From: no-reply@foiaonline.gov <no-reply@foiaonline.gov>
Sent: Thursday, March 11, 2021 12:50 PM EST
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Subject: Interim Release, Request DOC-BIS-2020-001022

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From: DCurtis@doc.gov [DCurtis@doc.gov]
Sent: 3/10/2020 4:15:59 PM
To: Hassebrock, Douglas [Douglas.Hassebrock@bis.doc.gov]
Subject: Re: FBI meeting tomorrow?

Mike Walsh wanted KDK to get that same briefing that the SEC'y has months ago. I was trying to find contact info on my calendar around the CFIUS briefing. Then I sent an invite.

If I set something up I will invite you.

Deborah A. Curtis
Chief Counsel for Industry and Security
U.S. Department of Commerce

> On Mar 10, 2020, at 11:53 AM, Douglas Hassebrock <Douglas.Hassebrock@bis.doc.gov> wrote:
>
>
> For EA? License info or supply chain or?
>
>
>
> ---
> Douglas R. Hassebrock
>
> **********
> This Message was sent from my Mobile Device.
> **********

AMERICAN OVERSIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	No. 1:19-cv-0778-CJN

PLAINTIFF CAUSE OF ACTION INSTITUTE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

At the end of last year, Congress passed and President Trump signed into law an appropriations bill that included a provision requiring Defendant Department of Commerce ("Commerce") to publish within thirty days a report prepared under Section 232 of the Trade Expansion Act of 1962 ("Section 232") about the national security impact of the importation of automobiles and automobile parts ("Auto Tariffs Report"). Plaintiff Cause of Action Institute ("CoA Institute") requested the same report under the Freedom of Information Act ("FOIA") in February 2019 and filed this lawsuit after Commerce failed to issue a timely determination.

Despite the congressionally mandated publication deadline having passed over a month ago, Commerce still has not—and says it will not—release the Auto Tariffs Report. The agency defends its intransigence by asserting that the White House has directed it to keep the report secret until "executive privilege" is deemed no longer to apply.[1] The basis for that position is set out in a January 2020 Office of Legal Counsel opinion (the "OLC Opinion") that Commerce has adopted, and which the Court has reviewed. The reasoning in that opinion is flawed and does not support withholding the report at issue from CoA Institute.

These developments mark an important turning point in this lawsuit. Until now, Commerce has not directly challenged the constitutionality of Section 232's *Federal Register* publication requirement. No longer. The OLC Opinion is a frontal assault on Congress's authority to condition its delegation of tariff authority to the President on the publication of a report. And it seeks to articulate a novel understanding of executive privilege that ignores the law and past practice, without a limiting principle. This Court should reject the OLC Opinion's conclusions

[1] Commerce also asserts, for the first time, that the Defense Production Act, 50 U.S.C. § 4555(d), allows it to withhold information in the report from this Court, despite FOIA's regularly relied upon *in camera* review provision. *See infra* at pp. 18–20.

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and order the government to promptly produce the Auto Tariffs Report, subject only to redaction of proprietary and classified information, as contemplated by Section 232.

ARGUMENT

In the parties' last Joint Status Report, Commerce "confirmed that, in accordance with the January 17, 2020 OLC Opinion, [it] will continue to withhold the [Auto Tariffs Report] until [executive] privilege is deemed no longer applicable." ECF No. 31 at 2. Following a second oral hearing earlier this month, the Court ordered supplemental briefing on the import of the OLC Opinion to this case, as well as other issues the parties may wish to elaborate upon.

The release of the OLC Opinion, and Commerce's reliance on it as a basis for refusing either to publish the Auto Tariffs Report in the *Federal Register* or to release it under the FOIA, bear directly on this lawsuit. The OLC Opinion provides detailed insight into the Administration's incorrect view of how Section 232 operates and whether and when "executive privilege"—either generally or vis-à-vis the presidential-communications or deliberative-process privileges—can keep agency records secret and out of the reach of Congress or the public.

As explained below, the OLC Opinion's reasoning is infirm and the Court should reject it. Commerce must publish the Auto Tariffs Report in the *Federal Register* and cannot rely on executive privilege, in conjunction with Exemption 5 of the FOIA, to continue to withhold it from CoA Institute. Commerce also improperly withheld portions of the report in its *ex parte* submission and thereby deprived the Court of the ability to conduct thorough *in camera* review.

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I. The OLC Opinion materially impacts this lawsuit and contains important concessions that should affect the Court's analysis.

A. The OLC Opinion offers arguments about the use of executive privilege relevant under the FOIA.

When an agency attempts to withhold records under Exemption 5 of the FOIA, the applicable standard entails an examination of whether "the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23–28 (1983). This "routine disclosure" rule distinguishes the FOIA context from standard civil discovery and therefore eliminates the distinction between qualified and absolute privileges. As for the presidential-communications and deliberative-process privileges, the "routine disclosure" rule also means that an agency need not prove that the President—with presidential communications—or a high-ranking agency official—with deliberative processes—*actually* invoked the privilege. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 320 F. Supp. 3d 110, 117 (D.D.C. 2018) [hereinafter *EPIC*]. In effect, the procedural niceties of civil discovery do not apply.

Even so, while "the *manner* in which [an] exemption is raised" may not matter under the FOIA, courts must still attend to the "*content or nature* of a document generally" to determine whether it would be "routinely" privileged. *Lardner v. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *7 (D.D.C. Mar. 31, 2005). This is so for both the deliberative-process privilege, *EPIC*, 320 F. Supp. 3d at 117 (citation omitted), and the presidential-communications privilege. *Id.* (citing *Lardner*, 2005 WL 758267, at *6–10).

Here, the OLC Opinion frames Congress's efforts to enforce Section 232's publication requirement—and, indirectly, CoA Institute's request for disclosure under FOIA—in terms of qualified privilege and whether there is "legitimate justification for intruding upon the confidentiality of the Executive Branch." Office of Legal Counsel, Dep't of Justice, *Publication*

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of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security at 22 (Jan. 17, 2020) [hereinafter OLC Opinion], *available at* http://bit.ly/32hPREQ. But that framing confuses the issue. The question here is whether Section 232 reports *as such* are presumptively subject to executive privilege. Or whether, as CoA Institute has previously argued, Congress has directed Commerce to create those reports outside the scope of the privilege, given the nature of their creation and purpose in the exercise of congressionally delegated tariff authority. If the OLC Opinion is wrong about the nature, content, and purpose of secretarial reports, Commerce's Exemption 5 arguments must fail.

B. The OLC Opinion concedes that waiver applies to portions of the Auto Tariffs Report and that the report does not contain classified information.

The OLC Opinion contains two remarkable concessions that affect this case. *First*, the OLC Opinion concedes that the government waived its ability to exert executive privilege over the portions of the Auto Tariffs Report described or quoted in President Trump's May 2019 proclamation: "The proclamation's summary of and quotation from certain portions of the report did not waive or forfeit executive privilege over the remainder of the report." *Id.* at 10 n.7 (citation omitted); *see generally* Tr. of [Second] Mot. Hr'g at 37:17–38:04 (Feb. 6, 2020) [hereinafter 2d Tr.], ECF No. 32. Despite CoA Institute raising waiver in the previous round of briefing, and the Court's continued attempts to solicit the government's views, defense counsel has not articulated a clear-cut position on the import of the May 2019 proclamation. *See* 2d Tr. at 37:15 ("MR. MOUSTAKAS: I have not given thought to that [question of waiver]."); Tr. of [First] Mot. Hr'g at 28:14–17 (Nov. 21, 2019) [hereinafter 1st Tr.], ECF No. 29 ("MR. MOUSTAKAS: I would want to give a little bit more thought to that. I have said very quickly it's waivable because, obviously there are situations where, clearly, it's waivable."); *id.* at 32:07–12 ("[I]n all candor, . . . as a practical matter, direct quotes, I think the courts have said, are sort of free game.").

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This is not a difficult issue, and the law is straightforward. "[A]ny voluntary disclosure . . . to a third party breaches . . . confidentiality . . . and therefore waives the privilege[.]" *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). To be sure, executive privilege exists "'to aid the government decisionmaking process, [and] a waiver should not be lightly inferred.'" *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (citation omitted). And, in the context of the deliberative-process and presidential-communications privileges, courts should avoid an "all-or-nothing" approach where waiver extends to "related materials." *Id.* But the public release of the contents of the Auto Tariffs Report, in extensive summary form and through direct quotation, meets the otherwise high bar for the waiver of executive privilege. "[T]he White House has waived its claims of privilege in regard to the specific documents that it voluntarily revealed to third parties outside the White House[.]" *Id.* at 741–42; *see Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013) ("Although . . . disclosure of portions of a document subject to the presidential communications privilege does not waive the privilege as to the entire document, . . . the widely publicized nature of [a document] is important in considering the confidentiality interests implicated by the [document's] disclosure under FOIA.").

Second, the OLC Opinion concedes that the Auto Tariffs Report does not contain classified information. *See* OLC Opinion at 6 ("[T]he report contains proprietary information but not any classified information."). But if the report contains no classified content, how can there be a compelling national security reason for continued secrecy? *Cf.* OLC Opinion at 18 (arguing "Congress acknowledged" a "legitimate confidentiality interest" of the Executive Branch "by excluding classified information from [Section 232's] publication requirement"). The OLC Opinion tries to divert attention by mischaracterizing the nature of secretarial reports and

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improperly recasting the President's decision-making under Section 232 as an exercise of his authority to conduct diplomacy or act as Commander in Chief. *See id.* at 12–14.

II. The OLC Opinion offers no compelling justification for withholding the Auto Tariffs Report under executive privilege.

A. The OLC Opinion mischaracterizes secretarial reports and relies on inapt history to support the government's misuse of the presidential-communications privilege.

The OLC Opinion describes the Autos Tariffs Report as a "quintessential privileged presidential communication[.]" OLC Opinion at 7. CoA Institute has already explained why this cannot be so. *See* Pl.'s Opp'n to Def.'s Mot. for Summ. J. & Cross-Mot. for Summ J. at 13–23 [hereinafter Pl.'s Cross-Mot.], ECF No. 24; *see also* Pl.'s Reply in Supp. of its Cross-Mot. for Summ. J. at 7–13 [hereinafter Pl.'s Reply], ECF No. 27. But the OLC Opinion offers two additional points that should be addressed.

First, the OLC Opinion claims the use of the presidential-communications privilege is "not affected by the fact that the [Auto Tariffs Report] reflects the exercise of statutory authority delegated to the President pursuant to Congress's constitutional powers[.]" OLC Opinion at 8. But a secretarial report does *not* reflect the exercise of statutory authority delegated to the President because, under Section 232, presidential decision-making only starts *after* the Secretary has completed *his* investigation and finalized *his* report and recommendation. *See* 19 U.S.C. § 1862(c)(1)(A). The Auto Tariffs Report does not provide insight into what the President will do or how he will do it, especially since Section 232 provides various avenues for potential action, including the imposition of tariffs/import adjustments, *id.* § 1862(c)(1)(B); renegotiation of existing agreements, *id.* § 1862(c)(3)(A); or even *no* action. *Id.* § 1862(c)(3)(B). Instead, the Auto Tariffs Report reflects Commerce's exercise of its statutory authority to investigate the impacts of imports and to prepare a report.

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While dismissing the relevance of the underlying delegation of tariff authority, the OLC Opinion also relies on irrelevant authorities that betray Commerce's efforts to mischaracterize the nature of secretarial reports. For example, previous OLC opinions on the application of executive privilege "to communications concerning the execution of statutes," OLC Opinion at 8, each addressed Congress's efforts to obtain via subpoena—and pursuant to Congress's investigative and oversight authority—*organically created* Executive Branch documents, including those which reflected solicited legal advice.[2] In those cases, the White House was never "on notice" that the subpoenaed records would ever be discoverable, and creation of the records was never required by statute. Here, by contrast, the Auto Tariffs Report would not exist *but for* Congress's delegation. Commerce (and the President) have always known that the report must be published, so there is no cognizable "chill" argument. And again, the Auto Tariffs Report does not provide insight into presidential decision-making but reflects Commerce's findings and recommendations.

Second, and relatedly, the OLC Opinion claims executive privilege has been used to protect the "confidentiality of communications regarding the President's use of his section 232 authority." OLC Opinion at 9. Although that is true, it is irrelevant here because those "communications" *never* included a secretarial report. In the lone example cited in the OLC Opinion, a House subcommittee had subpoenaed documents reflecting White House deliberations *after* the disposition of a secretarial investigation and long *after* the secretarial report had been published in the *Federal Register*. *See* 2d Tr. at 16:13–17:10; *see also infra* at p. 14.[3] Although executive

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[2] Office of Legal Counsel, Dep't of Justice, *Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request* (June 19, 2008), *available at* http://bit.ly/3c6VQ3E; Office of Legal Counsel, Dep't of Justice, *Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking* (Sept. 30, 1996), *available at* http://bit.ly/3cdDoGv.

[3] The memorandum about Congress's attempt to subpoena records from the Carter Administration regarding the gasoline conservation fee does not appear to be publicly available, but another Department of Justice document cites a relevant portion and highlights why a Section 232 report is different from internal White House documents about

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privilege properly protected candid legal advice and internal White House deliberations, it did *not* and could not protect the sort of record at issue—a secretarial report.

The bulk of the case law appears to limit the presidential-communications privilege to confidential records solicited and received by the President or his closest advisors for core Article II presidential decision-making. *See United States v. Nixon*, 418 U.S. 683, 715 (1974) (The privilege attends to the "unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."); *In re Sealed Case*, 121 F.3d at 745, 752 (The privilege is rooted in "the President's unique constitutional role," particularly when "quintessential and nondelegable Presidential power" is at hand."). This is especially true in the FOIA context. "[T]he presidential communications privilege is rooted in the President's 'need for confidentiality in the communications of his office,' in order to effectively and faithfully carry out his Article II duties[.]" *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004). The privilege does not apply just because the "President[] [was] direct[ly] involve[d] in a communication, either as an author or recipient[.]" *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 28.

The limits of executive privilege—or, at least, the presidential-communications privilege—are particularly evident when dealing with records that reflect decisions required by law to be made by agency heads, as well as records about presidential decision-making authorized by a statutory delegation. As for the former, for example, it is indisputable that the President could not withhold agency reports created under the National Environmental Policy Act or the Regulatory Flexibility Act simply because they had passed through the White House at some point or were used for presidential deliberations. *See* 2d Tr. at 14:15–15:03. With each statute, Congress

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how the President chooses to act on the Secretary's recommendations. *See* Letter from the Hon. Michael B. Mukasey, U.S. Att'y Gen., to the Hon. Harry Reid, U.S. S., at 3–4 (Nov. 14, 2008), *available at* http://bit.ly/2T2fVkk.

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requires agencies to undertake investigations and publish reports. *See* 42 U.S.C. § 4332; 40 C.F.R. pt. 1501; *see also* 5 U.S.C. §§ 603–04. The Section 232 investigations and reports are no different.

As for the President's broader responsibility to oversee the Executive Branch, it is important to remember that constitutional provisions, such as the Take Care Clause, or vague notions of implied powers, are not independent sources of constitutional authority. They merely impose obligations on the President to ensure the Executive Branch faithfully carries out the will of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). Opposing counsel's suggestion that, once Congress delegates responsibility to the Executive Branch, "it's as if it's a power of the president," 2d Tr. at 36:18–19, with the same level of constitutional protection afforded to inherent Article II authority, finds no support in our system of constitutional governance and cannot support Commerce's use of the presidential-communications privilege.

B. The OLC Opinion confuses the interplay of the presidential-communications and deliberative-process privileges.

The OLC Opinion perpetuates Commerce's confusion over the interaction between the presidential-communications and deliberative-process privileges, which courts have historically treated as non-overlapping. *See Judicial Watch, Inc.*, 365 F.3d at 1122; *see also Judicial Watch, Inc. v. Dep't of Justice*, No. 01-639, 2006 WL 2038513 (D.D.C. July 19, 2006). "While the presidential communications privilege and the deliberative process privilege are closely affiliated, [they] . . . are distinct and have different scopes." *In re Sealed Case*, 121 F.3d at 745. The government has yet to point to a single case that supports the notion that the deliberative-process privilege can be used to withhold records that do not otherwise meet the higher bar for protection under the presidential-communications privilege. *See* Pl.'s Reply at 13–15.

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The relevant caselaw dealing with the deliberative-process privilege associates it with *agency* decision-making. *See, e.g.*, *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). The D.C. Circuit requires the document be predecisional "of an *agency* policy" and "also be a part of the *agency* give-and-take[.]" *Id.* (emphases added and citations omitted). Even when courts have considered the possibility of both privileges applying to the same record exchanged between an agency and the White House, they have made pains to distinguish *whose* decision-making was implicated. *See Loving v. Dep't of Def.*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007).

Here, under Section 232, Congress assigned responsibility for the creation and publication of the Auto Tariffs Report to the Secretary of Commerce, and it foresaw no role for the President in that process. *See* 19 U.S.C. § 1862(b); *cf.* Pl's Cross-Mot. at 17–18; 2d Tr. at 14:15–15:03. Presidential decision-making begins only after the report is final and transmitted to the President, and that decision-making is not reflected in the report in any way. *See* 19 U.S.C. § 1862(c). Thus, a secretarial report cannot be privileged.

C. The OLC Opinion confuses the President's exercise of delegated tariff authority with his inherent responsibility for ongoing diplomatic negotiation and the conduct of foreign affairs.

The OLC Opinion claims the Auto Tariffs Report "plainly implicates information in the field of foreign relations and national security." OLC Opinion at 12. That is a rather transparent sleight-of-hand, but an understandable one for OLC to attempt; executive privilege is at its strongest when records concern the exercise of core Article II power. But the exercise of delegated tariff authority is *not* in the same category as the decision-making undertaken by the President as Commander in Chief or as the final authority in diplomatic matters.

CoA Institute explained before that the caselaw about treaty deliberations and diplomatic negotiations is inapt because it either implicates FOIA Exemption 1, which OLC has conceded is

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not at issue, or because the Auto Tariffs Report does not reveal the "give-and-take" of the treaty process. *See* Pl.'s Reply at 9–10. Moreover, the OLC Opinion offers no limiting principle to distinguish the President's conduct of foreign affairs, or his efforts to protect national security, from other matters, including the performance of delegated statutory duties.

D. The OLC Opinion is wrong about statutorily required reporting.

The OLC Opinion makes several claims about the limits on Congress's authority to require the Executive Branch to prepare and publish reports or to impose conditions upon the President's exercise of delegated authority. The government argues that "[n]either the statutory origin of the [Auto Tariffs Report] [n]or its connection to the President's exercise of delegated authority means that executive privilege is inapplicable." OLC Opinion at 14. Despite the dearth of relevant caselaw about supposed "unconstitutional conditions" in appropriations legislation or ostensibly "unconstitutional" reporting regimes in statutes, two points are worth noting.

First, it is important to distinguish between reporting that is required as part of a statutory delegation, on the one hand, and reporting (or disclosure) *after the fact* as part of Congress's oversight or investigative function, on the other. As noted, most of the examples the OLC Opinion relies on do not deal with the exercise of delegated authority as such, but involve congressional subpoenas to obtain organically created Executive Branch documents. *See id.* at 17–19. Under Section 232, by contrast, Congress directs the Secretary of Commerce to prepare and publish a report—this is a procedural condition that the agency must meet before the President exercises tariff authority. *Cf. supra* at pp. 8–9. Although the President may claim privilege over records reflecting how his Administration uses a secretarial report, the report *itself* reflects the agency's performance of a statutory duty in an area that otherwise belongs to Congress. The government cannot keep it secret. "Congress creates the executive departments and agencies [and] it may be empowered to legislate concerning legislative and public access to their internal affairs."

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Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1419 (1974) (citing *Meyers v. United States*, 272 U.S. 52, 66–85 (1926) (Brandeis, J., dissenting)).

Second, the cases cited by the OLC Opinion where Congress tried to use appropriations legislation to force disclosure of records and deprive the President of the use of privilege are inapt because they involved Congress's attempt to use the "power of the purse" to usurp inherent presidential power.[4] OLC Opinion at 20. It is true, Congress cannot "supplant the Executive in what exclusively belongs to the Executive." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). But Section 232 concerns a constitutional authority belonging to Congress, and the secretarial report at issue is an integral part of Congress's delegation of that authority to the Executive Branch. The Auto Tariffs Report does not reflect presidential decision-making and does not implicate legitimate presidential confidentiality interests. It cannot be kept secret under executive privilege.

III. Section 232 leaves little room for delay in publishing a secretarial report.

The OLC Opinion maintains that "[S]ection 232 requires [a] report's publication 'upon the disposition' of the Secretary's investigation." OLC Opinion at 4. CoA Institute pointed to this same term—"disposition"—in its reply brief. Pl.'s Reply at 11. The government argues that "disposition of an investigation" only occurs *after* the President takes final action under Section 232. That must be wrong. Statutory history, past and current practice, and common sense dictate that the "disposition" of a secretarial investigation occurs at the finalization of a secretarial report and upon transmission of that report to the President.

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[4] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions* at 261 (July 31, 1989), *available at* http://bit.ly/2VyQVT4 ("Congress's authority incident to its power over the purse is broad, and generally includes the power to attach conditions to appropriations, but its power is by no means limitless. For example, Congress appropriates money for all federal agencies in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces.").

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A. Statutory History

Section 232 requires that, "[u]pon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition." 19 U.S.C. § 1862(d)′(1). The phrase "request, application, or motion" appears in only one other provision of Section 232, which requires the Secretary to "immediately initiate an appropriate investigation" upon "request, application, or motion." *Id.* § 1862(b)(1)(A). Read together, subsections (b) and (d)′ demonstrate that the *Federal Register* publication requirement applies to the Secretary, not the President, and it attaches at the end of a secretarial investigation, not at the end of the overall Section 232 tariff process.[5] To conclude otherwise would offend fundamental canons of statutory interpretation, which oblige courts to read the "language and design of [a] statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), and to give "identical words used in different parts of the same act . . . the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

Section 1862(d)′ is the original publication provision from the Trade Expansion Act of 1962. Pub. L. No. 87-794, § 232(d), 76 Stat. 872, 877; *cf.* OLC Opinion at 4 n.3.[6] Congress added the current, more-detailed publication requirement found at 19 U.S.C. § 1862(b)(3)(B) with the Omnibus Trade and Competitiveness Act of 1988. *See* Pub. L. No. 100-418, § 1501(a), 102 Stat. 1107, 1257–58. The 1988 amendment also separated the Secretary's investigative and reporting responsibilities under subsection (b) from the President's responsibilities after submission of a report under subsection (c). *See id.* The statutory history therefore suggests that Congress understood the *Federal Register* publication requirement was tied to the conclusion of a secretarial

[5] Commerce's implementing regulations basically parrot the statutory language and provide no contradictory explanation. *See* 15 C.F.R. §§ 705.10, 705.12; *cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (discussing limited interpretative value of and judicial deference to parroting regulations).

[6] Section 1862(d)′ should have been renumbered as subsection (e) in the U.S. Code. *See* 2d Tr. at 06:13–16.

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investigation and not presidential action. Otherwise, Congress would have added the new publication requirement in another part of Section 232. To be sure, the retention of the partially superfluous original publication requirement may have been inartful, but "'[i]t is beyond [the] province [of the courts] to rescue Congress from its drafting error[.]'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (citation omitted). The Court should give effect to 19 U.S.C. § 1862(d)'.

B. Past and Current Practice

Past practice and the historical record support CoA Institute's argument. On March 14, 1979, the Secretary of the Treasury transmitted a secretarial report to the White House and soon after published it in the *Federal Register*.[7] *See* Publication of Report of Investigation to Determine the Effects on the National Security of Oil Imports, 44 Fed. Reg. 18,818 (Mar. 29, 1979). In the notice, the Secretary explicitly indicated he was publishing a report "pursuant to section 232(d)"—the provision that refers to "disposition" of an "investigation." *Id.* Yet the President waited almost an *entire year* before acting on the report and imposing a gasoline conservation fee. *See* Petroleum Import Adjustment Program, 45 Fed. Reg. 22,864 (Apr. 3, 1980). If the OLC Opinion were correct about the meaning of "disposition," then the secretarial report on oil imports would not have been released while presidential deliberations were ongoing.

When counsel for CoA Institute raised this example during the last oral hearing, the Court suggested that there is "nothing in the statute that prohibits the president . . . [or] secretary from publishing the report now," that is, on a discretionary basis while presidential decision-making is still ongoing. 2d Tr. at 09:19–10:11. CoA Institute respectfully disagrees. Assuming, *arguendo*, the government's understanding of Section 232 is correct, it would leave *no* room for discretion.

[7] The Secretary of the Treasury previously performed the function assigned today to the Secretary of Commerce. *See* OLC Opinion at 4 n.3.

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The President's "written statement" under 19 U.S.C. § 1862(c)(2), which informs Congress of the action that will be undertaken, "*shall be* included in the report under subsection [(d)′]," [8] 19 U.S.C. § 1862(c)(2) (emphasis added), and that latter report "*shall*" be submitted to Congress and published in the *Federal Register* upon "disposition" of an investigation. *Id.* § 1862(d)′ (emphasis added). If "disposition" referred to the finalization of presidential decision-making, as the OLC Opinion maintains, then Section 232 would not permit the "early" release of a secretarial report. And even if it did, such discretionary publication would not obviate the requirement to publish a final report—whatever that may be—which includes both a copy of the secretarial report *and* the President's "written statement." Yet as far as CoA Institute can tell, no such report has ever been published. CoA Institute's explanation for the interaction of Section 232's different reporting provisions, and the meaning of "disposition," avoids these problems. *See infra* at pp. 15–17.

Relatedly, the Court asked if the "written statement" described at paragraph (c)(2), and discussed above, has any bearing on whether the subsection (d)′ report is the same report required to be published in the *Federal Register* under subsection (b). *See* 2d Tr. at 07:08–25, 08:05–13. There are several, related reasons why paragraph (c)(2) does not impact this case.

First, paragraph (c)(2) likely refers to a now-defunct reporting requirement that used to be listed under paragraph (d)′(2), immediately following the report referenced in paragraph (d)′(1) that must be published upon "disposition" of a secretarial investigation. *See* 2d Tr. at 08:14–09:04. The President previously "submit[ted] to the Congress an annual report on the operation" of Section 232. Omnibus Trade and Competitiveness Act of 1988, § 1501(b), 102 Stat. at 1259. That stand-alone report was eliminated with the Federal Reports Elimination and Sunset Act of 1995.

[8] Again, paragraph (c)(2) requires the President, within thirty days of determining whether to take action to adjust tariffs, to "submit to the Congress a written statement of the reasons" for his determination, which "shall be included in the report published under subsection [(d)′]." 19 U.S.C. § 1862(c)(2).

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See Pub. L. No. 104-66, § 3003, 109 Stat. 707, 734–35. It is reasonable to conclude that the annual report on the operation of delegated tariff authority would have been the one to include statements on presidential action under paragraph (c)(1).[9]

Second, to read paragraph (c)(2) in the manner suggested by the Court would undercut the further reporting requirements imposed by 19 U.S.C. § 1862(c)(3). To wit: when the President decides *not* to take immediate action under subparagraph (c)(1)(B) but tries to renegotiate existing trade agreements—as was done here with automobile imports—he must inform Congress both of that initial decision, *see id.* at § 1862(c)(2), and also "publish in the Federal Register notice of any *additional* actions," including a decision to take no action at all. 19 U.S.C. § 1862(c)(3)(A) (emphasis added). The existence of these latter reports makes little sense if the report required by paragraph (c)(2) were necessarily included in a secretarial report and if publication were delayed while "deliberations" remain ongoing, or so long as the President found continued secrecy useful.

Third, as for the practice of the current Administration, neither of Commerce's reports on the national security impacts of aluminum and steel imports included the "written statement" contemplated by paragraph (c)(2) and, in fact, both were dated and publicly released *before* the President acted. *See* Dep't of Commerce, The Effect of Imports of Aluminum on the National Security (Jan. 17, 2018), *available at* http://bit.ly/2N35R9q; Dep't of Commerce, The Effects of Imports of Steel on the National Security (Jan. 11, 2018), *available at* http://bit.ly/2L7gBRJ.[10] Separate proclamations—ostensibly, the "written statements" required by paragraph (c)(2)—

[9] Commerce undertook at least four Section 232 investigations during the years that the paragraph (d)'(2) reporting requirement was effective. *See* Pl.'s Cross-Mot. Ex. 3 at 6–7, ECF No. 24-3. The relevant annual reports on presidential action do not appear to be publicly available and, because they would have been created by the White House for use by Congress, they would not likely be "agency records" subject to disclosure under the FOIA.

[10] CoA Institute cannot locate any evidence that Commerce published notices of availability for the steel and aluminum reports in the *Federal Register*, as required by Section 232 and its implementing regulations. The agency simply posted them on its website.

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followed the next month. *See* Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 15, 2018); Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619 (Mar. 15, 2018). Thus, neither current practice nor the historical record confirms the Court's suggestion about the relevance of paragraph (c)(2). *Cf. supra* at note 3.

C. Common Sense

Finally, as a matter of common sense, the OLC Opinion must be wrong about the meaning of "disposition" because, if taken to its logical conclusion, the OLC Opinion's reasoning would justify an absurd result: the President could indefinitely withhold a secretarial report, even after tariffs were imposed or if they were never imposed.

Here, the government argues the President has continuing authority under paragraph (c)(3) to act after attempted renegotiation of existing trade arrangements have failed. *See* OLC Opinion at 11 (Section 232 "continues to authorize the President to take action [on auto imports]" but "[t]here . . . is no statutory deadline . . . to exercise that power" and there is "strong confidentiality interest" in keeping the secretarial report secret."); *cf. id.* at 6. Elsewhere, the government has claimed the President enjoys special authority either to revisit or revise settled tariff decisions under paragraph (c)(1), *see, e.g.*, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5,281 (Jan. 29, 2020), or to delay "disposition" of a matter (and keep a secretarial report secret) even after the President *disagrees* with a secretarial recommendation and is arguably disallowed from undertaking *any* further action. *See* 2d Tr. at 10:01–04; *see also Cause of Action Inst. v. Dep't of Commerce*, No. 19-2698 (D.D.C. filed Sept. 9, 2019) (FOIA lawsuit for release of Section 232 Uranium Report); White House, Mem. On the Effect of Uranium Imports on the National Security & Establishment of the U.S. Nuclear Fuel Working Group (July 12, 2019), *available at* http://bit.ly/326VOmz.

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The logic of the OLC Opinion, as applied to any of the above (non-hypothetical) situations, would permit the President to keep a Section 232 report secret for *any* reason, no matter what has or has not been done, and all under the guise of executive privilege and protecting the "national security" or ongoing "diplomacy." *See* OLC Opinion at 12. In other words, the publication requirement would be nullified. That cannot be correct. Even if Section 232 were ambiguous in setting a deadline for publication of a secretarial report—which it is not—the law does not give the President such unbridled discretion. The natural reading of "disposition" is that it refers to the conclusion of a secretarial investigation, not presidential action.

IV. Commerce improperly withheld portions of the Auto Tariffs Report when it submitted *ex parte* a copy of the report for *in camera* review.

Finally, when Commerce noticed its *ex parte* submission of the Auto Tariffs Report to this Court, it explained that, "[c]onsistent with the Defense Production Act (50 U.S.C. § 4555(d))," it had "redact[ed] . . . proprietary information[.]" Def.'s Not. of *Ex Parte* Submission at 1 n.1, ECF No. 34. The agency provided no explanation or argument for the legitimacy of its withholding. That potentially unprecedented act of refusing to disclose information to the Court for *in camera* review is an affront to the independence of the judicial system. It also violates well-established constitutional principles about the ability of an Article III judge to review sensitive materials, including confidential business information, and standard FOIA litigation practice.

Commerce provided no argument for why the Defense Production Act ("DPA") even applies. The DPA, which concerns the "domestic industrial base"—and not the national security threats posed by the importation of foreign commodities, *see generally* 50 U.S.C. § 4502—provides that the President may deem certain "information . . . confidential," and keep it from being "published or disclosed," unless he "determines that the withholding . . . is contrary to the interest of the national defense." 50 U.S.C. § 4555(d). Yet such confidential "information" must

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have been obtained *by the President* "as [was] necessary or appropriate" to enforce the DPA. Although the DPA provides for "industry studies assessing the abilities of the United States industrial base to support the national defense," *id.* § 4555(a), Commerce did not explain why such a report is identical to, or analogous enough to, a secretarial report under Section 232. Commerce also did not explain how preparing a secretarial report—a process purposefully set apart from presidential decision-making—otherwise implicates the DPA. And it did not point to any implementing regulations or official policies or procedures that confirm that the DPA is at all relevant in the administration of Section 232.

Even if the DPA did apply, it likely would not matter. Section 232 does not provide the President with broad discretion to withhold "confidential" information. It only permits Commerce to redact "proprietary information" or "classified information." 19 U.S.C. § 1862(b)(3)(B). Commerce has not explained how far the categories of "confidential" and "proprietary" information under the DPA and Section 232, respectively, overlap. And it failed to connect either statute to the FOIA: Commerce has not raised an Exemption 4 claim and Section 4555(d) is not a recognized Exemption 3 statute.

More importantly, even if Section 4555 applied to portions of the Auto Tariffs Report and otherwise gave the President discretion to withhold information independently of the FOIA or Section 232, that is insufficient grounds to withhold information *from an Article III judge*. The FOIA empowers this Court to conduct *in camera* review to "examine the contents of . . . agency records," 5 U.S.C. § 552(a)(4)(B), and to determine the legality of an agency's withholding, even when national security concerns are present. *See Armstrong v. Exec. Office of the President*, 97 F.3d 575, 577–78, 580 (D.C. Cir. 1996).[11] The matter is no different outside the FOIA context.

[11] Congress created the FOIA's *in camera* provision because it disagreed with the Supreme Court's view on the availability and utility of such review when dealing with classified documents under Exemption 1. *See Nat'l Labor*

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Cf. United States v. Reynolds, 345 U.S. 1, 8–10 (1953). Commerce's incomplete *ex parte* submission deprives the Court of the ability to determine the correctness of the Executive Branch's treatment of the Auto Tariffs Report. That defeats the purpose of *in camera* review. The Court should therefore order Commerce promptly to resubmit *ex parte* an *unredacted* copy of the report.

CONCLUSION

For these reasons, and those set forth in CoA Institute's previous briefs and at oral argument, the Court should deny Commerce's motion for summary judgment and grant CoA Institute's cross-motion. CoA Institute respectfully requests that the Court order Commerce to promptly produce the Auto Tariffs Report.

Dated: February 28, 2020

Respectfully submitted,

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Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 235 (1978) (discussing Congress's reaction to *Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1983)). *In camera* review has become an uncontroversial practice, even when dealing with highly sensitive records. *See* Office of Info. Policy, Dep't of Justice, *Litigation Review: History of Exemption 1 Disclosure Orders (FOIA Update, vol. XVI, No. 2)* (Jan. 1, 1995), http://bit.ly/2Td4QeN (last visited Feb. 28, 2020) (describing cases involving *in camera* review of classified information following FOIA reform post-*Mink*).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. U.S. DEPARTMENT OF COMMERCE, Defendant.	No. 1:19-cv-0778-CJN

PLAINTIFF CAUSE OF ACTION INSTITUTE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

At the end of last year, Congress passed and President Trump signed into law an appropriations bill that included a provision requiring Defendant Department of Commerce ("Commerce") to publish within thirty days a report prepared under Section 232 of the Trade Expansion Act of 1962 ("Section 232") about the national security impact of the importation of automobiles and automobile parts ("Auto Tariffs Report"). Plaintiff Cause of Action Institute ("CoA Institute") requested the same report under the Freedom of Information Act ("FOIA") in February 2019 and filed this lawsuit after Commerce failed to issue a timely determination.

Despite the congressionally mandated publication deadline having passed over a month ago, Commerce still has not—and says it will not—release the Auto Tariffs Report. The agency defends its intransigence by asserting that the White House has directed it to keep the report secret until "executive privilege" is deemed no longer to apply.[1] The basis for that position is set out in a January 2020 Office of Legal Counsel opinion (the "OLC Opinion") that Commerce has adopted, and which the Court has reviewed. The reasoning in that opinion is flawed and does not support withholding the report at issue from CoA Institute.

These developments mark an important turning point in this lawsuit. Until now, Commerce has not directly challenged the constitutionality of Section 232's *Federal Register* publication requirement. No longer. The OLC Opinion is a frontal assault on Congress's authority to condition its delegation of tariff authority to the President on the publication of a report. And it seeks to articulate a novel understanding of executive privilege that ignores the law and past practice, without a limiting principle. This Court should reject the OLC Opinion's conclusions

[1] Commerce also asserts, for the first time, that the Defense Production Act, 50 U.S.C. § 4555(d), allows it to withhold information in the report from this Court, despite FOIA's regularly relied upon *in camera* review provision. *See infra* at pp. 18–20.

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and order the government to promptly produce the Auto Tariffs Report, subject only to redaction of proprietary and classified information, as contemplated by Section 232.

ARGUMENT

In the parties' last Joint Status Report, Commerce "confirmed that, in accordance with the January 17, 2020 OLC Opinion, [it] will continue to withhold the [Auto Tariffs Report] until [executive] privilege is deemed no longer applicable." ECF No. 31 at 2. Following a second oral hearing earlier this month, the Court ordered supplemental briefing on the import of the OLC Opinion to this case, as well as other issues the parties may wish to elaborate upon.

The release of the OLC Opinion, and Commerce's reliance on it as a basis for refusing either to publish the Auto Tariffs Report in the *Federal Register* or to release it under the FOIA, bear directly on this lawsuit. The OLC Opinion provides detailed insight into the Administration's incorrect view of how Section 232 operates and whether and when "executive privilege"—either generally or vis-à-vis the presidential-communications or deliberative-process privileges—can keep agency records secret and out of the reach of Congress or the public.

As explained below, the OLC Opinion's reasoning is infirm and the Court should reject it. Commerce must publish the Auto Tariffs Report in the *Federal Register* and cannot rely on executive privilege, in conjunction with Exemption 5 of the FOIA, to continue to withhold it from CoA Institute. Commerce also improperly withheld portions of the report in its *ex parte* submission and thereby deprived the Court of the ability to conduct thorough *in camera* review.

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I. The OLC Opinion materially impacts this lawsuit and contains important concessions that should affect the Court's analysis.

A. The OLC Opinion offers arguments about the use of executive privilege relevant under the FOIA.

When an agency attempts to withhold records under Exemption 5 of the FOIA, the applicable standard entails an examination of whether "the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23–28 (1983). This "routine disclosure" rule distinguishes the FOIA context from standard civil discovery and therefore eliminates the distinction between qualified and absolute privileges. As for the presidential-communications and deliberative-process privileges, the "routine disclosure" rule also means that an agency need not prove that the President—with presidential communications—or a high-ranking agency official—with deliberative processes—*actually* invoked the privilege. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 320 F. Supp. 3d 110, 117 (D.D.C. 2018) [hereinafter *EPIC*]. In effect, the procedural niceties of civil discovery do not apply.

Even so, while "the *manner* in which [an] exemption is raised" may not matter under the FOIA, courts must still attend to the "*content or nature* of a document generally" to determine whether it would be "routinely" privileged. *Lardner v. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *7 (D.D.C. Mar. 31, 2005). This is so for both the deliberative-process privilege, *EPIC*, 320 F. Supp. 3d at 117 (citation omitted), and the presidential-communications privilege. *Id.* (citing *Lardner*, 2005 WL 758267, at *6–10).

Here, the OLC Opinion frames Congress's efforts to enforce Section 232's publication requirement—and, indirectly, CoA Institute's request for disclosure under FOIA—in terms of qualified privilege and whether there is "legitimate justification for intruding upon the confidentiality of the Executive Branch." Office of Legal Counsel, Dep't of Justice, *Publication*

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of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security at 22 (Jan. 17, 2020) [hereinafter OLC Opinion], *available at* http://bit.ly/32hPREQ. But that framing confuses the issue. The question here is whether Section 232 reports *as such* are presumptively subject to executive privilege. Or whether, as CoA Institute has previously argued, Congress has directed Commerce to create those reports outside the scope of the privilege, given the nature of their creation and purpose in the exercise of congressionally delegated tariff authority. If the OLC Opinion is wrong about the nature, content, and purpose of secretarial reports, Commerce's Exemption 5 arguments must fail.

B. The OLC Opinion concedes that waiver applies to portions of the Auto Tariffs Report and that the report does not contain classified information.

