

DPA Update: Biden Administration Brings Renewed Focus to Defense Production Act

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As part of the federal government's efforts to combat the COVID-19 pandemic, President Biden plans to "fully use" the Defense Production Act (the "DPA") to compel production of medical and protective equipment, and ensure adequate supplies and distribution of vaccines. On January 21, 2021, the White House released its [National Strategy for the COVID-19 Response and Pandemic Preparedness](#), in which it stated that "the federal government will use its full powers to prevent hoarding and price gouging, including by reviewing and expanding the designated scarce materials under the DPA." In doing so, the new administration re-committed the federal government to using the DPA to combat price gouging, a practice started by President Trump in March 2020.

As previously [covered](#), the DPA grants the President the power to command private industry in the name of national defense, by doing such things as compelling private companies to accept and prioritize contracts, or diverting production or materials to specified buyers. The DPA also criminalizes accumulating goods deemed "scarce" either (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purposes of resale in excess of prevailing market prices. The DPA is different from state price gouging laws in that it adds a requirement of "accumulation" in addition to sale at an inflated price. It remains unclear what a court would consider the reasonable demands of business or personal consumption, or what method it would use to calculate what exactly constitutes charging a price "in excess of prevailing market prices."

Some have raised questions about the general efficacy of the Trump administration's invocation of the DPA, including a July 28, 2020 report by the Congressional Research Service stating that the administration's implementation of the Act was "sporadic and relatively narrow" and that it was "unclear which executive agency leads overall efforts under DPA authority, in response to the pandemic." To the extent federal criminal charges were brought under the DPA, it was for clear acts of price gouging (including one seller charging mark-ups of up to 1,328%) that failed to shed light on the more nuanced questions surrounding the act.

Accordingly, the Biden administration will be painting on a relatively clean canvas under the DPA as it relates to price gouging enforcement. And while it is likely that the majority of the Biden administration's efforts under the DPA will be focused on the act's main purpose – directing the production and distribution of necessary goods, businesses can expect an expanded list of materials deemed scarce pursuant to the Act, as well as a renewed interest and focus by federal investigators. Accordingly, companies should continue to monitor the Biden administration's use of the DPA to combat price gouging, and should continue to closely monitor their own compliance efforts.

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