to the government as a whole in emergency situations.

- The Administration has exercised DPA’s [anti-hoarding/price gouging provisions](#) to make arrests and [seize goods for redistribution](#). However, the DPA does not define an “excess of prevailing market price” or include operational standards on when and how these provisions may be used.
- FEMA announced the existence of DPA rated orders on April 14, but did not include details. While orders matching FEMA’s description were identified in the FPDS, there were discrepancies in the dates. There is no statutory requirement for DPA actions to be reported in FPDS or elsewhere.
- The USDA’s May 5 letters reference DPA authorities to reopen and ensure production in meat processing facilities, which could be interpreted to supersede more stringent state directives. However, USDA statements do not specify the operative DPA authorities in its policy. The agency also did not state whether CDC/OSHA guidance is intended to “preempt” state guidance, and what DPA authorities support that interpretation. For a legal analysis of E.O. 13917, see CRS Legal Sidebar LSB10456.
- The E.O. delegating Title III authorities to DFC was issued as part of the Administration’s broader policy to expand national stockpiles. However, as an international development agency created in 2019, DFC’s capacity for making domestic DPA investments is unknown.

## Policy Considerations

Given these issues, Congress may wish to consider several policy options:

- Congress may conduct oversight or pursue legislation to obtain clarity over differing interpretations of DPA authorities, such as the use of the DPA fund by DOD vs. other federal agencies; congressional authorization for promulgating DPA regulations; the need for increased DPA reporting and transparency; and parameters for anti-hoarding/price gouging actions.
- Congress may consider creating a centralized office for DPA implementation, reporting, and coordination. The Office of Defense Mobilization, created alongside the DPA in 1950, established [executive administrative infrastructure](#) to plan and execute DPA authorities. One [current proposal](#) provides for an “executive officer” to fulfill this function in a limited, temporary fashion.
- Congress may amend the DPA to expand congressional oversight and involvement in DPA actions, and curtail or constrain presidential discretion in employing DPA authorities outside congressional intent.

## Author Information

Michael H. Cecire  
Analyst in Intergovernmental Relations and Economic  
Development Policy

Heidi M. Peters  
Analyst in U.S. Defense Acquisition Policy

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.



# Defense Production Act (DPA): Recent Developments in Response to COVID-19

Updated July 28, 2020

The Administration has employed the [Defense Production Act of 1950 \(DPA\)](#) as part of federal countermeasures to the Coronavirus Disease 2019 (COVID-19) pandemic. The DPA confers presidential authorities to mobilize domestic industry in service of the national defense, broadly defined, including emergency preparedness. The DPA includes provisions under Title I to prioritize the acceptance of contracts, and to allocate scarce goods, materials, and services; and under Title III, to provide for the expansion of productive capacity. Title VII provides definitions and other supporting provisions.

This Insight considers recent DPA actions in response to COVID-19 and is intended as a companion to [CRS Insight IN11387](#). See [CRS Report R43767](#) for an in-depth discussion of DPA history and authorities.

## Recent DPA Implementation Actions

Since May 12, a number of DPA actions have occurred or been made public:

- **May 12:** The Federal Emergency Management Agency (FEMA) and the Department of Justice (DOJ) announced a “voluntary agreement” pursuant to Title VII of the DPA to coordinate industry cooperation.
- **May 13:** FEMA issued its “Emergency Management Priorities and Allocations System” to govern Title I implementation processes.
- **May 18:** The Food and Drug Administration (FDA) and the Department of Agriculture (USDA) issued a memorandum of understanding (MOU) regarding DPA food security implementation.
- **May 30:** The Department of Defense (DOD) reversed plans to allocate [approximately 75%](#) of the \$1 billion in DPA Title III funds appropriated for health resources under the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) in response to the pandemic, and instead allocated \$688 million for [defense industrial base investments](#).
- **June 22:** DOD and the International Development Finance Corporation (DFC) signed an MOU in which the DFC would support lending activities under DOD’s Title III program.

Congressional Research Service

<https://crsreports.congress.gov>

IN11470

- July 7: According to Federal Procurement Data System [records](#), FEMA initiated a fourth DPA Title I priority-rated order of N95 respirators from the 3M Company.
- In May and July, the DOJ's COVID-19 Hoarding and Price Gouging Task Force arrested persons in [Staten Island](#) and [Suffolk County](#), New York and [New Jersey](#) for violating DPA anti-hoarding/price gouging provisions.

In addition, DPA Title III projects facilitated by DOD's [Industrial Policy office](#) were announced:

- [May 12](#): Coordinating with the Department of Health and Human Services (HHS), DOD awarded \$138 million to support COVID-19 vaccine supply chain development.
- [May 28](#): DOD and HHS awarded \$2.2 million to Hollingsworth & Vose Company to increase N95 ventilator and filter production.
- [May 29](#): DOD awarded \$18.45 million for the space-based defense industrial base.
- [June 10](#): DOD awarded \$135 million for the textile, aviation, and shipbuilding defense industrial base.
- [June 16](#): A funding opportunity announcement (FOA) was posted in the System for Award Management (SAM) for space launch services, but withdrawn [on July 1](#).
- [June 19](#): DOD awarded \$187 million for shipbuilding, aviation, and textile defense industrial base.
- [July 10](#): DOD awarded \$84.4 million for the unmanned aerial systems, space, and shipbuilding defense industrial base.
- [July 15](#): A Title III FOA was posted in SAM for upgrading military clothing manufacturing facilities to mitigate workplace COVID-19 transmissibility.
- [July 17](#): DOD awarded \$36.9 million for the aviation and shipbuilding defense industrial base.
- [July 24](#): DOD awarded \$77.3 million for the microelectronics, aviation, and rare earths defense industrial base.
- [July 28](#): DFC and DOD announced a \$765 million loan to the Eastman Kodak Company to support domestic pharmaceutical production.

These may not be exhaustive of all recent DPA activity, as there is no standing requirement for publishing DPA actions, and no centralized repository where they are collected.