The OLC Opinion contains two remarkable concessions that affect this case. *First*, the OLC Opinion concedes that the government waived its ability to exert executive privilege over the portions of the Auto Tariffs Report described or quoted in President Trump's May 2019 proclamation: "The proclamation's summary of and quotation from certain portions of the report did not waive or forfeit executive privilege over the remainder of the report." *Id.* at 10 n.7 (citation omitted); *see generally* Tr. of [Second] Mot. Hr'g at 37:17–38:04 (Feb. 6, 2020) [hereinafter 2d Tr.], ECF No. 32. Despite CoA Institute raising waiver in the previous round of briefing, and the Court's continued attempts to solicit the government's views, defense counsel has not articulated a clear-cut position on the import of the May 2019 proclamation. *See* 2d Tr. at 37:15 ("MR. MOUSTAKAS: I have not given thought to that [question of waiver]."); Tr. of [First] Mot. Hr'g at 28:14–17 (Nov. 21, 2019) [hereinafter 1st Tr.], ECF No. 29 ("MR. MOUSTAKAS: I would want to give a little bit more thought to that. I have said very quickly it's waivable because, obviously there are situations where, clearly, it's waivable."); *id.* at 32:07–12 ("[I]n all candor, . . . as a practical matter, direct quotes, I think the courts have said, are sort of free game.").

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This is not a difficult issue, and the law is straightforward. "[A]ny voluntary disclosure . . . to a third party breaches . . . confidentiality . . . and therefore waives the privilege[.]" *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). To be sure, executive privilege exists "'to aid the government decisionmaking process, [and] a waiver should not be lightly inferred.'" *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (citation omitted). And, in the context of the deliberative-process and presidential-communications privileges, courts should avoid an "all-or-nothing" approach where waiver extends to "related materials." *Id.* But the public release of the contents of the Auto Tariffs Report, in extensive summary form and through direct quotation, meets the otherwise high bar for the waiver of executive privilege. "[T]he White House has waived its claims of privilege in regard to the specific documents that it voluntarily revealed to third parties outside the White House[.]" *Id.* at 741–42; *see Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013) ("Although . . . disclosure of portions of a document subject to the presidential communications privilege does not waive the privilege as to the entire document, . . . the widely publicized nature of [a document] is important in considering the confidentiality interests implicated by the [document's] disclosure under FOIA.").

Second, the OLC Opinion concedes that the Auto Tariffs Report does not contain classified information. *See* OLC Opinion at 6 ("[T]he report contains proprietary information but not any classified information."). But if the report contains no classified content, how can there be a compelling national security reason for continued secrecy? *Cf.* OLC Opinion at 18 (arguing "Congress acknowledged" a "legitimate confidentiality interest" of the Executive Branch "by excluding classified information from [Section 232's] publication requirement"). The OLC Opinion tries to divert attention by mischaracterizing the nature of secretarial reports and

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improperly recasting the President's decision-making under Section 232 as an exercise of his authority to conduct diplomacy or act as Commander in Chief. *See id.* at 12–14.

II. The OLC Opinion offers no compelling justification for withholding the Auto Tariffs Report under executive privilege.

A. The OLC Opinion mischaracterizes secretarial reports and relies on inapt history to support the government's misuse of the presidential-communications privilege.

The OLC Opinion describes the Autos Tariffs Report as a "quintessential privileged presidential communication[.]" OLC Opinion at 7. CoA Institute has already explained why this cannot be so. *See* Pl.'s Opp'n to Def.'s Mot. for Summ. J. & Cross-Mot. for Summ J. at 13–23 [hereinafter Pl.'s Cross-Mot.], ECF No. 24; *see also* Pl.'s Reply in Supp. of its Cross-Mot. for Summ. J. at 7–13 [hereinafter Pl.'s Reply], ECF No. 27. But the OLC Opinion offers two additional points that should be addressed.

First, the OLC Opinion claims the use of the presidential-communications privilege is "not affected by the fact that the [Auto Tariffs Report] reflects the exercise of statutory authority delegated to the President pursuant to Congress's constitutional powers[.]" OLC Opinion at 8. But a secretarial report does *not* reflect the exercise of statutory authority delegated to the President because, under Section 232, presidential decision-making only starts *after* the Secretary has completed *his* investigation and finalized *his* report and recommendation. *See* 19 U.S.C. § 1862(c)(1)(A). The Auto Tariffs Report does not provide insight into what the President will do or how he will do it, especially since Section 232 provides various avenues for potential action, including the imposition of tariffs/import adjustments, *id.* § 1862(c)(1)(B); renegotiation of existing agreements, *id.* § 1862(c)(3)(A); or even *no* action. *Id.* § 1862(c)(3)(B). Instead, the Auto Tariffs Report reflects Commerce's exercise of its statutory authority to investigate the impacts of imports and to prepare a report.

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While dismissing the relevance of the underlying delegation of tariff authority, the OLC Opinion also relies on irrelevant authorities that betray Commerce's efforts to mischaracterize the nature of secretarial reports. For example, previous OLC opinions on the application of executive privilege "to communications concerning the execution of statutes," OLC Opinion at 8, each addressed Congress's efforts to obtain via subpoena—and pursuant to Congress's investigative and oversight authority—*organically created* Executive Branch documents, including those which reflected solicited legal advice.[2] In those cases, the White House was never "on notice" that the subpoenaed records would ever be discoverable, and creation of the records was never required by statute. Here, by contrast, the Auto Tariffs Report would not exist *but for* Congress's delegation. Commerce (and the President) have always known that the report must be published, so there is no cognizable "chill" argument. And again, the Auto Tariffs Report does not provide insight into presidential decision-making but reflects Commerce's findings and recommendations.

Second, and relatedly, the OLC Opinion claims executive privilege has been used to protect the "confidentiality of communications regarding the President's use of his section 232 authority." OLC Opinion at 9. Although that is true, it is irrelevant here because those "communications" *never* included a secretarial report. In the lone example cited in the OLC Opinion, a House subcommittee had subpoenaed documents reflecting White House deliberations *after* the disposition of a secretarial investigation and long *after* the secretarial report had been published in the *Federal Register*. *See* 2d Tr. at 16:13–17:10; *see also infra* at p. 14.[3] Although executive

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[2] Office of Legal Counsel, Dep't of Justice, *Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request* (June 19, 2008), *available at* http://bit.ly/3c6VQ3E; Office of Legal Counsel, Dep't of Justice, *Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking* (Sept. 30, 1996), *available at* http://bit.ly/3cdDoGv.

[3] The memorandum about Congress's attempt to subpoena records from the Carter Administration regarding the gasoline conservation fee does not appear to be publicly available, but another Department of Justice document cites a relevant portion and highlights why a Section 232 report is different from internal White House documents about

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privilege properly protected candid legal advice and internal White House deliberations, it did *not* and could not protect the sort of record at issue—a secretarial report.

The bulk of the case law appears to limit the presidential-communications privilege to confidential records solicited and received by the President or his closest advisors for core Article II presidential decision-making. *See United States v. Nixon*, 418 U.S. 683, 715 (1974) (The privilege attends to the "unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."); *In re Sealed Case*, 121 F.3d at 745, 752 (The privilege is rooted in "the President's unique constitutional role," particularly when "quintessential and nondelegable Presidential power" is at hand."). This is especially true in the FOIA context. "[T]he presidential communications privilege is rooted in the President's 'need for confidentiality in the communications of his office,' in order to effectively and faithfully carry out his Article II duties[.]" *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004). The privilege does not apply just because the "President[] [was] direct[ly] involve[d] in a communication, either as an author or recipient[.]" *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 28.

The limits of executive privilege—or, at least, the presidential-communications privilege—are particularly evident when dealing with records that reflect decisions required by law to be made by agency heads, as well as records about presidential decision-making authorized by a statutory delegation. As for the former, for example, it is indisputable that the President could not withhold agency reports created under the National Environmental Policy Act or the Regulatory Flexibility Act simply because they had passed through the White House at some point or were used for presidential deliberations. *See* 2d Tr. at 14:15–15:03. With each statute, Congress

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how the President chooses to act on the Secretary's recommendations. *See* Letter from the Hon. Michael B. Mukasey, U.S. Att'y Gen., to the Hon. Harry Reid, U.S. S., at 3–4 (Nov. 14, 2008), *available at* http://bit.ly/2T2fVkk.

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requires agencies to undertake investigations and publish reports. *See* 42 U.S.C. § 4332; 40 C.F.R. pt. 1501; *see also* 5 U.S.C. §§ 603–04. The Section 232 investigations and reports are no different.

As for the President's broader responsibility to oversee the Executive Branch, it is important to remember that constitutional provisions, such as the Take Care Clause, or vague notions of implied powers, are not independent sources of constitutional authority. They merely impose obligations on the President to ensure the Executive Branch faithfully carries out the will of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). Opposing counsel's suggestion that, once Congress delegates responsibility to the Executive Branch, "it's as if it's a power of the president," 2d Tr. at 36:18–19, with the same level of constitutional protection afforded to inherent Article II authority, finds no support in our system of constitutional governance and cannot support Commerce's use of the presidential-communications privilege.

B. The OLC Opinion confuses the interplay of the presidential-communications and deliberative-process privileges.

The OLC Opinion perpetuates Commerce's confusion over the interaction between the presidential-communications and deliberative-process privileges, which courts have historically treated as non-overlapping. *See Judicial Watch, Inc.*, 365 F.3d at 1122; *see also Judicial Watch, Inc. v. Dep't of Justice*, No. 01-639, 2006 WL 2038513 (D.D.C. July 19, 2006). "While the presidential communications privilege and the deliberative process privilege are closely affiliated, [they] . . . are distinct and have different scopes." *In re Sealed Case*, 121 F.3d at 745. The government has yet to point to a single case that supports the notion that the deliberative-process privilege can be used to withhold records that do not otherwise meet the higher bar for protection under the presidential-communications privilege. *See* Pl.'s Reply at 13–15.

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The relevant caselaw dealing with the deliberative-process privilege associates it with *agency* decision-making. *See, e.g.*, *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). The D.C. Circuit requires the document be predecisional "of an *agency* policy" and "also be a part of the *agency* give-and-take[.]" *Id.* (emphases added and citations omitted). Even when courts have considered the possibility of both privileges applying to the same record exchanged between an agency and the White House, they have made pains to distinguish *whose* decision-making was implicated. *See Loving v. Dep't of Def.*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007).

Here, under Section 232, Congress assigned responsibility for the creation and publication of the Auto Tariffs Report to the Secretary of Commerce, and it foresaw no role for the President in that process. *See* 19 U.S.C. § 1862(b); *cf.* Pl's Cross-Mot. at 17–18; 2d Tr. at 14:15–15:03. Presidential decision-making begins only after the report is final and transmitted to the President, and that decision-making is not reflected in the report in any way. *See* 19 U.S.C. § 1862(c). Thus, a secretarial report cannot be privileged.

C. The OLC Opinion confuses the President's exercise of delegated tariff authority with his inherent responsibility for ongoing diplomatic negotiation and the conduct of foreign affairs.

The OLC Opinion claims the Auto Tariffs Report "plainly implicates information in the field of foreign relations and national security." OLC Opinion at 12. That is a rather transparent sleight-of-hand, but an understandable one for OLC to attempt; executive privilege is at its strongest when records concern the exercise of core Article II power. But the exercise of delegated tariff authority is *not* in the same category as the decision-making undertaken by the President as Commander in Chief or as the final authority in diplomatic matters.

CoA Institute explained before that the caselaw about treaty deliberations and diplomatic negotiations is inapt because it either implicates FOIA Exemption 1, which OLC has conceded is

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not at issue, or because the Auto Tariffs Report does not reveal the "give-and-take" of the treaty process. *See* Pl.'s Reply at 9–10. Moreover, the OLC Opinion offers no limiting principle to distinguish the President's conduct of foreign affairs, or his efforts to protect national security, from other matters, including the performance of delegated statutory duties.

D. The OLC Opinion is wrong about statutorily required reporting.

The OLC Opinion makes several claims about the limits on Congress's authority to require the Executive Branch to prepare and publish reports or to impose conditions upon the President's exercise of delegated authority. The government argues that "[n]either the statutory origin of the [Auto Tariffs Report] [n]or its connection to the President's exercise of delegated authority means that executive privilege is inapplicable." OLC Opinion at 14. Despite the dearth of relevant caselaw about supposed "unconstitutional conditions" in appropriations legislation or ostensibly "unconstitutional" reporting regimes in statutes, two points are worth noting.

First, it is important to distinguish between reporting that is required as part of a statutory delegation, on the one hand, and reporting (or disclosure) *after the fact* as part of Congress's oversight or investigative function, on the other. As noted, most of the examples the OLC Opinion relies on do not deal with the exercise of delegated authority as such, but involve congressional subpoenas to obtain organically created Executive Branch documents. *See id.* at 17–19. Under Section 232, by contrast, Congress directs the Secretary of Commerce to prepare and publish a report—this is a procedural condition that the agency must meet before the President exercises tariff authority. *Cf. supra* at pp. 8–9. Although the President may claim privilege over records reflecting how his Administration uses a secretarial report, the report *itself* reflects the agency's performance of a statutory duty in an area that otherwise belongs to Congress. The government cannot keep it secret. "Congress creates the executive departments and agencies [and] it may be empowered to legislate concerning legislative and public access to their internal affairs."

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Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1419 (1974) (citing *Meyers v. United States*, 272 U.S. 52, 66–85 (1926) (Brandeis, J., dissenting)).

Second, the cases cited by the OLC Opinion where Congress tried to use appropriations legislation to force disclosure of records and deprive the President of the use of privilege are inapt because they involved Congress's attempt to use the "power of the purse" to usurp inherent presidential power.[4] OLC Opinion at 20. It is true, Congress cannot "supplant the Executive in what exclusively belongs to the Executive." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). But Section 232 concerns a constitutional authority belonging to Congress, and the secretarial report at issue is an integral part of Congress's delegation of that authority to the Executive Branch. The Auto Tariffs Report does not reflect presidential decision-making and does not implicate legitimate presidential confidentiality interests. It cannot be kept secret under executive privilege.

III. Section 232 leaves little room for delay in publishing a secretarial report.

The OLC Opinion maintains that "[S]ection 232 requires [a] report's publication 'upon the disposition' of the Secretary's investigation." OLC Opinion at 4. CoA Institute pointed to this same term—"disposition"—in its reply brief. Pl.'s Reply at 11. The government argues that "disposition of an investigation" only occurs *after* the President takes final action under Section 232. That must be wrong. Statutory history, past and current practice, and common sense dictate that the "disposition" of a secretarial investigation occurs at the finalization of a secretarial report and upon transmission of that report to the President.

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[4] *See, e.g.*, Office of Legal Counsel, Dep't of Justice, *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions* at 261 (July 31, 1989), *available at* http://bit.ly/2VyQVT4 ("Congress's authority incident to its power over the purse is broad, and generally includes the power to attach conditions to appropriations, but its power is by no means limitless. For example, Congress appropriates money for all federal agencies in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces.").

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A. Statutory History

Section 232 requires that, "[u]pon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition." 19 U.S.C. § 1862(d)′(1). The phrase "request, application, or motion" appears in only one other provision of Section 232, which requires the Secretary to "immediately initiate an appropriate investigation" upon "request, application, or motion." *Id.* § 1862(b)(1)(A). Read together, subsections (b) and (d)′ demonstrate that the *Federal Register* publication requirement applies to the Secretary, not the President, and it attaches at the end of a secretarial investigation, not at the end of the overall Section 232 tariff process.[5] To conclude otherwise would offend fundamental canons of statutory interpretation, which oblige courts to read the "language and design of [a] statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), and to give "identical words used in different parts of the same act . . . the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

Section 1862(d)′ is the original publication provision from the Trade Expansion Act of 1962. Pub. L. No. 87-794, § 232(d), 76 Stat. 872, 877; *cf.* OLC Opinion at 4 n.3.[6] Congress added the current, more-detailed publication requirement found at 19 U.S.C. § 1862(b)(3)(B) with the Omnibus Trade and Competitiveness Act of 1988. *See* Pub. L. No. 100-418, § 1501(a), 102 Stat. 1107, 1257–58. The 1988 amendment also separated the Secretary's investigative and reporting responsibilities under subsection (b) from the President's responsibilities after submission of a report under subsection (c). *See id.* The statutory history therefore suggests that Congress understood the *Federal Register* publication requirement was tied to the conclusion of a secretarial

[5] Commerce's implementing regulations basically parrot the statutory language and provide no contradictory explanation. *See* 15 C.F.R. §§ 705.10, 705.12; *cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (discussing limited interpretative value of and judicial deference to parroting regulations).

[6] Section 1862(d)′ should have been renumbered as subsection (e) in the U.S. Code. *See* 2d Tr. at 06:13–16.

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investigation and not presidential action. Otherwise, Congress would have added the new publication requirement in another part of Section 232. To be sure, the retention of the partially superfluous original publication requirement may have been inartful, but "'[i]t is beyond [the] province [of the courts] to rescue Congress from its drafting error[.]'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (citation omitted). The Court should give effect to 19 U.S.C. § 1862(d)'.

B. Past and Current Practice

Past practice and the historical record support CoA Institute's argument. On March 14, 1979, the Secretary of the Treasury transmitted a secretarial report to the White House and soon after published it in the *Federal Register*.[7] *See* Publication of Report of Investigation to Determine the Effects on the National Security of Oil Imports, 44 Fed. Reg. 18,818 (Mar. 29, 1979). In the notice, the Secretary explicitly indicated he was publishing a report "pursuant to section 232(d)"—the provision that refers to "disposition" of an "investigation." *Id.* Yet the President waited almost an *entire year* before acting on the report and imposing a gasoline conservation fee. *See* Petroleum Import Adjustment Program, 45 Fed. Reg. 22,864 (Apr. 3, 1980). If the OLC Opinion were correct about the meaning of "disposition," then the secretarial report on oil imports would not have been released while presidential deliberations were ongoing.

When counsel for CoA Institute raised this example during the last oral hearing, the Court suggested that there is "nothing in the statute that prohibits the president . . . [or] secretary from publishing the report now," that is, on a discretionary basis while presidential decision-making is still ongoing. 2d Tr. at 09:19–10:11. CoA Institute respectfully disagrees. Assuming, *arguendo*, the government's understanding of Section 232 is correct, it would leave *no* room for discretion.

[7] The Secretary of the Treasury previously performed the function assigned today to the Secretary of Commerce. *See* OLC Opinion at 4 n.3.

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The President's "written statement" under 19 U.S.C. § 1862(c)(2), which informs Congress of the action that will be undertaken, "*shall be* included in the report under subsection [(d)′]," [8] 19 U.S.C. § 1862(c)(2) (emphasis added), and that latter report "*shall*" be submitted to Congress and published in the *Federal Register* upon "disposition" of an investigation. *Id.* § 1862(d)′ (emphasis added). If "disposition" referred to the finalization of presidential decision-making, as the OLC Opinion maintains, then Section 232 would not permit the "early" release of a secretarial report. And even if it did, such discretionary publication would not obviate the requirement to publish a final report—whatever that may be—which includes both a copy of the secretarial report *and* the President's "written statement." Yet as far as CoA Institute can tell, no such report has ever been published. CoA Institute's explanation for the interaction of Section 232's different reporting provisions, and the meaning of "disposition," avoids these problems. *See infra* at pp. 15–17.

Relatedly, the Court asked if the "written statement" described at paragraph (c)(2), and discussed above, has any bearing on whether the subsection (d)′ report is the same report required to be published in the *Federal Register* under subsection (b). *See* 2d Tr. at 07:08–25, 08:05–13. There are several, related reasons why paragraph (c)(2) does not impact this case.

First, paragraph (c)(2) likely refers to a now-defunct reporting requirement that used to be listed under paragraph (d)′(2), immediately following the report referenced in paragraph (d)′(1) that must be published upon "disposition" of a secretarial investigation. *See* 2d Tr. at 08:14–09:04. The President previously "submit[ted] to the Congress an annual report on the operation" of Section 232. Omnibus Trade and Competitiveness Act of 1988, § 1501(b), 102 Stat. at 1259. That stand-alone report was eliminated with the Federal Reports Elimination and Sunset Act of 1995.

[8] Again, paragraph (c)(2) requires the President, within thirty days of determining whether to take action to adjust tariffs, to "submit to the Congress a written statement of the reasons" for his determination, which "shall be included in the report published under subsection [(d)′]." 19 U.S.C. § 1862(c)(2).

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See Pub. L. No. 104-66, § 3003, 109 Stat. 707, 734–35. It is reasonable to conclude that the annual report on the operation of delegated tariff authority would have been the one to include statements on presidential action under paragraph (c)(1).[9]

Second, to read paragraph (c)(2) in the manner suggested by the Court would undercut the further reporting requirements imposed by 19 U.S.C. § 1862(c)(3). To wit: when the President decides *not* to take immediate action under subparagraph (c)(1)(B) but tries to renegotiate existing trade agreements—as was done here with automobile imports—he must inform Congress both of that initial decision, *see id.* at § 1862(c)(2), and also "publish in the Federal Register notice of any *additional* actions," including a decision to take no action at all. 19 U.S.C. § 1862(c)(3)(A) (emphasis added). The existence of these latter reports makes little sense if the report required by paragraph (c)(2) were necessarily included in a secretarial report and if publication were delayed while "deliberations" remain ongoing, or so long as the President found continued secrecy useful.

Third, as for the practice of the current Administration, neither of Commerce's reports on the national security impacts of aluminum and steel imports included the "written statement" contemplated by paragraph (c)(2) and, in fact, both were dated and publicly released *before* the President acted. *See* Dep't of Commerce, The Effect of Imports of Aluminum on the National Security (Jan. 17, 2018), *available at* http://bit.ly/2N35R9q; Dep't of Commerce, The Effects of Imports of Steel on the National Security (Jan. 11, 2018), *available at* http://bit.ly/2L7gBRJ.[10] Separate proclamations—ostensibly, the "written statements" required by paragraph (c)(2)—

[9] Commerce undertook at least four Section 232 investigations during the years that the paragraph (d)'(2) reporting requirement was effective. *See* Pl.'s Cross-Mot. Ex. 3 at 6–7, ECF No. 24-3. The relevant annual reports on presidential action do not appear to be publicly available and, because they would have been created by the White House for use by Congress, they would not likely be "agency records" subject to disclosure under the FOIA.

[10] CoA Institute cannot locate any evidence that Commerce published notices of availability for the steel and aluminum reports in the *Federal Register*, as required by Section 232 and its implementing regulations. The agency simply posted them on its website.

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followed the next month. *See* Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 15, 2018); Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619 (Mar. 15, 2018). Thus, neither current practice nor the historical record confirms the Court's suggestion about the relevance of paragraph (c)(2). *Cf. supra* at note 3.

C. Common Sense

Finally, as a matter of common sense, the OLC Opinion must be wrong about the meaning of "disposition" because, if taken to its logical conclusion, the OLC Opinion's reasoning would justify an absurd result: the President could indefinitely withhold a secretarial report, even after tariffs were imposed or if they were never imposed.

Here, the government argues the President has continuing authority under paragraph (c)(3) to act after attempted renegotiation of existing trade arrangements have failed. *See* OLC Opinion at 11 (Section 232 "continues to authorize the President to take action [on auto imports]" but "[t]here . . . is no statutory deadline . . . to exercise that power" and there is "strong confidentiality interest" in keeping the secretarial report secret."); *cf. id.* at 6. Elsewhere, the government has claimed the President enjoys special authority either to revisit or revise settled tariff decisions under paragraph (c)(1), *see, e.g.*, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5,281 (Jan. 29, 2020), or to delay "disposition" of a matter (and keep a secretarial report secret) even after the President *disagrees* with a secretarial recommendation and is arguably disallowed from undertaking *any* further action. *See* 2d Tr. at 10:01–04; *see also Cause of Action Inst. v. Dep't of Commerce*, No. 19-2698 (D.D.C. filed Sept. 9, 2019) (FOIA lawsuit for release of Section 232 Uranium Report); White House, Mem. On the Effect of Uranium Imports on the National Security & Establishment of the U.S. Nuclear Fuel Working Group (July 12, 2019), *available at* http://bit.ly/326VOmz.

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The logic of the OLC Opinion, as applied to any of the above (non-hypothetical) situations, would permit the President to keep a Section 232 report secret for *any* reason, no matter what has or has not been done, and all under the guise of executive privilege and protecting the "national security" or ongoing "diplomacy." *See* OLC Opinion at 12. In other words, the publication requirement would be nullified. That cannot be correct. Even if Section 232 were ambiguous in setting a deadline for publication of a secretarial report—which it is not—the law does not give the President such unbridled discretion. The natural reading of "disposition" is that it refers to the conclusion of a secretarial investigation, not presidential action.

IV. Commerce improperly withheld portions of the Auto Tariffs Report when it submitted *ex parte* a copy of the report for *in camera* review.

Finally, when Commerce noticed its *ex parte* submission of the Auto Tariffs Report to this Court, it explained that, "[c]onsistent with the Defense Production Act (50 U.S.C. § 4555(d))," it had "redact[ed] . . . proprietary information[.]" Def.'s Not. of *Ex Parte* Submission at 1 n.1, ECF No. 34. The agency provided no explanation or argument for the legitimacy of its withholding. That potentially unprecedented act of refusing to disclose information to the Court for *in camera* review is an affront to the independence of the judicial system. It also violates well-established constitutional principles about the ability of an Article III judge to review sensitive materials, including confidential business information, and standard FOIA litigation practice.

Commerce provided no argument for why the Defense Production Act ("DPA") even applies. The DPA, which concerns the "domestic industrial base"—and not the national security threats posed by the importation of foreign commodities, *see generally* 50 U.S.C. § 4502—provides that the President may deem certain "information . . . confidential," and keep it from being "published or disclosed," unless he "determines that the withholding . . . is contrary to the interest of the national defense." 50 U.S.C. § 4555(d). Yet such confidential "information" must

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have been obtained *by the President* "as [was] necessary or appropriate" to enforce the DPA. Although the DPA provides for "industry studies assessing the abilities of the United States industrial base to support the national defense," *id.* § 4555(a), Commerce did not explain why such a report is identical to, or analogous enough to, a secretarial report under Section 232. Commerce also did not explain how preparing a secretarial report—a process purposefully set apart from presidential decision-making—otherwise implicates the DPA. And it did not point to any implementing regulations or official policies or procedures that confirm that the DPA is at all relevant in the administration of Section 232.

Even if the DPA did apply, it likely would not matter. Section 232 does not provide the President with broad discretion to withhold "confidential" information. It only permits Commerce to redact "proprietary information" or "classified information." 19 U.S.C. § 1862(b)(3)(B). Commerce has not explained how far the categories of "confidential" and "proprietary" information under the DPA and Section 232, respectively, overlap. And it failed to connect either statute to the FOIA: Commerce has not raised an Exemption 4 claim and Section 4555(d) is not a recognized Exemption 3 statute.

More importantly, even if Section 4555 applied to portions of the Auto Tariffs Report and otherwise gave the President discretion to withhold information independently of the FOIA or Section 232, that is insufficient grounds to withhold information *from an Article III judge*. The FOIA empowers this Court to conduct *in camera* review to "examine the contents of . . . agency records," 5 U.S.C. § 552(a)(4)(B), and to determine the legality of an agency's withholding, even when national security concerns are present. *See Armstrong v. Exec. Office of the President*, 97 F.3d 575, 577–78, 580 (D.C. Cir. 1996).[11] The matter is no different outside the FOIA context.

[11] Congress created the FOIA's *in camera* provision because it disagreed with the Supreme Court's view on the availability and utility of such review when dealing with classified documents under Exemption 1. *See Nat'l Labor*

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Cf. United States v. Reynolds, 345 U.S. 1, 8–10 (1953). Commerce's incomplete *ex parte* submission deprives the Court of the ability to determine the correctness of the Executive Branch's treatment of the Auto Tariffs Report. That defeats the purpose of *in camera* review. The Court should therefore order Commerce promptly to resubmit *ex parte* an *unredacted* copy of the report.

CONCLUSION

For these reasons, and those set forth in CoA Institute's previous briefs and at oral argument, the Court should deny Commerce's motion for summary judgment and grant CoA Institute's cross-motion. CoA Institute respectfully requests that the Court order Commerce to promptly produce the Auto Tariffs Report.

Dated: February 28, 2020

Respectfully submitted,

/s/ Ryan P. Mulvey
Ryan P. Mulvey (D.C. Bar No. 1024362)
R. James Valvo, III (D.C. Bar No. 1017390)
Lee A. Steven (D.C. Bar No. 468543)

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Counsel for Plaintiff

Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 235 (1978) (discussing Congress's reaction to *Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1983)). *In camera* review has become an uncontroversial practice, even when dealing with highly sensitive records. *See* Office of Info. Policy, Dep't of Justice, *Litigation Review: History of Exemption 1 Disclosure Orders (FOIA Update, vol. XVI, No. 2)* (Jan. 1, 1995), http://bit.ly/2Td4QeN (last visited Feb. 28, 2020) (describing cases involving *in camera* review of classified information following FOIA reform post-*Mink*).

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March 27, 2020

The Honorable Donald J. Trump
President of the United States
1600 Pennsylvania Ave.
Washington, DC 20515

Dear President Trump:

America's Uranium Miners Need Immediate Assistance to Avoid Permanent Job Losses and Collapse of the Domestic Industry. Neither administrative nor legislative action has addressed our deepening crisis.

The Administration has sought to bolster strategic stockpiles to assist supply chain and market disruptions in the current COVID-19 crisis, including increased holdings within the Strategic Petroleum Reserve. This action would assist domestic oil and gas producers in managing a perfect storm of diminishing demand, predatory market behavior by foreign producers, steep declines in market value and the availability of capital. As uranium miners we understand those pressures because we have been struggling to manage them for several years and the COVID-19 related economic decline is only worsening the situation. Domestic uranium mines are suspending operations and people in our industry are losing jobs, and our industry is on the cusp of complete collapse, now.

This current pandemic crisis is exposing the vulnerability of our nuclear fuel supply chain. Nearly 100% of domestic uranium demand in the 4th quarter of 2019 was supplied by foreign producers. Almost 40% of our nuclear fuel travels along a highly vulnerable supply chain from Russia, and half of that supply chain, sourced from Kazakhstan, may be constrained by COVID-19. On March 23 it was announced that uranium production in America's largest supplier, Canada, is shutting down in response to health concerns over COVID-19. For the first time since the 1940's there is no current uranium production in the US or Canada. Today, it was announced that Chinese-controlled production in Africa has started to be shut-in as well.

Without immediate action, our reliance on Russia and its allies to fuel our domestic reactors could increase, making our energy systems even more susceptible to intentional market disruptions. The US cannot assert energy dominance when our nuclear fuel cycle, which fuels 20% of our nation's electricity, is completely dependent on foreign mining, conversion and enrichment.

This week, Secretary of State Pompeo said, "*We need to fundamentally review our supply chains and make sure that we know those supply chains and have control over them for moments just like this.*" Further, with respect to uranium, "*We've got to get back our mining, processing, enriching cycle.*" We agree, and we have been raising these same concerns with the Administration for over two years.

We are small businesses, but we have a big impact on America's energy and national security. We simply ask that you immediately implement the initial Nuclear Fuel Working Group ("NFWG") recommendation outlined in your FY 2021 budget to establish a strategic reserve of uranium. The Defense Production Act also enables you to purchase strategic stockpiles of critical minerals and doing so is the likeliest way to save the faltering domestic capacity. The Administration has spent over eight months studying the tools available to correct this supply chain and market interruptions. We implore the White House to release its report and implement the NFWG recommendations for immediate relief, which Energy Secretary Brouillette testified before Congress would be released the first week of March. Even without administrative action the report could assist in demonstrating to Congress the dire need to support the fuel cycle before it is too late.

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Strategic stockpiles of critical energy products protect against market shocks and blunts foreign bad behavior. The comparatively minute investment of $150 million this fiscal year would ensure uranium production remains available domestically in the case of supply chain disruption and serve as the first step in restarting domestic capacity to fulfill civilian and national security demands.

We commend the Administration for its response to the global COVID-19 crisis. The government is appropriately asserting itself to assist broad swaths of the US economy. We can think of no other sector that has received more thorough government review over the last year than our own. The time is now to act to save our critical industry.

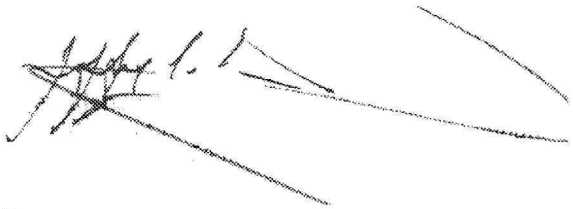
Last July, the Commerce Department concluded an exhaustive study of the negative impacts of uranium imports and recommended the establishment of trade remedies to address the national security implications of imported uranium. In a July 12 memo, you agreed that the significant challenges faced by the domestic uranium industry are an issue of national security and established the NFWG with instructions to report their findings within ninety days. Eight months later the report is still pending. The lack of action threatens to cede our domestic capacity to produce uranium to foreign producers controlled by antagonistic governments, including Russia and China. Markets responded to the decision not to provide trade relief by drastically discounting the value of domestic miners, and that situation has only worsened throughout the protracted delay in action by the Nuclear Fuel Working Group and now accelerated in the broad COVID-19 sell off.

The COVID-19 crisis will pass but without immediate support from the federal government we could emerge from it and learn that a critical domestic capacity was permanently lost.

Respectfully,



Mark Chalmers
President and Chief Executive Officer of Energy Fuels Resources (USA) Inc.



Jeff Klenda
Chairman, Chief Executive Officer, and Founder of Ur-Energy USA Inc.

CC: The Honorable Michael Pence, Vice President of the United States
The Honorable Michael Pompeo, Secretary of State
The Honorable Wilbur Ross, Secretary of Commerce
The Honorable Dan Brouillette, Secretary of Energy
The Honorable Steven Mnuchin, Secretary of Treasury
The Honorable Mark Esper, Secretary of Defense
The Honorable Lawrence Kudlow, Assistant to the President
The Honorable Robert O'Brien, Assistant to the President

AMERICAN OVERSIGHT

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs	)	WC Docket No. 18-89
	)	
	)	
	)	
	)	

ORDER

Adopted: April 2, 2020 **Released: April 2, 2020**

Response Date: May 22, 2020

By the Chief, Wireline Competition Bureau and the Acting Chief, Office of Economics and Analytics:

1. By this Order, the Wireline Competition Bureau (WCB) and the Office of Economics and Analytics (OEA) grant a 30-day extension of time for filers to complete the Supply Chain Information Collection.[1] With this extension, responses to the Supply Chain Information Collection are due on May 22, 2020.

2. On November 26, 2019, the Commission adopted the *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs Report and Order*, which, among other things, directed WCB and OEA to establish an information collection for eligible telecommunications carriers (ETCs) to report whether they own or use potentially prohibited equipment or services provided by Huawei Technologies Company or ZTE Corporation, their subsidiaries, parents, or affiliates, in their networks; what that equipment is and what those services are; the costs associated with purchasing or installing such equipment or services; and the costs associated with removing or replacing such equipment or services.[2] On February 26, 2020, WCB and OEA announced that the Supply Chain Information Collection had begun and that ETCs must report the required information through the portal established for this purpose by April 22, 2020.[3]

3. On March 24, 2020, the Rural Wireless Association (RWA) requested that WCB and OEA extend the Supply Chain Information Collection deadline by eight weeks to June 22, 2020 because of complications arising from the COVID-19 pandemic.[4] RWA asserts that the pandemic has caused its

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[1] FCC, Identifying Potentially Prohibited Communications Supply Chain Equipment and Services, www.fcc.gov/supplychain.

[2] *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, 11481-82, paras. 162-66 (2019) (*2019 Supply Chain Order*).

[3] *Wireline Competition Bureau and Office of Economics and Analytics Open Reporting Portal for Supply Chain Security Information Collection*, WC Docket No. 18-89, Public Notice, DA 20-166 (WCB and OEA 2020).

[4] Request of RWA for Extension of Time to Report Supply Chain Security Information, WC Docket No. 18-89, (filed Mar. 24, 2020), https://ecfsapi.fcc.gov/file/103241353608744/RNSCsupplychainextension%20%20FINAL.pdf (RWA Request).

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"member ETCs to devote substantial time and resources away from compliance with regulatory reporting obligations to numerous pandemic-related urgent new activities," including reconfiguring their networks to accommodate increased demand for telecommunications services, and devoting resources to their own business continuity issues.[5] As a result, RWA argues its members do not have enough time to complete the information collection.[6] RWA also contends that its members are missing information from vendors needed to complete the information collection, as these vendors are also adversely impacted by the COVID-19 pandemic.[7]

4. On March 27, 2020, USTelecom filed two letters with the Commission, the first requesting the Commission waive or postpone the April 22, 2020 Supply Chain Information Collection deadline because of the pandemic,[8] and the second expressing support for RWA's request.[9] USTelecom claims that its member companies' engineers and officers responsible for completing the information collection "are now fully occupied with the greater mission of serving their customers . . . necessitating more time to complete the information request."[10]

5. On April 1, 2020, NTCA filed a letter with the Commission expressing support for RWA's request.[11] NTCA states that employees who would have normally prepared the information necessary to complete the Supply Chain Information Collection are currently needed to assist with new installations or increased bandwidth because of an increase in network demand in residential locations.[12]

6. As set forth in section 1.46 of the Commission's rules,[13] it is the policy of the Commission that extensions of time shall not be routinely granted. In light of the COVID-19 pandemic and community and business efforts to respond to this public safety crisis, we find there is good cause to grant a limited extension of the supply chain information collection reporting and certification deadline. We believe that an additional 30 days will provide enough time for ETCs to provide accurate and complete responses to the information collection while still allowing the Commission to expeditiously move forward with its efforts to increase the security of the communications supply chain. We therefore grant RWA's request in part and establish a new reporting and certification deadline of May 22, 2020. We expect that this extension will "result in more meaningful data being provided to the Commission" to help inform the Commission's decision-making in this proceeding.[14]

7. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 5(c) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), and 155(c), and sections 0.21, 0.91, 0.271, 0.291, and 1.46 of the Commission's rules, 47 CFR §§ 0.21, 0.91, 0.271, 0.291, and 1.46 that RWA's Request for an Extension of Time to Report Supply Chain Security Information IS GRANTED IN PART.

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[5] RWA Request at 2.

[6] RWA Request at 3.

[7] RWA Request at 5.

[8] Letter from Jonathan Spalter, President and Chief Executive Officer, USTelecom, to Ajit Pai, Chairman, FCC, WC Docket No. 18-89 (filed Mar. 27, 2020).

[9] Letter from Mike Saperstein, Vice President, Strategic Initiatives & Partnerships, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89 (filed Mar. 27, 2020).

[10] *Id.* at 1.

[11] Letter from Michael Romano, Senior Vice President – Industry Affairs and Business Development, NTCA, to Marlene H Dortch, Secretary, FCC, WC Docket No. 18-89 (filed Apr. 1, 2020).

[12] *Id.*

[13] 47 CFR § 1.46.

[14] RWA Request at 5.

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8. IT IS FURTHER ORDERED that the deadline for ETCs to complete the Supply Chain Information Collection is extended until May 22, 2020.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

Giulia McHenry
Acting Chief
Office of Economics and Analytics

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	ATRO	AURO	CRO	DRO	PRO	SRO	TOTAL
Area Director (GS-301-14)					1		1
New Superviory Position (GS-301-14) (New)			1	1			2
Econ. Dev. Rep. (GS-1101-13)		2	3				5
Econ. Dev. Rep. (GS-1101-12) (New)				5			5
Econ. Dev. Spec. (GS-1101-9/11/12)	1	3	1	1	2		8
Econ. Dev. Asst./Admin. Asst. (GS-303-9)	1		1			1	3
Program Analyst (RLF - Support) (GS-343-12)	1	1	1	1	2	1	7
Civil Engineer (GS-810-13)	1		2	1	2		6
Management Analyst (GS-343-12/13)				1			1
TOTAL	4	6	9	10	7	2	38

	OAS	OCC	ORA	OEAC	OIE	OFMS	TOTAL
Enterprise Operations & Policy Advisor GS-301-14/15 (New)	1						1
Attorney Advisor Gs-0905-14/15		3					3
Program Manager - GS-0301-15 (New)			1				1
Program Analyst (ERSF Field Coordinator) GS-343-13			2				2
Economist (GS-0110-11)			1				1
Program Analyst (EDI) (GS-343-11)			1				1
Program Analyst - (GS-343-9)			2				2
Program Analyst -(GS-343-11)			1				1
Economist (Data Scientist) (GS-0110-9)			2				2
Regional Public Affairs Spec. (GS-1035-13)				6			6
IT Specialist (Webmaster) (GS-2210-12) (New- PD Library)				1			1
Governor's Liaison (GS-301-12/13) (New)				1			1
Intergovernmental Affairs Specialist (GS-301-12/13) (New) (Need GS-12)				1			1
Correspondence Specialist (GS-301-11/12) (New)				1			1
Grants Processing Specialist (GS-11/12) (New)				1			1
Economic Development Specialist (GS-1101-9/11/12)					5		5
Management Analyst (Human Capital Assistant) (GS-343-11)						1	1
Management Analyst (Acquistion/Procurement) (GS-343-11/12)						1	1
Training Specialist (GS-1712-13)						1	1
IT Support (contract support/MOU)						1	1
Security Support (contract support/MOU)						1	1
Budget Analyst (GS-560-9/11)						2	2
TOTAL	1	3	10	11	5	7	37

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institution becomes subject to the disclosure of the supplementary leverage ratio pursuant to § 324.172(d) and § 324.173(a)(2).

