



CRISIS PRACTICE

Coronavirus

LIFE SCIENCES AND HEALTHCARE

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Criminal and Civil Enforcement of the Defense Production Act

The Defense Production Act (the “DPA” or “the Act”)¹ and its implementing regulations² are among the tools available to the federal government as it responds to the COVID-19 pandemic. The DPA provides the federal government broad authority to require private U.S. companies to provide essential goods and services needed for the “national defense,” defined broadly to include preparedness activities for public health emergencies under the Stafford Act.³

Since declaring a national emergency in response to the COVID-19 pandemic on March 13, 2020,⁴ President Trump has invoked the DPA—and at times threatened its invocation—to require companies to produce scarce, essential medical equipment, including ventilators and N95 respirator masks, and to prioritize federal receipt of equipment in the fight against COVID-19.⁵

The broad restraints imposed by the DPA on companies and manufacturers has become a crucible for enforcement activity. Recently and in rapid succession, the Department of Justice dusted off the DPA’s anti-hoarding and price-gouging provisions—which never before were used criminally—to bring charges against a series of defendants who allegedly sought to take advantage of the shortage of personal protective equipment (“PPE”) wrought by the pandemic.

This alert examines the government’s increased enforcement activity under the DPA, starting with the Act’s history and the dearth of enforcement precedent, then turning to potential challenges under the Supreme Court’s void-for-vagueness doctrine that could arise due to the breadth of the Act.

For businesses involved in industries covered by the DPA’s reach, its enforceability should be a paramount concern. Companies should understand the broad authority granted by the DPA, while understanding potential limits and challenges to its applicability.



BRIEF HISTORY OF THE DPA

Congress passed the DPA in 1950 in response to the Korean War, modeling it on the First and Second War Powers Acts of 1941 and 1942, both of which gave President Franklin Roosevelt sweeping authority to control the domestic economy during World War II. The DPA grants the President broad authority to act in the interest of “national defense.”⁶ Over time, the definition of “national defense” has expanded. Currently, the Act permits the Executive Branch to insert itself into domestic industrial affairs to ensure military readiness and domestic preparedness for national emergencies like the COVID-19 pandemic.

The President’s Power to Allocate and Set Priorities

Relevant to this alert, Title I of the DPA grants the President broad *priority* and *allocation* powers:

- The priority power allows the President “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.”⁷
- The allocation power allows the President “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.”⁸

The DPA requires that the President—before exercising either of these powers—find “(1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”⁹

The DPA’s Price-Gouging and Anti-Hoarding Provisions

The DPA prohibits hoarding and price-gouging of materials covered by the DPA. The anti-hoarding provision bars accumulation “in excess of the reasonable demands of business, personal, or home consumption,” while the price-gouging provision bars accumulation for the “purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation.”¹⁰

The materials covered by these provisions must be “published in the Federal Register,” as must “any withdrawal of such designation.”¹¹ In making these designations, “the President may prescribe such conditions with respect to the accumulation of materials in excess of the reasonable demands of business, personal, or home consumption . . . ”¹²

CRIMINAL AND CIVIL ENFORCEMENT OF THE DPA

Criminal Penalties

Since the initial passage of the DPA in 1950, criminal penalties have been available to address willful noncompliance with “any act required” by the DPA, including its price-gouging and anti-hoarding provisions.¹³ The DPA’s implementing regulations further provide that a “[w]illful violation of the [DPA],” “this part,” “or an official action,” is a federal crime carrying maximum penalties of a \$10,000 fine, one year’s imprisonment, or both.¹⁴ With these penalties, a criminal violation of the DPA amounts to a Class A misdemeanor.¹⁵

Like the more general conspiracy and aiding and abetting provisions available under federal law,¹⁶ the DPA’s implementing regulations make two additional categories of conduct unlawful: (1) soliciting, influencing, or permitting a person to perform a prohibited act or omit a required act; and (2) conspiring to perform a prohibited act or omit a required



act.¹⁷ Additionally, the implementing regulations make it unlawful for a person to “deliver any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act, this part, or an official action.”¹⁸