## Additional DPA Developments

In addition, other recent developments occurred with DPA relevance:

- On [May 14](#), Deputy Assistant Secretary of Defense for Industrial Policy Jennifer Santos was reassigned from head of DOD's Industrial Policy office. DOD did not publicly comment on the reason for her departure, but [updated reporting](#) suggested her handling of DPA was a potential factor.
- On [July 14](#), the House Committees on Financial Services, Homeland Security, Armed Services, Foreign Affairs, and Energy and Commerce released a letter addressed to the HHS and DOD secretaries. The letter outlined concerns over the Administration's COVID-19 response, including DPA implementation. It objects to DOD's use of DPA Title III CARES Act appropriations, noting that Congress intended those funds to be reserved for health and medical countermeasures, and not defense industrial base support. The letter also listed concerns regarding the DFC's role supporting Title III projects.

- On July 1, a new nasal swab factory funded under DPA Title III was scheduled to open in Pittsfield, Maine, but no opening announcement has been made by DOD, which awarded the contract, or by the company performing the contract, Puritan Medical. According to a [June 5 press release](#), the company hosted the President and reported its new facility would open July 1. No progress updates have been issued since then, though the company advertises [vacant positions](#) for the new factory.

## Policy Considerations

The Administration's DPA implementation pattern appears [sporadic and relatively narrow](#). Although the volume of DPA actions has increased, no new DPA Title I prioritization orders for health articles have been observed [since April 14](#). Most direct Title III funding has been awarded to the defense industrial base.

Despite continued [congressional concerns](#) over personal protective equipment (PPE) availability, the Administration has not consistently employed DPA authorities to expedite PPE contracts. For example, on [July 19](#), DOD and HHS announced a \$3.5 million award for surgical mask production (with production not expected until May 2021). However, this action did not appear to be accomplished under DPA authorities. In a media interview, White House trade advisor Peter Navarro reiterated past assertions that the Administration wielded DPA authorities to [compel voluntary action](#) without the need to actually implement them.

It is unclear which executive agency leads overall efforts under DPA authority, in response to the pandemic. Reporting on DPA activities remains dispersed among multiple agency sources and appears incomplete. In addition, it is not clear under which authorities agencies are undertaking certain DPA-attributed activities, such as DOD's redirection of Title III funds, or DOJ's enforcement of anti-hoarding/price gouging.

## Author Information

Michael H. Cecire  
Analyst in Intergovernmental Relations and Economic  
Development Policy

Heidi M. Peters  
Analyst in U.S. Defense Acquisition Policy

---

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However,

---

as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.



# Presidential Documents

**Title 3—****Executive Order 13603 of March 16, 2012****The President****National Defense Resources Preparedness**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), and section 301 of title 3, United States Code, and as Commander in Chief of the Armed Forces of the United States, it is hereby ordered as follows:

**PART I—PURPOSE, POLICY, AND IMPLEMENTATION**

**Section 101. Purpose.** This order delegates authorities and addresses national defense resource policies and programs under the Defense Production Act of 1950, as amended (the “Act”).

**Sec. 102. Policy.** The United States must have an industrial and technological base capable of meeting national defense requirements and capable of contributing to the technological superiority of its national defense equipment in peacetime and in times of national emergency. The domestic industrial and technological base is the foundation for national defense preparedness. The authorities provided in the Act shall be used to strengthen this base and to ensure it is capable of responding to the national defense needs of the United States.

**Sec. 103. General Functions.** Executive departments and agencies (agencies) responsible for plans and programs relating to national defense (as defined in section 801(j) of this order), or for resources and services needed to support such plans and programs, shall:

(a) identify requirements for the full spectrum of emergencies, including essential military and civilian demand;

(b) assess on an ongoing basis the capability of the domestic industrial and technological base to satisfy requirements in peacetime and times of national emergency, specifically evaluating the availability of the most critical resource and production sources, including subcontractors and suppliers, materials, skilled labor, and professional and technical personnel;

(c) be prepared, in the event of a potential threat to the security of the United States, to take actions necessary to ensure the availability of adequate resources and production capability, including services and critical technology, for national defense requirements;

(d) improve the efficiency and responsiveness of the domestic industrial base to support national defense requirements; and

(e) foster cooperation between the defense and commercial sectors for research and development and for acquisition of materials, services, components, and equipment to enhance industrial base efficiency and responsiveness.

**Sec. 104. Implementation.** (a) The National Security Council and Homeland Security Council, in conjunction with the National Economic Council, shall serve as the integrated policymaking forum for consideration and formulation of national defense resource preparedness policy and shall make recommendations to the President on the use of authorities under the Act.

(b) The Secretary of Homeland Security shall:

(1) advise the President on issues of national defense resource preparedness and on the use of the authorities and functions delegated by this order;

(2) provide for the central coordination of the plans and programs incident to authorities and functions delegated under this order, and provide guidance to agencies assigned functions under this order, developed in consultation with such agencies; and

(3) report to the President periodically concerning all program activities conducted pursuant to this order.

(c) The Defense Production Act Committee, described in section 701 of this order, shall:

(1) in a manner consistent with section 2(b) of the Act, 50 U.S.C. App. 2062(b), advise the President through the Assistant to the President and National Security Advisor, the Assistant to the President for Homeland Security and Counterterrorism, and the Assistant to the President for Economic Policy on the effective use of the authorities under the Act; and

(2) prepare and coordinate an annual report to the Congress pursuant to section 722(d) of the Act, 50 U.S.C. App. 2171(d).

(d) The Secretary of Commerce, in cooperation with the Secretary of Defense, the Secretary of Homeland Security, and other agencies, shall:

(1) analyze potential effects of national emergencies on actual production capability, taking into account the entire production system, including shortages of resources, and develop recommended preparedness measures to strengthen capabilities for production increases in national emergencies; and

(2) perform industry analyses to assess capabilities of the industrial base to support the national defense, and develop policy recommendations to improve the international competitiveness of specific domestic industries and their abilities to meet national defense program needs.