* * * * *

TABLE 6 TO § 324.173—CREDIT RISK: DISCLOSURES FOR PORTFOLIOS SUBJECT TO IRB RISK-BASED CAPITAL FORMULA

Qualitative disclosures	(a)	* * *
		(1) Structure of internal rating systems and if the FDIC-supervised institution considers external ratings, the relation between internal and external ratings;
*	*	* * * * * * *

* * * * *

TABLE 9 TO § 324.173—SECURITIZATION

*	*	* * * * * * *
Quantitative Disclosures.		
*	*	* * * * * * *
	(i)	* * *
		(2) Aggregate amount disclosed separately by type of underlying exposure in the pool of any: (i) After-tax gain-on-sale on a securitization that has been deducted from common equity tier 1 capital; and (ii) Credit-enhancing interest-only strip that is assigned a 1,250 percent risk weight.
*	*	* * * * * * *

* * * * *

■ 37. Section 324.403(b) is revised to read as follows:

§ 324.403 Capital measures and capital category definitions.

* * *

(b) *Capital categories.* For purposes of section 38 of the FDI Act and this subpart, an FDIC-supervised institution shall be deemed to be:

(1) "Well capitalized" if it:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 8.0 percent or greater; and

(iii) Has a common equity tier 1 capital ratio of 6.5 percent or greater; and

(iv) Has a leverage ratio of 5.0 percent or greater;

(v) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure; and

(vi) Beginning on January 1, 2018 and thereafter, an FDIC-supervised institution that is a subsidiary of a covered BHC will be deemed to be well capitalized if the FDIC-supervised institution satisfies paragraphs (b)(1)(i) through (v) of this section and has a supplementary leverage ratio of 6.0 percent or greater. For purposes of this paragraph, a covered BHC means a U.S. top-tier bank holding company with more than $700 billion in total assets as reported on the company's most recent Consolidated Financial Statement for Bank Holding Companies (FR Y–9C) or more than $10 trillion in assets under custody as reported on the company's most recent Banking Organization Systemic Risk Report (FR Y–15).

* * * * *

Dated: June 16, 2015.

Thomas J. Curry,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, June 15, 2015.

Robert deV. Frierson,

Secretary of the Board.

Dated at Washington, DC, this 16th day of June, 2015.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2015–15748 Filed 7–14–15; 8:45 am]

BILLING CODE

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 702

[Docket No. 140501396–5463–02]

RIN 0694–AG17

U.S. Industrial Base Surveys Pursuant to the Defense Production Act of 1950

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule sets forth the policies and procedures of the Bureau of Industry and Security (BIS) for conducting surveys to obtain information in order to perform industry studies assessing the U.S. industrial base to support the national defense pursuant to the Defense Production Act of 1950, as amended. Specifically, this rule provides a description of BIS's authority to issue surveys; the purpose for the surveys and the manner in which such surveys are developed; the confidential treatment of submitted information; and the penalties for non-compliance with surveys. This rule is intended to facilitate compliance with surveys, thereby resulting in stronger and more complete assessments of the U.S. industrial base.

DATES: This rule is effective August 14, 2015.

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FOR FURTHER INFORMATION CONTACT: Jason Bolton, Trade and Industry Analyst, Office of Technology Evaluation, phone: 202–482–5936 email: *jason.bolton@bis.doc.gov* or Brad Botwin, Director, Industrial Base Studies, Office of Technology Evaluation, phone: 202–482–4060 email: *brad.botwin@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to authorities under section 705 of the Defense Production Act of 1950 as amended (DPA) (50 U.S.C. app. 2155) and § 104 of Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness, 77 FR 16651, 3 CFR, 2012 Comp., p. 225), the Bureau of Industry and Security (BIS) conducts studies that assess the capabilities of the U.S. industrial base to support the national defense. To produce these studies, BIS may issue surveys to collect detailed information related to the health and competitiveness of the U.S. industrial base from government sources and private individuals or organizations.

BIS published a proposed rule addressing its authority to conduct the studies, the authority to issue surveys to gather data in support of the studies, the purpose of the surveys and the manner in which such surveys are developed, the confidential treatment of submitted information, and the penalties for non-compliance with surveys (*see* 80 FR 11350, March 3, 2015). BIS received two comments on the proposed rule and is not making any changes to the final rule text in response to those comments. This final rule makes no substantive change to the proposed rule.

Public Comments and BIS's Response

BIS received two comments on the proposed rule. They are reproduced in their entireties along with BIS's responses below.

Comment 1.

"The Defense Production Act of 1950 was enacted so that [the] [P]resident could (1) require business[es] to sign contracts deemed necessary for defense, (2) allow the [P]resident to create mechanisms that would allow the allocation of goods and services to support defense and (3) allow the [P]resident to control civilian economy so that scare resource are available for defense. This Act was used during for the Cold War, and could be labeled as outdated and unnecessary. Under this act, the [P]resident and his staff is given a lot of power over the economy. I disagree with the BIS that there should be some sort of supervision over this act. From what I have researched I have found one use of the Act in 2011, where the Government seized equipment from telecommunications companies for criminal charges. One incident should not raise alarm of possible fraud or misuse. Although I wish that all sections of the government could be monitored more, I know that the money spent on the oversight of this Act could be spent more effectively elsewhere."

Response: Section 705 of the Defense Production Act of 1950 (50 U.S.C. app. 2155), authorizes the President to, among other things, "require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder." In 2003, an amendment to that Act made clear that such "authority . . . includes the authority to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense." This rule is designed to set forth policies and procedures to facilitate the accurate and timely completion of surveys issued by BIS to collect data for these studies. Whether or not the Act is outdated and unnecessary is a decision for Congress, and is not something to be addressed in this regulation. This regulation is solely intended to clearly implement the provisions of Section 705 of the DPA.

Additionally, BIS does not engage in "supervision over this act." The studies that BIS conducts under the DPA are for the purpose of assessing the capabilities of the United States industrial base to support the national defense. BIS does not seize property under the DPA in connection with criminal charges and the proposed rule makes no mention of seizure authority.

Accordingly, BIS is making no changes to the proposed rule in response to this comment.

Comment 2.

"The corporation does not posses [sic] the rights of citizenship within U.S. borders, privileges or immunity clause ensures this within The Constitution of the United States of America. Societal roles force us to consider the implications surrounding predictive analytics based in Logic while the National Identity is a consensus being manufactured through a rational theory exercise in speculative risk. Insurers effectively are prohibited from utilizing coercion due to the McCarran Ferguson Act, however significant concerns exist with regard to the applicability of industry influence with-out the force of Anti-trust regulations to secure American values toward equality. A proposal to reduce the unnecessary burdens establishing this future of regulation, suggests the McCarran Ferguson Act may be applied to the Gramm Leech Bliley Act as a measured and proportionate Logic introduced to the irrational manufacture of consent.

Response: The proposed rule and this final rule are entirely unrelated to the rights of citizenship as they may or may not apply to corporations, the privileges and immunities clause of the Constitution of the United States, the regulation of insurers, anti-trust law, the Gramm Leech Bliley Act, or the McCarran Ferguson Act. The proposed rule and this final rule address surveys issued by BIS to collect data for studies assessing the capabilities of the United States industrial base to support the national defense, consistent with the authorities set forth in section 705 of the Defense Production Act of 1950.

As this comment is unrelated to the BIS activities this rule addresses, BIS is making no changes to the final rule in response to this comment.

General Description of the Rule

This rule sets forth procedures intended to facilitate the accurate and timely completion of surveys issued by BIS to collect data for these studies. This rule sets forth in a single part of the Code of Federal Regulations the information about BIS's authority to conduct the studies, the authority to issue surveys to gather data in support of the studies, the purpose of the surveys and the manner in which such surveys are developed, the confidential treatment of submitted information, and the penalties for non-compliance with surveys.

Additionally, this rule explains BIS's procedures for verifying that the scope and purpose of the surveys are well defined, and assures that the surveys do not solicit data that duplicates adequate and authoritative data that is available to BIS from any federal or other responsible agency. A survey may require the submission of information similar or identical to information possessed by another federal agency but that is not available to BIS.

Based on requests it receives from U.S. Government agencies, BIS produces studies to develop findings and policy recommendations for the purpose of improving the competitiveness of specific domestic industries and technologies critical to meeting national defense and essential civilian requirements. These studies may require surveys to collect relevant data and assessments of that data and other information available to BIS.

BIS, in cooperation with the requesting agency, selects the persons to be surveyed based on the likelihood that they will have information relevant to a

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study. That likelihood is related to the person's association with the industry sector, material, product, service or technology that is the subject of the study. That association may be based on factors such as the person's role in directly or indirectly providing, producing, distributing, utilizing, procuring, researching, developing, consulting or advising on, the industry sector, material, product, service or technology that is the subject of the study.

Whether a person's association with the industry sector, material, product, service or technology being assessed is proximate or remote does not determine whether that person's association is sufficient for inclusion in the survey. For example, information about a supplier of raw materials or components that is several transactions removed from the production of the product that is the subject of a study may be relevant to assessing the capabilities of the U.S. industrial base to supply the product to support the national defense. In such a situation, the supplier would be included in the survey. The nature of the person from whom the information is sought also does not determine whether that person's association with the industry sector, material, product, service or technology at issue is sufficient for inclusion in the survey. Surveys may require information from businesses organized for profit, non-profit organizations, academic institutions and government agencies.

To be useful, a study must be comprehensive, accurate and focused on the relevant industry sector, material, product, service or technology. Therefore, surveys may require information about employment, research and development, sources of supply, manufacturing processes, customers, business strategy, finances and other factors affecting the industry's health and competitiveness. To properly focus the survey on the industry sector, material, product, service or technology being assessed, BIS may request information about a corporation as a whole or information about one or more specified units or individual activities of that corporation. The DPA provides both a civil remedy and criminal penalties that may be used when recipients of surveys do not supply the information sought.

BIS deems the information supplied in response to survey requests to be confidential and is prohibited by law from publishing or disclosing such information unless the Under Secretary for Industry and Security determines that withholding the information is contrary to the interest of the national defense. The authority to make this determination, which section 705(d) of the DPA gives to the President, has been delegated to relevant agencies, including the Secretary of Commerce, by § 802 of Executive Order 13603. The Secretary of Commerce re -delegated this authority to the Under Secretary for Industry and Security. The DPA provides criminal penalties for any person who willfully violates its prohibition on publication or disclosure.

Section by Section Description of the Rule

This rule creates a new part in Title 15, Chapter VII, Subchapter A of the Code of Federal Regulations to be designated as 15 CFR part 702. This new part is devoted exclusively to BIS's collection of information under section 705 of the DPA (50 U.S.C. app. 2155). Placing the new part in Subchapter A promotes an orderly and logical regulatory structure because all other regulations implementing BIS authorities related to the DPA are contained in that subchapter.

Section 702.1

Section 702.1 sets forth a general description of BIS's authority to collect information needed to complete the surveys. The survey responses assist BIS in determining the capabilities of the industrial base to support the national defense and to develop policy recommendations to improve both the international competitiveness of specific domestic industries and their ability to meet national defense needs.

Section 702.2

Section 702.2 implements the requirement found in section 705 of the DPA (50 U.S.C. app. 2155(a)) to publish regulations by requiring BIS personnel of appropriate competence and authority to ensure that before a survey is sent to any person for completion; 1) the scope and purpose of a survey have been established, 2) the scope and purpose are consistent with BIS's authorities under the DPA, and 3) the data requested by the survey does not duplicate adequate and authoritative data available to BIS from a federal or other authoritative source. A survey may require information that is similar or identical to information possessed by other federal agencies but not available to BIS. The section does not limit the factors that may be considered in deciding whether to conduct a survey nor does it modify or replace the requirements of the Paperwork Reduction Act. In addition, all surveys are reviewed by BIS and by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act before they are distributed. The OMB review process provides additional assurance that surveys are designed to collect only information deemed necessary to meet the scope and purpose of a study.

Section 702.3

Section 702.3 addresses the confidentiality requirements imposed by section 705(d) of the DPA (50 U.S.C. app. 2155(d)) and, in accordance with that section, provides two procedures by which the restrictions on disclosure in section 705(d) would be invoked. First, consistent with its current practice, BIS would deem all information submitted in response to a survey to be confidential. Second, a person submitting a response to a survey may request confidential treatment of the information submitted. Although the second procedure is likely to be redundant of the first, the statute prohibits disclosure if either the government deems the information to be confidential or if the person furnishing the information requests confidential treatment. BIS concludes that both procedures should be included in the regulations to be consistent with the statute. Additionally, § 702.3 notes that confidential information shall not be published or disclosed unless the Under Secretary for Industry and Security determines that withholding the information is contrary to the interest of the national defense. The statutory authority of the President to make this determination has been delegated to the Under Secretary for Industry and Security. This section also repeats the penalties that the statute authorizes for persons convicted of willfully violating the prohibition on disclosure.

Section 702.4

Section 702.4 requires timely, complete and adequate responses to surveys. Specifically, the section requires that survey responses be returned to BIS within the time frame stated on the initial distribution letter or other request for information. The section treats a response as "inadequate" if it provides information that is not responsive to the questions asked or if it provides aggregated information when specific information was requested.

Section 702.4 sets forth the criteria by which BIS may grant either an exemption from complying with the survey requirement or an extension of time to comply. The grounds for granting an exemption or an extension are limited and generally result when

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BIS concludes that the survey recipient lacks information deemed relevant to the survey or when compliance with the requirement would be unduly burdensome.

Section 702.4 makes clear that the deadline for complying with a survey is not suspended by submitting a request for an exemption or extension of time to comply.

Finally, § 702.4 provides that BIS may return responses that are incomplete or inadequate and specify a due date for a complete and adequate response.

Section 702.5

Section 702.5 sets forth the consequences of failure to comply with a survey or other request for information. These consequences are established by section 705(a) and (c) of the DPA (50 U.S.C. app. 2155(a) and (c)). If a person does not comply with a survey, BIS may serve a subpoena upon that person to compel compliance. If the person still does not comply, the government may apply to the U.S. district court in any district in which the person is found, resides or transacts business for an order requiring such person to comply. The district court has authority to punish any failure to comply with the order as contempt of court. Persons who are convicted of willfully failing to comply with a survey or other request for information may be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 702.6

Section 702.6 defines certain terms used in part 702.

The word "confidential" is defined in terms of section 705(d) of the DPA, thereby distinguishing its use in this rule from its use in connection with the classification of information for national security purposes as set forth in Executive Order 13526 of December 29, 2009, Classified National Security Information (75 FR 707; 3 CFR, 2010 Comp., p. 298).

The definition of the term "person" is based on the definition of "person" in section 702 of the DPA (50 U.S.C. app. 2152) with some additions. The DPA definition reads: "The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof." Use of the word "includes" in the statutory definition implies that the list following that word is not exhaustive. BIS concludes that the use of "includes" indicates that Congress recognized that the agency implementing the DPA would need discretion to identify the types of entities that would likely possess information relevant to the subject of each industrial base assessment to ensure a comprehensive collection of information.

This rule adds "The Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof." BIS has concluded that inclusion of the additional entities is within its authority under the DPA because the DPA definition prefaces the list of entities with the word "includes," and because inclusion of the additional entities is necessary to achieve the purpose of the statute.

Based on prior studies, BIS has observed that the U.S. Government makes a significant contribution to the industrial base, whether in research, technology development, testing, manufacturing, repair and overhaul, or trade development. As a result, the U.S. Government is a significant source of information regarding the industrial base. Similarly, it is plausible that the District of Columbia, commonwealths of the United States and other territories and agencies can be survey respondents, and therefore have been included to ensure the completeness of a survey sample and corresponding assessment.

The regulatory definition also makes clear that the term "corporation, partnership, association, or any other organized group of persons" is not limited to commercial, for-profit enterprises or publicly traded corporations.

The definitions of the terms "initial distribution letter" and "survey" each describe a document used in the data collection process. The definitions describe those documents based on the way they are used in current BIS practice.

Supplement No. 1 to Part 702

Supplement No. 1 to part 702 provides information that BIS believes would be helpful to persons who receive a survey. This information includes both a description of the survey and a glossary of terms.

Differences Between This Final Rule and the Proposed Rule

The definition of "initial distribution letter" in § 702.6 in the proposed rule contained a sentence that read "[t]he letter also provides BIS contact information." In this final rule, the word "provides" has been replaced with the word "includes" for precision. This final rule also corrects a typographical error that appeared in Supplement No.1 to Part 702, introductory text, second sentence in the proposed rule. The phrase that read: ". . . is purely in example . . ." has been corrected to read ". . . is purely an example . . . ." There are no other differences in regulatory text between this final rule and the proposed rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined not to be a "significant regulatory action," significant, as that term is defined in Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*) unless that collection of information displays a currently valid OMB control number. This rule does not contain a collection of information that is subject to the Paperwork Reduction Act. This rule sets forth procedures related to BIS's administration of surveys pursuant to § 705 of the DPA (50 U.S.C. app. 2155). Individual surveys that are subject to the Paperwork Reduction Act will display a currently valid OMB control number.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. However, under § 605(b) of the RFA, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the RFA does not require the agency to prepare a regulatory flexibility

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analysis. Pursuant to § 605(b), the Chief Counsel for Regulation, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that the proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities. The proposed rule set forth the rationale for that certification. BIS received no comments on that rationale and is making no substantive changes to it. The rationale for that certification is as follows.

Impact

This rule sets forth, in a single part of the Code of Federal Regulations, the Department of Commerce's authority under § 705 of the DPA "to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense." Since the mid-1980s, BIS and its predecessor organizations within the Department of Commerce have conducted such studies and required survey responses based on the statute. Section 705 of the DPA authorizes the collection of the information. The statute also authorizes the issuance of subpoenas for the information and authorizes the United States district courts to issue orders compelling compliance with such subpoenas. It also provides criminal penalties for failure to comply with the government's requests for information. This final rule will not require any person to supply information that the person would not be required to provide pursuant to the statute.

This final rule requires that surveys issued by BIS pursuant to § 705 be responded to by the deadline set forth in the survey. The rule incorporates BIS's existing internal policies and standards for the granting of both an extension of time to comply with the requirement and exemptions from compliance. To the extent that publication of these policies and standards in the Code of Federal Regulations could be construed as a change in the burden on small entities or any other entities, the publication would have to be deemed as a reduction in burden because it facilitates access to the standards by all parties.

This final rule also sets forth the statutory standards for treating information submitted in response to a survey as confidential. It reiterates the statutory penalties for failure to comply with a survey and for unauthorized release of information that § 705 requires to be treated as confidential.

This rule adopts the statutory definition of "person" but also adds "[t]he Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof" to the definition. The term "person" is used in the statute and in this final rule to represent those to whom the requirements of the statute and this final rule apply. BIS has historically interpreted the statute to apply to units of the U.S. Government (including the District of Columbia Government and the governments of the territories and possessions) and does not view this as a substantive change. For purposes of this certification, the addition is immaterial because the government bodies that will be added to the statutory definition by this final rule are not small entities under the definition provided in the Small Business Regulatory Enforcement Fairness Act of 1996.

Number of Small Entities

Surveys are one-time exercises used to assess the state and/or capabilities of a particular industry sector or technology. Entities are selected for participation based on their role in, or relationship to, the industry sector or technology being assessed. Information obtained during the course of any one assessment may be relevant to determining whether the current entity supplying that information is a small entity. However, the composition of survey respondents varies dramatically between industry studies due to the complexity of each industry sector or technology being assessed. Consequently, BIS is unable to draw from existing data to estimate the number of small businesses participating in future collections. Accordingly, BIS is unable to determine the number of small entities that may be affected by this final rule.

Conclusion

Although BIS cannot predict the exact number of small entities that will be participating in any one survey, this rule will not impose a significant burden on any such small entities because it will not require any impacted entity to perform any action that it is not already required to perform pursuant to section 705 of the DPA.

List of Subjects in Part 702

Business and industry, Confidential business information, Employment, Penalties, National defense, Research, Science and technology.

Accordingly, the National Security Industrial Base Regulations (15 CFR Chapter VII, Subchapter A) are amended by adding Part 702 to read as follows:

Subchapter A—National Security Industrial Base Regulations

PART 702—INDUSTRIAL BASE SURVEYS—DATA COLLECTIONS

Sec.

702.1 Introduction.
702.2 Scope and purpose of surveys—avoiding duplicative requests for information.
702.3 Confidential information.
702.4 Requirement to comply with surveys or other requests for information.
702.5 Consequences of failure to comply.
702.6 Definitions.

Supplement No. 1 to Part 702—General Survey Information

Authority: 50 U.S.C. app. 2061 *et seq.;* E.O. 13603, 77 FR 16651, 3 CFR, 2012 Comp., p. 225.

§ 702.1 Introduction.

In accordance with 50 U.S.C. app. 2155, the Bureau of Industry and Security (BIS) may obtain such information from, require such reports and the keeping of such records by, make an inspection of the books, records, and other writings, premises or property of, take the sworn testimony of and administer oaths and affirmations to, any person as may be necessary or appropriate, in its discretion, to the enforcement or the administration of its authorities and responsibilities under the Defense Production Act of 1950 as amended (DPA) and any regulations or orders issued thereunder. BIS's authorities under the DPA (50 U.S.C. app. 2061 *et seq.*) include authority to collect data via surveys to perform industry studies assessing the capabilities of the United States industrial base to support the national defense and develop policy recommendations to improve both the international competitiveness of specific domestic industries and their ability to meet national defense program needs.

§ 702.2 Scope and purpose of surveys—avoiding duplicative requests for information.

(a) BIS will not send any survey to any person for completion unless the scope and purpose of the survey have been established, that scope and purpose are consistent with BIS's authorities under the DPA, and the data requested by the survey does not duplicate adequate and authoritative data already available to BIS from a Federal or other authoritative source.

(b) BIS personnel of appropriate competence and authority will ensure that the requirements of paragraph (a) of this section are met.

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(c) This section shall not be construed as limiting the criteria that BIS may consider in determining whether to proceed with a survey. This paragraph shall not be construed as replacing or in any way modifying the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

§ 702.3 Confidential information.

This section implements section 705(d) of the DPA.

(a) BIS deems all information submitted in response to a survey issued pursuant to this part to be confidential.

(b) Any person submitting information in response to a survey issued pursuant to this part may request confidential treatment of that information.

(c) The President's authority under the DPA to protect confidential information has been delegated to the Under Secretary for Industry and Security. The information described in paragraphs (a) and (b) of this section shall not be published or disclosed unless the Under Secretary for Industry and Security determines that the withholding thereof is contrary to the interest of the national defense.

(d) Any person convicted of willfully violating the prohibition in paragraph (c) of this section may be fined not more than $10,000 or imprisoned for not more than one year, or both.

§ 702.4 Requirement to comply with surveys or other requests for information.

(a) *Requirement to comply.* Every person who receives a survey or other request for information issued pursuant to this part must submit a complete and adequate response to BIS within the time frame stated on the initial distribution letter or other request for information. Survey response information that does not adhere to the survey question criteria or that contains only aggregate information in place of specified information will be treated as inadequate and therefore noncompliant. BIS may exempt persons from this requirement for the reasons in paragraph (b) of this section, or grant extensions of time to comply as set forth in paragraph (c) of this section. Submitting a request to BIS for an exemption or an extension of time for completion does not suspend the initial deadline required by BIS (or any extended deadline subsequently granted by BIS). Thus, persons who request an exemption or extension of time are advised to proceed as if the response is required by the deadline until advised otherwise by BIS.

(b) *Grounds for exemption.* (1) An exemption from the requirements of this section may be granted if the person receiving the survey or other request for information:

(i) Has no physical presence in the United States of any kind;

(ii) Does not provide, produce, distribute, utilize, procure, research, develop, consult or advise on, or have any other direct or indirect association with the materials, products, services or technology that are within the scope of the survey;

(iii) Has ceased business operations more than 12 months prior to receipt of the survey;

(iv) Has been in business for less than one year; or

(v) BIS determines that extenuating circumstances exist that make responding impractical.

(2) BIS may also grant an exemption if, based on the totality of the circumstances, it concludes that compliance would be impractical and/or that requiring compliance would be unduly time intensive.

(3) Existence of a pre-existing private non-disclosure agreement or information sharing agreement between a person and another party (*e.g.,* customers, suppliers, etc.), does not exempt a person from the obligation to comply with and complete a survey. The authority to conduct the survey and comply with the survey is derived from the DPA, and that statutory obligation to comply supersedes any private agreement.

(c) *Extensions of time to complete.* A person who receives a survey or other request for information may request an extension of time to submit the complete response to BIS. BIS may grant such an extension of time, if, in its judgment, circumstances are such that additional time reasonably is needed, the extension would not jeopardize timely completion of BIS's overall analysis, and the person is making reasonable progress towards completing the survey or response to the other request for information. Generally, extensions will be for no more than two weeks. A person who receives a survey or other request for information may request successive extensions if the person believes that it continues to have a legitimate need for additional time to complete the survey. BIS will not grant extensions that would jeopardize the performance and timely completion of its industrial base assessments.

(d) *Procedure for requesting exemptions or extensions of time.* Requests for exemptions or extensions of time must be made to BIS at the telephone number, email address or BIS physical address provided in the initial distribution letter for a survey or in the other request for information. A request for an exemption must provide factual information and documentation that are adequate for BIS to determine that one or more of the criteria stated in paragraph (b) or (c) of this section are met.

(e) *Responses that are incomplete or inadequate.* BIS may return responses that are incomplete or inadequate to the person for prompt completion. BIS will specify the required period of time permitted for completion and submission of the revised survey.

§ 702.5 Consequences of failure to comply.

(a) *Civil.* If any person fails to comply with the requirements of § 702.4, BIS may issue a subpoena requiring that person to submit the information called for in the survey. In the case of contumacy or refusal to obey such a subpoena, the U.S. Government may apply for an order by the United States district court in a district where that person resides or transacts business that would compel the person to submit the completed survey.

(b) *Criminal.* In accordance with 50 U.S.C. app. 2155, any person who willfully fails to comply with § 702.4, may, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both.

§ 702.6 Definitions.

The definitions in this section apply throughout this part.

Confidential. A description of information that is subject to the disclosure prohibitions of the DPA (50 U.S.C. app. 2155(d)).

Initial distribution letter. A letter that BIS sends to a person that has been identified by the U.S. Government as a supplier or customer of materials, products or services used for activities of the industry that is the focus of a survey. The letter describes the survey's primary objectives, how survey results will assist the U.S. Government, and the confidential treatment of the information submitted. The letter also includes BIS contact information.

Person. The term "person" includes:

(1) An individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof;

(2) Any State or local government or agency thereof;

(3) The Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof.

Note to the definition of "person." Paragraph (1) of this definition is not

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limited to commercial or for-profit organizations. For example, the term "any other organized group of persons" may encompass labor unions, academic institutions, charitable organizations or any group of persons who are organized in some manner. The term corporation is not limited to publicly traded corporations or corporations that exist for the purpose of making a profit.

Survey. A questionnaire or other request for information that collects detailed information and data to support both the assessment of a particular industrial sector or technology and the development of a corresponding study.

Supplement No. 1 to Part 702—General Survey Information

This supplement provides general information about surveys and the content of the typical survey. The content of this supplement is purely an example of a typical survey, and in no way limits the content that may appear in a specific Bureau of Industry and Security (BIS)-issued survey. Procedures and content vary from survey to survey, and as such, there is no set template to follow. Nonetheless, BIS is offering this information as a basic guide to some elements of a survey.

Survey Structure

Most surveys include the following sections: Cover Page; Table of Contents; General Instructions; Glossary of Terms; Organizational Information, and sector-specific sections.

—The cover page typically includes the title of the survey, its scope, an explanation of the legal requirement to comply, the burden estimate for compliance with the survey, the Office of Management and Budget (OMB) control number, and the survey date of expiration.

—The General Instructions section normally includes process steps necessary for a person's survey submittal. These include but are not limited to instructions for survey completion, survey support staff point-of-contact information, the name and address of the presiding BIS official, and instructions for both survey certification and submittal.

—The Glossary of Terms section explains terms contained in the survey. Terms contained in the survey may be unique to the subject matter of the industry assessment, and therefore may change in meaning from survey to survey. Therefore, it is important to follow the specific instructions and defined terms contained in the specific survey you receive, regardless of any previous survey you might have completed.

—The Organization Information section requests information related to the person in receipt of the survey, including address information, the source level of response (*e.g.,* facility, business unit, division, corporate consolidated, etc.), point of contact details, and other pertinent contact information.

The survey is generally organized in a question and answer format and is presented on an electronic survey system. Each survey is specially tailored to collect the specific information requested. Therefore, specific detailed information is what should be submitted in response to a survey requesting such information.

—For example, if we ask for a listing of your customers that order widget A, your response should not be a listing of your entire customer base. Only the information pertaining to customers' ordering widget A is responsive to that kind of question.

Also note that your reply to a survey request is compulsory, unless you meet the criteria for exemption set forth in the body of the regulation. Therefore, any non-disclosure agreements or similar agreements you may have with your customers or clients are not applicable to a survey's request for information. Compliance with the survey is required by the DPA. Accordingly, compliance with that statutory requirement is paramount to any private agreement you have with your customers or other parties.

In addition to the aforementioned sections, each survey contains sections tailored to the specific scope of the study, including but not limited to Facility Locations, Products and Services, Inventories, Suppliers and Customers, Challenges and Organizational Outlook, Employment, Operations, Financial Statements, Sales, Research and Development, and Capital Expenditures.

Examples of survey terms.

Certification: A section of the survey in which a person (an authorizing official) certifies that the information supplied in response to the survey is complete and correct, to the best of the person's knowledge.

Facility: A building or the minimum complex of buildings or parts of buildings in which a person operates to serve a particular function, producing revenue and incurring costs for the person. A facility may produce an item of tangible or intangible property or may perform a service. It may encompass a floor or group of floors within a building, a single building, or a group of buildings or structures. Often, a facility is a group of related locations at which employees work, together constituting a profit-and-loss center for the person, and it may be identified by a unique Dun and Bradstreet number.

Sole source: An organization that is the only source for the supply of parts, components, materials, or services. No alternative U.S. or non-U.S. based supplier exists other than the current supplier.

Survey template: The data collection instrument supplied by BIS to persons by which survey information is recorded and submitted to BIS. The survey is generally organized in a question and answer format and is presented on an electronic survey system.

Supplier: An entity from which your organization obtains inputs. A supplier may be another firm with which you have a contractual relationship, or it may be another facility owned by the same parent organization. The inputs may be materials, products or services.

Dated: July 10, 2015.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2015–17388 Filed 7–14–15; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–75388; File No. S7–07–14]

RIN 3235–AL58

Freedom of Information Act Regulations: Fee Schedule, Addition of Appeals Time Frame, and Miscellaneous Administrative Changes

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to its regulations under the Freedom of Information Act ("FOIA") to allow the Commission to collect fees that reflect its actual costs, add an appeals time frame that will create a more practical and systematic administrative process and clarify other issues in the regulations.

DATES: *Effective Date:* August 14, 2015.

FOR FURTHER INFORMATION CONTACT: John Livornese, FOIA/PA Officer, Office of FOIA Services, (202) 551–3831; Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to

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institution becomes subject to the disclosure of the supplementary leverage ratio pursuant to § 324.172(d) and § 324.173(a)(2).

* * * * *

TABLE 6 TO § 324.173—CREDIT RISK: DISCLOSURES FOR PORTFOLIOS SUBJECT TO IRB RISK-BASED CAPITAL FORMULA

Qualitative disclosures	(a)	* * *
		(1) Structure of internal rating systems and if the FDIC-supervised institution considers external ratings, the relation between internal and external ratings;
*	*	* * * * * * *

* * * * *

TABLE 9 TO § 324.173—SECURITIZATION

*	*	* * * * * * *
Quantitative Disclosures.		
*	*	* * * * * * *
	(i)	* * *
		(2) Aggregate amount disclosed separately by type of underlying exposure in the pool of any: (i) After-tax gain-on-sale on a securitization that has been deducted from common equity tier 1 capital; and (ii) Credit-enhancing interest-only strip that is assigned a 1,250 percent risk weight.
*	*	* * * * * * *

* * * * *

■ 37. Section 324.403(b) is revised to read as follows:

§ 324.403 Capital measures and capital category definitions.

* * *

(b) *Capital categories.* For purposes of section 38 of the FDI Act and this subpart, an FDIC-supervised institution shall be deemed to be:

(1) "Well capitalized" if it:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 8.0 percent or greater; and

(iii) Has a common equity tier 1 capital ratio of 6.5 percent or greater; and

(iv) Has a leverage ratio of 5.0 percent or greater;

(v) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure; and

(vi) Beginning on January 1, 2018 and thereafter, an FDIC-supervised institution that is a subsidiary of a covered BHC will be deemed to be well capitalized if the FDIC-supervised institution satisfies paragraphs (b)(1)(i) through (v) of this section and has a supplementary leverage ratio of 6.0 percent or greater. For purposes of this paragraph, a covered BHC means a U.S. top-tier bank holding company with more than $700 billion in total assets as reported on the company's most recent Consolidated Financial Statement for Bank Holding Companies (FR Y–9C) or more than $10 trillion in assets under custody as reported on the company's most recent Banking Organization Systemic Risk Report (FR Y–15).

* * * * *

Dated: June 16, 2015.

Thomas J. Curry,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, June 15, 2015.

Robert deV. Frierson,

Secretary of the Board.

Dated at Washington, DC, this 16th day of June, 2015.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2015–15748 Filed 7–14–15; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 702

[Docket No. 140501396–5463–02]

RIN 0694–AG17

U.S. Industrial Base Surveys Pursuant to the Defense Production Act of 1950

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule sets forth the policies and procedures of the Bureau of Industry and Security (BIS) for conducting surveys to obtain information in order to perform industry studies assessing the U.S. industrial base to support the national defense pursuant to the Defense Production Act of 1950, as amended. Specifically, this rule provides a description of BIS's authority to issue surveys; the purpose for the surveys and the manner in which such surveys are developed; the confidential treatment of submitted information; and the penalties for non-compliance with surveys. This rule is intended to facilitate compliance with surveys, thereby resulting in stronger and more complete assessments of the U.S. industrial base.

DATES: This rule is effective August 14, 2015.

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FOR FURTHER INFORMATION CONTACT: Jason Bolton, Trade and Industry Analyst, Office of Technology Evaluation, phone: 202–482–5936 email: *jason.bolton@bis.doc.gov* or Brad Botwin, Director, Industrial Base Studies, Office of Technology Evaluation, phone: 202–482–4060 email: *brad.botwin@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to authorities under section 705 of the Defense Production Act of 1950 as amended (DPA) (50 U.S.C. app. 2155) and § 104 of Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness, 77 FR 16651, 3 CFR, 2012 Comp., p. 225), the Bureau of Industry and Security (BIS) conducts studies that assess the capabilities of the U.S. industrial base to support the national defense. To produce these studies, BIS may issue surveys to collect detailed information related to the health and competitiveness of the U.S. industrial base from government sources and private individuals or organizations.

BIS published a proposed rule addressing its authority to conduct the studies, the authority to issue surveys to gather data in support of the studies, the purpose of the surveys and the manner in which such surveys are developed, the confidential treatment of submitted information, and the penalties for non-compliance with surveys (*see* 80 FR 11350, March 3, 2015). BIS received two comments on the proposed rule and is not making any changes to the final rule text in response to those comments. This final rule makes no substantive change to the proposed rule.

Public Comments and BIS's Response

BIS received two comments on the proposed rule. They are reproduced in their entireties along with BIS's responses below.

Comment 1.

"The Defense Production Act of 1950 was enacted so that [the] [P]resident could (1) require business[es] to sign contracts deemed necessary for defense, (2) allow the [P]resident to create mechanisms that would allow the allocation of goods and services to support defense and (3) allow the [P]resident to control civilian economy so that scare resource are available for defense. This Act was used during for the Cold War, and could be labeled as outdated and unnecessary. Under this act, the [P]resident and his staff is given a lot of power over the economy. I disagree with the BIS that there should be some sort of supervision over this act. From what I have researched I have found one use of the Act in 2011, where the Government seized equipment from telecommunications companies for criminal charges. One incident should not raise alarm of possible fraud or misuse. Although I wish that all sections of the government could be monitored more, I know that the money spent on the oversight of this Act could be spent more effectively elsewhere."

Response: Section 705 of the Defense Production Act of 1950 (50 U.S.C. app. 2155), authorizes the President to, among other things, "require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder." In 2003, an amendment to that Act made clear that such "authority . . . includes the authority to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense." This rule is designed to set forth policies and procedures to facilitate the accurate and timely completion of surveys issued by BIS to collect data for these studies. Whether or not the Act is outdated and unnecessary is a decision for Congress, and is not something to be addressed in this regulation. This regulation is solely intended to clearly implement the provisions of Section 705 of the DPA.

Additionally, BIS does not engage in "supervision over this act." The studies that BIS conducts under the DPA are for the purpose of assessing the capabilities of the United States industrial base to support the national defense. BIS does not seize property under the DPA in connection with criminal charges and the proposed rule makes no mention of seizure authority.

Accordingly, BIS is making no changes to the proposed rule in response to this comment.

Comment 2.

"The corporation does not posses [sic] the rights of citizenship within U.S. borders, privileges or immunity clause ensures this within The Constitution of the United States of America. Societal roles force us to consider the implications surrounding predictive analytics based in Logic while the National Identity is a consensus being manufactured through a rational theory exercise in speculative risk. Insurers effectively are prohibited from utilizing coercion due to the McCarran Ferguson Act, however significant concerns exist with regard to the applicability of industry influence with-out the force of Anti-trust regulations to secure American values toward equality. A proposal to reduce the unnecessary burdens establishing this future of regulation, suggests the McCarran Ferguson Act may be applied to the Gramm Leech Bliley Act as a measured and proportionate Logic introduced to the irrational manufacture of consent.

Response: The proposed rule and this final rule are entirely unrelated to the rights of citizenship as they may or may not apply to corporations, the privileges and immunities clause of the Constitution of the United States, the regulation of insurers, anti-trust law, the Gramm Leech Bliley Act, or the McCarran Ferguson Act. The proposed rule and this final rule address surveys issued by BIS to collect data for studies assessing the capabilities of the United States industrial base to support the national defense, consistent with the authorities set forth in section 705 of the Defense Production Act of 1950.

As this comment is unrelated to the BIS activities this rule addresses, BIS is making no changes to the final rule in response to this comment.

General Description of the Rule

This rule sets forth procedures intended to facilitate the accurate and timely completion of surveys issued by BIS to collect data for these studies. This rule sets forth in a single part of the Code of Federal Regulations the information about BIS's authority to conduct the studies, the authority to issue surveys to gather data in support of the studies, the purpose of the surveys and the manner in which such surveys are developed, the confidential treatment of submitted information, and the penalties for non-compliance with surveys.

Additionally, this rule explains BIS's procedures for verifying that the scope and purpose of the surveys are well defined, and assures that the surveys do not solicit data that duplicates adequate and authoritative data that is available to BIS from any federal or other responsible agency. A survey may require the submission of information similar or identical to information possessed by another federal agency but that is not available to BIS.

Based on requests it receives from U.S. Government agencies, BIS produces studies to develop findings and policy recommendations for the purpose of improving the competitiveness of specific domestic industries and technologies critical to meeting national defense and essential civilian requirements. These studies may require surveys to collect relevant data and assessments of that data and other information available to BIS.

BIS, in cooperation with the requesting agency, selects the persons to be surveyed based on the likelihood that they will have information relevant to a

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study. That likelihood is related to the person's association with the industry sector, material, product, service or technology that is the subject of the study. That association may be based on factors such as the person's role in directly or indirectly providing, producing, distributing, utilizing, procuring, researching, developing, consulting or advising on, the industry sector, material, product, service or technology that is the subject of the study.