No criminal charges were brought in the first seventy years following the DPA’s enactment. That said, federal authorities have used the threat of criminal penalties to leverage compliance with the DPA. For instance, in 2011, President Obama threatened criminal penalties under the DPA against telecommunications companies if they did not provide detailed information to the Commerce Department’s Bureau of Industry and Security on the use of foreign-manufactured hardware and software in their networks, as part of efforts to combat Chinese cyberespionage.¹⁹

Civil Remedies

Apart from enforcement through criminal penalties, civil remedies also are available to the federal government. The DPA’s implementing regulations permit the government to “seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this regulation, or an official action.”²⁰ The Department of Commerce has the power to conduct audits and investigations to ensure compliance with the DPA, and has the power to issue administrative subpoenas for testimony and records.²¹

Aside from early litigation soon after passage of the DPA in the early 1950s, the federal government has not had to resort to injunctive relief provisions in decades.²²

INVOCATION OF THE DPA TO COMBAT COVID-19

On March 18, 2020, President Trump invoked the DPA in Executive Order 13909, “Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19,”²³ in which he found “that health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)).”²⁴ The President delegated authority to the Secretary of Health and Human Services (“HHS”) to “identify additional specific health and medical resources that meet the criteria of section 101(b).”²⁵

On March 23, 2020, the President issued Executive Order 13910, declaring that “it is the policy of the United States that health and medical resources needed to respond to the spread of COVID-19, such as personal protective equipment and sanitizing and disinfecting products, are not hoarded.”²⁶ The President again delegated authority to the Secretary of HHS, “to prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States,” and “to implement any restrictions on hoarding.”²⁷ On March 30, 2020, the Secretary of HHS exercised that authority, designating a number of health and medical resources as scarce materials or materials the supply of which would be threatened by accumulation in excess of reasonable demands of business, personal, or home consumption, or for the purpose of resale at prices in excess of prevailing market prices, as of March 25, 2020.²⁸

THE DEPARTMENT OF JUSTICE’S RECENT CRIMINAL ENFORCEMENT ACTIVITY UNDER THE DPA

On March 24, 2020, Attorney General William Barr directed United States Attorneys to immediately create “a task force to address COVID-19-related market manipulation, hoarding, and price gouging,”²⁹ commenting that “[t]he pandemic is dangerous enough without wrongdoers seeking to profit from public panic[,]” and that such “conduct cannot be tolerated.”³⁰ Shortly after the Attorney General’s pronouncement, the DOJ brought its first criminal charges.

In April 2020, the United States Attorney’s Office for the Eastern District of New York charged an individual with violations of the DPA’s anti-hoarding and price-gouging provisions. The government alleged the defendant exceeded the “reasonable demands” of his business by accumulating PPE and other health and medical resources in quantities that “far exceeded the reasonable demands of [his] retail business, which, until that point in time, had not dealt in such



products.³¹ The government also alleged that the defendant resold materials at prices “in excess of prevailing market prices,”³² with markups ranging from 87% to 1,328% above cost.³³

Also in April 2020, the United States Attorney’s Office for the Eastern District of New York brought charges against two men, one an attorney, for allegedly conspiring to violate the DPA’s price gouging provision.³⁴ The defendants allegedly attempted to resell masks at double or triple their purchase price, with one defendant allegedly telling an undercover federal agent he would falsify invoices and draft a letter stating that he purchased the masks close to the resale price.³⁵

In another recent investigation, federal authorities approached a Brooklyn man after finding that he was selling N95 masks and other material at an approximately 700% markup over normal prices. The man allegedly made false statements to authorities and assaulted them (by allegedly coughing on the agents and claiming to have COVID-19), leading the United States Attorney’s Office for the Southern District of New York to initiate federal charges for assault of a federal officer and false statements.³⁶

In late May 2020, the U.S. Attorney’s Office for the Southern District of New York brought charges against two defendants in separate cases alleging criminal DPA violations. One defendant was charged with wire fraud and conspiracy to accumulate, for the purpose of resale at prices in excess of prevailing market prices, certain facemasks and respirators to New York City as part of a \$45 million scheme.³⁷ Charges were brought against the second defendant, a pharmacist, under the anti-hoarding and resale-at-excessive-prices provisions of the DPA for accumulating \$200,000 worth of N95 masks with the intent to sell at “severely inflated prices.”³⁸

DUE PROCESS AND CRIMINAL ENFORCEMENT OF THE DPA

The Due Process Clause of the Constitution requires clarity and unambiguity in criminal statutes—principles that the Supreme Court regularly reinforces and calls upon in interpreting and applying the law.³⁹ With that lens, consider the DPA’s anti-hoarding and price-gouging provisions, and the potential breadth of their reach against actors who accumulate needed material “in excess of” “reasonable demands,” and who sell material at “prices in excess of prevailing market prices.”