## PART II—PRIORITIES AND ALLOCATIONS

**Sec. 201. *Priorities and Allocations Authorities.*** (a) The authority of the President conferred by section 101 of the Act, 50 U.S.C. App. 2071, to require acceptance and priority performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, is delegated to the following agency heads:

(1) the Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;

(2) the Secretary of Energy with respect to all forms of energy;

(3) the Secretary of Health and Human Services with respect to health resources;

(4) the Secretary of Transportation with respect to all forms of civil transportation;

(5) the Secretary of Defense with respect to water resources; and

(6) the Secretary of Commerce with respect to all other materials, services, and facilities, including construction materials.

(b) The Secretary of each agency delegated authority under subsection (a) of this section (resource departments) shall plan for and issue regulations to prioritize and allocate resources and establish standards and procedures by which the authority shall be used to promote the national defense, under both emergency and non-emergency conditions. Each Secretary shall authorize the heads of other agencies, as appropriate, to place priority ratings on contracts and orders for materials, services, and facilities needed in support of programs approved under section 202 of this order.

(c) Each resource department shall act, as necessary and appropriate, upon requests for special priorities assistance, as defined by section 801(l)

of this order, in a time frame consistent with the urgency of the need at hand. In situations where there are competing program requirements for limited resources, the resource department shall consult with the Secretary who made the required determination under section 202 of this order. Such Secretary shall coordinate with and identify for the resource department which program requirements to prioritize on the basis of operational urgency. In situations involving more than one Secretary making such a required determination under section 202 of this order, the Secretaries shall coordinate with and identify for the resource department which program requirements should receive priority on the basis of operational urgency.

(d) If agreement cannot be reached between two such Secretaries, then the issue shall be referred to the President through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism.

(e) The Secretary of each resource department, when necessary, shall make the finding required under section 101(b) of the Act, 50 U.S.C. App. 2071(b). This finding shall be submitted for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism. Upon such approval, the Secretary of the resource department that made the finding may use the authority of section 101(a) of the Act, 50 U.S.C. App. 2071(a), to control the general distribution of any material (including applicable services) in the civilian market.

**Sec. 202. Determinations.** Except as provided in section 201(e) of this order, the authority delegated by section 201 of this order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(a) by the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities;

(b) by the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(c) by the Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

**Sec. 203. Maximizing Domestic Energy Supplies.** The authorities of the President under section 101(c)(1)–(2) of the Act, 50 U.S.C. App. 2071(c)(1)–(2), are delegated to the Secretary of Commerce, with the exception that the authority to make findings that materials (including equipment), services, and facilities are critical and essential, as described in section 101(c)(2)(A) of the Act, 50 U.S.C. App. 2071(c)(2)(A), is delegated to the Secretary of Energy.

**Sec. 204. Chemical and Biological Warfare.** The authority of the President conferred by section 104(b) of the Act, 50 U.S.C. App. 2074(b), is delegated to the Secretary of Defense. This authority may not be further delegated by the Secretary.

### PART III—EXPANSION OF PRODUCTIVE CAPACITY AND SUPPLY

**Sec. 301. Loan Guarantees.** (a) To reduce current or projected shortfalls of resources, critical technology items, or materials essential for the national defense, the head of each agency engaged in procurement for the national defense, as defined in section 801(h) of this order, is authorized pursuant to section 301 of the Act, 50 U.S.C. App. 2091, to guarantee loans by private institutions.

(b) Each guaranteeing agency is designated and authorized to: (1) act as fiscal agent in the making of its own guarantee contracts and in otherwise carrying out the purposes of section 301 of the Act; and (2) contract with any Federal Reserve Bank to assist the agency in serving as fiscal agent.

(c) Terms and conditions of guarantees under this authority shall be determined in consultation with the Secretary of the Treasury and the Director of the Office of Management and Budget (OMB). The guaranteeing agency is authorized, following such consultation, to prescribe: (1) either specifically or by maximum limits or otherwise, rates of interest, guarantee and commitment fees, and other charges which may be made in connection with such guarantee contracts; and (2) regulations governing the forms and procedures (which shall be uniform to the extent practicable) to be utilized in connection therewith.

**Sec. 302. Loans.** To reduce current or projected shortfalls of resources, critical technology items, or materials essential for the national defense, the head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 302 of the Act, 50 U.S.C. App. 2092, to make loans thereunder. Terms and conditions of loans under this authority shall be determined in consultation with the Secretary of the Treasury and the Director of OMB.

**Sec. 303. Additional Authorities.** (a) To create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, the head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 303 of the Act, 50 U.S.C. App. 2093, to make provision for purchases of, or commitments to purchase, an industrial resource or a critical technology item for Government use or resale, and to make provision for the development of production capabilities, and for the increased use of emerging technologies in security program applications, and to enable rapid transition of emerging technologies.

(b) Materials acquired under section 303 of the Act, 50 U.S.C. App. 2093, that exceed the needs of the programs under the Act may be transferred to the National Defense Stockpile, if, in the judgment of the Secretary of Defense as the National Defense Stockpile Manager, such transfers are in the public interest.

**Sec. 304. Subsidy Payments.** To ensure the supply of raw or nonprocessed materials from high-cost sources, or to ensure maximum production or supply in any area at stable prices of any materials in light of a temporary increase in transportation cost, the head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 303(c) of the Act, 50 U.S.C. App. 2093(c), to make subsidy payments, after consultation with the Secretary of the Treasury and the Director of OMB.

**Sec. 305. Determinations and Findings.** (a) Pursuant to budget authority provided by an appropriations act in advance for credit assistance under section 301 or 302 of the Act, 50 U.S.C. App. 2091, 2092, and consistent with the Federal Credit Reform Act of 1990, as amended (FCRA), 2 U.S.C. 661 *et seq.*, the head of each agency engaged in procurement for the national defense is delegated the authority to make the determinations set forth in sections 301(a)(2) and 302(b)(2) of the Act, in consultation with the Secretary making the required determination under section 202 of this order; provided, that such determinations shall be made after due consideration of the provisions of OMB Circular A-129 and the credit subsidy score for the relevant loan or loan guarantee as approved by OMB pursuant to FCRA.

