



Executive Order on the Food Supply Chain and the Defense Production Act: FAQs

May 1, 2020

On April 28, 2020, President Trump issued an [executive order](#) (EO) invoking the [Defense Production Act](#) (DPA) to address the food supply chain for meat and poultry products during the national emergency caused by the COVID-19 outbreak. The release of the EO was preceded by some [state](#) and [congressional](#) calls for such an order, and significant [media coverage](#) about the [potential contents](#) of such an order. This Sidebar addresses some frequently asked questions about the EO's contents, legal bases, and potential effects.

What does the EO do and how does it use the DPA?

The EO designates “meat and poultry in the food supply chain” as “critical and strategic materials” under [section 101\(b\)](#) of the DPA. This section of the DPA permits the President to control distribution of designated materials in the civilian market, if: (1) the material is determined to be essential to the national defense, and (2) that the requirements of the national defense cannot be met through other means “without creating a significant dislocation of the normal distribution” of the designated material “to such a degree as to create appreciable hardship.” Having made such a finding, the EO authorizes the Secretary of Agriculture to “take all appropriate action under [section 101(b)] to ensure that meat and poultry processors continue operations consistent with the [guidance](#) for their operations jointly issued by the [Centers for Disease Control and Prevention (CDC)] and [the Occupational Safety and Health Administration (OSHA)].” Based on a plain reading of the text, the EO itself does not order any plants to remain open. Rather, it permits the Secretary to issue regulations, orders, or take other actions to address continued operation of processors, while also ensuring that processors adhere to the CDC/OSHA guidance.

The EO further authorizes the Secretary to “identify additional specific food supply chain resources” as “critical and strategic materials” under the DPA. Based on this authorization, the Secretary could conceivably extend the reach of the EO beyond meat and poultry to any other commodity or resource within a food supply chain, provided these commodities or resources satisfy the requirements of section 101(b).

Finally, the EO provides additional authority under [section 101\(a\)](#) of the DPA to allow the Secretary to prioritize contracts or “allocate materials, services, and facilities as deemed necessary or appropriate to

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promote the national defense.” To implement this part of the EO, the President has also delegated authority to the Secretary to, among other things, [issue regulations and orders](#), [require information or records from any person](#), and [seek to enforce DPA orders](#) (discussed in more detail below). The U.S. Department of Agriculture (USDA) currently has regulations, known as the [Agriculture Priorities and Allocations System](#) (APAS), in place to set out how it will implement section 101 during emergencies and non-emergencies, as directed by President Obama’s [Executive Order 13603](#). President Trump’s new EO seeks to ensure that USDA may create new or amended regulations if USDA believes it necessary to address the COVID-19 emergency (i.e., USDA may rely on existing regulations, but could also issue new or amended regulations).

How does an agency implement a DPA EO?

There is not necessarily a standard way of implementing an EO implicating the DPA, as much depends on the contents of any EO and the fact that agencies have discretion to [issue regulations and orders](#) within the scope of their authority, as they believe appropriate. That said, USDA appears, at least initially, to be attempting to implement the EO via negotiation as opposed to more coercive measures (e.g., orders directed to specific processors or regions). On April 29, 2020, USDA issued a [statement](#) that it intends to first “work with meat processing [plants] to affirm they will operate in accordance with the CDC and OSHA Guidance, and then work with state and local officials to ensure that these plants are allowed to operate.”

Are there penalties for processors that fail to comply with DPA orders?

The DPA empowers the President and agencies to enforce DPA orders in several ways. First, they may [seek injunctions or restraining orders](#) in federal court to require an entity to do or refrain from doing something in violation of a DPA order. Second, they may promulgate [regulations](#) imposing [liability](#) on non-compliant parties. These regulations may incorporate the statutory penalties set out in [section 103](#) of the DPA, which states that “any person who willfully” violates the statutory or regulatory provisions involving Title I of the DPA (i.e., allocation or prioritization of contracts and orders against hoarding supplies) may be fined up to \$10,000 or imprisoned for not more than one year, or both.

USDA currently has [regulations](#) addressing compliance under its APAS program. If USDA chooses to rely on these regulations to implement the prioritization and allocation of orders under the current EO, it could also seek to rely on the penalty components of these provisions if processors refuse to comply with DPA orders.

Does the EO or DPA limit the legal liability of processors?

The EO contains no reference to legal liability or immunity from lawsuits for affected processors and, on its own, does not grant immunity to processors. However, the DPA contains a provision that provides parties subject to DPA orders with a defense against liability, which applies regardless of whether an EO expressly references it. [Section 707](#) of the DPA states as follows:

No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

As an initial matter, this provision is not a blanket grant of immunity from liability for all actions that an entity may take under a DPA order. Rather, the act (or failure to act) in question must “result[] directly or indirectly from compliance” with an EO or other rule, regulation, or order issued by an agency. Thus, while an entity may raise a DPA order as a defense if sued for actions taken while complying with that

order, whether that entity will ultimately be granted immunity by a court is a fact-specific inquiry. This is evident from a case in which a federal court of appeals [rejected](#) a company’s argument that it was immune from liability for toxic waste cleanup costs because it was producing Agent Orange under a DPA order for the federal government.

Moreover, whether section 707 extends beyond breach of contract situations to tort law (e.g., negligence or product defect claims) remains debated and under-litigated. On its face, section 707 does not differentiate between contract and tort law, which may indicate it could apply to both types of disputes provided the act in question resulted “directly or indirectly” from compliance with a DPA order. As one federal district court has [noted](#), Congress originally designed section 707 to apply only to contract issues, but Congress later removed the section’s express reference to contractual liability. Given this legislative history, it may be that Congress intended that entities subject to DPA orders could raise section 707 as a defense in both contract and tort litigation. But, as that same district court pointed out, it may be “unlikely that Congress would work such a major change in tort law without being explicit about it.”

In sum, the precise scope and applicability of section 707 is unclear for at least two reasons: (1) it is undecided whether and how far it extends beyond contract disputes to tort litigation, and (2) whether an action in dispute results “directly or indirectly” from compliance with a DPA order is fact-specific and must be determined on a case-by-case basis.

Does OSHA’s enforcement policy limit legal liability for processors?

OSHA’s [interim enforcement response plan](#), as clarified by a [statement of enforcement policy](#), does not affect processors’ legal obligations. The response plan and enforcement policy are mechanisms used to set out broadly OSHA’s enforcement priorities and indicate how it will exercise its enforcement discretion. Thus, although OSHA indicates that it “does not anticipate citing employers that adhere to” the CDC/OSHA [guidance](#) for operations, this is not a guarantee of non-enforcement or immunity.

Potentially to address processor concerns about legal liability resulting from continuing operations, OSHA has [indicated](#) a willingness to entertain requests from processors that are sued for alleged workplace exposure to COVID-19 to participate in the litigation, provided the processor being sued has “demonstrated good faith attempts to comply” with the CDC/OSHA guidance. However, this is not a promise to participate in litigation. Further, OSHA has extended a similar offer to employees, indicating it may opt to participate on behalf of the employees “if their employer has not taken steps in good faith” to comply with the CDC/OSHA guidance.

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