

MEMORANDUM

From: Elizabeth Barr Fawell
Brian D. Eyink

Date: April 29, 2020

Re: President Trump Issues Executive Order Invoking Defense Production Act for Meat and Poultry Processors

Late yesterday, President Donald Trump issued an Executive Order invoking the Defense Production Act (DPA) to protect the meat and poultry production supply chain.¹ In the Executive Order, entitled, *Delegating Authority Under The Defense Production Act With Respect To Food Supply Chain Resources During The National Emergency Caused By The Outbreak Of COVID-19*, the President finds that the meat and poultry supply chain meets the criteria under Section 101(b) of the DPA. In doing so, the President has reinforced the importance of the meat and poultry supply chain to national security and has triggered various mechanisms that allow the federal government to prioritize production and allocate supply of meat and poultry products should it wish to do so. Moreover, the Executive Order repeatedly emphasizes the importance of meat and poultry processors being permitted to continue operations provided they are following recent interim guidance jointly issued by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA).²

Background

The DPA dates to the Korean War and is based on World War II-era domestic production statutes intended to facilitate war mobilization. In the years since, the DPA has been amended periodically and has expanded in scope to encompass production related more broadly to national defense concerns, including terrorism response and disaster relief efforts. The DPA's multiple objectives include "the protection and restoration of domestic critical infrastructure operations under emergency conditions."

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* (Apr. 28, 2020), available at <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>.

² See Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA), *Meat and Poultry Processing Workers and Employers* (Apr. 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

Summary of the Executive Order

In the Executive Order, President Trump explains it is “important that processors of beef, pork, and poultry . . . in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans.” The order notes that “outbreaks of COVID-19 among workers at some processing facilities” as well as “recent actions in some States” have led to reductions in output or complete facility closures, which “threaten the continued functioning of the national meat and poultry supply chain.” The Executive Order notes that some state actions “may differ from or be inconsistent with interim guidance recently issued by” the CDC and OSHA.

The Executive Order finds that meat and poultry production satisfies the requirements of Section 101(b) of the DPA, which means meat and poultry products are considered “scarce and critical material essential to the national defense” and such national defense requirements “cannot otherwise be met without creating a significant dislocation of the normal distribution” of these products in the marketplace. This determination allows the federal government to exercise its authority under the DPA to (1) require that companies prioritize filling certain orders issued in support of national defense programs, and (2) allocate materials, facilities, and services to further national defense needs. By finding that Section 101(b) is met, the federal government may also “control the general distribution” of meat and poultry products in the marketplace.

The Executive Order delegates DPA authority regarding meat and poultry processing to the Secretary of Agriculture. In doing so, the Executive Order instructs the Secretary 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 CDC and OSHA.” The Executive Order emphasizes multiple times the need to ensure that meat and poultry processors continue operating by following the recently issued CDC and OSHA guidance covering worker safety. The Executive Order also empowers the Secretary to “identify additional specific food supply chain resources that meet the criteria of section 101(b)” of the DPA.

Importantly, invoking the DPA does not require the government to place prioritized orders for meat or poultry products or to use its authority to allocate production. Although that is now a possibility, the White House has not yet expressed publicly that it intends to do so. The White House has, however, characterized the Executive Order as being important for ensuring meat and poultry processors “are able to remain operating at this critical moment, while also taking steps to prevent the spread of COVID-19 in their facilities.”³ It remains unclear how the federal government intends to coordinate implementation with state and local health departments and resolve issues regarding specific facilities.

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We will continue to monitor developments related to this Executive Order and COVID-19 generally. If you have any questions, please contact us.

³ White House Fact Sheets, *President Donald J. Trump Is Taking Action To Ensure The Safety Of Our Nation’s Food Supply Chain* (Apr. 28, 2020), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-action-ensure-safety-nations-food-supply-chain/>.