Whether a person's association with the industry sector, material, product, service or technology being assessed is proximate or remote does not determine whether that person's association is sufficient for inclusion in the survey. For example, information about a supplier of raw materials or components that is several transactions removed from the production of the product that is the subject of a study may be relevant to assessing the capabilities of the U.S. industrial base to supply the product to support the national defense. In such a situation, the supplier would be included in the survey. The nature of the person from whom the information is sought also does not determine whether that person's association with the industry sector, material, product, service or technology at issue is sufficient for inclusion in the survey. Surveys may require information from businesses organized for profit, non-profit organizations, academic institutions and government agencies.

To be useful, a study must be comprehensive, accurate and focused on the relevant industry sector, material, product, service or technology. Therefore, surveys may require information about employment, research and development, sources of supply, manufacturing processes, customers, business strategy, finances and other factors affecting the industry's health and competitiveness. To properly focus the survey on the industry sector, material, product, service or technology being assessed, BIS may request information about a corporation as a whole or information about one or more specified units or individual activities of that corporation. The DPA provides both a civil remedy and criminal penalties that may be used when recipients of surveys do not supply the information sought.

BIS deems the information supplied in response to survey requests to be confidential and is prohibited by law from publishing or disclosing such information unless the Under Secretary for Industry and Security determines that withholding the information is contrary to the interest of the national defense. The authority to make this determination, which section 705(d) of the DPA gives to the President, has been delegated to relevant agencies, including the Secretary of Commerce, by § 802 of Executive Order 13603. The Secretary of Commerce re -delegated this authority to the Under Secretary for Industry and Security. The DPA provides criminal penalties for any person who willfully violates its prohibition on publication or disclosure.

Section by Section Description of the Rule

This rule creates a new part in Title 15, Chapter VII, Subchapter A of the Code of Federal Regulations to be designated as 15 CFR part 702. This new part is devoted exclusively to BIS's collection of information under section 705 of the DPA (50 U.S.C. app. 2155). Placing the new part in Subchapter A promotes an orderly and logical regulatory structure because all other regulations implementing BIS authorities related to the DPA are contained in that subchapter.

Section 702.1

Section 702.1 sets forth a general description of BIS's authority to collect information needed to complete the surveys. The survey responses assist BIS in determining the capabilities of the industrial base to support the national defense and to develop policy recommendations to improve both the international competitiveness of specific domestic industries and their ability to meet national defense needs.

Section 702.2

Section 702.2 implements the requirement found in section 705 of the DPA (50 U.S.C. app. 2155(a)) to publish regulations by requiring BIS personnel of appropriate competence and authority to ensure that before a survey is sent to any person for completion; 1) the scope and purpose of a survey have been established, 2) the scope and purpose are consistent with BIS's authorities under the DPA, and 3) the data requested by the survey does not duplicate adequate and authoritative data available to BIS from a federal or other authoritative source. A survey may require information that is similar or identical to information possessed by other federal agencies but not available to BIS. The section does not limit the factors that may be considered in deciding whether to conduct a survey nor does it modify or replace the requirements of the Paperwork Reduction Act. In addition, all surveys are reviewed by BIS and by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act before they are distributed. The OMB review process provides additional assurance that surveys are designed to collect only information deemed necessary to meet the scope and purpose of a study.

Section 702.3

Section 702.3 addresses the confidentiality requirements imposed by section 705(d) of the DPA (50 U.S.C. app. 2155(d)) and, in accordance with that section, provides two procedures by which the restrictions on disclosure in section 705(d) would be invoked. First, consistent with its current practice, BIS would deem all information submitted in response to a survey to be confidential. Second, a person submitting a response to a survey may request confidential treatment of the information submitted. Although the second procedure is likely to be redundant of the first, the statute prohibits disclosure if either the government deems the information to be confidential or if the person furnishing the information requests confidential treatment. BIS concludes that both procedures should be included in the regulations to be consistent with the statute. Additionally, § 702.3 notes that confidential information shall not be published or disclosed unless the Under Secretary for Industry and Security determines that withholding the information is contrary to the interest of the national defense. The statutory authority of the President to make this determination has been delegated to the Under Secretary for Industry and Security. This section also repeats the penalties that the statute authorizes for persons convicted of willfully violating the prohibition on disclosure.

Section 702.4

Section 702.4 requires timely, complete and adequate responses to surveys. Specifically, the section requires that survey responses be returned to BIS within the time frame stated on the initial distribution letter or other request for information. The section treats a response as "inadequate" if it provides information that is not responsive to the questions asked or if it provides aggregated information when specific information was requested.

Section 702.4 sets forth the criteria by which BIS may grant either an exemption from complying with the survey requirement or an extension of time to comply. The grounds for granting an exemption or an extension are limited and generally result when

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BIS concludes that the survey recipient lacks information deemed relevant to the survey or when compliance with the requirement would be unduly burdensome.

Section 702.4 makes clear that the deadline for complying with a survey is not suspended by submitting a request for an exemption or extension of time to comply.

Finally, § 702.4 provides that BIS may return responses that are incomplete or inadequate and specify a due date for a complete and adequate response.

Section 702.5

Section 702.5 sets forth the consequences of failure to comply with a survey or other request for information. These consequences are established by section 705(a) and (c) of the DPA (50 U.S.C. app. 2155(a) and (c)). If a person does not comply with a survey, BIS may serve a subpoena upon that person to compel compliance. If the person still does not comply, the government may apply to the U.S. district court in any district in which the person is found, resides or transacts business for an order requiring such person to comply. The district court has authority to punish any failure to comply with the order as contempt of court. Persons who are convicted of willfully failing to comply with a survey or other request for information may be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 702.6

Section 702.6 defines certain terms used in part 702.

The word "confidential" is defined in terms of section 705(d) of the DPA, thereby distinguishing its use in this rule from its use in connection with the classification of information for national security purposes as set forth in Executive Order 13526 of December 29, 2009, Classified National Security Information (75 FR 707; 3 CFR, 2010 Comp., p. 298).

The definition of the term "person" is based on the definition of "person" in section 702 of the DPA (50 U.S.C. app. 2152) with some additions. The DPA definition reads: "The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof." Use of the word "includes" in the statutory definition implies that the list following that word is not exhaustive. BIS concludes that the use of "includes" indicates that Congress recognized that the agency implementing the DPA would need discretion to identify the types of entities that would likely possess information relevant to the subject of each industrial base assessment to ensure a comprehensive collection of information.

This rule adds "The Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof." BIS has concluded that inclusion of the additional entities is within its authority under the DPA because the DPA definition prefaces the list of entities with the word "includes," and because inclusion of the additional entities is necessary to achieve the purpose of the statute.

Based on prior studies, BIS has observed that the U.S. Government makes a significant contribution to the industrial base, whether in research, technology development, testing, manufacturing, repair and overhaul, or trade development. As a result, the U.S. Government is a significant source of information regarding the industrial base. Similarly, it is plausible that the District of Columbia, commonwealths of the United States and other territories and agencies can be survey respondents, and therefore have been included to ensure the completeness of a survey sample and corresponding assessment.

The regulatory definition also makes clear that the term "corporation, partnership, association, or any other organized group of persons" is not limited to commercial, for-profit enterprises or publicly traded corporations.

The definitions of the terms "initial distribution letter" and "survey" each describe a document used in the data collection process. The definitions describe those documents based on the way they are used in current BIS practice.

Supplement No. 1 to Part 702

Supplement No. 1 to part 702 provides information that BIS believes would be helpful to persons who receive a survey. This information includes both a description of the survey and a glossary of terms.

Differences Between This Final Rule and the Proposed Rule

The definition of "initial distribution letter" in § 702.6 in the proposed rule contained a sentence that read "[t]he letter also provides BIS contact information." In this final rule, the word "provides" has been replaced with the word "includes" for precision. This final rule also corrects a typographical error that appeared in Supplement No.1 to Part 702, introductory text, second sentence in the proposed rule. The phrase that read: ". . . is purely in example . . ." has been corrected to read ". . . is purely an example . . . ." There are no other differences in regulatory text between this final rule and the proposed rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined not to be a "significant regulatory action," significant, as that term is defined in Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*) unless that collection of information displays a currently valid OMB control number. This rule does not contain a collection of information that is subject to the Paperwork Reduction Act. This rule sets forth procedures related to BIS's administration of surveys pursuant to § 705 of the DPA (50 U.S.C. app. 2155). Individual surveys that are subject to the Paperwork Reduction Act will display a currently valid OMB control number.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. However, under § 605(b) of the RFA, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the RFA does not require the agency to prepare a regulatory flexibility

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analysis. Pursuant to § 605(b), the Chief Counsel for Regulation, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that the proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities. The proposed rule set forth the rationale for that certification. BIS received no comments on that rationale and is making no substantive changes to it. The rationale for that certification is as follows.

Impact

This rule sets forth, in a single part of the Code of Federal Regulations, the Department of Commerce's authority under § 705 of the DPA "to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense." Since the mid-1980s, BIS and its predecessor organizations within the Department of Commerce have conducted such studies and required survey responses based on the statute. Section 705 of the DPA authorizes the collection of the information. The statute also authorizes the issuance of subpoenas for the information and authorizes the United States district courts to issue orders compelling compliance with such subpoenas. It also provides criminal penalties for failure to comply with the government's requests for information. This final rule will not require any person to supply information that the person would not be required to provide pursuant to the statute.

This final rule requires that surveys issued by BIS pursuant to § 705 be responded to by the deadline set forth in the survey. The rule incorporates BIS's existing internal policies and standards for the granting of both an extension of time to comply with the requirement and exemptions from compliance. To the extent that publication of these policies and standards in the Code of Federal Regulations could be construed as a change in the burden on small entities or any other entities, the publication would have to be deemed as a reduction in burden because it facilitates access to the standards by all parties.

This final rule also sets forth the statutory standards for treating information submitted in response to a survey as confidential. It reiterates the statutory penalties for failure to comply with a survey and for unauthorized release of information that § 705 requires to be treated as confidential.

This rule adopts the statutory definition of "person" but also adds "[t]he Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof" to the definition. The term "person" is used in the statute and in this final rule to represent those to whom the requirements of the statute and this final rule apply. BIS has historically interpreted the statute to apply to units of the U.S. Government (including the District of Columbia Government and the governments of the territories and possessions) and does not view this as a substantive change. For purposes of this certification, the addition is immaterial because the government bodies that will be added to the statutory definition by this final rule are not small entities under the definition provided in the Small Business Regulatory Enforcement Fairness Act of 1996.

Number of Small Entities

Surveys are one-time exercises used to assess the state and/or capabilities of a particular industry sector or technology. Entities are selected for participation based on their role in, or relationship to, the industry sector or technology being assessed. Information obtained during the course of any one assessment may be relevant to determining whether the current entity supplying that information is a small entity. However, the composition of survey respondents varies dramatically between industry studies due to the complexity of each industry sector or technology being assessed. Consequently, BIS is unable to draw from existing data to estimate the number of small businesses participating in future collections. Accordingly, BIS is unable to determine the number of small entities that may be affected by this final rule.

Conclusion

Although BIS cannot predict the exact number of small entities that will be participating in any one survey, this rule will not impose a significant burden on any such small entities because it will not require any impacted entity to perform any action that it is not already required to perform pursuant to section 705 of the DPA.

List of Subjects in Part 702

Business and industry, Confidential business information, Employment, Penalties, National defense, Research, Science and technology.

Accordingly, the National Security Industrial Base Regulations (15 CFR Chapter VII, Subchapter A) are amended by adding Part 702 to read as follows:

Subchapter A—National Security Industrial Base Regulations

PART 702—INDUSTRIAL BASE SURVEYS—DATA COLLECTIONS

Sec.

702.1 Introduction.
702.2 Scope and purpose of surveys—avoiding duplicative requests for information.
702.3 Confidential information.
702.4 Requirement to comply with surveys or other requests for information.
702.5 Consequences of failure to comply.
702.6 Definitions.

Supplement No. 1 to Part 702—General Survey Information

Authority: 50 U.S.C. app. 2061 *et seq.;* E.O. 13603, 77 FR 16651, 3 CFR, 2012 Comp., p. 225.

§ 702.1 Introduction.

In accordance with 50 U.S.C. app. 2155, the Bureau of Industry and Security (BIS) may obtain such information from, require such reports and the keeping of such records by, make an inspection of the books, records, and other writings, premises or property of, take the sworn testimony of and administer oaths and affirmations to, any person as may be necessary or appropriate, in its discretion, to the enforcement or the administration of its authorities and responsibilities under the Defense Production Act of 1950 as amended (DPA) and any regulations or orders issued thereunder. BIS's authorities under the DPA (50 U.S.C. app. 2061 *et seq.*) include authority to collect data via surveys to perform industry studies assessing the capabilities of the United States industrial base to support the national defense and develop policy recommendations to improve both the international competitiveness of specific domestic industries and their ability to meet national defense program needs.

§ 702.2 Scope and purpose of surveys—avoiding duplicative requests for information.

(a) BIS will not send any survey to any person for completion unless the scope and purpose of the survey have been established, that scope and purpose are consistent with BIS's authorities under the DPA, and the data requested by the survey does not duplicate adequate and authoritative data already available to BIS from a Federal or other authoritative source.

(b) BIS personnel of appropriate competence and authority will ensure that the requirements of paragraph (a) of this section are met.

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(c) This section shall not be construed as limiting the criteria that BIS may consider in determining whether to proceed with a survey. This paragraph shall not be construed as replacing or in any way modifying the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

§ 702.3 Confidential information.

This section implements section 705(d) of the DPA.

(a) BIS deems all information submitted in response to a survey issued pursuant to this part to be confidential.

(b) Any person submitting information in response to a survey issued pursuant to this part may request confidential treatment of that information.

(c) The President's authority under the DPA to protect confidential information has been delegated to the Under Secretary for Industry and Security. The information described in paragraphs (a) and (b) of this section shall not be published or disclosed unless the Under Secretary for Industry and Security determines that the withholding thereof is contrary to the interest of the national defense.

(d) Any person convicted of willfully violating the prohibition in paragraph (c) of this section may be fined not more than $10,000 or imprisoned for not more than one year, or both.

§ 702.4 Requirement to comply with surveys or other requests for information.

(a) *Requirement to comply.* Every person who receives a survey or other request for information issued pursuant to this part must submit a complete and adequate response to BIS within the time frame stated on the initial distribution letter or other request for information. Survey response information that does not adhere to the survey question criteria or that contains only aggregate information in place of specified information will be treated as inadequate and therefore noncompliant. BIS may exempt persons from this requirement for the reasons in paragraph (b) of this section, or grant extensions of time to comply as set forth in paragraph (c) of this section. Submitting a request to BIS for an exemption or an extension of time for completion does not suspend the initial deadline required by BIS (or any extended deadline subsequently granted by BIS). Thus, persons who request an exemption or extension of time are advised to proceed as if the response is required by the deadline until advised otherwise by BIS.

(b) *Grounds for exemption.* (1) An exemption from the requirements of this section may be granted if the person receiving the survey or other request for information:

(i) Has no physical presence in the United States of any kind;

(ii) Does not provide, produce, distribute, utilize, procure, research, develop, consult or advise on, or have any other direct or indirect association with the materials, products, services or technology that are within the scope of the survey;

(iii) Has ceased business operations more than 12 months prior to receipt of the survey;

(iv) Has been in business for less than one year; or

(v) BIS determines that extenuating circumstances exist that make responding impractical.

(2) BIS may also grant an exemption if, based on the totality of the circumstances, it concludes that compliance would be impractical and/or that requiring compliance would be unduly time intensive.

(3) Existence of a pre-existing private non-disclosure agreement or information sharing agreement between a person and another party (*e.g.,* customers, suppliers, etc.), does not exempt a person from the obligation to comply with and complete a survey. The authority to conduct the survey and comply with the survey is derived from the DPA, and that statutory obligation to comply supersedes any private agreement.

(c) *Extensions of time to complete.* A person who receives a survey or other request for information may request an extension of time to submit the complete response to BIS. BIS may grant such an extension of time, if, in its judgment, circumstances are such that additional time reasonably is needed, the extension would not jeopardize timely completion of BIS's overall analysis, and the person is making reasonable progress towards completing the survey or response to the other request for information. Generally, extensions will be for no more than two weeks. A person who receives a survey or other request for information may request successive extensions if the person believes that it continues to have a legitimate need for additional time to complete the survey. BIS will not grant extensions that would jeopardize the performance and timely completion of its industrial base assessments.

(d) *Procedure for requesting exemptions or extensions of time.* Requests for exemptions or extensions of time must be made to BIS at the telephone number, email address or BIS physical address provided in the initial distribution letter for a survey or in the other request for information. A request for an exemption must provide factual information and documentation that are adequate for BIS to determine that one or more of the criteria stated in paragraph (b) or (c) of this section are met.

(e) *Responses that are incomplete or inadequate.* BIS may return responses that are incomplete or inadequate to the person for prompt completion. BIS will specify the required period of time permitted for completion and submission of the revised survey.

§ 702.5 Consequences of failure to comply.

(a) *Civil.* If any person fails to comply with the requirements of § 702.4, BIS may issue a subpoena requiring that person to submit the information called for in the survey. In the case of contumacy or refusal to obey such a subpoena, the U.S. Government may apply for an order by the United States district court in a district where that person resides or transacts business that would compel the person to submit the completed survey.

(b) *Criminal.* In accordance with 50 U.S.C. app. 2155, any person who willfully fails to comply with § 702.4, may, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both.

§ 702.6 Definitions.

The definitions in this section apply throughout this part.

Confidential. A description of information that is subject to the disclosure prohibitions of the DPA (50 U.S.C. app. 2155(d)).

Initial distribution letter. A letter that BIS sends to a person that has been identified by the U.S. Government as a supplier or customer of materials, products or services used for activities of the industry that is the focus of a survey. The letter describes the survey's primary objectives, how survey results will assist the U.S. Government, and the confidential treatment of the information submitted. The letter also includes BIS contact information.

Person. The term "person" includes:

(1) An individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof;

(2) Any State or local government or agency thereof;

(3) The Government of the United States, of the District of Columbia, of any commonwealth, territory or possession of the United States, or any department, agency or commission thereof.

Note to the definition of "person." Paragraph (1) of this definition is not

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limited to commercial or for-profit organizations. For example, the term "any other organized group of persons" may encompass labor unions, academic institutions, charitable organizations or any group of persons who are organized in some manner. The term corporation is not limited to publicly traded corporations or corporations that exist for the purpose of making a profit.

Survey. A questionnaire or other request for information that collects detailed information and data to support both the assessment of a particular industrial sector or technology and the development of a corresponding study.

Supplement No. 1 to Part 702—General Survey Information

This supplement provides general information about surveys and the content of the typical survey. The content of this supplement is purely an example of a typical survey, and in no way limits the content that may appear in a specific Bureau of Industry and Security (BIS)-issued survey. Procedures and content vary from survey to survey, and as such, there is no set template to follow. Nonetheless, BIS is offering this information as a basic guide to some elements of a survey.

Survey Structure

Most surveys include the following sections: Cover Page; Table of Contents; General Instructions; Glossary of Terms; Organizational Information, and sector-specific sections.

—The cover page typically includes the title of the survey, its scope, an explanation of the legal requirement to comply, the burden estimate for compliance with the survey, the Office of Management and Budget (OMB) control number, and the survey date of expiration.

—The General Instructions section normally includes process steps necessary for a person's survey submittal. These include but are not limited to instructions for survey completion, survey support staff point-of-contact information, the name and address of the presiding BIS official, and instructions for both survey certification and submittal.

—The Glossary of Terms section explains terms contained in the survey. Terms contained in the survey may be unique to the subject matter of the industry assessment, and therefore may change in meaning from survey to survey. Therefore, it is important to follow the specific instructions and defined terms contained in the specific survey you receive, regardless of any previous survey you might have completed.

—The Organization Information section requests information related to the person in receipt of the survey, including address information, the source level of response (*e.g.,* facility, business unit, division, corporate consolidated, etc.), point of contact details, and other pertinent contact information.

The survey is generally organized in a question and answer format and is presented on an electronic survey system. Each survey is specially tailored to collect the specific information requested. Therefore, specific detailed information is what should be submitted in response to a survey requesting such information.

—For example, if we ask for a listing of your customers that order widget A, your response should not be a listing of your entire customer base. Only the information pertaining to customers' ordering widget A is responsive to that kind of question.

Also note that your reply to a survey request is compulsory, unless you meet the criteria for exemption set forth in the body of the regulation. Therefore, any non-disclosure agreements or similar agreements you may have with your customers or clients are not applicable to a survey's request for information. Compliance with the survey is required by the DPA. Accordingly, compliance with that statutory requirement is paramount to any private agreement you have with your customers or other parties.

In addition to the aforementioned sections, each survey contains sections tailored to the specific scope of the study, including but not limited to Facility Locations, Products and Services, Inventories, Suppliers and Customers, Challenges and Organizational Outlook, Employment, Operations, Financial Statements, Sales, Research and Development, and Capital Expenditures.

Examples of survey terms.

Certification: A section of the survey in which a person (an authorizing official) certifies that the information supplied in response to the survey is complete and correct, to the best of the person's knowledge.

Facility: A building or the minimum complex of buildings or parts of buildings in which a person operates to serve a particular function, producing revenue and incurring costs for the person. A facility may produce an item of tangible or intangible property or may perform a service. It may encompass a floor or group of floors within a building, a single building, or a group of buildings or structures. Often, a facility is a group of related locations at which employees work, together constituting a profit-and-loss center for the person, and it may be identified by a unique Dun and Bradstreet number.

Sole source: An organization that is the only source for the supply of parts, components, materials, or services. No alternative U.S. or non-U.S. based supplier exists other than the current supplier.

Survey template: The data collection instrument supplied by BIS to persons by which survey information is recorded and submitted to BIS. The survey is generally organized in a question and answer format and is presented on an electronic survey system.

Supplier: An entity from which your organization obtains inputs. A supplier may be another firm with which you have a contractual relationship, or it may be another facility owned by the same parent organization. The inputs may be materials, products or services.

Dated: July 10, 2015.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2015–17388 Filed 7–14–15; 8:45 am]

BILLING CODE 3510–33–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–75388; File No. S7–07–14]

RIN 3235–AL58

Freedom of Information Act Regulations: Fee Schedule, Addition of Appeals Time Frame, and Miscellaneous Administrative Changes

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to its regulations under the Freedom of Information Act ("FOIA") to allow the Commission to collect fees that reflect its actual costs, add an appeals time frame that will create a more practical and systematic administrative process and clarify other issues in the regulations.

DATES: *Effective Date:* August 14, 2015.

FOR FURTHER INFORMATION CONTACT: John Livornese, FOIA/PA Officer, Office of FOIA Services, (202) 551–3831; Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to

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State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Rutland, Township of, Tioga County	422099	March 14, 1975, Emerg; August 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Shippen, Township of, Tioga County	422100	May 23, 1975, Emerg; December 1, 1986, Reg; July 16, 2015, Susp.	.....do	do
Sullivan, Township of, Tioga County	421183	December 20, 1974, Emerg; March 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Tioga, Borough of, Tioga County	420827	February 9, 1973, Emerg; May 1, 1988, Reg; July 16, 2015, Susp.	.....do	do
Tioga, Township of, Tioga County	420828	April 17, 1973, Emerg; August 15, 1980, Reg; July 16, 2015, Susp.	.....do	do
Union, Township of, Tioga County	421184	August 7, 1975, Emerg; February 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Ward, Township of, Tioga County	422101	August 8, 1975, Emerg; July 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Wellsboro, Borough of, Tioga County ...	420829	December 26, 1973, Emerg; April 15, 1981, Reg; July 16, 2015, Susp.	.....do	do
Westfield, Borough of, Tioga County	422093	April 22, 1975, Emerg; March 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Westfield, Township of, Tioga County ..	421185	March 11, 1975, Emerg; March 1, 1987, Reg; July 16, 2015, Susp.	.....do	do
Virginia:				
Hopewell, City of, Independent City.	510080	May 27, 1975, Emerg; September 5, 1979, Reg; July 16, 2015, Susp.	.....do	do
Region IV				
Florida:				
Okeechobee, City of, Okeechobee County.	120178	July 2, 1975, Emerg; August 26, 1977, Reg; July 16, 2015, Susp.	.....do	do
Okeechobee County, Unincorporated Areas..	120177	May 1, 1975, Emerg; February 4, 1981, Reg; July 16, 2015, Susp.	.....do	do
Region IX				
California:				
Burlingame, City of, San Mateo County	065019	March 19, 1971, Emerg; September 16, 1981, Reg; July 16, 2015, Susp.	.....do	do
San Mateo, City of, San Mateo County	060328	December 26, 1974, Emerg; March 30, 1981, Reg; July 16, 2015, Susp.	.....do	do
San Mateo County, Unincorporated Areas..	060311	August 27, 1975, Emerg; July 5, 1984, Reg; July 16, 2015, Susp.	.....do	do

*.....do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: June 25, 2015.

Roy E. Wright,

Deputy Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2015–17526 Filed 7–16–15; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

45 CFR Part 101

RIN 0991–AB94

Health Resources Priority and Allocations System (HRPAS)

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Interim final rule.

SUMMARY: This interim final rule establishes standards and procedures by which the U.S. Department of Health and Human Services (HHS) may require that certain contracts or orders that promote the national defense be given priority over other contracts or orders. This rule also sets new standards and procedures by which HHS may allocate materials, services, and facilities to promote the national defense. This rule will implement HHS's administration of priorities and allocations actions, and establish the Health Resources Priorities and Allocation System (HRPAS). The HRPAS will cover health resources pursuant to the authority under Section 101(c) of the Defense Production Act as delegated to HHS by Executive Order 13603. Priorities authorities (and other authorities delegated to the Secretary in E.O. 13603, but not covered by this regulation) may be re-delegated by the Secretary. The Secretary retains the authority for allocations.

DATES: Effective July 17, 2015. Comments must be received by September 15, 2015.

ADDRESSES: You may submit comments, identified by RIN 0991–AB94 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- By email directly to *Cassandra.Freeman@hhs.gov.*
- By mail or delivery to Cassandra Freeman, Director, Division of Acquisition Policy, Office of the Assistant Secretary for Preparedness and Response, U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 630G, Washington, DC 20201.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements or any other provisions contained in this interim final rule may

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be submitted to Cassandra Freeman, Director, Division of Acquisition Policy, Office of the Assistant Secretary for Preparedness and Response, U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 630G, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: The agency program contact is Cassandra R. Freeman, who can be contacted by phone at (202) 205–1855 or via email at *Cassandra.Freeman@hhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

HHS is publishing this rule to comply with a requirement of the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67) (the ''DPAR''). The Defense Production Act Reauthorization of 2009 required that HHS, and all other agencies that previously have been delegated authority to issue rated orders under Executive Order 13603, publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services, and facilities to promote the national defense under both emergency and non-emergency conditions. HHS's regulation, along with regulations promulgated by other agencies, will become part of the Federal Priorities and Allocations System.

The HRPAS is part of the Federal Priorities and Allocations System. The HRPAS has two principal components: priorities and allocations. Under the priorities component, certain contracts between the government and private parties or between private parties for the production or delivery of industrial resources are required to be given priority over other contracts to facilitate expedited delivery in promotion of the U.S. national defense. Under the allocations component, materials, services, and facilities may be allocated to promote the national defense. For both components, the term ''national defense''' is defined broadly and can include critical infrastructure protection and restoration, emergency preparedness and response, and recovery from natural and man-made disasters. Priorities authorities (and other authorities delegated to the Secretary in E.O. 13603, but not covered by this regulation) may be re-delegated by the Secretary. The Secretary retains the authority for allocations.

On September 30, 2009, Congress amended the DPA through the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67) (the ''DPAR''). The DPAR directed, all agencies to which the President has delegated priorities and allocations authority under E.O. 13603, publish final rules establishing standards and procedures by which that authority will be used to promote the national defense in both emergency and nonemergency situations. The DPAR also required all such agencies to consult as appropriate and to the extent practicable to develop a consistent and unified Federal priorities and allocations system. This rule is one of several rules to be published to implement the provisions of the DPAR. The final rules of the agencies with DPAR authorities, which are the Departments of Commerce, Energy, Transportation, Health and Human Services, Defense, and Agriculture, will comprise the Federal Priorities and Allocations System (''FPAS''). HHS is publishing this interim final rule in compliance with the provision of the DPAR noted above. HHS's HRPAS provisions are consistent with the FPAS regulations being issued by other agencies. The specific proposals in this rule are more fully described below.

Analysis of the Priorities and Allocations System

General

Section 101.1 states the purpose of the HRPAS in general terms, as providing guidance and procedures for use of the Defense Production Act (DPA) priorities and allocations authority with respect to health resources necessary or appropriate to promote the national defense.

Section 101.2 provides guidance and procedures for the use of the DPA priorities and allocation authority with respect to health resources necessary or appropriate to promote the national defense.

Section 101.3 provides an overview of the HRPAS program eligibility.

This section describes briefly aspects of the HRPAS, including the certain programs for military and health resources under the DPA.

Definitions

The ''Definitions'' section appears in § 101.20 and provides definitions for the relevant regulatory terms.

Placement of Rated Orders

Section 101.30, ''Delegation of Authority,'' describes fully the President's delegations to HHS. It also describes, in general terms, the items subject to HHS's jurisdiction. This provision facilitates public understanding of the role that each delegate agency plays in the overall priorities and allocations system.

Section 101.31, ''Priority ratings,'' describes the two possible levels of priority and program identification symbols used when rating an order.

Section 101.32, ''Elements of a rated order,'' describes in detail what each rated order must include, consisting of the appropriate priority rating, delivery date information, signatures and required language. HHS seeks comment specifically on the text of this provision.

Section 101.33, ''Acceptance and rejection of rated orders,'' details when orders placed by HHS may or must be accepted or rejected, and what the procedures are for both, including customer notification requirements and certain exceptions for emergency preparedness conditions. Specifically, persons must accept or reject rated orders for emergency response-related approved programs within fifteen (15) working days (or ten (10) working days, depending on the circumstance). HHS requires the shorter time limit in for the recipient to respond to a rated order issued in connection with an emergency response because such orders would require a shorter time frame to ensure delivery in time to provide disaster assistance, emergency response or similar activities. HHS believes that the exigent circumstances inherent in such activities justify requiring a shorter response time.

Section 101.34, ''Preferential scheduling,'' details procedures in cases where a person receives two or more conflicting rated orders. If a person is unable to resolve such a conflict, this section refers them to special priorities assistance as provided in §§ 101.40 through 101.44.

Section 101.35, ''Extension of priority ratings,'' requires a person to use rated orders with suppliers to obtain items or services needed to fill a rated order. This allows the priority rating to ''extend'' from contractor to subcontractor to supplier throughout the entire procurement chain.

Section 101.36, ''Changes or cancellations of priority ratings and rated orders,'' provides procedures for changing or cancelling a rated order, both by HHS or other persons who placed the order.

Section 101.37, ''Use of rated orders,'' lists what items must be rated. It also introduces the use of certain program identification symbols used when rated orders may be combined, and details the procedures for combining two or more rated orders, as well as rated and unrated orders.

Section 101.38, ''Limitations on placing rated orders,'' prohibits the use of rated orders in a list of specific circumstances. This section also

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specifically excludes the use of rated orders for resources within the resource jurisdiction of agencies other than HHS with DPA priorities and allocations authority.

Special Priorities Assistance

Section 101.40, "General provisions" illustrates when and how HHS can provide special priorities assistance, and provides specific HHS points of contact and the form to be used for requesting such assistance. Special priorities assistance may generally be requested for any reason.

Section 101.41, "Requests for priority rating authority," directs persons to the Department of Commerce to request rating authority for production or construction equipment. This section also identifies circumstances in which HHS may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract, and lists factors HHS will consider in deciding whether to grant this authority.

Section 101.42, "Examples of assistance," provides a number of examples of when special priorities assistance may be provided, although it may generally be provided for any reason.

Section 101.43 lists the criteria for granting assistance, and § 101.44 lists instances in which assistance may not be provided (*i.e.,* to secure a price advantage).

Allocation Actions

Sections 101.50 through 101.52 describe allocations and contain procedures for the use of allocation orders. Specifically, allocation orders will be used only if priorities authority will not provide a sufficient supply of material, services or facilities for national defense requirements, or when use of priorities authority will cause a severe and prolonged disruption in the supply of resources available to support normal U.S. economic activities. Allocation orders will not be used to ration materials or services at the retail level. Allocation orders will be distributed equitably among the suppliers of the resource(s) being allocated and will not require any person to relinquish a disproportionate share of the civilian market. The standards set forth in §§ 101.50 through 101.52 provide reasonable assurance that allocation orders will be used only in situations where the circumstances justify such orders.

Section 101.53 describes the three types of allocation orders that HHS might issue. The types of allocation orders are a set-aside, an allocation directive, and an allotment. A set-aside is an official action that will require a person to reserve resource capacity in anticipation of receipt of rated orders. An allocation directive is an official action that will require a person to take or refrain from taking certain actions in accordance with its provisions (an allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period). An allotment is an official action that will specify the maximum quantity of an item authorized for use in a specific program or application. HHS is requiring these three types of allocation orders because it believes that, collectively, they describe the types of actions that might be taken in any situation in which allocation is justified.

Section 101.54, "Elements of an allocation order," sets forth the minimum elements of an allocation order. Those elements are:

- A detailed description of the required allocation action(s);
- Specific start and end calendar dates for each required allocation action;
- The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Health and Human Services or his/her designee, which certifies that the order is authorized under this regulation and that the order is consistent with requirements of the regulation;
- A statement that reads in substance: *This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Health Resources Priorities and Allocations System regulation (45 CFR 101.1), which is part of the Federal Priorities and Allocations System;* and
- A current copy of the HRPAS.

HHS rquires these elements because it believes that they provide a proper balance between the need for standards to permit the public to recognize and understand an allocation order if one is issued, and the expectation that any actual allocation orders will have to be tailored to meet unforeseeable circumstances. The language of § 101.54 precludes HHS from including additional information in an allocation order if circumstances warrant doing so.

Section 101.55, "Mandatory acceptance of allocation orders," requires that an allocation order must be accepted if a person is capable of fulfilling the order. If a person is unable to comply fully with the required actions specific in an allocation order, the person must notify HHS immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. This section also states that a person may not discriminate against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions different than what the person imposed on contracts or orders for the same resource(s) that were received prior to receiving the allocation order. Section 101.55 makes it clear to the public that the limited circumstances and emergency situations that trigger issuance of an allocation order require immediate response from the public in order to address the situation in an expedient fashion.

Section 101.56, "Changes or cancellations of an allocation order" provides that an allocation order may be changed or cancelled by HHS.

Official Actions

Section 101.60, "General Provisions", provides HHS and overview regarding implementation of this subpart.

Section 101.61, "Rating Authorizations," defines a rating authorization as an official action granting specific priority rating authority, and refers persons to § 101.21 to request such priority rating authority.

Section 101.62, "Directives," defines a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. This section details directive compliance for the public.

Section 101.63, "Letters and Memoranda of Understanding," defines a letter or memorandum of understanding as an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties, and explains its use.

Compliance

Section 101.70, "General Provisions" details the official actions which may be taken by HHS to enforce or administer the DPA and other applicable statutes.

Section 101.71, "Audits and investigations," details the procedures for official examinations of books, records, documents, and other writings and information to ensure that the provisions of the DPA and other applicable statutes, this regulation, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this regulation.

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Section 101.72, "Compulsory process," provides that if a person refuses to permit a duly authorized HHS representative to have access to necessary information, HHS may seek the institution of appropriate legal action, including ex parte application for an inspection warrant, in any forum of appropriate jurisdiction.

Sections 101.73 and 101.74 both provide procedures for notification of failure to comply with the DPA, these regulations, or HHS official actions, and describe the resulting penalties and remedies.

Section 101.75, "Compliance Conflicts," requires that persons immediately contact HHS should compliance with the DPA, these regulations, or an official action prevent a person from filling a rated order or from complying with another provision of the DPA and other applicable statutes, this regulation, or an official action.

Adjustments, Exceptions, and Appeals

Section 101.80, "Adjustments, Exceptions, and Appeals," reflects the procedures necessary to request an adjustment or exception to the provisions of these regulations.

Section 101.81, "Appeals," provides the procedures, timing and contact information for appealing a decision made on a request for relief in the previous section.

Miscellaneous Provisions

Section 101.90, "Protection against claims," provides that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any part of this regulation or an official action.

Section 101.91, "Records and reports," requires that persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this regulation or an official action. Various requirements and procedures regarding such records are provided in this section. The confidentiality provisions of the DPA governing the submission of information pursuant to the DPA and these regulations are also set forth.

Section 101.92, "Applicability of this regulation and official actions," provides the jurisdictional applicability of this regulation and official actions.

Section 101.93, "Communications," provides a HHS point of contact for all communications regarding this regulation.

A. Review Under Executive Order 12866 and Executive Order 13563

HHS has examined the impacts of the interim final rule under Executive Order 12866 and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). This rule is not an economically significant regulatory action under Executive Order 12866.

A summary of the cost benefit analysis is provided below.

This rule sets criteria under which HHS (or agencies to which HHS delegates HHS's DPA authority to issue rated orders) will authorize prioritization of certain orders or contracts as well as criteria under which HHS will issue orders allocating resources or production facilities. To date, HHS has minimally exercised its prioritization authority for contracts during the response to H1N1 influenza in 2009 to order ancillary supplies in support of the Centers for Disease Control and Prevention's (CDC) Immunization Program, and not exercised its existing allocations authority.

Under prioritization, HHS or its Delegate Agency designates certain orders as one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions taken in or inactions required for, compliance with the rule.

The impact of HRPAS on private companies receiving priority orders is expected to vary. However, in most cases, there is likely to be no economic impact in filling priority orders because it will generally just be changing the timing in which orders are completed.

HRPAS is expected to have an overall positive impact on the U.S. public and industry by maintaining and restoring the production, processing, storage, and distribution of health resources during times of both emergency and nonemergency conditions to promote national defense and to prevent civilian hardship in the food marketplace. While HHS has not yet administered HRPAS under DPA authority, the continued use of DPAS by the Department of Defense proves the utility of a priorities and allocations system.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. HHS reviewed this interim final rule under the provisions of the Regulatory Flexibility Act and has determined that this rule, if promulgated, will not have a significant impact on a substantial number of small entities.

Number of Small Entities

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this interim final rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (January 2012 Edition), has a maximum annual revenue of $33.5 million and a maximum of 1,500 employees (for some business categories, these number are lower). A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This rule sets criteria under which HHS (or agencies to which HHS delegates HHS's DPA authority to issue rated orders) will authorize prioritization of certain orders or contracts as well as criteria under which HHS will issue orders allocating resources or production facilities. Because the rule affects commercial transactions, HHS believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. To date, HHS has

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minimally exercised its prioritization authority for contracts during the response to 2009 H1N1 influenza to order ancillary supplies in support of HHS/CDC's Immunization Program, and not exercised its existing allocations authority. As such, HHS has no basis on which to estimate the number of small businesses that may be affected by this rule.

Impact

The interim final rule has two principle components: prioritization and allocation. Under prioritization, HHS, or its Delegate Agency, designates certain orders as one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions taken in or inactions required for, compliance with the rule.

Although rated orders could require a firm to fill one order prior to filling another, they will not necessarily require a reduction in the total volume of orders. The regulations will also not require the recipient of a rated order to reduce prices or provide rated orders with more favorable terms than a similar non-rated order. Under these circumstances, the economic effects on the rated order recipient of substituting one order for another are likely to be mutually offsetting, resulting in no net economic impact.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocation actions that HHS might take are as follows:

Set-aside: an official action that requires a person to reserve resource capacity in anticipation of receipt of rated orders.

Allocations directive: an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. An allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, or divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period.

Allotment: an official action that specifies the maximum quantity of an item authorized for use in a specific program or application.

HHS has not yet taken any actions under its existing allocations authority, and any future allocations actions would be used only in extraordinary circumstances. As required by section 101(b) of the Defense Production Act of 1950, as amended, (50 U.S.C. App. Sec. 2071), hereinafter "DPA," and by Section 201(a) (3) of Executive Order 13603, HHS may implement allocations only if the Secretary of Health and Human Services makes, and the President approves, and determines that there is a scarcity of critical materials and services essential to the national defense, and that the requirements of the national defense cannot otherwise be met without a significant interruption of normal distribution of these essential materials or services in the civilian marketplace that would cause considerable hardship. "National defense" covers programs for military and health resources production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

Any allocation actions taken by HHS must assure that small business concerns shall be accorded, to the extent practicable; a fair share of the materials or services covered by the allocation action in proportion to the share received by small business concerns under normal conditions, giving such special consideration as may be possible to emerging business concerns, 50 U.S.C. App. Sec. 2151(e).