Defining “In Excess of” “Reasonable Demands” and “Prevailing Market Prices”

Significantly, neither the legislative history for the DPA nor case law precedent addresses what constitutes “in excess of” “reasonable demands” for supply, and what may constitute prices “in excess of” “prevailing market prices.” Likewise, neither the DPA’s implementing regulations nor executive orders clarify the two provisions.

What, then, is the appropriate standard for gauging whether a defendant’s accumulation of a product exceeded his “reasonable demands” or whether a defendant sold product “in excess of prevailing market prices”? Should these terms be viewed through the eyes of a reasonable person standing in the shoes of the defendant? Should “prevailing market prices” be defined as the difference between price and cost? If so, what difference suffices, and on what order of magnitude? Or should it be some percentage increase and, if so, what percentage increase will do?

The Void-for-Vagueness Doctrine

The breadth of the DPA potentially implicates the void-for-vagueness doctrine. This constitutional doctrine requires that criminal statutes have “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁴⁰

The Supreme Court’s application of the void-for-vagueness doctrine in *United States v. L. Cohen Grocery Co.*⁴¹ provides apt parallels for the DPA. In *Cohen*, the Supreme Court was faced with a criminal statute that made it unlawful “for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities[.]”⁴² The Supreme Court held the statute unconstitutional under the void-for-vagueness doctrine. The



Supreme Court observed that the statute “forbid[] no specific or definite act,” while “leav[ing] open … the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.”⁴³ The Supreme Court ultimately was troubled because enforcement “would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.”⁴⁴ The statutory language at issue in *Cohen* is strikingly similar to the DPA, and may prove to be fertile ground for analogy as the recent DPA prosecutions make their way through the court system.

CONCLUSION

As companies navigate the complex world wrought by the COVID-19 pandemic, companies involved in responding to the pandemic and whose actions may be covered by the DPA must keep its broad scope as well as the government’s increasing criminal enforcement in mind. Companies should be aware of the risk arising from the DPA’s breadth and the large potential swath of conduct covered, keeping in mind constitutional principles in the event they must challenge the law’s application.

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¹ 50 U.S.C. §§ 4501, *et seq.*

² See 15 C.F.R. Part 700.

³ See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207. Companies may be required, for example, to accept new federal contracts, known as “rated orders,” for products and/or services identified as necessary meet the needs of the national defense or other national emergency. Rated orders allow the federal government’s needs to take priority in manufacturing production lines—such contracts must be prioritized over any competing obligations, including prior commitments to commercial customers and orders placed under non-rated federal contracts.

⁴ The White House, “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

⁵ Now that Peter Navarro, the White House trade adviser, has been appointed coordinator of Defense Production Act policy, Navarro has compared efforts to combat the spread of the novel coronavirus with being at war: “We have a wartime president fighting an invisible enemy and we have the full force of government coupled with the full power of bearing down on this problem for the American people.” Jeffery Martin, *Trump Taps Peter Navarro*



as Defense Production Act Policy Coordinator During Coronavirus Pandemic, Newsweek (Mar. 27, 2020), available at <https://www.newsweek.com/trump-taps-peter-navarro-defense-production-act-policy-coordinator-during-coronavirus-pandemic-1494782>.

⁶ 50 U.S.C. § 4552.

⁷ 50 U.S.C. § 4511(a)(1).

⁸ *Id.* at § 4511(a)(2). The President may also exercise this authority “to control the general distribution of any material in the civilian market” if the President finds “(1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.” *Id.* at § 4511(b).

⁹ *Id.* There are other restrictions on the President’s ability to allocate and priority energy supply-related contracts. See *id.* at § 4511(c).

¹⁰ *Id.* at § 4512.

¹¹ *Id.*

¹² *Id.*

¹³ 50 U.S.C. § 4513.