(b) Other than any determination by the President under section 303(a)(7)(b) of the Act, the head of each agency engaged in procurement for the national defense is delegated the authority to make the required determinations, judgments, certifications, findings, and notifications defined under section 303 of the Act, 50 U.S.C. App. 2093, in consultation with the Secretary making the required determination under section 202 of this order.

**Sec. 306. Strategic and Critical Materials.** The Secretary of Defense, and the Secretary of the Interior in consultation with the Secretary of Defense as the National Defense Stockpile Manager, are each delegated the authority of the President under section 303(a)(1)(B) of the Act, 50 U.S.C. App.

2093(a)(1)(B), to encourage the exploration, development, and mining of strategic and critical materials and other materials.

**Sec. 307. *Substitutes.*** The head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 303(g) of the Act, 50 U.S.C. App. 2093(g), to make provision for the development of substitutes for strategic and critical materials, critical components, critical technology items, and other resources to aid the national defense.

**Sec. 308. *Government-Owned Equipment.*** The head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 303(e) of the Act, 50 U.S.C. App. 2093(e), to:

(a) procure and install additional equipment, facilities, processes, or improvements to plants, factories, and other industrial facilities owned by the Federal Government and to procure and install Government-owned equipment in plants, factories, or other industrial facilities owned by private persons;

(b) provide for the modification or expansion of privately owned facilities, including the modification or improvement of production processes, when taking actions under sections 301, 302, or 303 of the Act, 50 U.S.C. App. 2091, 2092, 2093; and

(c) sell or otherwise transfer equipment owned by the Federal Government and installed under section 303(e) of the Act, 50 U.S.C. App. 2093(e), to the owners of such plants, factories, or other industrial facilities.

**Sec. 309. *Defense Production Act Fund.*** The Secretary of Defense is designated the Defense Production Act Fund Manager, in accordance with section 304(f) of the Act, 50 U.S.C. App. 2094(f), and shall carry out the duties specified in section 304 of the Act, in consultation with the agency heads having approved, and appropriated funds for, projects under title III of the Act.

**Sec. 310. *Critical Items.*** The head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 107(b)(1) of the Act, 50 U.S.C. App. 2077(b)(1), to take appropriate action to ensure that critical components, 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. Appropriate action may include restricting contract solicitations to reliable sources, restricting contract solicitations to domestic sources (pursuant to statutory authority), stockpiling critical components, and developing substitutes for critical components or critical technology items.

**Sec. 311. *Strengthening Domestic Capability.*** The head of each agency engaged in procurement for the national defense is delegated the authority of the President under section 107(a) of the Act, 50 U.S.C. App. 2077(a), to utilize the authority of title III of the Act or any other provision of law 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.

**Sec. 312. *Modernization of Equipment.*** The head of each agency engaged in procurement for the national defense, in accordance with section 108(b) of the Act, 50 U.S.C. App. 2078(b), may utilize the authority of title III of the Act to guarantee the purchase or lease of advance manufacturing equipment, and any related services with respect to any such equipment for purposes of the Act. In considering title III projects, the head of each agency engaged in procurement for the national defense shall provide a strong preference for proposals submitted by a small business supplier or subcontractor in accordance with section 108(b)(2) of the Act, 50 U.S.C. App. 2078(b)(2).

**PART IV—VOLUNTARY AGREEMENTS AND ADVISORY COMMITTEES**

**Sec. 401. Delegations.** The authority of the President under sections 708(c) and (d) of the Act, 50 U.S.C. App. 2158(c), (d), is delegated to the heads of agencies otherwise delegated authority under this order. The status of the use of such delegations shall be furnished to the Secretary of Homeland Security.

**Sec. 402. Advisory Committees.** The authority of the President under section 708(d) of the Act, 50 U.S.C. App. 2158(d), and delegated in section 401 of this order (relating to establishment of advisory committees) shall be exercised only after consultation with, and in accordance with, guidelines and procedures established by the Administrator of General Services.

**Sec. 403. Regulations.** The Secretary of Homeland Security, after approval of the Attorney General, and after consultation by the Attorney General with the Chairman of the Federal Trade Commission, shall promulgate rules pursuant to section 708(e) of the Act, 50 U.S.C. App. 2158(e), incorporating standards and procedures by which voluntary agreements and plans of action may be developed and carried out. Such rules may be adopted by other agencies to fulfill the rulemaking requirement of section 708(e) of the Act, 50 U.S.C. App. 2158(e).

**PART V—EMPLOYMENT OF PERSONNEL**

**Sec. 501. National Defense Executive Reserve.** (a) In accordance with section 710(e) of the Act, 50 U.S.C. App. 2160(e), there is established in the executive branch a National Defense Executive Reserve (NDER) composed of persons of recognized expertise from various segments of the private sector and from Government (except full-time Federal employees) for training for employment in executive positions in the Federal Government in the event of a national defense emergency.

(b) The Secretary of Homeland Security shall issue necessary guidance for the NDER program, including appropriate guidance for establishment, recruitment, training, monitoring, and activation of NDER units and shall be responsible for the overall coordination of the NDER program. The authority of the President under section 710(e) of the Act, 50 U.S.C. App. 2160(e), to determine periods of national defense emergency is delegated to the Secretary of Homeland Security.

(c) The head of any agency may implement section 501(a) of this order with respect to NDER operations in such agency.

(d) The head of each agency with an NDER unit may exercise the authority under section 703 of the Act, 50 U.S.C. App. 2153, to employ civilian personnel when activating all or a part of its NDER unit. The exercise of this authority shall be subject to the provisions of sections 501(e) and (f) of this order and shall not be redelegated.

(e) The head of an agency may activate an NDER unit, in whole or in part, upon the written determination of the Secretary of Homeland Security that an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency.

(f) Prior to activating the NDER unit, the head of the agency shall notify, in writing, the Assistant to the President for Homeland Security and Counterterrorism of the impending activation.