Conclusion

Although HHS cannot determine precisely the number of small entities that will be affected by this rule, HHS believes that the overall impact on such entities will not be significant. In most instances, rated contracts will be fulfilled in addition to other (unrated) contracts and, in some instances might actually increase the total amount of business of the firm that receives a rated contract.

Because allocations can be imposed only after an agency determination confirmed by the President, and because HHS has not yet used its allocations authority that has existed since passage of the Defense Production Act in 1950, one can expect allocations will be ordered only in particular circumstances. Any allocation actions would also have to comply with Section 701(e) of DPA (50 U.S.C. app. 2151(e)), which provides that small business concerns be accorded, to the extent practicable, a fair share of the material, including services, in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to emerging business concerns.

Therefore, HHS believes that the requirement for a Presidential determination and the provisions of section 701 of the DPA indicate that any impact on small business will not be significant.

Therefore, for the reasons set forth above, the Secretary of the Department of Health and Human Services certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

This interim final rule contains a collection-of-information requirement for Request for Special Priorities Assistance, which is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. Data required will include: name, location, contact information, items for which the applicant is requesting assistance on, quantity, and delivery date. Public reporting burden for submission of a request for special priorities assistance or priority rating authority is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information

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to (see *Cassandra.Freeman@hhs.gov,* Office of the Assistant Secretary for Preparedness and Response, U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 630G, Washington, DC 20201).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Title: Request for Special Priorities Assistance for HRPAS.

OMB Control Number: To be provided by OMB.

Type of Request: New Collection.

Abstract: HRPAS will efficiently place priority ratings on contracts or orders of health resources within its authority as specified in the Defense Production Act (DPA) of 1950, as amended, when necessary. Applicants (Government agencies or private individuals with a role in emergency preparedness, response, and recovery functions) will request authorization from HHS to place a rating on a contract for items to support national defense activities. Applicants must supply, at time of request, their name, location, contact information, items for which the applicant is requesting assistance on, quantity, and delivery date. Applicants can submit the request by mail or fax.

Estimate of Burden: Public reporting for this collection of information is estimated to average 30 minutes per response.

Type of Respondents: Individuals, businesses, and Agencies with responsibilities for emergency preparedness and response.

Estimated Number of Respondents: 100.

Estimated Number of Responses per Respondents: 0.95.

Estimated Total Number of Respondents: 95.

Estimate Total Annual Burden Hours on Respondents: 50 hours.

We are requesting comments on all aspects of this information collection to help us: (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of HHS, including whether the information will have practical utility; (2) Evaluate the accuracy of HHS's estimate of burden including the validity of the methodology and assumptions used; (3) Enhance the quality, utility and clarity of the information to be collected; (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All comments received in response to this document, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

D. Review Under Executive Order 13132

HHS reviewed this rule pursuant to Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. HHS determined that the rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government.

E. Review Under Unfunded Mandates Reform Act

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any one year for State, local, or Tribal governments, in the aggregate, or to the private sector. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or Tribal governments or for the private sector; therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

F. Approval of the Office of the Secretary

The Secretary of Health and Human Services has approved publication of this interim final rule.

List of Subjects in 45 CFR Part 101

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements, Strategic and critical materials.

For the reasons stated in the preamble, HHS adds part 101 to subchapter A of title 45 of the Code of Federal Regulations to read as follows:

PART 101—DESCRIBING AGENCY NEEDS

Subpart A—Health Resources Priorities and Allocations System

General

Sec.
101.1 Purpose.
101.2 Priorities and allocations authority.
101.3 Program eligibility.

Subpart B—Definitions

101.20 Definitions.

Subpart C—Placement of Rated Orders

101.30 Delegations of authority.
101.31 Priority ratings.
101.32 Elements of a rated order.
101.33 Acceptance and rejection of rated orders.
101.34 Preferential scheduling.
101.35 Extension of priority ratings.
101.36 Changes or cancellations of priority ratings and rated orders.
101.37 Use of rated orders.
101.38 Limitations on placing rated orders.

Subpart D—Special Priorities Assistance

101.40 General provisions.
101.41 Requests for priority rating authority.
101.42 Examples of assistance.
101.43 Criteria for assistance.
101.44 Instances where assistance may not be provided.

Subpart E—Allocation Actions

101.50 Policy.
101.51 General procedures.
101.52 Controlling the general distribution of a material in the civilian market.
101.53 Types of allocation orders.
101.54 Elements of an allocation order.
101.55 Mandatory acceptance of an allocation order.
101.56 Changes or cancellations of an allocation order.

Subpart F—Official Actions

101.60 General provisions.
101.61 Rating Authorizations.
101.62 Directives.
101.63 Letters and Memoranda of Understanding.

Subpart G—Compliance

101.70 General provisions.
101.71 Audits and investigations.
101.72 Compulsory process.
101.73 Notification of failure to comply.
101.74 Violations, penalties, and remedies.
101.75 Compliance conflicts.

Subpart H—Adjustments, Exceptions, and Appeals

101.80 Adjustments or exceptions.
101.81 Appeals.

Subpart I—Miscellaneous Provisions

101.90 Protection against claims.
101.91 Records and reports.
101.92 Applicability of this part and official actions.
101.93 Communications.

Authority: 50 U.S.C. App. 2061–2171;

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Subpart A—Health Resources Priorities and Allocations System

General

§101.1 Purpose.

This section provides guidance and procedures for use of Defense Production Act (DPA) of 1950 Section 101(a) priorities and allocations authority with respect to all forms of health resources necessary or appropriate to promote the national defense. The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations that, as a whole, form the Federal Priorities and Allocations System. Guidance and procedures for use of the DPA priorities and allocations authority with respect to other types of resources are provided for: food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer in7 CFR part 700; energy supplies in 10 CFR part 217; all forms of civil transportation in 49 CFR part 33; water resources in 32 CFR part 555; and all other materials, services, and facilities, including construction materials in the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700).

§101.2 Priorities and allocations authority.

(a) Section 201 of E.O. 13603, delegates the President's authority under Section 101 of the DPA. DPA Section 101 provides the President with authority to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to a number of agencies. Section 201 of E.O. 13603 delegates the President's authority to specific agencies as follows:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202(a) of E.O. 13603 states that the priorities and allocations authority delegated in Section 201 of that Executive Order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(1) By the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities;

(2) By the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(3) By the Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

(c) Section 201(e) of E.O. 13603 provides that each department that is delegated priorities and allocations authority under Section 201(a) of E.O. 13603 may use this authority with respect to control of the general distribution of any material (including applicable services) in the civilian market only after:

(1) Making the finding required under Section 101(b) of the DPA; and

(2) The finding has been approved by the President.

(d) Priorities authorities (and other authorities delegated to the Secretary in E.O. 13603 but not covered by this regulation) have been re-delegated by the Secretary to the Assistant Secretary for Preparedness and Response (the "ASPR"). The Secretary retains the authority for allocations.

§101.3 Program eligibility.

Certain programs to promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, deployment and sustainment of military forces, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 *et seq.*] and critical infrastructure protection and restoration.

Subpart B—Definitions

§101.20 Definitions.

The following definitions pertain to all sections of this part:

Allocation means the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allocation order means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allotment means an official action that specifies the maximum quantity or use of a material, service, or facility authorized for a specific use to promote the national defense.

Approved program means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with Section 202 of E.O. 13603.

Construction means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

Critical infrastructure means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

Defense Production Act or *DPA* means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*).

Delegate agency means a Federal government agency authorized by delegation from HHS to place priority ratings on contracts or orders needed to support approved programs.

Directive means an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

Emergency preparedness means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. "Emergency Preparedness" includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the

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recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for firefighting; rescue; emergency medical, health and sanitation services; monitoring for specific dangers of special weapons; unexploded bomb reconnaissance; essential debris clearance; emergency welfare measures; and immediately essential emergency repair or restoration of damaged vital facilities).

Facilities includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

Farm equipment means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of Food resources.

Fertilizer means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

Food resources means all commodities and products, (simple, mixed, or compound), or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. ''Food Resources'' also means potable water packaged in commercially marketable containers, all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

Food resource facilities means plants, machinery, vehicles (including on-farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

Hazard means an emergency or disaster resulting from:

(1) A natural disaster; or

(2) An accidental or human-caused event.

Health resources means drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.

Homeland Security includes efforts—

(1) To prevent terrorist attacks within the United States;

(2) To reduce the vulnerability of the United States to terrorism;

(3) To minimize damage from a terrorist attack in the United States; and

(4) To recover from a terrorist attack in the United States.

Industrial Resource means all materials, services, and facilities, including construction materials, but not including: Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; all forms of health resources; all forms of civil transportation; and water resources.

Item means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

Maintenance and Repair and Operating Supplies (MRO) includes the following—

(1) ''Maintenance'' is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) ''Repair'' is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) ''Operating Supplies'' are any resources carried as operating supplies according to a person's established accounting practice. ''Operating Supplies'' may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

Materials includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply;

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items; and

(3) Natural resources such as oil and gas.

National defense means programs for military and health resources production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, *et seq.*) and critical infrastructure protection and restoration.

Official action means an action taken by the Department of Health and Human Services or another resource agency under the authority of the Defense Production Act, E.O.13603, and this part or another regulation under the Federal Priorities and Allocations System. Such actions include the issuance of Rating Authorizations, Directives, Set Asides, Allotments, Letters of Understanding, Memoranda of Understanding, and Demands for Information, Inspection Authorizations, and Administrative Subpoenas.

Person includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

Rated order means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

Resource agency means any agency delegated priorities and allocations authority as specified in § 101.2.

Secretary means the Secretary of Health and Human Services.

Services includes any effort that is needed for or incidental to—

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(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

Set-aside means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

Stafford Act means title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197h).

Water resources means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements, except "water resources does not include usable water that qualifies as "food resources".

Subpart C—Placement of Rated Orders

§ 101.30 Delegations of authority.

The priorities and allocations authorities of the President under Title I of the DPA with respect to all forms of health resources have been delegated to the Secretary under E.O. 13603. The Secretary may re-delegate the Secretary's priority rating activities under the DPA though the allocations authority provided to the Secretary is not subject to delegation per Section 201(e) of E.O. 13603.

§ 101.31 Priority ratings.

(a) *Levels of priority.* (1) There are two levels of priority established by Federal Priorities and Allocations System regulations, identified by the rating symbols "DO" and "DX".

(2) All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 101.34(c).)

(3) In addition, a Directive regarding priority treatment for a given item issued by the Department of Health and Human Services for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see § 101. 62.

(b) *Program identification symbols.* Program identification symbols, such as "DO–HR", or "DX–HR", indicate which approved program is being supported by a rated order. Programs may be approved under the procedures of E.O. 13603 Section 202 at any time. Program identification symbols do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol—DO or DX—and the program identification symbol, such as DO–HR or DX–HR.

§ 101.32 Elements of a rated order.

Each rated order must include:

(a) The appropriate priority rating (*e.g.* DO–HR or DX–HR);

(b) A required delivery date or dates. The words "immediately" or "as soon as possible" do not constitute a delivery date. A "requirements contract", "basic ordering agreement", "prime vendor contract", or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items or service from time-to-time or within a stated period against specific purchase orders, such as "calls", "requisitions", and "delivery orders". These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(d)(1) A statement that reads in substance:

> This is a rated order certified for national defense use, and you are required to follow all the provisions of the Health Resources Priorities and Allocations System regulation at 45 CFR part 101.

(2) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement set forth in paragraph (d)(1) of this section:

(i) This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within two (2) days after receipt of the order if:

(A) The order is issued in response to a hazard that has occurred; or

(B) If the order is issued to prepare for an imminent hazard, as specified in HRPAS § 101.33(e).

(ii) [Reserved]

§ 101.33 Acceptance and rejection of rated orders.

(a) *Mandatory acceptance.* (1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by HHS for a rated order involving all forms of health resources:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO-rated order for delivery on a date which would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX-rated order for delivery on a date which would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(c) *Optional rejection.* Unless otherwise directed by HHS for a rated order involving all forms of health resources, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

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(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the HHS issued under the authority of the DPA or another relevant statute.

(d) *Customer notification requirements.* (1) Except as provided in paragraph (e) of this section, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO-rated order and within ten (10) working days after receipt of a DX-rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days.

(e) *Exception for emergency response conditions.* If the rated order is placed for the purpose of emergency preparedness, a person must accept or reject a rated order and transmit the acceptance or rejection in writing or in an electronic format within two (2) days after receipt of the order if:

(1) The order is issued in response to a hazard that has occurred; or

(2) The order is issued to prepare for an imminent hazard.

§ 101.34 Preferential scheduling.

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) *Conflicting rated orders.* (1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person shall give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in §§ 101.40 through 101.44. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in §§ 101.40 through 101.44. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 101.33(d)(2).

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 101.37(b).

§ 101.35 Extension of priority ratings.

(a) A person must use rated orders with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Health and Human Services.

(b) The priority rating must be included on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

§ 101.36 Changes or cancellations of priority ratings and rated orders.

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of HHS; or

(2) Written notification from the originating agency that placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 101.33.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

§ 101.37 Use of rated orders.

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

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(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating may not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol "H1" must be used (*i.e.,* DO–H1).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol "H1" (*i.e.,* DO–H1 or DX–H1).

(d) *Combining rated and unrated orders.* (1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 101.32, are included on the order with the statement required in § 101.32(d) modified to read in substance:

> This purchase order contains rated order quantities certified for national defense use, and you are required to follow all applicable provisions of the Health Resources Priorities and Allocations System regulations at 45 CFR part 101, subpart A, only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 101.33 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under § 101.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR) (see 48 CFR 2.101) or in other authorized acquisition regulatory or management systems) whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

§ 101.38 Limitations on placing rated orders.

(a) *General limitations.* (1) A person may not place a DO- or DX-rated order unless entitled to do so under this part.

(2) Rated orders may not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by HHS (see § 101.41(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by HHS, or as otherwise permitted by this part; or

(v) Any of the following items unless specific priority rating authority has been obtained from HHS, a Delegate Agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment. [For information on requesting priority rating authority, see § 101.41.]

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense. This provision does not however prohibit the use of the priority and allocations authority to acquire or produce qualified countermeasures that are necessary to treat, identify, or prevent harm from any biological or chemical agent that may cause a public health emergency affecting national security.

(b) *Jurisdictional limitations.* Unless authorized by the resource agency with jurisdiction, the provisions of this part are not applicable to the following resources:

(1) Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer (Resource agency with jurisdiction—Department of Agriculture);

(2) Energy supplies (Resource agency with jurisdiction—Department of Energy);

(3) All forms of civil transportation (Resource agency with jurisdiction—Department of Transportation);

(4) Water resources (Resource agency with jurisdiction—Department of Defense/U.S. Army Corps of Engineers); and

(5) Communications services (Resource agency with jurisdiction—National Communications System under E.O. 12472 of April 3, 1984).

Subpart D—Special Priorities Assistance

§ 101.40 General provisions.

(a) The six regulations that comprise the Federal Priorities and Allocations System are designed to be largely self-executing. However, from time-to-time production or delivery problems will arise in connection with rated orders for health resources as covered under this part. In this event, a person should immediately contact the Secretary for guidance, as specified in § 101.93. If the HHS is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, HHS may forward the request to another agency with resource jurisdiction, or the Department of Commerce, as appropriate, for action. Special priorities assistance is provided to alleviate problems that do arise.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted to the Secretary, as specified in § 101.93.

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§ 101.41 Requests for priority rating authority.

(a) If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) *Rating authority for production or construction equipment.* (1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on Form BIS–999.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) *Rating authority in advance of a rated prime contract.* (1) In certain cases and upon specific request, the Department of Health and Human Services, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance-rating authority must obtain sponsorship of the request from the Department of Health and Human Services or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from the Department of Health and Human Services and our use of that priority rating with our suppliers in no way commits the Department of Health and Human Services or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, HHS will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time;

(v) The time period for which the rating is being requested.

(4) The HHS may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

§ 101.42 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

§ 101.43 Criteria for assistance.

Requests for special priorities assistance should be timely, *i.e.,* the request has been submitted promptly and enough time exists for HHS, or the agencies to which HHS has delegated its authority to issue rated orders (the "Delegate Agency"), or the Department of Commerce for industrial resources to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

§ 101.44 Instances where assistance may not be provided.

Special priorities assistance is provided at the discretion of HHS or the Delegate Agency when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

Subpart E—Allocation Actions

§ 101.50 Policy.

(a) It is the policy of the Federal Government that the allocations authority under title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

§ 101.51 General procedures.

When HHS plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department shall develop a plan that includes the following information:

(a) A copy of the Secretary's finding for Presidential approval made, in accordance with Section 201(e) of E.O. 13603, that the material or materials at issue are scarce and critical materials essential to the national defense and that the requirements for national defense for such material(s) cannot otherwise be met without creating a significant dislocation of the normal distribution of such material(s) in to such a degree as to create appreciable hardship.

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

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(f) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (*i.e.,* anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

§ 101.52 Controlling the general distribution of a material in the civilian market.

(a) No allocation action taken by HHS may be used to control the general distribution of a material in the civilian market, unless the Secretary has:

(1) Made a written finding that:

(i) Such material is a scarce and critical material essential to the national defense, and

(ii) 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;

(2) Submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

(3) The President has approved the finding.

(b) The requirements of this section may not delegated by the Secretary (See E.O. 13603, Section 201(e)).

§ 101.53 Types of allocation orders.

There are three types of allocation orders available for communicating allocation actions. These are:

(a) *Set-aside.* An official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders;

(b) *Directive.* An official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. A directive can require a person to: Stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another; and

(c) *Allotment.* An official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

§ 101.54 Elements of an allocation order.

Each allocation order must include:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Health and Human Services. The signature or use of the name certifies that the order is authorized under this part and that the requirements of this part are being followed;

(d) A statement that reads in substance:

This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Health Resources Priorities and Allocations System regulation (45 CFR part 101, subpart A), which is part of the Federal Priorities and Allocations System; and

(e) A current copy of the Health Resources Priorities and Allocations System regulation (subpart A of this part).

§ 101.55 Mandatory acceptance of an allocation order.

(a) Except as otherwise specified in this section (see paragraph (c) of this section), a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Secretary, as specified in § 101.93, immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Health and Human Services that the order has been changed or cancelled.

§ 101.56 Changes or cancellations of an allocation order.

An allocation order may be changed or canceled by an official action of the Department of Health and Human Services.

Subpart F—Official Actions

§ 101.60 General provisions.

(a) HHS may take specific official actions to implement the provisions of this subpart.

(b) These official actions include, but are limited to, Rating Authorizations, Directives, and Memoranda of Understanding (*See* § 101.20.)

§ 101.61 Rating Authorizations.

(a) A Rating Authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 101.41.

§ 101.62 Directives.

(a) A Directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each Directive issued. However, a person may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

(c) A Priorities Directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

(d) An Allocations Directive takes precedence over all Priorities Directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

§ 101.63 Letters and Memoranda of Understanding.

(a) A Letter or Memorandum of Understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties including HHS, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A Letter or Memorandum of Understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to

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impose restrictions under this part. Rather, Letters or Memoranda of Understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

Subpart G—Compliance

§ 101.70 General provisions.

(a) HHS may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or an official action. Such actions include Administrative Subpoenas, Demands for Information, and Inspection Authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of title I or section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of the Department of Health and Human Services is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as set forth in § 101.74.

§ 101.71 Audits and investigations.

(a) Audits and investigations are official examinations of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit or investigation, HHS shall:

(1) Define the scope and purpose in the official action given to the person under investigation; and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, HHS may issue the following documents that constitute official actions:

(1) *Administrative Subpoenas.* An Administrative Subpoena requires a person to appear as a witness before an official designated by HHS to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An Administrative Subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) *Demands for Information.* A Demand for Information requires a person to furnish to a duly authorized representative of HHS any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) *Inspection Authorizations.* An Inspection Authorization requires a person to permit a duly authorized representative of HHS to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept, if, prior to the return date specified in the Administrative Subpoena or Demand for Information, a duly authorized official of HHS is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a duly authorized representative of HHS may enter into a stipulation with a person as to the content of the material.

(e) An Administrative Subpoena, Demand for Information, or Inspection Authorization, shall include the name, title, or official position of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the Administrative Subpoena, Demand for Information, or Inspection Authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a Demand for Information or Inspection Authorization shall be made personally, or by Certified Mail-Return Receipt Requested at the person's last known address. Service of an Administrative Subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or over may serve an Administrative Subpoena, Demand for Information, or Inspection Authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure shall be stated on the original document.

§ 101.72 Compulsory process.

(a) If a person refuses to permit a duly authorized representative of the Department of Health and Human Services to have access to any premises or to the source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, this part, or official actions, HHS, through its authorized representative may seek compulsory process. Compulsory process means the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of the Secretary there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

§ 101.73 Notification of failure to comply.

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, HHS may inform the person in writing of HHS's position regarding that person's non-compliance with the requirements of the DPA and other applicable statutes, this part, or an official action.

(b) In cases where HHS determines that failure to comply with the provisions of the DPA and other applicable statutes, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the

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corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of DPA and other applicable statutes, this part, or an official action.

§ 101.74 Violations, penalties, and remedies.

(a) Willful violation of the provisions of the DPA, the priorities provisions of the Selective Service Act and related statutes (when applicable), this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalties provided by the DPA are a $10,000 fine, or one year in prison, or both. The maximum penalties provided by the Selective Service Act and related statutes are a $50,000 fine, or three years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the DPA, this part, or an official action.

(c) In order to secure the effective enforcement of the DPA and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the DPA and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the DPA and other applicable statutes, this part, or an official action.

(3) No person shall 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 DPA and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify HHS that, in accordance with this provision, delivery has not been made.

§ 101.75 Compliance conflicts.

If compliance with any provision of the DPA and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the DPA and other applicable statutes, this part, or an official action, the person must immediately notify the Secretary, as specified in § 101.93, for resolution of the conflict.

Subpart H—Adjustments, Exceptions, and Appeals

§ 101.80 Adjustments or exceptions.

(a) A person may submit a request to the Secretary for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action are contrary to the intent of the DPA and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Secretary or the Secretary's designated representative.

(d) A decision of the Secretary or the Secretary's designated representative under this section may be appealed to the Secretary (For information on the appeal procedure, see § 101.81.)

§ 101.81 Appeals.

(a) Any person whose request for adjustment or exception was denied by the Secretary or the Secretary's designated representative under Section. 94a.80, may appeal to the Secretary who, through the Secretary's designated representative, shall review and reconsider the denial.

(b)(1) Except as provided in paragraph (b)(2) of this section, an appeal must be received by the Secretary no later than 45 days after receipt of a written notice of denial. After this 45 day period, an appeal may be accepted at the discretion of the Secretary.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness (see § 101.33(e)), an appeal must be received by the Secretary, no later than 15 days after receipt of a written notice of denial. Contract performance under the order shall not be stayed pending resolution of the appeal.

(c) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the action appealed from and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Secretary or the Secretary's designated representative.

(e) When a hearing is granted, the Secretary may designate an HHS employee to act as the Secretary's representative and hearing officer to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Secretary may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to HHS or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Secretary.

Subpart I—Miscellaneous Provisions

§ 101.90 Protection against claims.

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

§ 101.91 Records and reports.

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of HHS as provided in § 101.71.

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(d) In addition, persons must develop, maintain, and submit any other records and reports to HHS that may be required for the administration of the DPA and other applicable statutes, and this part.

(e) DPA Section 705(d), as implemented by E.O. 13603, provides that information obtained under this section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to HHS in connection with the enforcement or administration of the DPA, this part, or an official action, is deemed to be confidential under DPA Section 705(d) and shall be handled in accordance with applicable Federal law.

§ 101.92 Applicability of this part and official actions.

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any state, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by HHS, or any outstanding contracts or orders placed pursuant to any of the regulations, orders, schedules or delegations of authority previously issued by HHS pursuant to authority granted to HHS, by the President under the DPA and E.O. 13603. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

§ 101.93 Communications.

All communications concerning this part, including requests for copies of the part and explanatory information, requests for guidance or clarification, and requests for adjustment or exception shall be addressed to the Secretary, U.S. Department of Health and Human Services, and Washington, DC.

Dated: March 3, 2015.

Sylvia M. Burwell,

Secretary.

Editorial note: This document was received by the Office of the Federal Register on July 8, 2015.

[FR Doc. 2015–17047 Filed 7–16–15; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 140214145–5582–02]

RIN 0648–BD81

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region; Amendment 8

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 8 to the Fishery Management Plan for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (FMP) (Amendment 8), as prepared by the South Atlantic Fishery Management Council (Council). This final rule expands portions of the northern and western boundaries of the Oculina Bank Habitat Area of Particular Concern (HAPC) (Oculina Bank HAPC) and allows transit through the Oculina Bank HAPC by fishing vessels with rock shrimp onboard; modifies vessel monitoring system (VMS) requirements for rock shrimp fishermen transiting through the Oculina Bank HAPC with rock shrimp on aboard; expands a portion of the western boundary of the Stetson Reefs, Savannah and East Florida Lithoherms, and Miami Terrace Deepwater Coral HAPC (CHAPC) (Stetson-Miami Terrace CHAPC), including modifications to the shrimp access area A, which is renamed "shrimp access area 1"; and expands a portion of the northern boundary of the Cape Lookout Lophelia Banks Deepwater CHAPC (Cape Lookout CHAPC). In addition, this rule makes a minor administrative change to the names of the shrimp fishery access areas. The purpose of this rule is to increase protections for deepwater coral based on new information for deepwater coral resources in the South Atlantic.

DATES: This rule is effective August 17, 2015.

ADDRESSES: Electronic copies of Amendment 8, which includes an environmental assessment and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/coral/index.html.*

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted in writing to Anik Clemens, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; and OMB, by email at *OIRA Submission@omb.eop.gov,* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Karla Gore, Southeast Regional Office, telephone: 727–824–5305.

SUPPLEMENTARY INFORMATION: South Atlantic coral is managed under the FMP. The FMP is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On May 20, 2014, NMFS published a notice of availability for Amendment 8 and requested public comment (79 FR 28880). On July 3, 2014, NMFS published a proposed rule for Amendment 8 and requested public comment (79 FR 31907). Subsequently, NMFS published a correction to the notice of availability (79 FR 37269, July 1, 2014) and the proposed rule (79 FR 37270, July 1, 2014) to correct an error in the size of the Oculina Bank HAPC. The proposed rule and NOA stated that the size of the Oculina Bank HAPC would expand "by 405.42 square miles (1,050 square km), for a total area of 694.42 square miles (1,798.5 square km) . . ." However, this was incorrect. The published corrections explained that the increase in size of the Oculina Bank HAPC would be 343.42 square miles (889.5 square km), for a total area of 632.42 square miles (1,638 square km). The Secretary approved the amendment on August 18, 2014. The proposed rule and Amendment 8 set forth the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule is provided below.

Management Measures Contained in This Final Rule

This final rule expands the boundaries of the Oculina Bank HAPC and allows transit through the Oculina Bank HAPC by fishing vessels with rock shrimp onboard; modifies the VMS

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Organizer: Hull, Cordell (Federal) : invalid:nomail

Subject: Supply Chain

Location: Rich's Office

Start Time: 2019-11-08T09:30:00-05:00

End Time: 2019-11-08T10:00:00-05:00

Attendees: Ashooh, Richard : Richard.Ashooh@bis.doc.gov, Borman, Matthew : Matthew.Borman@bis.doc.gov, Semsar, Joseph (Federal), JSemsar@doc.gov, Curyto, Jessica : Jessica.Curyto@bis.doc.gov, Albanese, Eileen : Eileen.Albanese@bis.doc.gov, Rarog, Robert : Robert.Rarog@bis.doc.gov, Chase, Petrina : Petrina.Chase@bis.doc.gov, Dorsey, Sonya : Sonya.Dorsey@bis.doc.gov, Harman, Anthony : Anthony.Harman@bis.doc.gov, Curtis, Deborah (Federal) : DCurtis@doc.gov

Not sure who all needs to attend, so sending broadly.

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Subject: Canceled: Meeting of ICTS EO Working Group
Start Time: 2020-02-11T16:00:00Z
End Time: 2020-02-11T17:00:00Z

FYSA, There will be a supply chain meeting on Tuesday to discuss responses to comments received for the NPRM only. This meeting will not be in 6527.

V/r,
Deniz

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Organizer:	Donna Ganoe : Donna.Ganoe@bis.doc.gov
Subject:	COVID Meeting
Location:	Acting U/S Conference Room
Start Time:	2020-03-05T14:30:00-05:00
End Time:	2020-03-05T15:00:00-05:00
Attendees:	Hull, Cordell : Cordell.Hull@bis.doc.gov, Pelter, Jeremy : Jeremy.Pelter@bis.doc.gov, Billy, Stephen : Stephen.Billy@bis.doc.gov, Curtis, Deborah (Federal) : DCurtis@doc.gov, Rose, Carol : Carol.Rose@bis.doc.gov

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Organizer:	Donna Ganoe : Donna.Ganoe@bis.doc.gov
Subject:	Supply Chain EO
Location:	Acting U/S conference room 3733
Start Time:	2020-03-06T13:30:00-05:00
End Time:	2020-03-06T14:00:00-05:00
Attendees:	Hull, Cordell : Cordell.Hull@bis.doc.gov, Kurland, Kevin : Kevin.Kurland@bis.doc.gov, Curtis, Deborah (Federal), DCurtis@doc.gov

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U.S. Department of Homeland Security
Washington, DC 20472

FEMA

Department of Homeland Security
Priority in Contracts and Orders
(Section 101 of the Defense Production Act) Program Determination

Program Determination

In accordance with subsection 202(c) of Executive Order 13603 and pursuant to authority delegated to me by the Administrator of the Federal Emergency Management Agency, I determine that the items listed in the Emergency Response IT Product List to Support Healthcare for use against Novel Coronavirus SARS-CoV-2 are necessary or appropriate to promote the national defense and are eligible to be supported using the priorities and allocations authority provided in section 101 of the Defense Production Act of 1950, as amended (50 U.S.C. § 4511).

Joel Doolin
Associate Administrator
Office of Policy and Program Analysis
Federal Emergency Management Agency

22 MAR 2020
Date

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U.S. Department of Homeland Security
Washington, DC 20472

FEMA

Department of Homeland Security
Priority in Contracts and Orders
(Section 101 of the Defense Production Act) Program Determination

Program Determination

In accordance with subsection 202(c) of Executive Order 13603 and pursuant to authority delegated to me by the Administrator of the Federal Emergency Management Agency, I determine that the items listed in the GSA Telework Emergency Response Equipment List and Cleaning supplies for use against Novel Coronavirus SARS-CoV-2 are necessary or appropriate to promote the national defense and is eligible to be supported using the priorities and allocations authority provided in section 101 of the Defense Production Act of 1950, as amended (50 U.S.C. § 4511).

Joel Doolin

14 MARCH 2020

Joel Doolin
Associate Administrator
Office of Policy and Program Analysis
Federal Emergency Management Agency

Date

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E-mail a link to this directive

BUREAU OF INDUSTRY AND SECURITY

Number: DOO 50-1

Effective Date: 2017-04-07

Exhibit 1: Organization Chart

Exhibit 1: Organization Chart - Accessible Text Description

SECTION 2. PURPOSE.

.01 This Order prescribes the principal organizational structure of the Bureau of Industry and Security (BIS). It prescribes the internal organization, management structure, and assignment of functions within BIS. Department Organization Order 10-16 prescribes the functions and the scope of authority of the Under Secretary for Industry and Security.

.02 This revision moves the Office of the Chief Information Officer (OCIO), an office currently within BIS's Office of the Chief Financial Officer and Director of Administration (OCFO), to report directly to the Deputy Under Secretary for Industry and Security. Both the OCIO and OCFO will maintain a peer relationship while reporting to the Deputy Under Secretary. The organization chart is revised to show the realignment of these functions.

This revision also directs the Deputy Under Secretary to perform the functions of the Under Secretary in the latter's absence or disability or in the event of a vacancy in that office.

SECTION 2. ORGANIZATION STRUCTURE.

The principal organizational structure and lines of authority of BIS are shown in the attached organization chart (Exhibit 1).

SECTION 3. OFFICE OF THE UNDER SECRETARY AND THE DEPUTY UNDER SECRETARY FOR INDUSTRY AND SECURITY.

.01 The Under Secretary for Industry and Security (the Under Secretary) determines the policy, directs the programs, is responsible for all activities of BIS, and exercises the authorities under which it functions. The Under Secretary oversees BIS's international programs. The Under Secretary serves on Secretarial-level boards, committees, and panels that focus primarily on export controls, export administration, export and antiboycott enforcement, implementation of certain treaty requirements, defense priorities and allocations, strategic trade, and U.S. industrial base issues. The Under Secretary acts on decisions of Administrative Law Judges in enforcement cases involving violations of export controls and antiboycott regulations, and reviews decisions on appeals of temporary denial orders. The Under Secretary acts on appeals arising under 15 CFR Part 756, and can designate the Deputy

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Under Secretary or other Department of Commerce (the Department) officials to review and decide on these appeals.

.02 The Deputy Under Secretary for Industry and Security (the Deputy Under Secretary) shall perform the functions of the Under Secretary in the event that the Under Secretary is unable to carry out his duties or during a vacancy in the office. The Deputy Under Secretary shall perform such duties as the Under Secretary may assign. The Deputy Under Secretary is responsible for the day-to-day management of BIS and represents BIS within and outside the Department at major meetings and fora. The Deputy Under Secretary provides guidance and direction to staff offices, provides overall supervision of BIS' information technology systems and infrastructure, and directs planning and coordination activities on behalf of the Under Secretary; and monitors and advises the Under Secretary on budget, funding, and personnel policy matters. When directed by the Under Secretary, the Deputy Under Secretary will also act as the principal liaison, with support from the Assistant Secretary for Export Enforcement, to the Assistant Secretary and Director General of the U.S. and Foreign Commercial Service (US&FCS) of the International Trade Administration (ITA) for the coordination of BIS's domestic and overseas programs.

.03 Except as provided otherwise in this Order, the Under Secretary may redelegate his or her authority subject to such conditions in the exercise of such authority as the Under Secretary may prescribe.

SECTION 4. STAFF OFFICES REPORTING TO THE UNDER SECRETARY AND THE DEPUTY UNDER SECRETARY FOR INDUSTRY AND SECURITY.

.01 The Office of Congressional and Public Affairs (OCPA) serves as the BIS liaison with the Congress, the press, and the business community. OCPA reports to the Under Secretary through the Chief of Staff, and provides support to the Office of the Under Secretary by managing the production of the BIS's annual and foreign policy reports to Congress. OCPA also coordinates development of publications with the offices of the Assistant Secretaries on their program activities.

.02 The Office of the Chief Financial Officer and Director of Administration serves as the advisor to the Under Secretary and the Deputy Under Secretary on financial management for BIS and reports to the Deputy Under Secretary. The Office of the Chief Financial Officer and Director of Administration develops BIS strategic plans and multi-year performance measures in cooperation with the Assistant Secretary for Export Administration and the Assistant Secretary for Export Enforcement, and in accordance with the Government Performance and Results Act (GPRA) of 1993; formulates, presents and executes the BIS budget; conducts management and program reviews of BIS to assess the accomplishment of performance measures and program effectiveness; effects financial and budgetary controls; provides financial reporting and financial internal controls in accordance with the Federal Managers' Financial Integrity Act of 1982, and Office of Management and Budget (OMB) Circulars A-50 and A-123; prepares formal financial statements in conformance with the Chief Financial Officers Act of 1990 and other OMB requirements; administers the Freedom of Information Act and the Privacy Act of 1974; implements policies and procedures for personnel, and physical security; coordinates all BIS activities related to safety and the emergency preparedness program, particularly as applicable to Executive Order 12656; and acts as the focal point for the Government Accountability Office and Departmental Inspector General audit activities. The Office of the Chief Financial Officer and Director of Administration coordinates human resources management activities, including time-and-attendance controls, workforce planning, career development, employee recognition, and performance management.

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.03 The Office of the Chief Information Office (CIO) serves as the advisor to the Under Secretary and Deputy Under Secretary on information technology (IT) resources management, security, and IT policy for BIS and reports to the Deputy Under Secretary. The Office of the Chief Information Officer is responsible for implementation of BIS's authorities under the Clinger-Cohen Act of 1996 and the Federal Information Technology Acquisition Reform Act (FITARA). Working in coordination with the Office of the Chief Financial Officer and Director of Administration, the CIO develops and coordinates BIS's strategic IT plan and operational plan; and, reviews and approves all budget submissions and acquisitions to identify and ensure all IT spending is in alignment with these plans. The CIO establishes and administers IT policies, procedures, and standards; plans and manages the enterprise IT architecture; provides and supports the IT infrastructure; reviews and approves IT systems development and acquisitions; approves and coordinates the development and deployment of BIS's domestic and international IT systems and applications; provides customer service support; manages enterprise-wide information management activities, including support for Internet and World Wide Web activities; ensures that all federal IT mandates are implemented within BIS; coordinates IT security activities and implementation of Federal Information Security Management Act requirements; and develops and administers IT workforce plans. The CIO actively participates on the Department's CIO Council and works with the Department's CIO on corporate issues, priorities, and technology solutions.

SECTION 5. THE OFFICE OF THE ASSISTANT SECRETARY FOR EXPORT ADMINISTRATION.

.01 The Assistant Secretary of Export Administration (the Assistant Secretary) performs such duties as the Under Secretary may assign. The Assistant Secretary assists and advises the Under Secretary on the development of policies pertaining to Export Administration issues; provides overall direction to and management of the national security, nonproliferation, foreign policy, short supply, national defense, and strategic industrial resource functions delegated to BIS, including the issuance of related regulations; serves as alternate to the Under Secretary in representing the Department on interagency committees dealing with BIS issues; as directed by the Under Secretary, represents the Department in domestic and international fora that address such issues; and chairs the Advisory Committee on Export Policy. The Assistant Secretary is responsible for supporting the President's Export Council Subcommittee on Export Administration as the principal point of contact; coordinating the Department's Technical Advisory Committees on export controls; and preparing Congressionally mandated reports, including Export Administration's contribution to BIS's Annual Report.

.02 The Deputy Assistant Secretary for Export Administration serves as the principal deputy to the Assistant Secretary; performs such duties as the Assistant Secretary may assign; and performs the duties of the Assistant Secretary during the latter's absence.

.03 The Operating Committee Chair directs the activities of the Operating Committee (OC) and serves as Executive Secretary of the Export Administration Review Board and the Advisory Committee for Export Policy. The OC reviews and makes determinations on licensing cases for which interagency agreement has not been reached.

.04 The Assistant Secretary directs the following offices:

a. The Office of Strategic Industries and Economic Security (SIES) is responsible for implementing a number of programs related to the ability of the defense industrial base to meet national security needs. These programs include administrating the Defense Priorities Allocation

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United States, reviewing proposed defense research and development agreements with foreign partners, and reviewing proposed sales of excess defense articles to allied nations.

b. The Office of Nonproliferation and Treaty Compliance (NPTC) is responsible for implementing multilateral export controls under the Australia Group, and for administering the Department's responsibilities under the Chemical Weapons Convention and the Biological and Toxin Weapons Convention; and for implementing multilateral export controls under the Missile Technology Control Regime and the Nuclear Suppliers Group. In addition, this office implements U.S. foreign policy controls to ensure that exports and reexports subject to the Export Administration Regulations are consistent with national security goals relating to human rights, crime control, antiterrorism, and regional stability. This office is responsible for all related policy actions, export licenses, commodity classifications, license determinations, and advisory opinions for affected commodities.

c. The Office of National Security and Technology Transfer Controls (NSTTC) is responsible for issues related to national security export and reexport controls. It implements multilateral export controls for national security reasons to comply with the Wassenaar Arrangement to control the spread of dual-use goods and related technologies. NSTTC is also responsible for U.S. export control policy for high performance computers and encryption. This office is responsible for all related policy actions, export licenses, commodity classifications, license determinations, and advisory opinions for affected commodities. This office is also the primary focal point for commodity jurisdiction assessments, and provides commodity classifications and transaction-specific policy review guidance to the U.S. Department of the Treasury for its licensing regime for exports to embargoed destinations. NSTTC is also responsible for administering the short supply provisions of the Export Administration Regulations and the unprocessed timber export control/monitoring provisions of the Forest Resources Conservation and Shortage Relief Amendments Act of 1993.

d. The Office of Exporter Services (OexS) is responsible for export control outreach to the business community, including counseling exporters on export control policy and procedures and developing and conducting export control seminars, and participating in other BIS educational efforts. OExS also has the responsibility for developing, drafting, and publishing changes to the Export Administration Regulations and other Federal Register publications; for compliance actions related to Special Comprehensive Licenses and the development of export management systems; and for screening and routing incoming export license and commodity classification applications.

e. The Office of Technology Evaluation (OTE) is responsible for analyzing the economic impact of export controls on key sectors in the U.S. industrial base. OTE identifies key technologies, analyzes the foreign availability and mass market status of those technologies, and reviews the practices of the relevant multilateral export control regimes in controlling these technologies. OTE also analyzes critical sectors of the defense industrial base to assess those sectors' ability to support U.S. security requirements. In addition, OTE oversees the operation of the BIS's Technical Advisory Committees to ensure industry input on the impact of export controls on key sectors of the U.S. industrial base.

