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## President Trump Invokes Defense Production Act to Halt Certain Exports

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On April 3, President Trump issued a [memorandum](#) directing the Secretary of Homeland Security (“DHS”) to “allocate to domestic use” certain types of personal protective equipment (“PPE”) previously identified as scarce by the Secretary of Health and Human Services (“HHS”). The presidential action was issued under the authority of the Defense Production Act (“DPA”), marking the latest in a series of such measures, as the Administration turns to activating a law that confers broad authority. Medical device companies, PPE companies, suppliers to such industries and companies with the capability to produce such items should closely monitor the President’s use of the DPA going forward and consider how their commercial and international contracts could be affected.

### The View From Washington

The DPA broadly empowers the President to take extraordinary measures to secure the supply of critical items in order to promote the national defense. Since first invoking the DPA on March 18, 2020, to shore up domestic supply of critical items in the face of the COVID-19 crisis, President Trump has issued five executive actions under the DPA, addressing hoarding of supplies, ventilator production and exports of PPE, with the various actions delegating certain responsibilities to the HHS and DHS Secretaries and, in certain cases, calling for certain actions regarding particular companies.

In its use of the DPA, the Trump Administration may seek to chart a measured course, given its stated preference for private sector solutions and industry concerns about the U.S. government assuming “command economy” authority over U.S. companies. However, with leaders in Congress and many commentators calling on the President to make full use of his powers under the DPA to help secure the domestic supply chain, it seems reasonable to expect further use of the DPA in response to the pandemic. Given

the fast-moving nature of efforts to support the public health system in responding to a surge in outbreaks of the coronavirus, DPA directives are apt to occur with little notice and with immediate effect.

## Presidential Powers Authorized Under the DPA

The DPA, enacted in 1950 during the Korean War, grants far-reaching powers to the President to intervene in the civilian economy to promote the national defense.

Specifically, the DPA empowers the President to:

- order that government contracts take priority over other contracts with respect to designated “scarce and critical” materials;
- allocate materials, services and facilities as appropriate to promote the national defense;
- prohibit the hoarding of scarce materials;
- implement wage and price controls (only with authorization of a joint resolution of Congress);
- authorize loan guarantees for financing extended to contractors supplying essential services;
- provide for loans related to the production of essential materials; and
- install equipment at, or provide for the modification or expansion of, privately owned plants.

Though the DPA is the statutory basis for review of foreign investments by the Committee on Foreign Investment in the United States (“CFIUS”) – which in recent years has taken on increased importance and intensity – subsequent to the Cold War, the DPA has only been seldom used on a targeted basis.

## President Trump Executive Actions Under the DPA

On March 13, President Trump [declared a national emergency with respect to COVID-19](#), which laid the groundwork for using the authority of the DPA. Since then, President Trump has taken the following actions with respect to the DPA, currently culminating in what amounts to an export ban on items such as N-95 masks and certain PPE masks and gloves:

Actions on Items and Companies

- **March 18:** Issued an [executive order](#) identifying “health and medical resources needed to respond to the spread of COVID-19,” including PPE and ventilators, as scarce and critical materials under the DPA, and delegating DPA powers with respect to such materials to the Secretary of HHS.
- **March 27:** Issued a [memorandum](#) directing the Secretary of HHS to require General Motors to prioritize contracts for ventilators as deemed appropriate by the Secretary.
- **April 2:** Issued a [memorandum](#) directing the Secretary of HHS, in consultation with the Secretary of DHS, to take action under the DPA to facilitate the supply of materials to General Electric, Hill-Rom Holdings, Medtronic, ResMed, Royal Philips N.V. and Vyair Medical for use in the production of ventilators.
- **April 2:** Issued a [memorandum](#) directing the Secretary of DHS to use the DPA to acquire N-95 respirators.

## The PPE Export Ban

On April 3, President Trump issued a [memorandum](#) directing the Secretary of DHS, in consultation with the Secretary of HHS, to use the DPA to “allocate to domestic use” N-95 facepiece respirators, other filtering facepiece respirators, elastomeric air-purifying respirators and related filters and cartridges, PPE surgical masks and PPE gloves or surgical gloves. The memorandum noted:

To ensure that these scarce or threatened PPE materials remain in the United States for use in responding to the spread of COVID-19, it is the policy of the United States to prevent domestic brokers, distributors, and other intermediaries from diverting such material overseas.

The April 3 memorandum appears to essentially impose an export ban with respect to the identified PPE items. Ordinarily, the U.S. Department of Commerce, Bureau of Industry and Security has authority to control the export of identified “dual-use” items, historically including those considered to be in “short supply.” Though it is not entirely clear how the export ban on PPE items under the DPA will be implemented, pursuant to the authority delegated by the President under the memorandum, DHS in turn may have authority to issue orders to companies prohibiting export of the identified PPE items, and to interdict outgoing shipments.

## Key Takeaways

- It is reasonable to expect continued use of the DPA in response to the COVID-19 pandemic.

- The Trump Administration’s approach thus far indicates that the Administration will make use of the DPA not only to designate and allocate critical items, but also will issue orders to, or relating to, specific companies.
- Though it remains to be seen how the recent export restrictions regarding PPE will be implemented, future DPA memoranda could identify additional critical items and related components and impose further export restrictions.
- Companies should carefully monitor their distribution and fulfillment chains, as the U.S. government is likely to scrutinize where and how health and medical products are being sold.

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