**Sec. 502. Consultants.** The head of each agency otherwise delegated functions under this order is delegated the authority of the President under sections 710(b) and (c) of the Act, 50 U.S.C. App. 2160(b), (c), to employ persons of outstanding experience and ability without compensation and to employ experts, consultants, or organizations. The authority delegated by this section may not be redelegated.

**PART VI—LABOR REQUIREMENTS**

**Sec. 601. Secretary of Labor.** (a) The Secretary of Labor, in coordination with the Secretary of Defense and the heads of other agencies, as deemed appropriate by the Secretary of Labor, shall:

- (1) collect and maintain data necessary to make a continuing appraisal of the Nation's workforce needs for purposes of national defense;
- (2) upon request by the Director of Selective Service, and in coordination with the Secretary of Defense, assist the Director of Selective Service in development of policies regulating the induction and deferment of persons for duty in the armed services;
- (3) upon request from the head of an agency with authority under this order, consult with that agency with respect to: (i) the effect of contemplated actions on labor demand and utilization; (ii) the relation of labor demand to materials and facilities requirements; and (iii) such other matters as will assist in making the exercise of priority and allocations functions consistent with effective utilization and distribution of labor;
- (4) upon request from the head of an agency with authority under this order: (i) formulate plans, programs, and policies for meeting the labor requirements of actions to be taken for national defense purposes; and (ii) estimate training needs to help address national defense requirements and promote necessary and appropriate training programs; and
- (5) develop and implement an effective labor-management relations policy to support the activities and programs under this order, with the cooperation of other agencies as deemed appropriate by the Secretary of Labor, including the National Labor Relations Board, the Federal Labor Relations Authority, the National Mediation Board, and the Federal Mediation and Conciliation Service.

(b) All agencies shall cooperate with the Secretary of Labor, upon request, for the purposes of this section, to the extent permitted by law.

**PART VII—DEFENSE PRODUCTION ACT COMMITTEE**

**Sec. 701. The Defense Production Act Committee.** (a) The Defense Production Act Committee (Committee) shall be composed of the following members, in accordance with section 722(b) of the Act, 50 U.S.C. App. 2171(b):

- (1) The Secretary of State;
- (2) The Secretary of the Treasury;
- (3) The Secretary of Defense;
- (4) The Attorney General;
- (5) The Secretary of the Interior;
- (6) The Secretary of Agriculture;
- (7) The Secretary of Commerce;
- (8) The Secretary of Labor;
- (9) The Secretary of Health and Human Services;
- (10) The Secretary of Transportation;
- (11) The Secretary of Energy;
- (12) The Secretary of Homeland Security;
- (13) The Director of National Intelligence;
- (14) The Director of the Central Intelligence Agency;
- (15) The Chair of the Council of Economic Advisers;
- (16) The Administrator of the National Aeronautics and Space Administration; and
- (17) The Administrator of General Services.

(b) The Director of OMB and the Director of the Office of Science and Technology Policy shall be invited to participate in all Committee meetings and activities in an advisory role. The Chairperson, as designated by the President pursuant to section 722 of the Act, 50 U.S.C. App. 2171, may invite the heads of other agencies or offices to participate in Committee meetings and activities in an advisory role, as appropriate.

**Sec. 702. Offsets.** The Secretary of Commerce shall prepare and submit to the Congress the annual report required by section 723 of the Act, 50 U.S.C. App. 2172, in consultation with the Secretaries of State, the Treasury, Defense, and Labor, the United States Trade Representative, the Director of National Intelligence, and the heads of other agencies as appropriate. The heads of agencies shall provide the Secretary of Commerce with such information as may be necessary for the effective performance of this function.

#### **PART VIII—GENERAL PROVISIONS**

**Sec. 801. Definitions.** In addition to the definitions in section 702 of the Act, 50 U.S.C. App. 2152, the following definitions apply throughout this order:

(a) “Civil transportation” includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. “Civil transportation” also shall include direction, control, and coordination of civil transportation capacity regardless of ownership. “Civil transportation” shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly.

(b) “Energy” means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquification, and coal gasification), solar, wind, other types of renewable energy, atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

(c) “Farm equipment” means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

(d) “Fertilizer” means any product or combination of products that contain one or more of the elements nitrogen, phosphorus, and potassium for use as a plant nutrient.

(e) “Food resources” means all commodities and products, (simple, mixed, or compound), or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. “Food resources” also means potable water packaged in commercially marketable containers, all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

(f) “Food resource facilities” means plants, machinery, vehicles (including on farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

(g) “Functions” include powers, duties, authority, responsibilities, and discretion.



(h) "Head of each agency engaged in procurement for the national defense" means the heads of the Departments of State, Justice, the Interior, and Homeland Security, the Office of the Director of National Intelligence, the Central Intelligence Agency, the National Aeronautics and Space Administration, the General Services Administration, and all other agencies with authority delegated under section 201 of this order.

(i) "Health resources" means drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.

(j) "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.

(k) "Offsets" means compensation practices required as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and the International Traffic in Arms Regulations, 22 C.F.R. 120.1-130.17.

(l) "Special priorities assistance" means action by resource departments to assist with expediting deliveries, placing rated orders, locating suppliers, resolving production or delivery conflicts between various rated orders, addressing problems that arise in the fulfillment of a rated order or other action authorized by a delegated agency, and determining the validity of rated orders.

(m) "Strategic and critical materials" means materials (including energy) that (1) would be needed to supply the military, industrial, and essential civilian needs of the United States during a national emergency, and (2) are not found or produced in the United States in sufficient quantities to meet such need and are vulnerable to the termination or reduction of the availability of the material.

(n) "Water resources" means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements, except "water resources" does not include usable water that qualifies as "food resources."

**Sec. 802. General.** (a) Except as otherwise provided in section 802(c) of this order, the authorities vested in the President by title VII of the Act, 50 U.S.C. App. 2151 *et seq.*, are delegated to the head of each agency in carrying out the delegated authorities under the Act and this order, by the Secretary of Labor in carrying out part VI of this order, and by the Secretary of the Treasury in exercising the functions assigned in Executive Order 11858, as amended.