SECTION 6. THE OFFICE OF THE ASSISTANT SECRETARY FOR EXPORT ENFORCEMENT.

.01 The Assistant Secretary for Export Enforcement (the Assistant Secretary) assists and advises the Under Secretary on the development of policy and the administration of programs for export enforcement and antiboycott compliance; provides overall direction on the enforcement of functions related to the national security, nonproliferation, foreign policy, short supply, fastener quality, and

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antiboycott compliance programs, including making recommendations on the clarity and enforceability of relevant regulations; as directed by the Under Secretary, represents the Department at interagency meetings on the development and enforcement of export control and antiboycott laws and regulations; approves orders regarding precharging settlements in administrative enforcement cases involving violations of export control and antiboycott laws; signs temporary denial orders; develops legislative proposals; and supports BIS's seminar and outreach efforts. The Assistant Secretary supervises special agents in the employ of BIS. The Assistant Secretary will also provide support to the Deputy Under Secretary in his/her role as the principal liaison with US&FCS for the coordination of BIS's domestic and overseas programs.

.02 The Deputy Assistant Secretary for Export Enforcement serves as the principal deputy to the Assistant Secretary; performs such duties as the Assistant Secretary may assign; and performs the duties of the Assistant Secretary during the latter's absence.

.03 The Assistant Secretary directs the following offices:

a. The Office of Antiboycott Compliance serves as the primary contact for administration of Departmental antiboycott responsibilities under the Export Administration Act (EAA) regarding unsanctioned foreign boycotts against countries friendly to the United States, and plans and directs the execution of antiboycott policies and programs.

b. The Office of Export Enforcement investigates suspected violations of the EAA, the Fastener Quality Act, their implementing regulations, and the regulations implementing the Chemical Weapons Convention and the National Defense Authorization Act of 1998; conducts criminal and administrative investigations in the United States, including those relating to suspected terrorist activities; makes recommendations on the disposition of cases; coordinates with the Department of Homeland Security's Bureau of Immigration and Customs Enforcement on investigative activities and seizure of goods; conducts pre-license and post-shipment checks abroad; engages in preventive programs to alert the business community to diversion risks; and performs the full range of investigative and law enforcement functions authorized under the law through its headquarters and field office structure. In addition, the Office provides support and training for the export enforcement operations of foreign governments.

c. The Office of Enforcement Analysis develops export control information and provides export license review and investigative support. The Office reviews license applications and initiates pre-license checks and post-shipment verifications to prevent and detect violations of the Export Administration Regulations. The Office also obtains and analyzes information and documents from other government agencies. The Office provides the U.S. export control community with export licensing information and analysis through research of databases and records in support of export enforcement investigations; provides licensing reviews to determine the suitability of foreign consignees, and makes final recommendations based on these reviews to Export Administration licensing officials; and conducts analysis to determine the reliability and diversion risk potential of recipients of U.S.-origin goods and technical data. The Office also evaluates intelligence information relating to actual or potential violations of law; and conducts research on information related to counter-terrorism, high performance computers, weapons of mass destruction, and the Chemical Weapons Convention in support of its preventive enforcement activities. In addition, the Office facilitates BIS's Export Control Officer program and serves as a liaison with other Government agencies concerning the exchange of information involving export control enforcement information, as well as providing information and training to foreign governments on preventive enforcement techniques.

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SECTION 7. EFFECT ON OTHER ORDERS.

This Order supersedes Department Organization Order 50-1, dated September 4, 2012.

Signed by: Under Secretary for Industry and Security

Approved by: Chief Financial Officer and Assistant Secretary for Administration

Questions and Comments

Send Questions or Comments on the Commerce Directives Management program to Directives@doc.gov.

Office of Privacy and Open Government
Office of the Chief Financial Officer and Assistant Secretary for Administration
U.S. Department of Commerce

Page last updated: April 10, 2017

AMERICAN OVERSIGHT

SOPP 8506: Management of Shortages of CBER-Regulated Products

Version: 4
Effective Date: January 14, 2020

Table of Contents

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I. Purpose

This Standard Operating Policy and Procedure (SOPP) serves as a guide for the Center for Biologics Evaluation and Research (CBER) staff for the receipt, evaluation and follow up to notifications of actual or potential shortages of CBER-regulated products and additional steps to be taken in the event of actual shortages of medically necessary CBER-regulated products that can have significant public health consequences.

II. Scope

This SOPP applies to all products regulated by CBER.

III. Background

A. Product shortages can arise for a variety of reasons. Quality problems at the manufacturing facility are the most common causes of shortages of CBER-regulated products. Other causes of product shortages include increased demand, corporate delays in manufacturing or shipping, distribution disruptions, production changes, unavailability of component

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materials, new indications, business decisions to discontinue the product, or natural disasters.

B. The Food and Drug Administration Safety and Innovation Act (FDASIA) amended section 506C of the Federal Food Drug and Cosmetic Act (FD&C) Act (21 U.S.C. 356c) to require all manufacturers of certain drugs to notify the Food and Drug Administration (FDA) 6 months in advance, or as soon as practicable, of a permanent discontinuance or an interruption in manufacturing.

C. FDASIA also permitted the FDA to apply section 506C to biological products by regulation and required FDA to issue a final rule implementing certain drug shortages provisions in FDASIA. The final rule was issued on July 8, 2015 and became effective September 8, 2015 (80 FR 38915, July 8, 2015). The rulemaking created new sections for drugs, including 21 CFR 314.81 and 21 CFR 600.82, "Notification of a permanent discontinuance or an interruption in manufacturing," that requires an applicant of a biological product, other than blood or blood components for transfusion, which is licensed under section 351 of the Public Health Service Act (PHS Act), and which may be dispensed only under prescription under section 503(b)(1) of the FD&C Act (21 U.S.C. 353(b)(1)), to notify FDA in writing of a permanent discontinuance of manufacture or an interruption in manufacturing that is likely to lead to a meaningful disruption in supply in the United States (21 CFR 600.82(a)(1)) if:

- The biological product is life supporting, life sustaining, or intended for use in the prevention or treatment of a debilitating disease or condition, including any such biological product used in emergency medical care or during surgery; and
- The biological product is not a radiopharmaceutical biological product.

An applicant of blood or blood components for transfusion must notify FDA in writing of a permanent discontinuance of manufacture of any product listed in its license or an interruption in manufacturing of any such product that is likely to lead to a significant disruption in supply of that product in the United States (21 CFR 600.82(a)(2)) if:

- The product is life supporting, life sustaining, or intended for use in the prevention or treatment of a debilitating disease or condition, including any such product used in emergency medical care or during surgery; and
- The applicant is a manufacturer of a significant percentage of the U.S. blood supply.

The regulations at 21 CFR 314.81 And 600.82 do not apply to biological products that also meet the definition of a device per section 201(h) of the

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Federal Food, Drug and Cosmetic Act (FFDCA), or CBER-regulated devices approved or cleared under FFDCA section 515 and 510(k), or HCT/Ps regulated solely under section 361 of the PHS Act.

D. CBER may be notified of actual or potential shortages by manufacturers, medical professionals, consumers/patients, other government offices, patient advocacy groups, media sources and others.

E. Shortage notifications may come to the CBER Product Shortage Coordinator through:

- The CBER Shortage email account at CBERshortage@fda.hhs.gov
- The CBER Biological Product Shortages dedicated phone line at (240) 402-8380
- Any of CBER's Offices
- FDA's Office of Regulatory Affairs (ORA)
- Media reports or inquiries from FDA's Press Office
- Patients/consumers individually or through associations
- Healthcare provider reports filed in the:
    - MedWatch
    - Vaccine Adverse Event Reporting System (VAERS)
- CBER's Biological Product Deviation Reporting System

IV. Definitions

A. **CBER-regulated product shortage or shortage** - period of time when the demand or projected demand for the biological product within the United States exceeds the supply of the product (21 CFR 600.82(f)).

B. **Intended for use in the prevention or treatment of a debilitating disease or condition** - a biological product intended for use in the prevention or treatment of a disease or condition associated with mortality or morbidity that has a substantial impact on day-to- day functioning (21 CFR 600.82(f)).

C. **Life supporting or life sustaining** - a biological product that is essential to, or that yields information that is essential to, the restoration or

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continuation of a bodily function important to the continuation of human life (21 CFR 600.82(f)).

D. **Meaningful disruption** - a change in production that is reasonably likely to lead to a reduction in the supply of a biological product by a manufacturer that is more than negligible and affects the ability of the manufacturer to fill orders or meet expected demand for its product, and does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a short period of time (21 CFR 600.82(f)).

E. **Medical necessity determination** – A formal, written assessment made by a CBER medical officer or officers with requisite expertise on the CBER-Regulated Product, stating whether the product meets the definition of medically necessary. Multiple CBER Offices and/or Divisions may be asked to make this determination.

F. **Medically Necessary Product -** A product is considered medically necessary when it is used to treat, cure, mitigate, prevent, or diagnose a serious disease or medical condition and there is no adequate alternative product available for that use. Note: Patient inconvenience alone is an insufficient basis to classify a product as a medically necessary.

G. **Significant disruption** - a change in production that is reasonably likely to lead to a reduction in the supply of blood or blood components by a manufacturer that substantially affects the ability of the manufacturer to fill orders or meet expected demand for its product, and does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a short period of time (21 CFR 600.82(f)).

V. Policy

A. For drugs, including biological products, regulated by CBER, 21 CFR 314.81(b) and 600.82(b) require notification electronically in a format FDA can process, review, and archive.

1. Applicants must email notifications to CBERshortage@fda.hhs.gov(for products regulated by CBER):

- At least 6 months prior to the date of the permanent discontinuance or interruption in manufacturing; or
- If 6 months' advance notice is not possible because the permanent discontinuance or interruption in manufacturing was not reasonably anticipated 6 months in advance, as soon as practicable thereafter,

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but in no case later than 5 business days after such a permanent discontinuance or interruption in manufacturing occurs.

2. Notifications required under 21 CFR 314.81(b) and 600.82(b) must include the following information (21 CFR 314.81(c) and 600.82(c)):

   - Name of the CBER-regulated product subject to the notification
   - Name of the applicant
   - Whether the notification relates to a permanent discontinuance or an interruption in manufacturing.
   - Description of the reason for the discontinuance or interruption
   - Estimated duration of the interruption in manufacturing

3. Under 21 CFR 314.81(e) and 600.82(e) CBER may issue a noncompliance letter to an applicant who fails to submit a notification as required under the regulations.

B. For all other CBER-regulated products, CBER encourages voluntary notification of a permanent discontinuance or an interruption in manufacturing that is likely to lead to a meaningful disruption in supply of that product in the United States, in the same manner as for CBER-regulated drugs (including biological products). Early notification concerning a permanent discontinuance or an interruption in manufacturing, enables CBER to work with a manufacturer, and may help to prevent or mitigate a product shortage. The most important way to prevent or mitigate a product shortage is for CBER to learn about a permanent discontinuance or an interruption in manufacturing as soon as possible. The sooner CBER is notified of a discontinuance or interruption in manufacturing, the more time CBER has between the disruption and the potential shortage to assist, where possible, in the best interest of public health.

C. The appropriate CBER Product Office - Office of Blood Research and Review (OBRR), and/or the Office of Tissues and Advanced Therapies (OTAT), and/or the Office of Vaccines Research and Review (OVRR) - will assist in identifying and gathering all necessary information about products for which there is a notification of an actual or potential shortage, and determine if the product is medically necessary, as appropriate.

D. The Office of Compliance and Biologics Quality (OCBQ) processes regulatory action recommendations. One of the many considerations in deciding on the appropriate action to take is the overall effect of the action on the availability of the products that are manufactured by the company that is the subject of the potential action. In matters of enforcement that could potentially result in shortages of CBER-regulated product(s), OCBQ will consult with CBER Product Offices and the Office of Regulatory Affairs (ORA) prior to concurring with any recommended action(s).

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E. A decision on whether or not to take enforcement action is based on careful consideration of the impact of the violations on the quality of the product, the medical risks associated with the violations, and any other factor(s) that CBER may deem relevant.

1. Where agency actions may impact the supply of CBER-regulated products, CBER carefully considers the alternatives. In an event where agency action may impact the supply of products, CBER carefully considers whether to exercise enforcement discretion in taking action.

2. If CBER determines that the shortage of a CBER-regulated product is not compliance related, (e.g., manufacturing facility destroyed by fire, facility closed for renovations), special actions may be taken by CBER to help mitigate the shortage. Special actions may range from discussions with industry to acceleration of review activities or lot release.

3. If CBER determines that the shortage of a CBER-regulated product is compliance-related (e.g., approved product does not meet any or all of the specification(s) in the license):

   a. CBER may consider whether or not to modify enforcement actions to address the impact on the availability of products. (In some circumstances, the agency may exercise enforcement discretion or facilitate an expedited review.)

   b. CBER may decide to modify enforcement actions based on careful consideration of the impact of the violation(s) on the quality of the product, the risks to the public that would result from use of the product versus inability of the public to use the product, and other factors CBER may deem relevant.

   c. CBER may consult with CBER Product Offices, Office of the Chief Counsel (OCC), and Office of CBER Director (OD).

   d. CBER may also consider taking special actions deemed relevant to the individual situation to help alleviate the shortage.

VI. Responsibilities

A. CBER Product Shortage Coordinator (PSC) - Office of Compliance and Biologics Quality (OCBQ), Immediate Office of the Director (IOD)

1. Receives all notifications, reports or inquiries of potential or actual product shortages including notifications of discontinuations that are likely to lead to a meaningful disruption in supply in the United States.

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2. Evaluates each potential or actual product shortage notification, report or inquiry.

3. Verifies that an actual product shortage exists through communications with manufacturers and other stakeholders.

4. Determines if the notification of shortage was received at least 6 months prior to the date of the permanent discontinuance or interruption in manufacturing or, if 6 months' advance notice is not possible, notification was received as soon as practicable but no later than 5 business days after a permanent discontinuance or interruption in manufacturing was discovered.

5. Verifies that the notification of shortage includes:

   a. Name of the CBER-regulated product subject to the notification

   b. Name of the applicant or manufacturer

   c. Whether the notification relates to a permanent discontinuance or an interruption in manufacturing.

   d. Description of the reason for the discontinuance or interruption

   e. Estimated duration of the interruption in manufacturing

6. Communicates each potential or actual CBER-regulated product shortage notification to CBER product offices so that the product offices can evaluate the status of each new shortage notification and, when necessary, make a medical necessity determination of the product in shortage.

7. Ensures that product shortage information posted on the CBER-Regulated Products: Shortages and Discontinuations Web page is accurate and current.

8. Ensures that updated public information is posted on the CBER-Regulated Products: Shortages and Discontinuations Web page as soon as possible.

9. Communicates information to the appropriate stakeholders both within and outside of the Agency from first notification to resolution.

10. Monitors each product shortage situation until resolution.

11. Provides CBER's Office of Communication, Outreach and Development (OCOD) with information/materials, as appropriate.

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12. Provides guidance on policy-level issues related to product shortages, as requested.

13. In conjunction with the Center for Drug Evaluation and Research (CDER) submits to Congress an annual report on drug shortages and FDA's efforts to address them.

14. Issues a noncompliance letter to an applicant who fails to submit a notification as required under 21 CFR 600.82(a) and (b) as appropriate.

B. CBER Product Offices (with product review responsibilities) - OBRR, OTAT, and OVRR

1. Evaluates the nature and status of each new shortage notification and, when necessary, makes a medical necessity determination of the CBER-regulated product in shortage.

2. Regulatory Project Management (RPM) Branch Chief within the CBER Product Offices:

   a. Serves as the Office representative for the purposes of triaging the notification.

   b. Forwards the notification to the appropriate review personnel within the Office.

C. CBER Office of Communication, Outreach and Development (OCOD)

1. Forwards all notifications, reports and inquiries concerning CBER-regulated product availability to the PSC.

2. Posts the information concerning product shortages, as appropriate, on the CBER-Regulated Products: Shortages and Discontinuations Web page.

3. Posts the information concerning product discontinuations that will lead to a meaningful disruption in supply in the United States, on the CBER-Regulated Products: Shortages and Discontinuations Web page.

4. Posts the information concerning the resolution of product shortages, on the CBER-Regulated Products: Shortages and Discontinuations Web page.

D. CBER Office of Biostatistics and Epidemiology (OBE)

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1. Forwards all MedWatch and VAERS reports concerning actual or potential CBER-regulated product shortages to the PSC at CBERshortage@fda.hhs.gov.

2. Assists the Product Offices and the PSC as necessary in assessing such reports.

E. FDA Office of Regulatory Affairs (ORA)

Program Divisions will:

1. Forward all information concerning CBER-regulated product shortage situations that do not involve compliance issues directly to the PSC via the product shortage email account at CBERshortage@fda.hhs.gov or via phone call at (240) 402-8380.

2. Alerts the PSC to all CBER-regulated product shortage situations involving compliance issues at CBERshortage@fda.hhs.gov or at (240) 402-8380.

3. Works with CBER as necessary in determining the nature and scope of all CBER-regulated product shortage situations.

VII. Procedures

A. Forward all notifications, reports, or inquiries, including any related MedWatch and VAERS reports, concerning actual or potential product shortages to the CBER Product Shortage Coordinator (PSC) in OCBQ. **[CBER Product Office(s) (OBRR, OCBQ, OTAT, OVRR), OBE, OCOD, ORA and/or RPMs from Product Offices]**

1. If there is an emergency that requires immediate attention, the CBER staff member receiving the notification, report or inquiry will attempt to contact the PSC by phone at (240) 402-8380.

2. If the situation is not urgent, the person receiving the notification, report or inquiry will promptly send it to CBERshortage@fda.hhs.gov.

B. Forward each notification of new shortage to the appropriate CBER Product Office RPM and/or contact person. **[PSC]**

C. Forward to appropriate review personnel within CBER Product Office. **[RPM]**

D. Evaluate the actual or potential product shortage. **[CBER Product Office(s) and PSC]**

The evaluation may include:

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1. Data identifying manufacturers of similar versions of the product in shortage as well as data showing total units of product distribution in the United States (U.S.).

2. Inventory data of product available at the manufacturer(s) and major wholesalers throughout the U.S.

3. Reports of the 30-day back order status of the manufacturer.

4. Reports from health care personnel, consumers, trade or patient groups regarding current and projected product availability and demand.

5. A determination if the CBER-regulated product in shortage is medically necessary. This may include a formal request of medical necessity determination from the CBER Product Office with expertise on that CBER-regulated Product.

    a. Typically, if an alternative product compliant with FDA's current Good Manufacturing Practice regulations (cGMPs) exists, is in adequate supply, and could be used to treat the same serious disease or medical condition as the shortage product then the product may not be considered to be medically necessary.

    b. If there is not an alternative product available, then the product may be considered to be medically necessary.

    c. In certain instances when the decision about whether or not the product is medically necessary is particularly complex, the CBER Product Office representative will consult with CBER management, as appropriate.

6. A determination if the medically necessary product shortage is related to manufacturing and quality issues.

    a. If CBER determines that the shortage of a medically necessary CBER-regulated product is not related to manufacturing and quality issues, (e.g., manufacturing facility destroyed by fire, facility closed for renovations, natural disaster), special actions may be taken by CBER to help mitigate the shortage.

    Medical Necessity Determination:

    Upon request of OCBQ, provide within five (5) working days of receipt of the shortage notification by the Product Office, a completed medical necessity determination via email to the CBER PSC at CBERshortage@fda.hhs.gov. **[CBER Product Office POC]**

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E. Submit public product shortage information to OCOD for posting in the CBER-Regulated Products: Current Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page and ensure posted information remains current. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;
2. Proprietary Name (Trade Name);
3. Manufacturer and Manufacturer Contact Information;
4. Product Availability and Estimated Shortage Duration (when known);
5. Shortage Reason (per FDASIA);
6. Manufacturer recommendation(s) or additional information (if provided by the manufacturer) intended for public use (e.g. weblinks, phone numbers, etc);
7. Date shortage began and any dates when updates occurred.

G. Submit information concerning CBER-regulated products which have been determined to no longer be in shortage status to OCOD. Request for OCOD to remove posting from the CBER-Regulated Products: Current Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page and place new information (posting) in the CBER-Regulated Products: Resolved Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page when the shortage has been determined to be resolved based on drug supply information provided from sponsor(s) or manufacturer(s). Generally, a shortage is considered to be resolved when all backorders have been filled and supply is once again meeting or exceeding demand. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;
2. Proprietary Name (Trade Name);
3. Manufacturer;
4. Manufacturer Contact Information;
5. Additional Information – which consists of a short summary of the reason for the shortage and any other helpful information;

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6. Resolved Date.

H. Submit information concerning CBER-regulated products which the manufacturer has permanently discontinued and, as a result, CBER has determined may likely lead to a meaningful disruption in the supply of that product in the United States to OCOD for posting in the CBER-Regulated Products: Discontinuations section of the CBER-Regulated Products: Shortages and Discontinuations Web site and ensure posted information remains current. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;
2. Proprietary Name (Trade Name);
3. Manufacturer;
4. Manufacturer Contact Information;
5. Additional Information – which consists of a short summary concerning the reason for discontinuation and any new recommendations, instructions, etc.;
6. Discontinued Date.

I. Document all meetings, telecons, etc. and include in the OCBQ record system and/or the EDR, as appropriate. **[CBER PSC, RPM, Product Reviewer]**

VIII. Appendix

N/A

IX. References

A. References below may be found on the Internet:

1. Executive Order 13588, Reducing Prescription Drug Shortages (October 31, 2011)
2. Food and Drug Administration Safety and Innovation Act (FDASIA), (July 9, 2012)
3. FDASIA Fact Sheet
4. Federal Food, Drug, and Cosmetic Act, (FD&C Act), Sec. 506 C

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5. Strategic Plan for Preventing and Mitigating Drug Shortages (October 2013)
6. Permanent Discontinuance or Interruption in Manufacturing of Certain Drug or Biological Products (80 FR 38915, July 8, 2015)
7. FDA, Office of Regulatory Affairs (ORA), Field Management Directive (FMD) 15 – Product Shortage Communication
8. CBER-Regulated Products: Current Shortages
9. CBER-Regulated Products: Discontinuations

X. History

Written/ Revised	Approved By	Approval Date	Version Number	Comment
M. Monser	N/A (Reviewed by JA Coordinator)	January 14, 2020	4	Technical Revision to Current Font/Format
J. Manik, A. Richardson, OCBQ	Christopher Joneckis, PhD	August 27, 2018	3	Revised to include new procedures as a result of new regulations
J. Manik, A. Richardson, OCBQ	Robert Yetter, PhD	March 29, 2012	2	Revised to include new procedures
M. Knippen, J. Davis, OCBQ	Robert Yetter, Ph.D.	January 2, 2004	1	Original

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SOPP 8506: Management of Shortages of CBER-Regulated Products

Version: 4
Effective Date: January 14, 2020

Table of Contents

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I. Purpose

This Standard Operating Policy and Procedure (SOPP) serves as a guide for the Center for Biologics Evaluation and Research (CBER) staff for the receipt, evaluation and follow up to notifications of actual or potential shortages of CBER-regulated products and additional steps to be taken in the event of actual shortages of medically necessary CBER-regulated products that can have significant public health consequences.

II. Scope

This SOPP applies to all products regulated by CBER.

III. Background

A. Product shortages can arise for a variety of reasons. Quality problems at the manufacturing facility are the most common causes of shortages of CBER-regulated products. Other causes of product shortages include increased demand, corporate delays in manufacturing or shipping, distribution disruptions, production changes, unavailability of component materials, new indications, business decisions to discontinue the product, or natural disasters.

B. The Food and Drug Administration Safety and Innovation Act (FDASIA) amended section 506C of the Federal Food Drug and Cosmetic Act (FD&C) Act (21 U.S.C. 356c) to require all manufacturers of certain drugs to notify the Food and Drug Administration (FDA) 6 months in advance, or as soon as practicable, of a permanent discontinuance or an interruption in manufacturing.

C. FDASIA also permitted the FDA to apply section 506C to biological products by regulation and required FDA to issue a final rule implementing certain drug shortages provisions in FDASIA. The final rule was issued on July 8, 2015 and became effective September 8, 2015 (80 FR 38915, July 8, 2015). The rulemaking created new sections for drugs, including 21

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CFR 314.81 and 21 CFR 600.82, "Notification of a permanent discontinuance or an interruption in manufacturing," that requires an applicant of a biological product, other than blood or blood components for transfusion, which is licensed under section 351 of the Public Health Service Act (PHS Act), and which may be dispensed only under prescription under section 503(b)(1) of the FD&C Act (21 U.S.C. 353(b)(1)), to notify FDA in writing of a permanent discontinuance of manufacture or an interruption in manufacturing that is likely to lead to a meaningful disruption in supply in the United States (21 CFR 600.82(a)(1)) if:

- The biological product is life supporting, life sustaining, or intended for use in the prevention or treatment of a debilitating disease or condition, including any such biological product used in emergency medical care or during surgery; and
- The biological product is not a radiopharmaceutical biological product.

An applicant of blood or blood components for transfusion must notify FDA in writing of a permanent discontinuance of manufacture of any product listed in its license or an interruption in manufacturing of any such product that is likely to lead to a significant disruption in supply of that product in the United States (21 CFR 600.82(a)(2)) if:

- The product is life supporting, life sustaining, or intended for use in the prevention or treatment of a debilitating disease or condition, including any such product used in emergency medical care or during surgery; and
- The applicant is a manufacturer of a significant percentage of the U.S. blood supply.

The regulations at 21 CFR 314.81 And 600.82 do not apply to biological products that also meet the definition of a device per section 201(h) of the Federal Food, Drug and Cosmetic Act (FFDCA), or CBER-regulated devices approved or cleared under FFDCA section 515 and 510(k), or HCT/Ps regulated solely under section 361 of the PHS Act.

D. CBER may be notified of actual or potential shortages by manufacturers, medical professionals, consumers/patients, other government offices, patient advocacy groups, media sources and others.

E. Shortage notifications may come to the CBER Product Shortage Coordinator through:

- The CBER Shortage email account at [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"]
- The CBER Biological Product Shortages dedicated phone line at (240) 402-8380

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- Any of CBER's Offices
- FDA's Office of Regulatory Affairs (ORA)
- Media reports or inquiries from FDA's Press Office
- Patients/consumers individually or through associations
- Healthcare provider reports filed in the:
    - MedWatch
    - Vaccine Adverse Event Reporting System (VAERS)
- CBER's Biological Product Deviation Reporting System

IV. Definitions

A. **CBER-regulated product shortage or shortage** - period of time when the demand or projected demand for the biological product within the United States exceeds the supply of the product (21 CFR 600.82(f)).

B. **Intended for use in the prevention or treatment of a debilitating disease or condition** - a biological product intended for use in the prevention or treatment of a disease or condition associated with mortality or morbidity that has a substantial impact on day-to- day functioning (21 CFR 600.82(f)).

C. **Life supporting or life sustaining** - a biological product that is essential to, or that yields information that is essential to, the restoration or continuation of a bodily function important to the continuation of human life (21 CFR 600.82(f)).

D. **Meaningful disruption** - a change in production that is reasonably likely to lead to a reduction in the supply of a biological product by a manufacturer that is more than negligible and affects the ability of the manufacturer to fill orders or meet expected demand for its product, and does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a short period of time (21 CFR 600.82(f)).

E. **Medical necessity determination** – A formal, written assessment made by a CBER medical officer or officers with requisite expertise on the CBER-Regulated Product, stating whether the product meets the definition of medically necessary. Multiple CBER Offices and/or Divisions may be asked to make this determination.

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F. **Medically Necessary Product -** A product is considered medically necessary when it is used to treat, cure, mitigate, prevent, or diagnose a serious disease or medical condition and there is no adequate alternative product available for that use. Note: Patient inconvenience alone is an insufficient basis to classify a product as a medically necessary.

G. **Significant disruption** - a change in production that is reasonably likely to lead to a reduction in the supply of blood or blood components by a manufacturer that substantially affects the ability of the manufacturer to fill orders or meet expected demand for its product, and does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a short period of time (21 CFR 600.82(f)).

V. Policy

A. For drugs, including biological products, regulated by CBER, 21 CFR 314.81(b) and 600.82(b) require notification electronically in a format FDA can process, review, and archive.

1. Applicants must email notifications to [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"](for products regulated by CBER):

   - At least 6 months prior to the date of the permanent discontinuance or interruption in manufacturing; or
   - If 6 months' advance notice is not possible because the permanent discontinuance or interruption in manufacturing was not reasonably anticipated 6 months in advance, as soon as practicable thereafter, but in no case later than 5 business days after such a permanent discontinuance or interruption in manufacturing occurs.

2. Notifications required under 21 CFR 314.81(b) and 600.82(b) must include the following information (21 CFR 314.81(c) and 600.82(c)):

   - Name of the CBER-regulated product subject to the notification
   - Name of the applicant
   - Whether the notification relates to a permanent discontinuance or an interruption in manufacturing.
   - Description of the reason for the discontinuance or interruption
   - Estimated duration of the interruption in manufacturing

3. Under 21 CFR 314.81(e) and 600.82(e) CBER may issue a noncompliance letter to an applicant who fails to submit a notification as required under the regulations.

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B. For all other CBER-regulated products, CBER encourages voluntary notification of a permanent discontinuance or an interruption in manufacturing that is likely to lead to a meaningful disruption in supply of that product in the United States, in the same manner as for CBER-regulated drugs (including biological products). Early notification concerning a permanent discontinuance or an interruption in manufacturing, enables CBER to work with a manufacturer, and may help to prevent or mitigate a product shortage. The most important way to prevent or mitigate a product shortage is for CBER to learn about a permanent discontinuance or an interruption in manufacturing as soon as possible. The sooner CBER is notified of a discontinuance or interruption in manufacturing, the more time CBER has between the disruption and the potential shortage to assist, where possible, in the best interest of public health.

C. The appropriate CBER Product Office - Office of Blood Research and Review (OBRR), and/or the Office of Tissues and Advanced Therapies (OTAT), and/or the Office of Vaccines Research and Review (OVRR) - will assist in identifying and gathering all necessary information about products for which there is a notification of an actual or potential shortage, and determine if the product is medically necessary, as appropriate.

D. The Office of Compliance and Biologics Quality (OCBQ) processes regulatory action recommendations. One of the many considerations in deciding on the appropriate action to take is the overall effect of the action on the availability of the products that are manufactured by the company that is the subject of the potential action. In matters of enforcement that could potentially result in shortages of CBER-regulated product(s), OCBQ will consult with CBER Product Offices and the Office of Regulatory Affairs (ORA) prior to concurring with any recommended action(s).

E. A decision on whether or not to take enforcement action is based on careful consideration of the impact of the violations on the quality of the product, the medical risks associated with the violations, and any other factor(s) that CBER may deem relevant.

1. Where agency actions may impact the supply of CBER-regulated products, CBER carefully considers the alternatives. In an event where agency action may impact the supply of products, CBER carefully considers whether to exercise enforcement discretion in taking action.

2. If CBER determines that the shortage of a CBER-regulated product is not compliance related, (e.g., manufacturing facility destroyed by fire, facility closed for renovations), special actions may be taken by CBER to help mitigate the shortage. Special actions may range from discussions with industry to acceleration of review activities or lot release.

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3. If CBER determines that the shortage of a CBER-regulated product is compliance-related (e.g., approved product does not meet any or all of the specification(s) in the license):

   a. CBER may consider whether or not to modify enforcement actions to address the impact on the availability of products. (In some circumstances, the agency may exercise enforcement discretion or facilitate an expedited review.)

   b. CBER may decide to modify enforcement actions based on careful consideration of the impact of the violation(s) on the quality of the product, the risks to the public that would result from use of the product versus inability of the public to use the product, and other factors CBER may deem relevant.

   c. CBER may consult with CBER Product Offices, Office of the Chief Counsel (OCC), and Office of CBER Director (OD).

   d. CBER may also consider taking special actions deemed relevant to the individual situation to help alleviate the shortage.

VI. Responsibilities

A. CBER Product Shortage Coordinator (PSC) - Office of Compliance and Biologics Quality (OCBQ), Immediate Office of the Director (IOD)

1. Receives all notifications, reports or inquiries of potential or actual product shortages including notifications of discontinuations that are likely to lead to a meaningful disruption in supply in the United States.

2. Evaluates each potential or actual product shortage notification, report or inquiry.

3. Verifies that an actual product shortage exists through communications with manufacturers and other stakeholders.

4. Determines if the notification of shortage was received at least 6 months prior to the date of the permanent discontinuance or interruption in manufacturing or, if 6 months' advance notice is not possible, notification was received as soon as practicable but no later than 5 business days after a permanent discontinuance or interruption in manufacturing was discovered.

5. Verifies that the notification of shortage includes:

   a. Name of the CBER-regulated product subject to the notification

   b. Name of the applicant or manufacturer

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c. Whether the notification relates to a permanent discontinuance or an interruption in manufacturing.

d. Description of the reason for the discontinuance or interruption

e. Estimated duration of the interruption in manufacturing

6. Communicates each potential or actual CBER-regulated product shortage notification to CBER product offices so that the product offices can evaluate the status of each new shortage notification and, when necessary, make a medical necessity determination of the product in shortage.

7. Ensures that product shortage information posted on the CBER-Regulated Products: Shortages and Discontinuations Web page is accurate and current.

8. Ensures that updated public information is posted on the CBER-Regulated Products: Shortages and Discontinuations Web page as soon as possible.

9. Communicates information to the appropriate stakeholders both within and outside of the Agency from first notification to resolution.

10. Monitors each product shortage situation until resolution.

11. Provides CBER's Office of Communication, Outreach and Development (OCOD) with information/materials, as appropriate.

12. Provides guidance on policy-level issues related to product shortages, as requested.

13. In conjunction with the Center for Drug Evaluation and Research (CDER) submits to Congress an annual report on drug shortages and FDA's efforts to address them.

14. Issues a noncompliance letter to an applicant who fails to submit a notification as required under 21 CFR 600.82(a) and (b) as appropriate.

B. CBER Product Offices (with product review responsibilities) - OBRR, OTAT, and OVRR

1. Evaluates the nature and status of each new shortage notification and, when necessary, makes a medical necessity determination of the CBER-regulated product in shortage.

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2. Regulatory Project Management (RPM) Branch Chief within the CBER Product Offices:

   a. Serves as the Office representative for the purposes of triaging the notification.

   b. Forwards the notification to the appropriate review personnel within the Office.

C. CBER Office of Communication, Outreach and Development (OCOD)

1. Forwards all notifications, reports and inquiries concerning CBER-regulated product availability to the PSC.

2. Posts the information concerning product shortages, as appropriate, on the CBER-Regulated Products: Shortages and Discontinuations Web page.

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1. Forwards all MedWatch and VAERS reports concerning actual or potential CBER-regulated product shortages to the PSC at [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"].

2. Assists the Product Offices and the PSC as necessary in assessing such reports.

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Program Divisions will:

1. Forward all information concerning CBER-regulated product shortage situations that do not involve compliance issues directly to the PSC via the product shortage email account at [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"] or via phone call at (240) 402-8380.

2. Alerts the PSC to all CBER-regulated product shortage situations involving compliance issues at [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"] or at (240) 402-8380.

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3. Works with CBER as necessary in determining the nature and scope of all CBER-regulated product shortage situations.

VII. Procedures

A. Forward all notifications, reports, or inquiries, including any related MedWatch and VAERS reports, concerning actual or potential product shortages to the CBER Product Shortage Coordinator (PSC) in OCBQ. **[CBER Product Office(s) (OBRR, OCBQ, OTAT, OVRR), OBE, OCOD, ORA and/or RPMs from Product Offices]**

1. If there is an emergency that requires immediate attention, the CBER staff member receiving the notification, report or inquiry will attempt to contact the PSC by phone at (240) 402-8380.

2. If the situation is not urgent, the person receiving the notification, report or inquiry will promptly send it to [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"].

B. Forward each notification of new shortage to the appropriate CBER Product Office RPM and/or contact person. **[PSC]**

C. Forward to appropriate review personnel within CBER Product Office. **[RPM]**

D. Evaluate the actual or potential product shortage. **[CBER Product Office(s) and PSC]**

The evaluation may include:

1. Data identifying manufacturers of similar versions of the product in shortage as well as data showing total units of product distribution in the United States (U.S.).

2. Inventory data of product available at the manufacturer(s) and major wholesalers throughout the U.S.

3. Reports of the 30-day back order status of the manufacturer.

4. Reports from health care personnel, consumers, trade or patient groups regarding current and projected product availability and demand.

5. A determination if the CBER-regulated product in shortage is medically necessary. This may include a formal request of medical necessity determination from the CBER Product Office with expertise on that CBER-regulated Product.

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a. Typically, if an alternative product compliant with FDA's current Good Manufacturing Practice regulations (cGMPs) exists, is in adequate supply, and could be used to treat the same serious disease or medical condition as the shortage product then the product may not be considered to be medically necessary.

b. If there is not an alternative product available, then the product may be considered to be medically necessary.

c. In certain instances when the decision about whether or not the product is medically necessary is particularly complex, the CBER Product Office representative will consult with CBER management, as appropriate.

6. A determination if the medically necessary product shortage is related to manufacturing and quality issues.

a. If CBER determines that the shortage of a medically necessary CBER-regulated product is not related to manufacturing and quality issues, (e.g., manufacturing facility destroyed by fire, facility closed for renovations, natural disaster), special actions may be taken by CBER to help mitigate the shortage.

Medical Necessity Determination:

Upon request of OCBQ, provide within five (5) working days of receipt of the shortage notification by the Product Office, a completed medical necessity determination via email to the CBER PSC at [HYPERLINK "mailto:CBERshortage@fda.hhs.gov"]. **[CBER Product Office POC]**

E. Submit public product shortage information to OCOD for posting in the CBER-Regulated Products: Current Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page and ensure posted information remains current. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;

2. Proprietary Name (Trade Name);

3. Manufacturer and Manufacturer Contact Information;

4. Product Availability and Estimated Shortage Duration (when known);

5. Shortage Reason (per FDASIA);

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6. Manufacturer recommendation(s) or additional information (if provided by the manufacturer) intended for public use (e.g. weblinks, phone numbers, etc);

7. Date shortage began and any dates when updates occurred.

G. Submit information concerning CBER-regulated products which have been determined to no longer be in shortage status to OCOD. Request for OCOD to remove posting from the CBER-Regulated Products: Current Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page and place new information (posting) in the CBER-Regulated Products: Resolved Shortages section of the CBER-Regulated Products: Shortages and Discontinuations Web page when the shortage has been determined to be resolved based on drug supply information provided from sponsor(s) or manufacturer(s). Generally, a shortage is considered to be resolved when all backorders have been filled and supply is once again meeting or exceeding demand. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;

2. Proprietary Name (Trade Name);

3. Manufacturer;

4. Manufacturer Contact Information;

5. Additional Information – which consists of a short summary of the reason for the shortage and any other helpful information;

6. Resolved Date.

H. Submit information concerning CBER-regulated products which the manufacturer has permanently discontinued and, as a result, CBER has determined may likely lead to a meaningful disruption in the supply of that product in the United States to OCOD for posting in the CBER-Regulated Products: Discontinuations section of the CBER-Regulated Products: Shortages and Discontinuations Web site and ensure posted information remains current. **[CBER PSC]**

The information to be supplied to OCOD for posting will include:

1. Product Name;

2. Proprietary Name (Trade Name);

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3. Manufacturer;

4. Manufacturer Contact Information;

5. Additional Information – which consists of a short summary concerning the reason for discontinuation and any new recommendations, instructions, etc.;

6. Discontinued Date.

I. Document all meetings, telecons, etc. and include in the OCBQ record system and/or the EDR, as appropriate. **[CBER PSC, RPM, Product Reviewer]**

VIII. Appendix

N/A

IX. References

A. References below may be found on the Internet:

1. [HYPERLINK "https://obamawhitehouse.archives.gov/the-press-office/2011/10/31/executive-order-13588-reducing-prescription-drug-shortages"]

2. [HYPERLINK "https://www.gpo.gov/fdsys/pkg/PLAW-112publ144/pdf/PLAW-112publ144.pdf"]

3. [HYPERLINK "https://www.fda.gov/regulatory-information/food-and-drug-administration-safety-and-innovation-act-fdasia/fact-sheet-drug-products-shortage-united-states"]

4. [HYPERLINK "https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section356c&num=0&edition=prelim"][HYPERLINK "https://www.fda.gov/media/86907/download"]

5. [HYPERLINK "https://www.gpo.gov/fdsys/pkg/FR-2015-07-08/pdf/2015-16659.pdf"]

6. [HYPERLINK "https://www.fda.gov/downloads/ICECI/Inspections/FieldManagementDirectives/UCM320662.doc"]

7. [HYPERLINK "https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/cber-regulated-products-current-shortages"]

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8. [HYPERLINK "https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/cber-regulated-products-permanent-discontinuations"]

X. History

Written/ Revised	Approved By	Approval Date	Version Number	Comment
M. Monser	N/A (Reviewed by JA Coordinator)	January 14, 2020	4	Technical Revision to Current Font/Format
J. Manik, A. Richardson, OCBQ	Christopher Joneckis, PhD	August 27, 2018	3	Revised to include new procedures as a result of new regulations
J. Manik, A. Richardson, OCBQ	Robert Yetter, PhD	March 29, 2012	2	Revised to include new procedures
M. Knippen, J. Davis, OCBQ	Robert Yetter, Ph.D.	January 2, 2004	1	Original

AMERICAN OVERSIGHT

From: Jeremy Pelter [Jeremy.Pelter@bis.doc.gov]
Sent: 3/12/2020 5:00:36 PM
To: Hull, Cordell [Cordell.Hull@bis.doc.gov]; Billy, Stephen [Stephen.Billy@bis.doc.gov]; Curtis, Deborah (Federal) [DCurtis@doc.gov]; Albanese, Eileen [Eileen.Albanese@bis.doc.gov]; Borman, Matthew [Matthew.Borman@bis.doc.gov]; Ashooh, Richard [Richard.Ashooh@bis.doc.gov]; Hassebrock, Douglas [Douglas.Hassebrock@bis.doc.gov]; Sonderman, John [John.Sonderman@bis.doc.gov]; Lopes, Alexander [Alexander.Lopes@bis.doc.gov]; NiesVogel, Karen [Karen.NiesVogel@bis.doc.gov]; Rose, Carol [Carol.Rose@bis.doc.gov]

Subject: BIS Leadership Check-In
Location: U/S Conference Room

Start: 3/12/2020 7:30:00 PM
End: 3/12/2020 8:00:00 PM
Show Time As: Tentative

Recurrence: (none)

An opportunity for our Senior Executive team to get together and discuss communications and planning related to COVID-19.