¹⁴ 15 C.F.R. § 700.74(a). The term “official action” is broadly defined. It covers “action taken by the Department of Commerce under the authority of the Defense Production Act” as well as its implementing regulations; and it is defined expansively to include demands for information, inspection authorizations, administrative subpoenas and allocation orders. *Id.* at § 700.8.

¹⁵ See 18 U.S.C. § 3559(a)(6).

¹⁶ See 18 U.S.C. §§ 2, 371.

¹⁷ 15 C.F.R. § 700.74(c)(1)-(2).

¹⁸ *Id.* at § 700.74(c)(3).

¹⁹ Michael Riley, *Obama Invokes Cold-War Law to Unmask Chinese Telecom Spyware*, Bloomberg (Nov. 30, 2011), available at <https://www.bloomberg.com/news/articles/2011-11-30/obama-invokes-cold-war-security-powers-to-unmask-chinese-telecom-spyware>.

²⁰ 15 CFR § 700.74(b).

²¹ 15 CFR § 700.71.

²² See, e.g., *United States v. St. Regis Paper Co.*, 106 F. Supp. 286 (S.D.N.Y. 1952) (addressing interpretation of now-repealed price-ceiling provision of the DPA); *United States v. Excel Packing Co.*, 210 F.2d 596 (10th Cir. 1954) (involving constitutionality and applicability of now-repealed price-ceiling provision of the DPA).

²³ 85 Fed. Reg. 16227 (Mar. 18, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-03-23/pdf/2020-06161.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 85 Fed. Reg. 17,001, available at <https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06478.pdf>.

²⁷ *Id.*

²⁸ 85 Fed. Reg. 17592, available at <https://www.govinfo.gov/content/pkg/FR-2020-03-30/pdf/2020-06641.pdf>.

²⁹ Dep’t of Justice Memorandum, “Department of Justice COVID-19 Hoarding and Price Gouging Task Force” (Mar. 24, 2020), available at <https://www.justice.gov/file/1262776/download>.

³⁰ Dep’t of Justice Memorandum, “COVID-19 – Department of Justice Priorities” (Mar. 16, 2020), available at <https://www.justice.gov/ag/page/file/1258676/download>.

³¹ Complaint, *United States v. Singh*, No.: 20-MJ-326 (E.D.N.Y. Apr. 24, 2020), available at <https://www.justice.gov/usao-edny/press-release/file/1271156/download>. The accumulated products included: 21,267 KN-95 respirator face masks; 75,500 surgical masks; 8,039 two- and three-ply face masks; 5,241 face shields; 2,471 full-body isolation suits; 176,104 disposable latex gloves; 711,400 disposable vinyl gloves; 8,200 disposable nitrile gloves; and 147 digital thermometers.

³² Press Release, *Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment*, Dep’t of Justice (Apr. 24, 2020), available at <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0>.



³³ *Id.*

³⁴ Complaint, *United States v. Kent Bulloch and William Young*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020), available at <https://www.justice.gov/usao-edny/press-release/file/1271741/download>.

³⁵ *Id.* at ¶¶ 4, 71-73.

³⁶ See Press Release, *U.S. Brooklyn Man Arrested for Assaulting FBI Agents and Making False Statements About His Possession and Sale of Scarce Medical Equipment*, Dep't of Justice (Mar. 30, 2020), available at <https://www.justice.gov/usao-nj/pr/brooklyn-man-arrested-assaulting-fbi-agents-and-making-false-statements-about-his>.

³⁷ Complaint, *United States v. Ronald Romano*, 20 MAG 5276 (S.D.N.Y. May 26, 2020), available at <https://www.justice.gov/usao-sdny/press-release/file/1278731/download>.

³⁸ Complaint, *United States v. Richard Schirripa*, 20 MAG 5275 (S.D.N.Y. May 26, 2020), available at <https://www.justice.gov/usao-sdny/press-release/file/1278736/download>.

³⁹ See *Skilling v. United States*, 561 U.S. 358 (2010).

⁴⁰ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

⁴¹ 255 U.S. 81 (1921). The defendant in *Cohen* was a sugar dealer who sold 50 pounds of sugar for \$10.07 and a 100-pound bag of sugar for \$19.50.

⁴² *Id.* at 89.

⁴³ *Id.*

⁴⁴ *Id.*