(b) The authorities that may be exercised and performed pursuant to section 802(a) of this order shall include:

(1) the power to redelegate authorities, and to authorize the successive re delegation of authorities to agencies, officers, and employees of the Government; and

(2) the power of subpoena under section 705 of the Act, 50 U.S.C. App. 2155, with respect to (i) authorities delegated in parts II, III, and section 702 of this order, and (ii) the functions assigned to the Secretary of the Treasury in Executive Order 11858, as amended, provided that the subpoena power referenced in subsections (i) and (ii) shall be utilized only after the scope and purpose of the investigation, inspection, or inquiry to which the subpoena relates have been defined either by the appropriate officer identified in section 802(a) of this order or by such other person or persons as the officer shall designate.

(c) Excluded from the authorities delegated by section 802(a) of this order are authorities delegated by parts IV and V of this order, authorities in section 721 and 722 of the Act, 50 U.S.C. App. 2170–2171, and the authority with respect to fixing compensation under section 703 of the Act, 50 U.S.C. App. 2153.

**Sec. 803. Authority.** (a) Executive Order 12919 of June 3, 1994, and sections 401(3)–(4) of Executive Order 12656 of November 18, 1988, are revoked. All other previously issued orders, regulations, rulings, certificates, directives, and other actions relating to any function affected by this order shall remain in effect except as they are inconsistent with this order or are subsequently amended or revoked under proper authority. Nothing in this order shall affect the validity or force of anything done under previous delegations or other assignment of authority under the Act.

(b) Nothing in this order shall affect the authorities assigned under Executive Order 11858 of May 7, 1975, as amended, except as provided in section 802 of this order.

(c) Nothing in this order shall affect the authorities assigned under Executive Order 12472 of April 3, 1984, as amended.

**Sec. 804. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,  
March 16, 2012.

- 
- • • • • • • • • •

Enter Search Term(s):

- [Prepare for Disasters](#)
- [Apply for Assistance](#)
- [Get Flood Insurance](#)

## Defense Production Act

FEMA exercises the Defense Production Act (DPA) to support the [DPA authority and functions of the FEMA Administrator](#) and the FEMA Associate Administrator for the Office of Policy and Program Analysis (OPPA). The support focuses on promoting effective use of DPA authorities by FEMA and other DHS components and providing coordination and guidance for the DPA plans and programs of federal departments and agencies.

### Use of DPA Authorities to Support Homeland Security Programs

---

The Defense Production Act is the primary source of presidential authorities to expedite and expand the supply of materials and services from the U.S. industrial base needed to promote the [national defense](#). DPA authorities are available to support: [emergency preparedness](#) activities conducted pursuant to title VI of the Stafford Act; protection or restoration of critical infrastructure; and efforts to prevent, reduce vulnerability to, minimize damage from, and recover from acts of terrorism within the United States. DPA authorities may be used to:

- Require acceptance and preferential performance of contracts and orders under DPA Title I. (See [Federal Priorities and Allocations System \(FPAS\)](#).)
- Provide financial incentives and assistance (under [DPA Title III](#)) for U.S. industry to expand productive capacity and supply needed for national defense purposes;
- Provide antitrust protection (through DPA voluntary agreements in [DPA Title VII](#)) for businesses to cooperate in planning and operations for national defense purposes, including homeland security.

Information about other DPA authorities in [DPA Title VII](#).

## Information for DHS Programs about Priority-Rated Orders

This link provides an overview of the [process to place a priority-rated contract or order](#) (“rated orders”) in support of a [DHS Approved Program](#). It answers such questions as: who is responsible for directing use of a rated order; what contracts and orders are eligible for a priority rating; how is a Contracting Officer directed to place a rated order; and how does a contract or order become a rated order?

## Information for Contractors about Priority-Rated Orders

See this link for [questions and answers regarding priority-rated contracts and orders](#) (“rated orders”), under the Defense Production Act. Answers explain what a rated order is, what is required of a contractor to accept and fulfill a rated order, and how issues involving rated orders are handled.

## DPA Guidance and Publications

---

- **Law**
  - [Defense Production Act of 1950](#), as Amended.
- **Delegations of DPA Authority**
  - [Executive Order \(E.O.\) 13603](#), *National Defense Resources Preparedness*, January 3, 2016, delegates authorities and addresses national defense resource policies and programs under the DPA. The DPA authorities and functions delegated to the Secretary of Homeland Security in E.O. 13603 are re-delegated to the Administrator of FEMA in DHS Delegation Number 09052, January 3, 2017.
  - [Defense Priorities and Allocations System \(DPAS\) Delegation 4](#), March 8, 2016, authorizes the Secretary of Homeland Security to place DPAS priority-rated contracts and orders (“rated orders”) in support of (1) DHS programs and (2) state, local, tribal, and territorial government emergency preparedness activities. The Secretary's DPAS authority is re-delegated to the Administrator of FEMA, who, in turn, has re-delegated authority to place DPAS rated orders in the following documents:
    - [DHS Delegation Number 09053](#), January 4, 2016, to: Commissioner, U.S. Customs and Border Protection; Assistant Secretary, U.S. Immigration and Customs Enforcement; Administrator, Transportation Security Administration; Director, U.S. Secret Service; Director, Federal Law Enforcement Training Center; and Under Secretary for Management;
    - Delegation of Authority Regarding the Defense Priorities and Allocations System, to the Commandant, U.S. Coast Guard, January 18, 2017;
    - Delegation of Authority Regarding the Defense Priorities and Allocations System to the Commanding General of the United States Army Corps of Engineers, December 2, 2015; and