AMERICAN OVERSIGHT

From: Jeremy Pelter [Jeremy.Pelter@bis.doc.gov]
Sent: 3/12/2020 5:02:41 PM
To: Hull, Cordell [Cordell.Hull@bis.doc.gov]; Billy, Stephen [Stephen.Billy@bis.doc.gov]; Curtis, Deborah (Federal) [DCurtis@doc.gov]; Albanese, Eileen [Eileen.Albanese@bis.doc.gov]; Borman, Matthew [Matthew.Borman@bis.doc.gov]; Ashooh, Richard [Richard.Ashooh@bis.doc.gov]; Hassebrock, Douglas [Douglas.Hassebrock@bis.doc.gov]; Sonderman, John [John.Sonderman@bis.doc.gov]; Lopes, Alexander [Alexander.Lopes@bis.doc.gov]; NiesVogel, Karen [Karen.NiesVogel@bis.doc.gov]; Rose, Carol [Carol.Rose@bis.doc.gov]; Cys, Michael [Michael.Cys@bis.doc.gov]

Subject: BIS Leadership Check-In
Attachments: invite.ics
Location: U/S Conference Room

Start: 3/12/2020 7:30:00 PM
End: 3/12/2020 8:00:00 PM
Show Time As: Tentative

Recurrence: (none)

When: Thursday, March 12, 2020, 3:30 PM to 4:00 PM. Eastern Time
Where: U/S Conference Room

~~*~*~*~*~*~*~*~*~*

An opportunity for our Senior Executive team to get together and discuss communications and planning related to COVID-19.

AMERICAN OVERSIGHT

From: Jeremy Pelter [Jeremy.Pelter@bis.doc.gov]
To: Cordell Hull [Cordell.Hull@bis.doc.gov]; Stephen Billy [Stephen.Billy@bis.doc.gov]; Curtis, Deborah (Federal) [DCurtis@doc.gov]; Eileen Albanese [Eileen.Albanese@bis.doc.gov]; Matthew Borman [Matthew.Borman@bis.doc.gov]; Richard Ashooh [Richard.Ashooh@bis.doc.gov]; Douglas Hassebrock [Douglas.Hassebrock@bis.doc.gov]; John Sonderman [John.Sonderman@bis.doc.gov]; Alexander Lopes [Alexander.Lopes@bis.doc.gov]; Karen NiesVogel [Karen.NiesVogel@bis.doc.gov]; Carol Rose [Carol.Rose@bis.doc.gov]; Michael Cys [Michael.Cys@bis.doc.gov]

Subject: BIS Leadership Check-In
Location: U/S Conference Room

Start: 3/12/2020 7:30:00 PM
End: 3/12/2020 8:00:00 PM
Show Time As: Tentative

Recurrence: (none)

When: Thursday, March 12, 2020, 3:30 PM to 4:00 PM. Eastern Time
Where: U/S Conference Room

~~*~*~*~*~*~*~*~*~*

An opportunity for our Senior Executive team to get together and discuss communications and planning related to COVID-19.

AMERICAN OVERSIGHT

Sent: 2/28/2020 4:49:15 PM
To: Nikakhtar, Nazak [Nazak.Nikakhtar@trade.gov]
Subject: Re: Coronavirus Med/Pharma Spreadsheet

Very much so! Hearing will start soon.

On: 28 February 2020 08:46,
"Nazak Nikakhtar" <Nazak.Nikakhtar@trade.gov> wrote:

AMERICAN OVERSIGHT

Sent: 2/27/2020 2:14:05 PM
To: Hylton, Daniel (Federal) [DHylton@doc.gov]; Cobau, John (Federal) [jCobau@doc.gov]
Subject: Fwd: Personal Protective Equipment (PPE) and novel coronavirus

---

From: "Curtis, Deborah (Federal)" <DCurtis@doc.gov>
Subject: FW: Personal Protective Equipment (PPE) and novel coronavirus
Date: 26 February 2020 20:55
To: "Nikakhtar, Nazak" <Nazak.Nikakhtar@trade.gov>

AMERICAN OVERSIGHT

From: Jeremy Pelter [Jeremy.Pelter@bis.doc.gov]
Sent: 3/12/2020 3:45:25 PM
To: Jeremy Pelter [Jeremy.Pelter@bis.doc.gov]; Hull, Cordell [Cordell.Hull@bis.doc.gov]; Billy, Stephen [Stephen.Billy@bis.doc.gov]; Curtis, Deborah (Federal) [DCurtis@doc.gov]; Albanese, Eileen [Eileen.Albanese@bis.doc.gov]; Borman, Matthew [Matthew.Borman@bis.doc.gov]; Ashooh, Richard [Richard.Ashooh@bis.doc.gov]; Hassebrock, Douglas [Douglas.Hassebrock@bis.doc.gov]; Sonderman, John [John.Sonderman@bis.doc.gov]; Lopes, Alexander [Alexander.Lopes@bis.doc.gov]; NiesVogel, Karen [Karen.NiesVogel@bis.doc.gov]; Rose, Carol [Carol.Rose@bis.doc.gov]

Subject: BIS Leadership Check-In
Location: U/S Conference Room

Start: 3/12/2020 7:30:00 PM
End: 3/12/2020 8:00:00 PM
Show Time As: Busy

Recurrence: (none)

An opportunity for our Senior Executive team to get together and discuss communications and planning related to COVID-19.

AMERICAN OVERSIGHT

From: dcurtis@doc.gov
Sent: 4/10/2020 6:32:31 AM
To: dcurtis@doc.gov
Subject: TEST Hi- don't open this message yet

[8:27 PM] TEST Hi- don't open this message yet

AMERICAN OVERSIGHT

From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 4/9/2020 8:28:08 PM
To: Cys, Michael [Michael.Cys@bis.doc.gov]
Subject: Recall: TEST Hi- don't open this message yet

Curtis, Deborah (Federal) would like to recall the message, "TEST Hi- don't open this message yet".

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The Defense Priorities and Allocations System Training Course

AMERICAN OVERSIGHT

4/26/2017

Click here to begin

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Course Overview

This course introduces the Defense Priorities and Allocations System (DPAS), a regulation administered by the Department of Commerce (DOC) that implements the priorities and allocations authority contained in Title 1 of the Defense Production Act (DPA) of 1950.

The primary purpose of the DPAS regulation (15 CFR Part 700) is to ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements.

NOTE: To navigate to other pages, make a selection on the bottom right or left corners of the screen.

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Primary Audience

The primary audience for this course are individuals who work for companies that receive contracts, subcontracts, or purchase orders from the U.S. Government or from U.S. Government contractors.

In order to ensure the effectiveness of the DPAS, it is essential that any individual who works for a company that receives or places a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

This training outlines some of the basic requirements that a company must adhere to when accepting DPAS rated orders.

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Course Outline

The goal of this course is to provide a basic understanding of the DPAS and its implementation. The course includes the major topics listed below. Please select a topic to begin.

1. What is the DPAS?
2. Overview of the Priorities and Allocations Authorities
3. Who has been delegated DPAS rating authority from the DOC?
4. Step by Step Guide: Processing Rated Orders
5. Who must comply with the DPAS?
6. How do I get assistance in the event of a problem?
7. What official actions does DOC utilize to implement/enforce the DPAS Provisions?
8. How does the DOC ensure compliance with the DPAS regulation?
9. How does the DPAS provide me protection against claims?
10. Examples of DPAS Assistance
11. How is the DPAS used for Energy Programs?
12. Course Review
13. Frequently Asked Questions
14. DPAS Contact Information

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What is the DPAS?

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What is the DPAS?

The Defense Priorities and Allocations System (DPAS) is a regulation administered by the Department of Commerce (DOC).

The DPAS implements the Title 1 priorities and allocations authority contained in the Defense Production Act (DPA) of 1950, that has been delegated to the Secretary of Commerce.

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What is the DPAS?

- The DPAS is used to prioritize national defense-related contracts/orders throughout the U.S. supply chain in order to support:
  - military programs
  - energy programs
  - homeland security
  - emergency preparedness
  - critical infrastructure

- The use of the DPAS is not limited to crises, emergency, or armed conflict.

- The DPAS can also be used to provide military or critical infrastructure assistance to foreign nations.

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What is the DPAS?

The purpose of the DPAS is to:

- Ensure the timely availability of industrial resources (and associated services) to meet current national defense and emergency preparedness program requirements
- Provide authority to U.S. Government agencies (and other authorized persons/entities) to order priority performance (i.e., delivery) on contracts and orders as well as allocate materials to meet national security requirements
- Provide an operating system to support rapid industrial response in a national emergency
- Minimize disruption to normal commercial activities

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Overview of the Priorities and Allocations Authorities

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Overview of the Priorities and Allocations Authorities

The graphic below provides an overview of the priorities and allocations authorities. Select a box to learn more.

Defense Production Act of 1950, 50 U.S.C. 4501, et seq.

Title 1 of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, et seq.) is the President's primary authority to expedite production/delivery of critical industrial items from the private sector.

Executive Order 13603

The National Defense Resources Preparedness Executive Order (E.O. 13603) delegates this authority to various agencies and addresses national defense resource programs and policies under the DPA.

DPAS Regulation 15 CFR Part 700

The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

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Who has been delegated DPAS rating authority from the DOC?

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Who has been delegated DPAS rating authority from the DOC?

The DOC has delegated the authority to place priority ratings on contracts/orders (rated orders) necessary or appropriate to promote the national defense, in accordance with the DPAS regulation (15 CFR Part 700) to:

- Department of Defense (DOD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS)
  - Federal Emergency Management Agency (FEMA) is the DPAS lead agency within DHS
- General Services Administration (GSA)

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Who has been delegated DPAS rating authority from the DOC?

- The DOC may also authorize other persons (including U.S. government agencies; foreign governments; U.S. and foreign contractors, subcontractors, and suppliers; or owners/operators of critical infrastructure) to place rated orders on a *case-by-case basis.*

- Such requests must first be determined as necessary or appropriate to promote the national defense by DOD, DOE, or DHS.



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Step by Step Guide:
Processing Rated Orders

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Step by Step Guide:
Processing Rated Orders

Below are the five important steps to processing rated orders. Select each step to learn more.

Step 1: What is a Rated Order and What Does it Mean for My Company?
Step 2: Identify Key Elements of Rated Order
Step 3: Accept or Reject the Rated Order
Step 4: Preferential Scheduling
Step 5: Extension of Priority Ratings

To learn additional information and important notes, please select the topics below:

- Additional Information
- Important Notes

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Who must comply with the DPAS?

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Who must comply with the DPAS?

- All companies in the United States must comply with the provisions of the DPAS regulation.

- Any person who places or receives a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

The following slides will provide additional information regarding the DPAS as well as a representation of the basic requirements that a person must adhere to when accepting DPAS rated orders.

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How do I get assistance in the event of a problem?

Special Priorities Assistance

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Special Priorities Assistance

- The DPAS is designed to be largely self-executing; however, problems may arise from time-to-time.
- In the event of a problem, a person should immediately contact the appropriate contact administration officer for guidance or assistance.
- If additional formal aid is needed, special priorities assistance (SPA) should be sought from the Delegate Agency through the contract administration officer.

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Special Priorities Assistance

- SPA can be provided for any reason in support of the DPAS regulation, such as:
  - Assisting in obtaining timely deliveries of items needed to satisfy rated orders
  - Authorizing the use of priority ratings on orders to obtain items not normally ratable under this regulation

- A request for special priorities assistance or priority rating authority must be submitted on Form BIS-999 to the local contract administration representative.
  - Form BIS-999 may be obtained from the Delegate Agency representative or from the Department of Commerce.
  - A sample of Form BIS-999 can be found here.

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Special Priorities Assistance

The following topics are covered in the DPAS regulation regarding SPA. Please select a topic to learn more:

- Requests for Priority Rating Authority (15 CFR § 700.51)
- Examples of Assistance (15 CFR § 700.52)
- Criteria for Assistance (15 CFR § 700.53)
- Instances where assistance will not be provided (15 CFR § 700.54)
- Assistance programs with Canada and other nations (15 CFR § 700.56)

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What official actions does DOC utilize to implement/enforce the DPAS Provisions?

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Official Actions

When necessary, the Department of Commerce may take specific official actions to implement or enforce the DPAS regulation, including the issuance of:

- Rating Authorization (15 CFR Part § 700.61)
- Directives (15 CFR Part § 700.62)
- Letters of Understanding (15 CFR Part § 700.63)

Please select on each topic above for more information.

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How does the DOC ensure compliance with the DPAS regulation?

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DPAS Compliance

Compliance with the DPAS regulation is outlined in 15 CFR § 700.70-75:

- DOC works closely with the DPAS Delegate Agencies (DOD, DOE, and DHS) to ensure compliance with DPAS regulation.

- Willful violation of the provisions of Title I or Sections 705 or 707 of the DPA, the priorities provisions of the Selective Service Act and related statutes or this part is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the DPA is $10,000 fine, or one year in prison, or both.

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How does the DPAS provide me protection against claims?

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Protection Against Claims

Protection against claims related to DPAS implementation is outlined in 15 CFR § 700.90:

- A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with the DPAS or official DPAS action.

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Examples of DPAS Assistance

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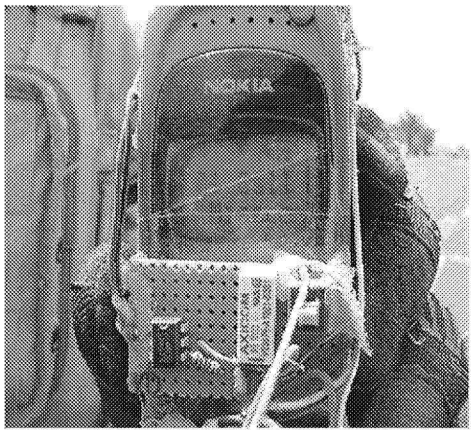
Examples of DPAS Assistance

DOC works closely with DOD to ensure materials to support critical programs receive appropriate priority.

<u>Examples of DPAS assistance in Iraq and Afghanistan:</u>

- Body Armor
- Mine Resistant Ambush Protected vehicles
- Counter-Improvised Explosive Devices







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Examples of DPAS Assistance

Foreign Requests:

- Resolving delivery delays for critical items (e.g., night vision/thermal imaging equipment, ammunition, aircraft spare parts)
- Supporting NATO operations in Afghanistan and counter-terrorism activities
- Requests supporting non-binding *"Security of Supply"* arrangements with foreign partners that provide for reciprocal priorities support
- Requests from non-Security of Supply foreign partners





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Examples of FEMA Approved Assistance

- Federal emergency preparedness, mitigation, response, and recovery
- State, local, tribal government emergency preparedness, mitigation, response, and recovery
- Intelligence and warning systems
- Border and transportation security
- Domestic counter-terrorism, including law enforcement
- Chemical, biological, radiological, and nuclear countermeasures
- Critical infrastructure protection and restoration



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How is the DPAS used for Energy Programs?

Industrial Priorities for Energy Programs

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Industrial Priorities for Energy Programs

The DPA authorizes the use of priority ratings for projects which maximize domestic energy supplies. These projects are outlined in the DPAS regulation (15 CFR § 700.20) and include:

- Those which maintain or further domestic energy exploration, production, refining, and transportation;
- Maintain or further the conservation of energy; or
- Are involved in the construction or maintenance of energy facilities.

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Industrial Priorities for Energy Programs

The DPAS regulation (15 CFR § 700.21) outlines the application process for a priority rating authorization for an energy program.

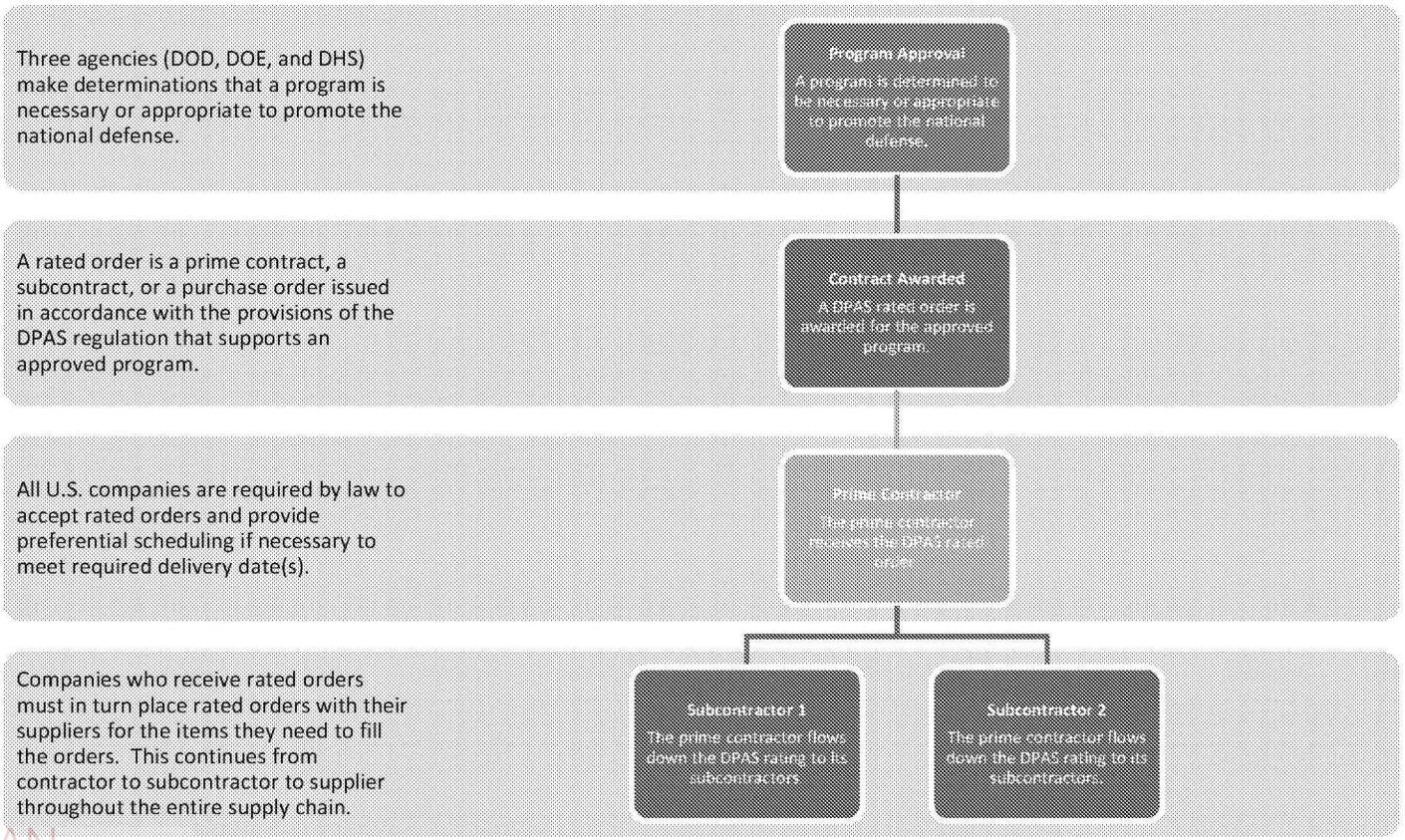
- For projects believed to maximize domestic energy supplies, a person may request priority authority for scarce, critical, and essential supplies of materials, equipment, and services (related to the production of materials or equipment, or the installation, repair, or maintenance of equipment) by submitting a request to the DOE.
- If the DOE notifies the DOC that the project maximizes domestic energy supplies and that the materials, equipment, or services are critical and essential, the DOC will determine whether the items in question are scarce, and, if they are scarce, whether there is a need to use the priority rating.
- After the DOC has conducted its analysis, it will advise the DOE of its findings as outlined in the regulation. If the findings are satisfied, the DOC will authorize the DOE to grant the use of a priority rating to the applicant.
- Schedule I of the DPAS regulation includes a list of approved programs to support the maximization of domestic energy supply. A DOE regulation setting forth the procedures and criteria used by the DOE in making its determination and findings is published in 10 CFR Part 216.

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Course Review

Below is a quick review of the rated contract or order process. To review other specific topics, you may return to the Course Outline by clicking below.



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Frequently Asked Questions

Q: May I accept a rated order contingent upon obtaining necessary production materials or equipment?

A: *No. Rated orders may not be accepted on a contingent basis. If you cannot meet the required delivery date, you must inform your customer of the earliest date on which delivery can be made, and offer to accept the order on the basis of that date.*

Q: If I encounter production or shipment conflicts following acceptance of several rated orders of equal priority status that will result in delayed delivery or performance against one or more orders, which of the conflicting orders should be given delivery or performance preference?

A: *You should give preference to order or orders in the sequence in which delivery or performance is required. For conflicting rated orders received on the same day, you should give preference to the order or orders with the earliest receipt date. If you cannot otherwise resolve the delivery or performance conflict, or if your customer objects to the rescheduling of the delayed order, you should promptly request special priorities assistance (SPA). For any order that will be delayed, you must notify your customer as provided in 15 CFR § 700.13(d)(3) of the DPAS regulation. Conflicting rated orders are discussed in section 700.14(c) of the DPAS regulation.*

Q: Can my suppliers charge a higher price to produce, deliver, or perform against my rated order?

A: *No. Your supplier may not discriminate against your rated order in any manner. Nor may the supplier impose any different terms or conditions than for comparable unrated orders.*

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Frequently Asked Questions

Q: May I use a rated order to purchase finished items, components, or production materials from a foreign supplier?

A: *No. The DPAS, and therefore priority ratings, has no legal standing outside of the United States. However, if you need assistance to obtain items from a supplier in Canada, you must submit a request through the Delegate Agency to the DOC/BIS's Office of Strategic Industries and Economic Security (SIES) on form BIS-999.*

If you need assistance to obtain items from a supplier in Australia, Finland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom, you should contact the Department of Defense DPAS Lead in the Office of Deputy Assistant Security of Defense for Manufacturing and Industrial Base Policy (MIBP). Please see 15 CFR § 700.57 (c) for more information.

Q: If my supplier refuses to accept or comply with a rated order, what should I do?

A: *You should attempt to obtain the reason for the refusal in writing. If the reason conforms to any of the provisions in section 700.13 (b) or (c) of the DPAS regulation, you should first seek an alternative source of supply. If there is no alternative source that can meet your requirements, you should promptly contact your customer or DOC/BIS. If the supplier refuses to give a reason or the reason does not conform to the provisions of section 700.13, you should promptly contact your customer or DOC/BIS.*

Q: Must I accept a rated contract or order from a customer with whom I have never done business?

A: *Yes. Except as provided in the DPAS in 15 CFR § 700.13, you must accept and fill all rated orders you receive.*

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Frequently Asked Questions

Q: If by accepting a rated order I must delay delivery against unrated orders, am I protected against claims for my customers for damages caused by this delay?

A: *Yes. Such protection is provided under Section 707 of the Defense Production Act of 1950. See section 700.90 of the DPAS. You may not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the statute, the DPAS, or a Directive issued by DOC/BIS.*

Q: If I use inventoried items to fill a rated order, may I replace those items by using a rated order?

A: *Yes. You may use a rated order to replace inventoried items if you place the order with your supplier within 90 days of the date of use of the items. However, you may only use the DO rating symbol on the order, even if the customer's order was DX.*

Q: To Fill a rated order, I need to purchase a quantity of items that is less than my supplier's minimum (commercially procurable) quantity. Is my supplier obligated to accept and fill a rated order for such quantity?

A: *No. However, as provided in section 700.17(e) of the DPAS and if reasonable to do so, you may place a rated order for the minimum commercially procurable quantity. If possible, you must combine rated orders to the supplier as provided in section 700.17(c) and (d).*

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Frequently Asked Questions

Q: May foreign entities (government agencies or contractors) place rated orders with U.S. suppliers?

A: *Yes. Foreign entities may place rated orders with U.S. suppliers only with express written authorization of DOC/BIS on a case-by-case basis where the procurement is deemed to be in the U.S. national defense interest. Special rules apply to the use of rated orders in the U.S. by the Canadian Government and authorized Canadian contractors. Sections 700.56 and 700.57 provide more information regarding these provisions.*

Q: Who is authorized to include priority ratings on contracts and purchase orders?

A: *Certain U.S. Government agencies and the Canadian Government are authorized by the DOC to include priority ratings on contracts and orders placed with U.S. contractors and suppliers in support of approved national defense programs. DPAS Schedule 1 lists the currently approved programs and the agency responsible for each program.*

Q: Must a rated order be in writing or may I give it verbally to my supplier over the phone? May it be placed electronically?

A: *Rated orders may be placed with suppliers either in writing or electronically. Regardless of common industry practice, if the order is given verbally, it must be followed-up immediately either in writing or electronically. The elements of a rated order are discussed in 15 CFR § 700.12.*

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DPAS
Contact Information

U.S. Department of Commerce
Bureau of Industry and Security
Office of Strategic Industries &
Economic Security
Defense Programs Division
(202) 482-3634
DPAS@bis.doc.gov
www.bis.doc.gov/dpas

U.S. Department of Defense
Office of the Under Secretary of Defense
Acquisition, Technology, & Logistics
Manufacturing & Industrial
Base Policy
(571) 372-6279
DPAS@osd.mil
www.acq.osd.mil/mibp/titleOne

U.S. Department of Homeland Security
Federal Emergency Management Agency
Office of Policy & Program Analysis
Defense Production Act Program Division
FEMA-OPPA-DPA@fema.dhs.gov

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End of Training Course

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Appendix A:

Overview of Priorities and Allocations Authorities

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Defense Production Act

- The DPA was enacted at the start of the Korean War as part of a broad war and civil defense mobilization effort. The DPA was created to ensure the availability of the country's industrial resources to address national security requirements.

- The DPA authorities are time-limited and undergo periodic amendment and reauthorization. The DPA Reauthorization of 2014 is through September 30, 2019.

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Defense Production Act

Under Title I of the DPA, the President is authorized to require:

- Preferential acceptance and performance of contracts or orders (other than contracts of employment) supporting certain approved national defense and energy programs

- To allocate materials, services, and facilities in such a manner as to promote these approved programs

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Defense Production Act

The DPA's definition of "national defense" includes programs for:

- Military and energy production or construction
- Military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity

The definition also includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, et seq.) and critical infrastructure protection and restoration.

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Defense Production Act

Title 1 of the DPA is the statutory basis for the National Defense Resources Preparedness Executive Order (Executive Order 13603) and the DPAS Regulation (15 CFR Part 700).

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Executive Order 13603

- The purpose of the National Defense Resources Preparedness executive order (Executive Order 13603) is to delegate authority and address national defense resource programs and policies under the DPA.

- Executive Order 13603 provides the framework for the allocation of resources, services, and materials to promote the national defense.

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Executive Order 13603

Section 201 of Executive Order 13603 delegates the authority granted to the President by the DPA (i.e., to require preferential acceptance and performance of contracts/orders for approved programs, and to allocate materials, services, and facilities to promote these approved programs) to the following Federal agencies:

	Agriculture (USDA) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer		**Defense (DOD)** Water Resources
	Energy (DOE) All Forms of Energy		**Transportation (DOT)** All Forms of Civil Transportation
	Health and Human Services (HHS) Health Resources		**Commerce (DOC)** All Other Materials, Services, and Facilities (including Construction Materials) Generally called "Industrial Resources"

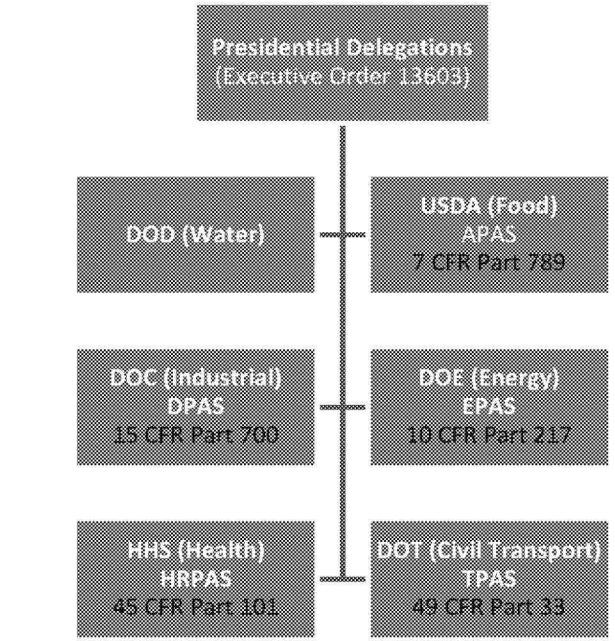
DPAS

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Executive Order 13603

Each department, except the Department of Defense (DOD), that has been delegated DPA authority has issued regulations. Each department's regulation covers only their delegated resources outlined in Section 201. For example, health resources are outside DPAS jurisdiction.

The figure to the right lists the citations for each department's regulation.



APAS – Agricultural Priorities and Allocations System
DPAS – Defense Priorities and Allocations System
EPAS – Energy Priorities and Allocations System
HRPAS – Health Resources Priorities and Allocations System
TPAS – Transportation Priorities and Allocations System

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Executive Order 13603

Section 202 of Executive Order 13603 authorizes three agencies to make the determination that a program is necessary or appropriate to promote the national defense:

- Defense – regarding military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense (DOD), space, and directly related activities

- Energy – regarding energy production and construction, distribution and use, and directly related activities

- Homeland Security – regarding all other national defense programs, including civil defense and continuity of Government.

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Executive Order 13603

- Section 201 of Executive Order 13603 authorizes the Secretary of Commerce to re-delegate the authority for the priority rating of contracts and orders for all industrial materials, services, and facilities needed in support of programs approved under Section 202.

- The DOC implements this authority through the DPAS regulation (15 CFR Part 700).

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DPAS Regulation: 15 CFR Part 700

- The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

- The DPAS regulation establishes procedures which requires preferential acceptance and performance of contracts or orders for industrial resources supporting certain national defense and energy programs. The regulation also instructs the public on the DPAS process and their obligations.

- This regulation is administered by DOC's Bureau of Industry and Security (BIS), and is used, as authorized by DOC/BIS, by other Federal departments, agencies, and industry.

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Appendix B:

Guide to Applying the DPAS to Contracts and Orders – Additional Information

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Step 1

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

- A rated order is a prime contract, a subcontract, or a purchase order issued in accordance with the provisions of the DPAS regulation that supports an approved program.
- U.S. companies are required by law to accept "rated orders" and provide preferential scheduling if necessary to meet required delivery date(s).
- Rated orders take preference over all unrated orders as necessary to meet required delivery dates; therefore, persons are required to reschedule unrated orders if they conflict with performance against a rated order.
- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill these orders.
- To learn about rated orders, click here.

Prime Contract/Purchase Order

When a company is awarded a U.S. Government (USG) contract or purchase order, it must determine whether the contract/purchase order is rated.

Subcontract/Flow-Down Purchase Order

When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

Prime Contract/Purchase Order

- For a prime contract/purchase order, a company will most likely receive a standard acquisition form known as the SF-33 (Solicitation, Offer and Award Form).
- On a SF-33, a company can determine whether they have received a rated order by looking at Block 1 of the form. If it is a rated order, a priority rating will be given. Click here for an example of this form.
- *NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating must be given. Certain exceptions apply.*

Subcontract/Flow-Down Purchase Order

- When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.
- For a subcontract/flow-down purchase order, there should be language in the contract/purchase order indicating that it is rated order and a priority rating should be given.

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Rated Order: Important Notes

- DPAS provisions are a standard part of U.S. defense contracting process.
- The DPAS is a standard clause in DOD contracts/orders.
- The DOD uses DPAS authority delegated to it by the DOC to place ratings on approximately 300,000 contracts annually. The Departments of Commerce and Defense estimate that, in addition, approximately 400,000 rated orders are "flowed down" annually through the supply chain to support those rated orders.
- Orders through DOD's Foreign Military Sales program are usually priority rated.
- Direct commercial sales to foreign persons are NOT priority rated unless authorized by DOC.



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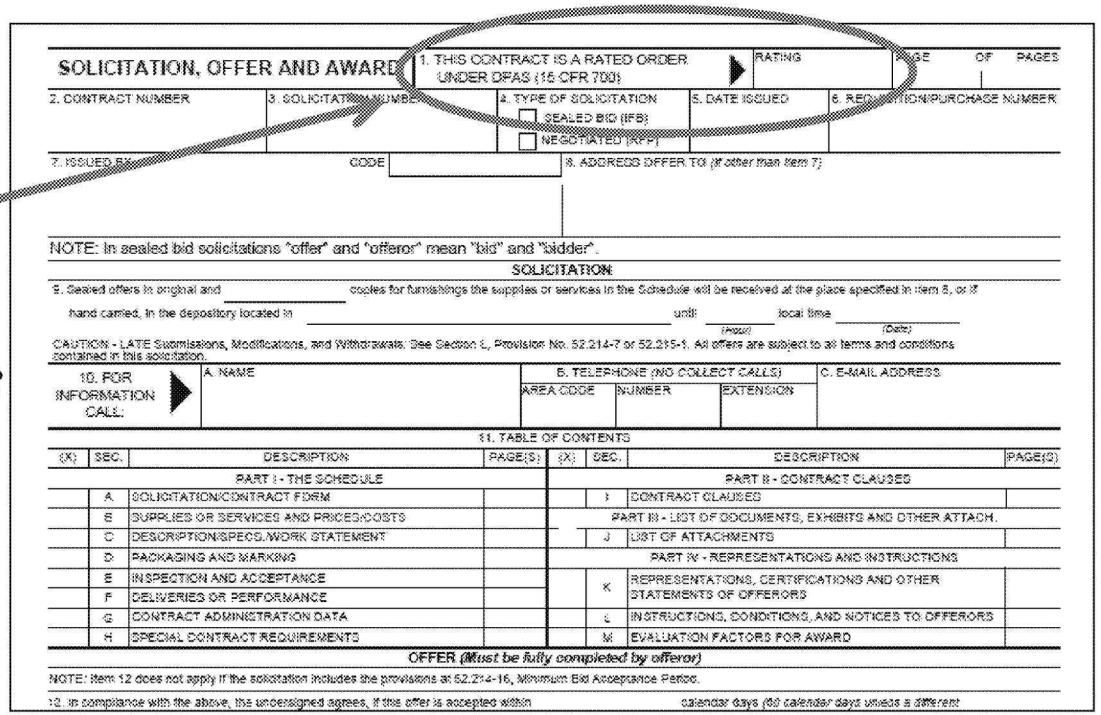
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Example of SF-33

Block 1 of the SF-33 indicates if the contract/purchase is a rated order.

NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating should be given.



SOLICITATION, OFFER AND AWARD | 1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) | RATING | PAGE OF PAGES

2. CONTRACT NUMBER | 3. SOLICITATION NUMBER | 4. TYPE OF SOLICITATION ☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP) | 5. DATE ISSUED | 6. REQUISITION/PURCHASE NUMBER

7. ISSUED BY | CODE | 8. ADDRESS OFFER TO (If other than Item 7)

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and ____ copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in ____ until ____ (Hour) local time ____ (Date)

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL: | A. NAME | B. TELEPHONE (NO COLLECT CALLS) AREA CODE / NUMBER / EXTENSION | C. E-MAIL ADDRESS

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if the offer is accepted within ____ calendar days (60 calendar days unless a different

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Step 2

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Step 2: Identify Key Elements of Rated Order

If a company is in receipt of a rated contract or purchase order, the company must identify the four key elements of a rated order outlined in 15 CFR § 700.12 and listed below. These four elements must appear on every contract, purchase order, or delivery order. If they do not appear, the company should request a completed rated order from the customer.

To learn more about these key elements, select an element:

1. Priority Rating
2. Required Delivery Date(s)
3. Authorized Written or Digital Signature
4. A Certification Statement

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Priority Rating

15 CFR § 700.11

Rated orders are identified by a priority rating. A priority rating consists of the rating symbol and a program identification symbol.

Priority Rating = (Rating Symbol) + (Program ID Symbol)

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Priority Rating

15 CFR § 700.11

There are two levels of priority established by the DPAS regulation, identified by the rating symbols "DX" and "DO":

1. DX – All DX rated orders have equal priority and take preference over DO and unrated orders (based on shipment schedule).

2. DO – All DO rated orders have equal priority and take preference over unrated orders (based on shipment schedule).

Note: DX ratings can only be approved by the Secretary of Defense or the Deputy Secretary of Defense. For a list of programs authorized to use DX industrial priority ratings, click here.

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DOD List of DX-Rated Programs

DOD components are currently authorized to use DX industrial priority ratings in support of the following programs:

Department of Defense:
- Program 390
- Integrated Ballistic Missile Defense System

Department of Navy:
- Presidential Helicopters (VH-3D, VH-60N)
- Fleet Ballistic Missile Weapons System, Trident System
- Program 341

Department of Air Force:
- Space-Based Infrared System (SBIRS) High
- Intercontinental Ballistic Missile, Minuteman III
- B-2 Stealth Bomber
- VC-25A Presidential Aircraft

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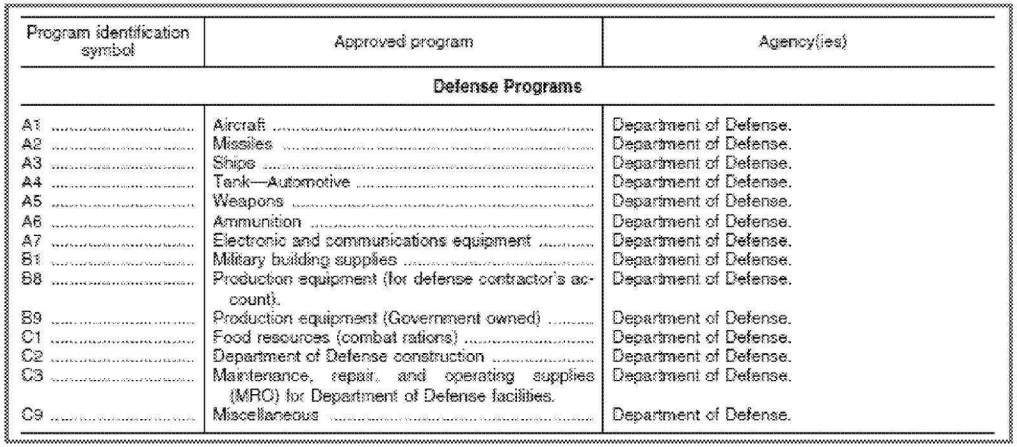
Priority Rating

15 CFR § 700.11

Program identification symbols indicates which approved program is being supported by a rated order.