- Delegation of Authority: Defense Priorities and Allocations System, to FEMA personnel, August 7, 2014.
  - Agriculture Priorities and Allocations System (APAS) Delegation 2, February 22, 2016, authorizes the Secretary of Homeland Security to place APAS rated orders for food resources. The Secretary's APAS authority is re-delegated to the Administrator of FEMA, who, in turn, has re-delegated authority to various FEMA personnel to place APAS rated orders.
- **DPA Regulations**
  - The [Federal Priorities and Allocations System \(FPAS\)](#) is the system of priorities and allocations regulations issued by federal departments that are delegated priorities and allocations under section 201 of E.O. 13603. These regulations all incorporate the same basic standards and procedures for use of the DPA priorities and allocations authorities.
  - [FEMA's voluntary agreements regulation](#) provides procedures for establishing and carrying out voluntary agreements under Section 708 of the DPA. A "voluntary agreement" is an association of industry, business, financing, agriculture, labor, or other private interests to help provide for the national defense, including emergency preparedness and response activities. Participants in a voluntary agreement are granted relief from antitrust laws under the provisions of Section 708 of the DPA.
- **DHS DPA Guidance**
  - Federal Priorities and Allocations System
    - [DHS Approved Programs](#) – Section 202 of E.O. 13603 provides that the priorities and allocations authorities "may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense." Responsibility for making this determination for homeland security programs has been delegated to the Associate Administrator for the Office of Policy and Program Analysis (OPPA) in FEMA. The following programs for which OPPA has made this determination are referred to as "DHS Approved Programs":
      - Programs involving emergency preparedness activities conducted pursuant to title VI of the Stafford Act
      - Intelligence and warning systems to counter terrorism within the United States
      - Border and transportation security programs to counter terrorism within the United States
      - Programs to address chemical, biological, radiological, and nuclear threats within the United States
      - Other programs, including law enforcement, to counter terrorism within the United States
      - Programs to protect or restore critical infrastructure
      - Federal Government continuity programs and functions.
    - [DHS Guidance for Placing DPAS Rated Orders](#) – Regulatory guidance and procedures for placing DPAS rated orders by the at 15 CFR Part 700. This provides supplemental DHS DPAS guidance for implementation of DPAS Delegation 4 authority in support of DHS Approved Programs.

- The FEMA Directive: Federal Priorities and Allocations System, FEMA Directive #211-1, June 13, 2018 establishes policy and responsibilities for managing and using the Presidential authority provided in [section 101 of the Defense Production Act](#).
- [Guidance for the National Defense Executive Reserve \(NDER\) Program](#) explains basic policies for the NDER and prescribes standards and procedures for administration of the program by FEMA and other Federal agencies.
- **Reports to Congress**
  - [The Defense Production Act Committee Report to Congress](#) (2015)

## Contact Us

---

For more information, please email [FEMA-DPA@fema.dhs.gov](mailto:FEMA-DPA@fema.dhs.gov).

Last updated July 30, 2020

- - - [Disaster Authorities](#)
      - [Defense Production Act](#)
        - [Defense Production Act Authority and Functions](#)
        - [Defense Production Act Authorities](#)
        - [DHS Approved Programs](#)
        - [Defense Production Act Program Definitions](#)
        - [Federal Priorities and Allocations System](#)
        - [Information for Contractors About Priority Rated Orders](#)
        - [Procedures for Placing a Priority-Rated Contract or Order](#)
      - [Stafford Act](#)
      - [Sandy Recovery Improvement Act](#)
      - [Disaster Recovery Reform Act](#)
- [Accessibility](#)
- [Accountability](#)
- [Careers](#)
- [Contact Us](#)
- [FOIA](#)
- [Glossary](#)
- [No FEAR Act](#)

- [Plug-Ins](#)
- [Privacy](#)
- [Report Disaster Fraud](#)
- [Website Information](#)
- [DHS.gov](#)
- [USA.gov](#)
- [Inspector General](#)

Follow FEMA

[A-Z Index](#)

[Advanced Search](#)

[Coronavirus Disease 2019 \(COVID-19\)](#)



- [Your Health](#)
- [Community, Work & School](#)
- [Healthcare Workers & Labs](#)
- [Health Depts](#)
- [Cases & Data](#)
- [More](#)

1. [Community, Work & School](#)

## **Meat and Poultry Processing Facility Assessment Toolkit**

Tools and resources for occupational safety and health professionals and state and local public health officials assessing meat and poultry processing facilities

Updated Aug. 1, 2020, 12:00 AM

- [Facebook](#)
- [Twitter](#)
- [LinkedIn](#)
- [Email](#)
- [Syndicate](#)

Meat and Poultry Processing Guidance



## [Meat and Poultry Processing Workers and Employers](#)

How and What to Communicate to your Employees about COVID-19

## [COVID-19 Communication Plan for Select Non-healthcare Critical Infrastructure Employers](#)

**Who these tools are for:** These tools and resources are for occupational safety and health professionals and state and local public health officials.

**Purpose:** Occupational safety and health professionals and state and local public health officials can use these tools to assess coronavirus disease 2019 (COVID-19) infection prevention and control measures at meat and poultry processing facilities, as well as these facilities' overall hazard assessment and control plans.

The tools are based on [Meat and Poultry Processing Workers and Employers – Interim Guidance from CDC and the Occupational Safety and Health Administration \(OSHA\)](#).

This interim guidance is based on what is currently known about the transmission and severity of COVID-19.

The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the [CDC COVID-19 website](#) periodically for updated interim guidance.

## Facility assessment checklist

### [Facility Assessment Checklist \[PDF – 9 pages\]](#)

The facility assessment checklist is intended **for use by occupational safety and health professionals to assess a facility's COVID-19 control plan** and determine whether control measures in place align with CDC/OSHA guidance. A checklist assessment should be done when control plans are formed, and each time that control plans are revised.

We recommend that those conducting the assessment checklist include the following steps. During each step include management and employee representatives (e.g., union representatives) if appropriate.

1. **Pre-assessment.** Inform all parties of the goals of the assessment. Work as a group to review the checklist to determine if each part applies to your company.
2. **Walkthrough of the facility.** While conducting the walkthrough of a facility, use the checklist to document what you find. Observe as much of the plant processes as possible. Limit participation to those familiar with plant processes.

3. **Post-assessment.** After conducting the assessment, discuss observations, develop action items, determine steps to protect workers, and prioritize actions to be taken to control and prevent the spread of COVID-19 within the workplace.

## Facility assessment tool

[Facility Assessment Tool \[PDF – 13 pages\]](#)

The facility assessment tool is intended **for state and local health officials to assess COVID-19 infection prevention and control measures in meat and poultry processing facilities**. This tool is not intended to assess regulatory compliance. Elements can be added or removed depending on the local situation. Officials can complete the assessment through a combination of the following actions:

- Review of written policies;
- Discussions with facility management and worker representatives;
- Direct observation through a site evaluation.

Direct observation of infection prevention and control practices is encouraged. A qualified public health or health and safety professional should complete the assessment.

If conducting a site evaluation, we recommend the following steps.

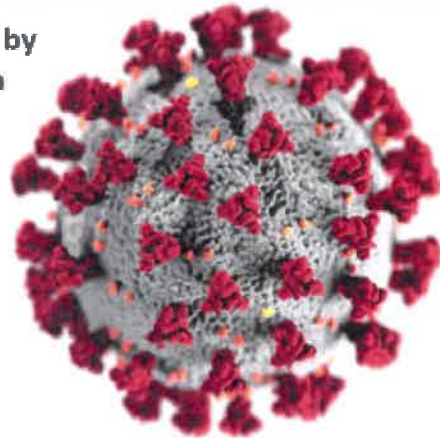
1. **Review the facility's COVID-19 workplace health and safety plan.** Use the facility assessment tool to evaluate the relevant infection prevention and control measures and assess whether the plan addresses all elements contained within the [CDC/OSHA guidance](#).
2. **Meet with management and employee representatives.** Use the meeting to inform all parties of the focus of the assessment.
3. **Conduct a site evaluation.** Conduct a walkthrough of the facility; observe as much of the facility as possible. Include management and employee representatives in the assessment, if possible, but limit participation to those familiar with plant processes.
4. **Conduct a post-assessment meeting.** After conducting the site evaluation, meet with the group to discuss observations, determine interim steps to protect workers, and prioritize actions to be taken to mitigate the spread of COVID-19 within the workplace.

## Quick reference slides for occupational safety and health professionals and state and local public health officials

## Virtual Occupational Technical Assistance (VOTA)

**Review of Facility Assessment Checklist for Use by Management and Occupational Safety & Health Professionals at Individual Facilities**

**And Review of Facility Assessment Tool for Use by Public Health Officials**



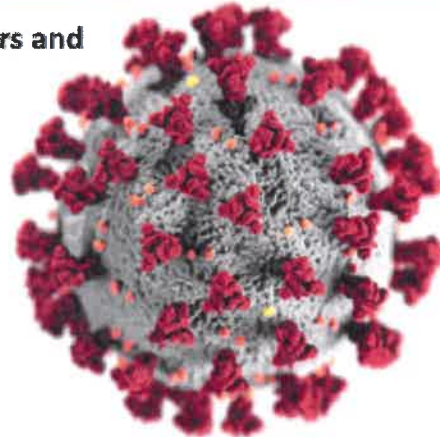
[cdc.gov/coronavirus](https://cdc.gov/coronavirus)

[pdf](#)

[icon](#)

## Virtual Occupational Technical Assistance (VOTA)

**Review of “Meat and Poultry Processing Workers and Employers - Interim Guidance from the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA)”**



[cdc.gov/coronavirus](https://cdc.gov/coronavirus)

[pdf](#)

[icon](#)

The meat and poultry processing workers guidance overview slides provide an overview of the [Meat and Poultry Processing Workers and Employers – Interim Guidance from CDC and the Occupational Safety and Health Administration \(OSHA\)](#). The information covered in these slides is not the only information that might be useful, and it is meant to provide a framework for the critical information meat and poultry processing facilities should use when developing plans for

continuing operations in the setting of COVID-19 occurring among workers, or in the surrounding community.

The meat and poultry processing assessment tools overview slides provide an overview of the components of the facility assessment checklist and the facility assessment tool.

## **Quick reference guides for meat and poultry processing facility employees and employers**

CDC has also developed three one-page flyers with recommendations and strategies for preventing the spread of COVID-19 in meat and poultry processing facilities and when carpooling to and from work. These include:

- [Key strategies for employerspdf icon](#) to prevent COVID-19 infection among employees
- [Tips for employeespdf icon](#) to protect themselves and other from COVID-19 at work and at home
- [Carpoolingpdf icon](#) tips to help prevent the spread of COVID-19 when carpooling to and from work

The fliers are available in multiple languages.

Alternate Language Links

**Key Strategies for Employers:** [Amharicpdf icon](#) | [Arabicpdf icon](#) | [Burmesepdf icon](#) | [Chinesepdf icon](#) | [Frenchpdf icon](#) | [Haitian-Creolepdf icon](#) | [Karenpdf icon](#) | [Koreanpdf icon](#) | [Nepalipdf icon](#) | [Portuguesepdf icon](#) | [Spanishpdf icon](#) | [Somalipdf icon](#) | [Tigrinyapdf icon](#) | [Vietnamesepdf icon](#)

**Tips for Employees:** [Amharicpdf icon](#) | [Arabicpdf icon](#) | [Burmesepdf icon](#) | [Chinesepdf icon](#) | [Frenchpdf icon](#) | [Haitian-Creolepdf icon](#) | [Karenpdf icon](#) | [Koreanpdf icon](#) | [Nepalipdf icon](#) | [Portuguesepdf icon](#) | [Spanishpdf icon](#) | [Somalipdf icon](#) | [Tigrinyapdf icon](#) | [Vietnamesepdf icon](#)

**Carpooling:** [Marshallesepdf icon](#) | [Russianpdf icon](#) | [Spanishpdf icon](#) | [Tamilpdf icon](#) | [Telugupdf icon](#) | [Vietnamesepdf icon](#)