- The list of approved programs and their identification symbols are listed in Schedule 1 of the DPAS regulation (15 CFR Part 700). Companies must ensure the symbol used is valid.
- It is also important to note that program identification symbols, in themselves, do not connote any priority.

Below are examples of program identification symbols for defense programs. You can find the complete list by clicking the image below.



Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.

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Schedule I to Part 700

Approved Programs and Delegate Agencies

Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.
	Military Assistance to Canada	
D1	Canadian military programs	Department of Commerce.
D2	Canadian production and construction	Department of Commerce.
D3	Canadian atomic energy program	Department of Commerce.
	Military Assistance to Other Foreign Nations	
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export.	Department of Commerce.
G2	Certain direct defense needs of foreign governments other than Canada.	Department of Commerce.
G3	Foreign nations (other than Canada) production and construction.	Department of Commerce.

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Schedule I to Part 700

Approved Programs and Delegate Agencies (continued)

Critical Infrastructure Assistance to Foreign Nations		
G4	Foreign critical infrastructure programs	Department of Commerce.
Co-Production		
J1	F–16 Co-Production Program	Departments of Commerce and Defense.
Atomic Energy Programs		
E1	Construction	Department of Energy.
E2	Operations—including maintenance, repair, and operating supplies (MRO).	Department of Energy.
E3	Privately owned facilities	Department of Energy.
Domestic Energy Programs		
F1	Exploration, production, refining, and transportation.	Department of Energy.
F2	Conservation	Department of Energy.
F3	Construction, repair, and maintenance	Department of Energy.
Other Defense, Energy, and Related Programs		
H1	Certain combined orders (see section 700.17(c))	Department of Commerce.
H5	Private domestic production	Department of Commerce.
H6	Private domestic construction	Department of Commerce.
H7	Maintenance, repair, and operating supplies (MRO).	Department of Commerce.
H8	Designated Programs	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Program identification symbol	Approved program	Agency(ies)
K1	Federal supply items	General Services Administration.
	Homeland Security Programs	
N1	Federal emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N3	Intelligence and warning systems	Department of Homeland Security.
N4	Border and transportation security	Department of Homeland Security.
N5	Domestic counter-terrorism, including law enforcement.	Department of Homeland Security.
N6	Chemical, biological, radiological, and nuclear countermeasures.	Department of Homeland Security.
N7	Critical infrastructure protection and restoration	Department of Homeland Security.
N8	Miscellaneous	Department of Homeland Security.

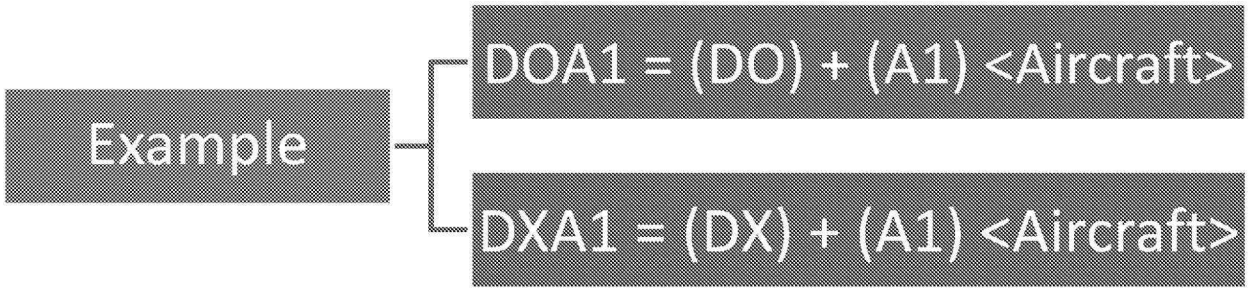
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Priority Rating

15 CFR § 700.11

Example of a Priority Rating:

If a company receives a rated order on a contract for the production of an aircraft, the order will will contain a DO-A1 or DX-A1 priority rating.



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Required Delivery Date(s)

- Rated orders are required to have a delivery date or dates.
- The words “immediately” or “as soon as possible” do not constitute a delivery date.
- A ‘‘requirements contract’’, ‘‘basic ordering agreement’’, ‘‘prime vendor contract’’, or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items from time-to-time or within a stated period against specific purchase orders, such as ‘‘calls’’, ‘‘requisitions’’, and ‘‘delivery orders’’.
  - These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document.

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Authorized Written or Digital Signature

- The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order is required.

- The signature or use of the name certifies that the rated order is authorized under the DPAS regulation and that the requirements of the DPAS regulation are being followed.

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Certification Statement

A certification statement is required on the rated order and should read in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR Part 700).

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Certification Statement

If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in §700.13(d)(2)].

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Step 3

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Step 3: Accept or Reject the Rated Order

Once a company has identified that they have received a rated order, the company must either accept or reject the order and provide customer notification according to the instructions provided in the DPAS regulation (15 CFR § 700.13).

Please select one of the topics below to learn more:

- Mandatory Acceptance
- Mandatory Rejection
- Optional Rejection
- Customer Notification Requirements

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Mandatory Acceptance

15 CFR § 700.13 (a)

- Any company in the United States must accept and fill a rated order for items that the company normally supplies.
- A company may not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.
- If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.

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Mandatory Rejection

15 CFR § 700.13 (b)

- A company may not accept a rated order for delivery on a specific date it is unable to meet that date.
  - However, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date.

- The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order.

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Optional Rejection

15 CFR § 700.13 (c)

A company may reject a rated order in any of the following cases as long as it does not discriminate among customers:

1. If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
2. If the order is for an item not supplied or a service not performed.
3. If the order is for an item produced, acquired, or provided only for the company's own use for which no orders have been filled for two years prior to the date of the receipt of the rated order. If, however, the company has sold some of these items, it must accept rated orders up to the quantity or portion of production, whichever is greater, sold within the past two years.
4. If the customer placing the order, other than the U.S. Government, makes the item or performs the service being ordered.

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Customer Notification Requirements

15 CFR § 700.13 (d)(1)

- A company must accept or reject a rated order in writing (hard copy), or in electronic format, to the customer placing the order within 15 working days after receipt of a DO rated order and 10 working days after receipt of a DX rated order.

- If the order is rejected, a company must provide the reasons in writing for the rejection.

- If a company has accepted a rated order and subsequently finds that the shipment or performance will be delayed, the company must notify the customer immediately, give the reasons for the delay, and advise of new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

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Customer Notification Requirements

15 CFR § 700.13 (d)(2)

- If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, and the order includes the statement set forth in 700.12(b), a company must accept or reject the rated order (in writing or electronically).
  - If the order is issued by an authorized person in response to a hazard that has occurred, the minimum time for acceptance or rejection is six hours after receipt.
  - If the order is issued by an authorized person to prepare for an imminent hazard, the minimum time for acceptance or rejection is 12 hours after receipt.

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Step 4

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Step 4: Preferential Scheduling

- Once a company has accepted a rated order, it must then schedule operations, including the acquisition of all needed production items, in order to satisfy the delivery requirements of each rated order.
- Companies are required to reschedule unrated orders if they conflict with performance against a rated order and must reschedule DO rated orders if they conflict with performance against a DX rated order.
- The DPAS regulation (15 CFR § 700.14) describes the requirements for preferential scheduling in further detail.
- Click here for examples of how preferential scheduling would be applied.

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Preferential Scheduling Examples

Below are examples of how preferential scheduling would be applied:

- Example 1: If a company receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed.

- Example 2: If a DX rated order is received calling for delivery on July 15 and a company has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order.

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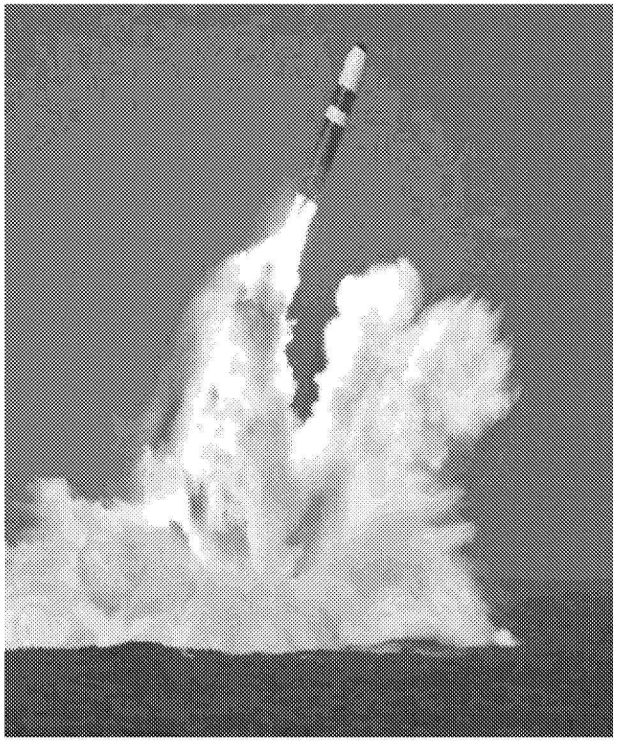
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Step 5

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Step 5: Extension of Priority Ratings

- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the rated orders.
- This continues from contractor to subcontractor to supplier throughout the entire supply chain.
- Companies must use the priority rating indicated on the customer's rated order, except as otherwise provided in the DPAS regulation or as directed by the DOC.



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Step 5: Extension of Priority Ratings

- A person is not required to place a priority rating on an order for less than $75,000, or on half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations(FAR)), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

- More information regarding extension of priority ratings can be found in 15 CFR § 700.15.

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Additional Information

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Additional Information

The DPAS Regulation provides additional information that a company in receipt of a rated order should be aware of. Select the topics below to learn more:

- Changes or Cancellations of Priority Ratings and Rated Orders (15 CFR § 700.16)
- Use of Rated Orders (15 CFR § 700.17)
- Limitations on Placing Rated Orders (15 CFR § 700.18)
- Records and Reports (15 CFR § 700.91)

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Additional Information:
Changes or Cancellations

The DPAS Regulation (15 CFR § 700.16) identifies how priority ratings and rated orders may be changed or cancelled. For example:

- The priority rating on a rated order may be charged or cancelled by:
  - An official action of the Department of Commerce
  - Written notification from the person who placed the rated order (including a Delegate Agency)

- If an unrated order is amended to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

- An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 700.13.

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Additional Information:
Changes or Cancellations

Examples continued:

- The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

- If a person no longer needs items to fill a rated order, any rated orders placed with suppliers for the items, or the priority rating on those orders, must be cancelled.

- When a priority rating is added to an unrated order, or is changed or cancelled, all suppliers must be promptly notified in writing.

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Additional Information:
Use of Rated Orders

The DPAS Regulation (15 CFR § 700.17) identifies how rated orders must, and can, be used.

Below are a few examples of the instructions found in 15 CFR § 700.17:

- A company must use rated orders to obtain:
  - Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;
  - Containers or other packaging materials required to make delivery of the finished items against rated orders;
  - Services, other than contracts of employment, needed to fill rated orders; and
  - MRO needed to produce the finished items to fill rated orders.

- A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:
  - The order must be placed within 90 days of the date of use of the inventory.

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Back to Additional Information

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Additional Information:
Limitations on Placing Rated Orders

The DPAS regulation (15 CFR § 700.18) outlines limitations on placing rated orders. Such limitations include:

- A person may not place a DO or DX rated order unless entitled to do so under the DPAS regulation.

- Rated orders may not be used to obtain:
  - Delivery on a date earlier than needed,
  - A greater quantity of the item than needed (with exception), or
  - Items in advance of the receipt of a rated order (with exception).

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Additional Information:
Records and Reports

The DPAS regulation (15 CFR § 700.91) outlines the recordkeeping and reporting requirements a company must adhere to.

Below are a few examples of the important requirements:

- A company is required to make and preserve for at least three years, accurate and complete records for any transaction covered by DPAS regulation or an official action.

- Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action.

- Records required to be maintained must be made available for examination on demand by duly authorized representatives of the DOC.

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Important Notes

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Important Notes

- Immediately notify the customer when you can't meet a delivery date, such as a DX request is received that overrides a DO request.

- If a company notifies the customer verbally, they should provide written notification one working day later.
  - This could trigger a Special Priorities Assistance (SPA) Request. SPAs will be covered in this training.

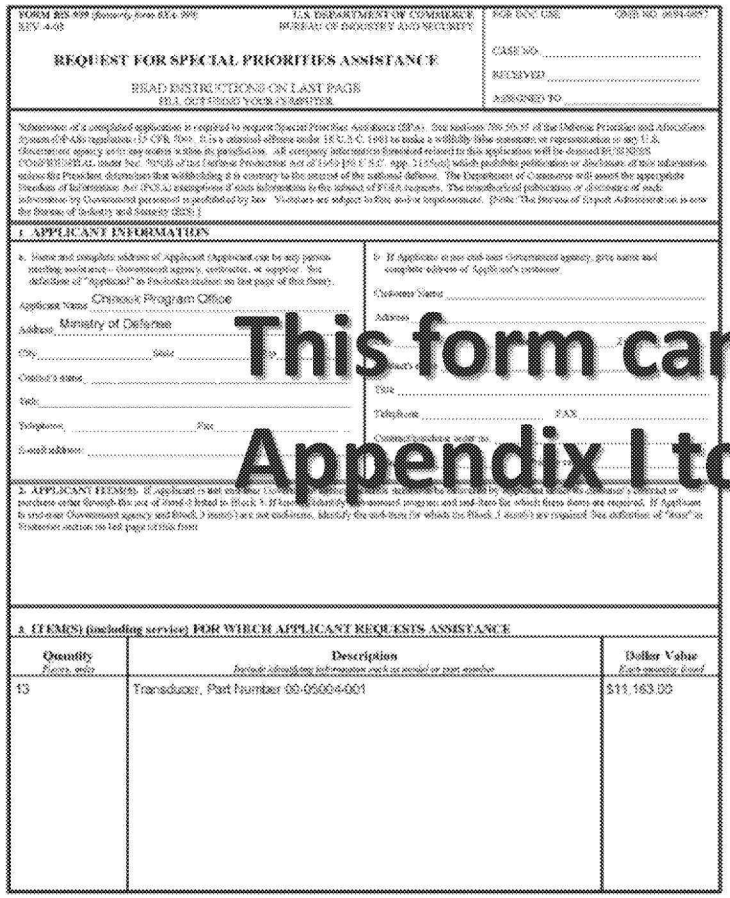
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Appendix C:

Special Priorities Assistance

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Example:
SPA Form BIS-999



FORM BIS-999 (formerly Form ITA-999) REV. 4-05

U.S. DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

FOR INT. USE: OMB NO. 0694-0057

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

READ INSTRUCTIONS ON LAST PAGE
FILL OUT FORM TYPE OR PRINTER

CASE NO.
RECEIVED
ASSIGNED TO

Submission of a completed application is required to request Special Priorities Assistance (SPA). See sections 700.50 et. of the Defense Priorities and Allocations System (DPAS) regulation (15 CFR 700). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency over any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 (50 U.S.C. app. 2155(d)) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Commerce will assert the appropriate exemptions to the Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment. [Note: The Bureau of Export Administration is now the Bureau of Industry and Security (BIS).]

1. APPLICANT INFORMATION

a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of "Applicant" in Definitions section on last page of this form).

Applicant Name: Chinook Program Office
Address: Ministry of Defense
City: State:
Contact's name:
Title:
Telephone: Fax:
E-mail address:

b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.

Customer Name:
Address:
City: State:
Contact's name:
Title:
Telephone: FAX:
Customer's order or reference number:

2. APPLICANT ITEMS: If Applicant is not end-user Government agency, identify the end-item for which the Block 3 item(s) are required or purchase order through the use of which listed in Block 3. If more than one shipment/end-item is involved, identify the end-item for which items listed are required. If Applicant is end-user Government agency and Block 3 item(s) are for stockpile, identify the end-item for which the Block 3 item(s) are required. See definition of "end-use" in Definitions section on last page of this form.

3. ITEM(S) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE

Quantity (Units, pcs)	Description (Include identifying information such as model or part number)	Dollar Value (Each separate item)
13	Transducer, Part Number 60-06004-001	$13,163.00

4. SUPPLIER INFORMATION

a. Name and complete address of Applicant's Supplier.

Supplier Name: AGC Systems
Address: 106 Michales Ave
City: Syracuse State: NY Zip: 13208
Contact Name: John Smith
Title:
Telephone: (703) 801-6007 Fax: (703) 607-4126
E-mail address: john.smith@allcsys.com

b. Applicant's contract or purchase order to Supplier.

Number: abcde-C-123456
Dated: January 1, 2008
Priority rating: (DO/DX) (If none, so state)

If Supplier is not same as manufacturer, give complete purchase or buyer-supplier information on Continuation Sheet on page 3 including purchase order number, date, and priority rating (if none, so state).

5. SHIPMENT SCHEDULE OF ITEMS SHOWN IN BLOCK 3

a. Applicant's original shipment performance requirement	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
b. Supplier's current shipment performance promise	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
c. Applicant's current shipment performance requirement	Month Year	Aug-2008	Sep-2008	Oct-2008				Total units
	Number of units	13						25
d. Supplier's current shipment performance promise	Month Year	Apr-2009						Total units
	Number of units	25						25

6. REASONS GIVEN BY SUPPLIER for inability to meet Applicant's required shipment or performance needs.

Unable to achieve expedites as suppliers have US Government orders with DPAS rating on them. Items not due until 27 April 2009. Contract has been expedited

7. BRIEF STATEMENT OF NEED FOR ASSISTANCE. As applicable, explain effect of delay in receipt of Block 3 item(s) on achieving timely shipment of Block 5 item(s) (e.g., production line shut-down), or the impact on program or project schedule. Describe attempts to resolve problems and give specific reasons why assistance is required. If priority rating authority is requested, please so state.

Any slip in delivery date or loss of items to third parties will have a dramatic effect on Ministry of Defense Chinook fleet and degrade readiness.

8. CERTIFICATION: I certify that the information contained in Blocks 1 - 7 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief. Each signature of this form to exercise priority granted and transmitted - use of name is deemed certification(s).

Signature of Applicant's authorized official: Title:
Print or type name of authorized official: Date:

This form can be found as Appendix I to 15 CFR 700

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SPA: Requests for Priority Rating Authority

- If a rated order is likely to be delayed because a person is unable to obtain items not normally rated under 15 CFR Part 700, the person may request the authority to use a priority rating in ordering the needed items. Examples include:
  - Production or construction equipment;
  - Computers when not used as production items; and
  - Expansion, rebuilding, or replacing plant facilities.

- In certain cases and upon specific request, the DOC, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract.

- For more information, see 15 CFR § 700.51.

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SPA: Examples of Assistance

While special priorities assistance may be provided for any reason in support of 15 CFR 700, it is usually provided in situations where:

- There is difficulty in obtaining delivery against a rated order by the required delivery date.
- Delivery conflicts need to be resolved.

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SPA: Criteria for Assistance

Requests for special priorities assistance should be timely, that is, the request has been submitted promptly and enough time exists for the Delegate Agency or Commerce to effect a meaningful resolution to the problem, and must establish that:

- There is an urgent need for the item
- The applicant has made a reasonable effort to resolve the problem

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SPA: Instances Where Assistance May Not Be Provided

Examples of when assistance may not be provided:

- Secure a price advantage
- Obtain delivery prior to the time required to fill a rated order
- Gain competitive advantage
- Overcome a supplier's regularly established terms of sale or conditions of doing business

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SPA: Assistance Programs with Canada and Other Nations

- To promote military assistance to foreign nations, this section provides for authorizing priority ratings to persons in Canada and in other foreign nations to obtain items in the United States in support of approved programs.

- Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance from countries that the U.S. Government has security of supply arrangements with in support for approved programs.

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SPA: Assistance Programs with Canada and Other Nations

- Security of supply is a non-binding arrangement concluded by the U.S. Government with a foreign partner to provide reciprocal priorities support.

- The U.S. Government has security of supply arrangements with the following countries:
  - Australia
  - Canada (MOU)
  - Finland
  - Italy
  - The Netherlands
  - Spain
  - Sweden
  - United Kingdom

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SPA: Assistance Programs with Canada and Other Nations

- Arrangements establish a process to request priority acceptance and performance of contracts, subcontracts, and purchase orders to address national defense needs.
  - Provides U.S. assurance of meeting requests via the DPAS
  - Provides foreign assurance via an Industry Code of Conduct

- Assistance can be requested by Governments, contractors, subcontractors, or suppliers.

- Not limited to crises, emergency, or armed conflict.

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Appendix D:
Official Actions

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Official Actions: Rating Authorization

An official action granting specific priority rating authority that permits a person to place a priority rating on an order for an item not normally ratable under this regulation, or authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

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Official Actions: Directives

- An official action requiring a company to deliver an item or take other action within a specified time frame.

- A company must comply with each Directive issued, however, a company may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

- Directives take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

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Official Actions: Letters of Understanding

- An official action which may be issued in resolving SPA requests to reflect an agreement reached by all parties (DOC, the Delegate Agency, the supplier, and the customer).

- A Letter of Understanding is used to confirm production or shipping schedules which do not require modifications to other rated orders.

- A Letter of Understanding is NOT used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this regulation, or to take other official actions.

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From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 3/13/2020 10:07:12 AM
To: Curtis, Deborah (Federal) [DCurtis@doc.gov]
Subject: Test

Deborah A. Curtis
Chief Counsel for Industry and Security
U.S. Department of Commerce

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From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 4/9/2020 8:30:52 PM
To: Michael Cys [Michael.Cys@bis.doc.gov]
Subject: RE: TEST Hi- don't open this message yet

Don't know

-----Original Message-----
From: Michael Cys <Michael.Cys@bis.doc.gov>
Sent: Thursday, April 9, 2020 4:30 PM
To: Curtis, Deborah (Federal) <DCurtis@doc.gov>
Subject: RE: TEST Hi- don't open this message yet

Still here

-----Original Message-----
From: Curtis, Deborah (Federal) <DCurtis@doc.gov>
Sent: Thursday, April 9, 2020 4:28 PM
To: Michael Cys <Michael.Cys@bis.doc.gov>
Subject: Recall: TEST Hi- don't open this message yet

EXTERNAL .GOV EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Curtis, Deborah (Federal) would like to recall the message, "TEST Hi- don't open this message yet".

AMERICAN OVERSIGHT

From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 3/20/2020 2:35:01 PM
To: Hull, Cordell [Cordell.Hull@bis.doc.gov]; Kurland, Kevin [Kevin.Kurland@bis.doc.gov]; Pelter, Jeremy (Federal) [JPelter@doc.gov]; Billy, Stephen [Stephen.Billy@bis.doc.gov]
Subject: DPAS Training Slides Final - Locked Full Screen for Public.pdf
Attachments: DPAS Training Slides Final - Locked Full Screen for Public.pdf

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The Defense Priorities and Allocations System Training Course

AMERICAN OVERSIGHT

4/26/2017

Click here to begin

Course Overview

This course introduces the Defense Priorities and Allocations System (DPAS), a regulation administered by the Department of Commerce (DOC) that implements the priorities and allocations authority contained in Title 1 of the Defense Production Act (DPA) of 1950.

The primary purpose of the DPAS regulation (15 CFR Part 700) is to ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements.

NOTE: To navigate to other pages, make a selection on the bottom right or left corners of the screen.

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Primary Audience

The primary audience for this course are individuals who work for companies that receive contracts, subcontracts, or purchase orders from the U.S. Government or from U.S. Government contractors.

In order to ensure the effectiveness of the DPAS, it is essential that any individual who works for a company that receives or places a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

This training outlines some of the basic requirements that a company must adhere to when accepting DPAS rated orders.

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Course Outline

The goal of this course is to provide a basic understanding of the DPAS and its implementation. The course includes the major topics listed below. Please select a topic to begin.

1. What is the DPAS?
2. Overview of the Priorities and Allocations Authorities
3. Who has been delegated DPAS rating authority from the DOC?
4. Step by Step Guide: Processing Rated Orders
5. Who must comply with the DPAS?
6. How do I get assistance in the event of a problem?
7. What official actions does DOC utilize to implement/enforce the DPAS Provisions?
8. How does the DOC ensure compliance with the DPAS regulation?
9. How does the DPAS provide me protection against claims?
10. Examples of DPAS Assistance
11. How is the DPAS used for Energy Programs?
12. Course Review
13. Frequently Asked Questions
14. DPAS Contact Information

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What is the DPAS?

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What is the DPAS?

The Defense Priorities and Allocations System (DPAS) is a regulation administered by the Department of Commerce (DOC).

The DPAS implements the Title 1 priorities and allocations authority contained in the Defense Production Act (DPA) of 1950, that has been delegated to the Secretary of Commerce.

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What is the DPAS?

- The DPAS is used to prioritize national defense-related contracts/orders throughout the U.S. supply chain in order to support:
  - military programs
  - energy programs
  - homeland security
  - emergency preparedness
  - critical infrastructure

- The use of the DPAS is not limited to crises, emergency, or armed conflict.

- The DPAS can also be used to provide military or critical infrastructure assistance to foreign nations.

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What is the DPAS?

The purpose of the DPAS is to:

- Ensure the timely availability of industrial resources (and associated services) to meet current national defense and emergency preparedness program requirements
- Provide authority to U.S. Government agencies (and other authorized persons/entities) to order priority performance (i.e., delivery) on contracts and orders as well as allocate materials to meet national security requirements
- Provide an operating system to support rapid industrial response in a national emergency
- Minimize disruption to normal commercial activities

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Overview of the Priorities and Allocations Authorities

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Overview of the Priorities and Allocations Authorities

The graphic below provides an overview of the priorities and allocations authorities. Select a box to learn more.

Defense Production Act of 1950, 50 U.S.C. 4501, et seq.

Title 1 of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, et seq.) is the President's primary authority to expedite production/delivery of critical industrial items from the private sector.

Executive Order 13603

The National Defense Resources Preparedness Executive Order (E.O. 13603) delegates this authority to various agencies and addresses national defense resource programs and policies under the DPA.

DPAS Regulation 15 CFR Part 700

The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

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Who has been delegated DPAS rating authority from the DOC?

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Who has been delegated DPAS rating authority from the DOC?

The DOC has delegated the authority to place priority ratings on contracts/orders (rated orders) necessary or appropriate to promote the national defense, in accordance with the DPAS regulation (15 CFR Part 700) to:

- Department of Defense (DOD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS)
  - Federal Emergency Management Agency (FEMA) is the DPAS lead agency within DHS
- General Services Administration (GSA)

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Who has been delegated DPAS rating authority from the DOC?

- The DOC may also authorize other persons (including U.S. government agencies; foreign governments; U.S. and foreign contractors, subcontractors, and suppliers; or owners/operators of critical infrastructure) to place rated orders on a *case-by-case basis.*

- Such requests must first be determined as necessary or appropriate to promote the national defense by DOD, DOE, or DHS.



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Step by Step Guide:
Processing Rated Orders

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Step by Step Guide:
Processing Rated Orders

Below are the five important steps to processing rated orders. Select each step to learn more.

Step 1: What is a Rated Order and What Does it Mean for My Company?
Step 2: Identify Key Elements of Rated Order
Step 3: Accept or Reject the Rated Order
Step 4: Preferential Scheduling
Step 5: Extension of Priority Ratings

To learn additional information and important notes, please select the topics below:

- Additional Information
- Important Notes

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Who must comply with the DPAS?

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Who must comply with the DPAS?

- All companies in the United States must comply with the provisions of the DPAS regulation.

- Any person who places or receives a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

The following slides will provide additional information regarding the DPAS as well as a representation of the basic requirements that a person must adhere to when accepting DPAS rated orders.

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How do I get assistance in the event of a problem?

Special Priorities Assistance

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Special Priorities Assistance

- The DPAS is designed to be largely self-executing; however, problems may arise from time-to-time.
- In the event of a problem, a person should immediately contact the appropriate contact administration officer for guidance or assistance.
- If additional formal aid is needed, special priorities assistance (SPA) should be sought from the Delegate Agency through the contract administration officer.

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Special Priorities Assistance

- SPA can be provided for any reason in support of the DPAS regulation, such as:
  - Assisting in obtaining timely deliveries of items needed to satisfy rated orders
  - Authorizing the use of priority ratings on orders to obtain items not normally ratable under this regulation

- A request for special priorities assistance or priority rating authority must be submitted on Form BIS-999 to the local contract administration representative.
  - Form BIS-999 may be obtained from the Delegate Agency representative or from the Department of Commerce.
  - A sample of Form BIS-999 can be found here.

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Special Priorities Assistance

The following topics are covered in the DPAS regulation regarding SPA. Please select a topic to learn more:

- Requests for Priority Rating Authority (15 CFR § 700.51)
- Examples of Assistance (15 CFR § 700.52)
- Criteria for Assistance (15 CFR § 700.53)
- Instances where assistance will not be provided (15 CFR § 700.54)
- Assistance programs with Canada and other nations (15 CFR § 700.56)

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What official actions does DOC utilize to implement/enforce the DPAS Provisions?

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Official Actions

When necessary, the Department of Commerce may take specific official actions to implement or enforce the DPAS regulation, including the issuance of:

- Rating Authorization (15 CFR Part § 700.61)
- Directives (15 CFR Part § 700.62)
- Letters of Understanding (15 CFR Part § 700.63)

Please select on each topic above for more information.

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How does the DOC ensure compliance with the DPAS regulation?

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DPAS Compliance

Compliance with the DPAS regulation is outlined in 15 CFR § 700.70-75:

- DOC works closely with the DPAS Delegate Agencies (DOD, DOE, and DHS) to ensure compliance with DPAS regulation.

- Willful violation of the provisions of Title I or Sections 705 or 707 of the DPA, the priorities provisions of the Selective Service Act and related statutes or this part is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the DPA is $10,000 fine, or one year in prison, or both.

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How does the DPAS provide me protection against claims?

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Protection Against Claims

Protection against claims related to DPAS implementation is outlined in 15 CFR § 700.90:

- A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with the DPAS or official DPAS action.

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Examples of DPAS Assistance

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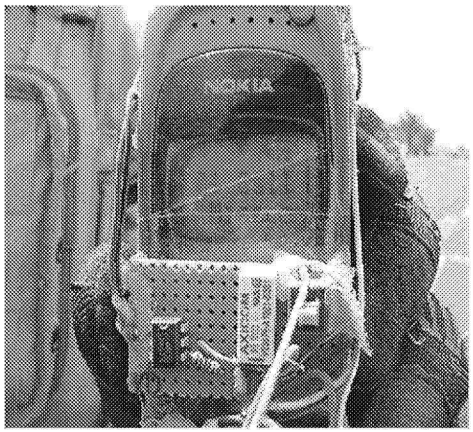
Examples of DPAS Assistance

DOC works closely with DOD to ensure materials to support critical programs receive appropriate priority.

<u>Examples of DPAS assistance in Iraq and Afghanistan:</u>

- Body Armor
- Mine Resistant Ambush Protected vehicles
- Counter-Improvised Explosive Devices







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Examples of DPAS Assistance

Foreign Requests:

- Resolving delivery delays for critical items (e.g., night vision/thermal imaging equipment, ammunition, aircraft spare parts)
- Supporting NATO operations in Afghanistan and counter-terrorism activities
- Requests supporting non-binding *"Security of Supply"* arrangements with foreign partners that provide for reciprocal priorities support
- Requests from non-Security of Supply foreign partners





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Examples of FEMA Approved Assistance

- Federal emergency preparedness, mitigation, response, and recovery
- State, local, tribal government emergency preparedness, mitigation, response, and recovery
- Intelligence and warning systems
- Border and transportation security
- Domestic counter-terrorism, including law enforcement
- Chemical, biological, radiological, and nuclear countermeasures
- Critical infrastructure protection and restoration



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How is the DPAS used for Energy Programs?

Industrial Priorities for Energy Programs

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Industrial Priorities for Energy Programs

The DPA authorizes the use of priority ratings for projects which maximize domestic energy supplies. These projects are outlined in the DPAS regulation (15 CFR § 700.20) and include:

- Those which maintain or further domestic energy exploration, production, refining, and transportation;
- Maintain or further the conservation of energy; or
- Are involved in the construction or maintenance of energy facilities.

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Industrial Priorities for Energy Programs

The DPAS regulation (15 CFR § 700.21) outlines the application process for a priority rating authorization for an energy program.

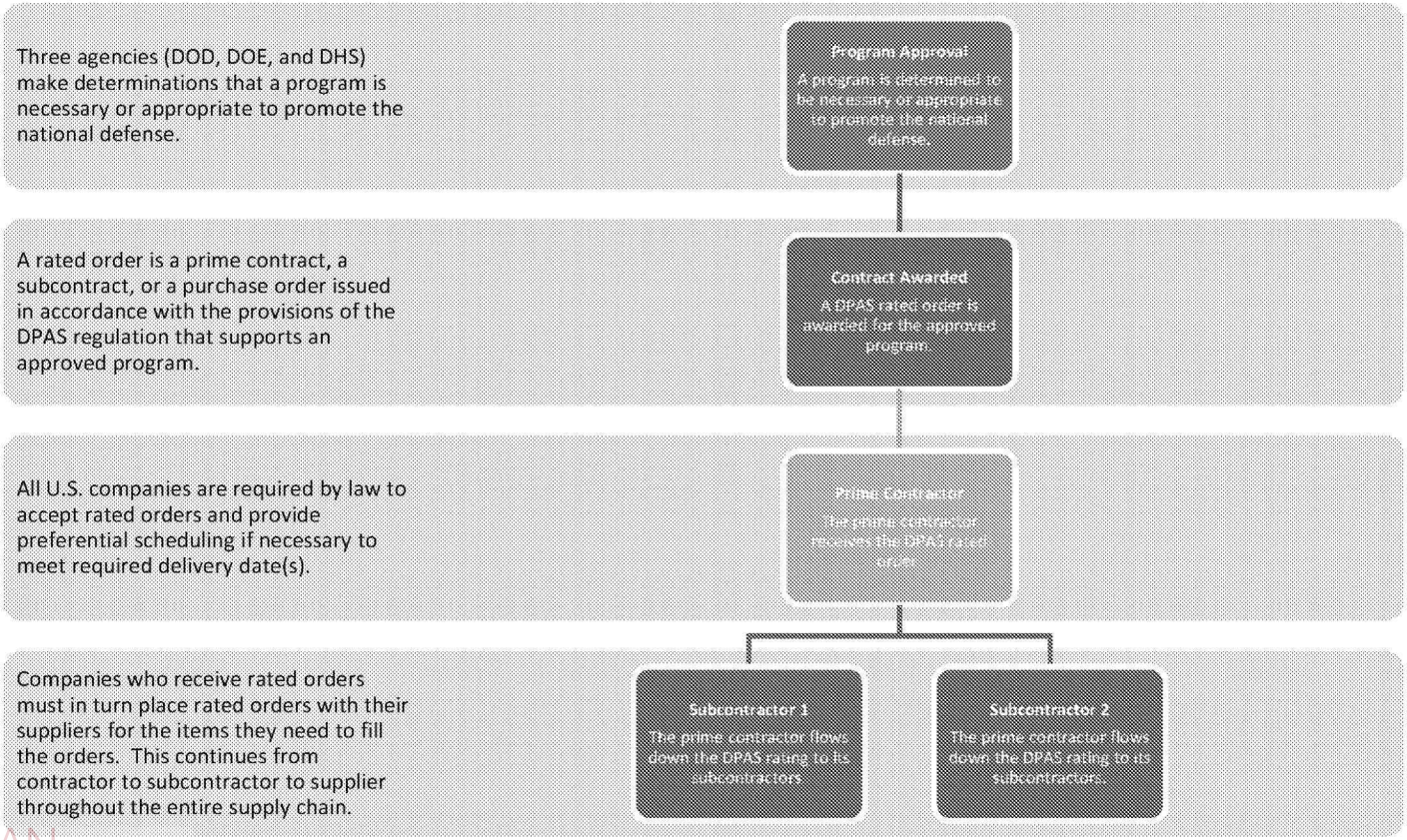
- For projects believed to maximize domestic energy supplies, a person may request priority authority for scarce, critical, and essential supplies of materials, equipment, and services (related to the production of materials or equipment, or the installation, repair, or maintenance of equipment) by submitting a request to the DOE.
- If the DOE notifies the DOC that the project maximizes domestic energy supplies and that the materials, equipment, or services are critical and essential, the DOC will determine whether the items in question are scarce, and, if they are scarce, whether there is a need to use the priority rating.
- After the DOC has conducted its analysis, it will advise the DOE of its findings as outlined in the regulation. If the findings are satisfied, the DOC will authorize the DOE to grant the use of a priority rating to the applicant.
- Schedule I of the DPAS regulation includes a list of approved programs to support the maximization of domestic energy supply. A DOE regulation setting forth the procedures and criteria used by the DOE in making its determination and findings is published in 10 CFR Part 216.

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Course Review

Below is a quick review of the rated contract or order process. To review other specific topics, you may return to the Course Outline by clicking below.



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Frequently Asked Questions

Q: May I accept a rated order contingent upon obtaining necessary production materials or equipment?

A: *No. Rated orders may not be accepted on a contingent basis. If you cannot meet the required delivery date, you must inform your customer of the earliest date on which delivery can be made, and offer to accept the order on the basis of that date.*

Q: If I encounter production or shipment conflicts following acceptance of several rated orders of equal priority status that will result in delayed delivery or performance against one or more orders, which of the conflicting orders should be given delivery or performance preference?

A: *You should give preference to order or orders in the sequence in which delivery or performance is required. For conflicting rated orders received on the same day, you should give preference to the order or orders with the earliest receipt date. If you cannot otherwise resolve the delivery or performance conflict, or if your customer objects to the rescheduling of the delayed order, you should promptly request special priorities assistance (SPA). For any order that will be delayed, you must notify your customer as provided in 15 CFR § 700.13(d)(3) of the DPAS regulation. Conflicting rated orders are discussed in section 700.14(c) of the DPAS regulation.*

Q: Can my suppliers charge a higher price to produce, deliver, or perform against my rated order?

A: *No. Your supplier may not discriminate against your rated order in any manner. Nor may the supplier impose any different terms or conditions than for comparable unrated orders.*

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Frequently Asked Questions

Q: May I use a rated order to purchase finished items, components, or production materials from a foreign supplier?

A: *No. The DPAS, and therefore priority ratings, has no legal standing outside of the United States. However, if you need assistance to obtain items from a supplier in Canada, you must submit a request through the Delegate Agency to the DOC/BIS's Office of Strategic Industries and Economic Security (SIES) on form BIS-999.*

If you need assistance to obtain items from a supplier in Australia, Finland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom, you should contact the Department of Defense DPAS Lead in the Office of Deputy Assistant Security of Defense for Manufacturing and Industrial Base Policy (MIBP). Please see 15 CFR § 700.57 (c) for more information.

Q: If my supplier refuses to accept or comply with a rated order, what should I do?

A: *You should attempt to obtain the reason for the refusal in writing. If the reason conforms to any of the provisions in section 700.13 (b) or (c) of the DPAS regulation, you should first seek an alternative source of supply. If there is no alternative source that can meet your requirements, you should promptly contact your customer or DOC/BIS. If the supplier refuses to give a reason or the reason does not conform to the provisions of section 700.13, you should promptly contact your customer or DOC/BIS.*

Q: Must I accept a rated contract or order from a customer with whom I have never done business?

A: *Yes. Except as provided in the DPAS in 15 CFR § 700.13, you must accept and fill all rated orders you receive.*

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Frequently Asked Questions

Q: If by accepting a rated order I must delay delivery against unrated orders, am I protected against claims for my customers for damages caused by this delay?

A: *Yes. Such protection is provided under Section 707 of the Defense Production Act of 1950. See section 700.90 of the DPAS. You may not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the statute, the DPAS, or a Directive issued by DOC/BIS.*

Q: If I use inventoried items to fill a rated order, may I replace those items by using a rated order?

A: *Yes. You may use a rated order to replace inventoried items if you place the order with your supplier within 90 days of the date of use of the items. However, you may only use the DO rating symbol on the order, even if the customer's order was DX.*

Q: To Fill a rated order, I need to purchase a quantity of items that is less than my supplier's minimum (commercially procurable) quantity. Is my supplier obligated to accept and fill a rated order for such quantity?

A: *No. However, as provided in section 700.17(e) of the DPAS and if reasonable to do so, you may place a rated order for the minimum commercially procurable quantity. If possible, you must combine rated orders to the supplier as provided in section 700.17(c) and (d).*

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Frequently Asked Questions

Q: May foreign entities (government agencies or contractors) place rated orders with U.S. suppliers?

A: *Yes. Foreign entities may place rated orders with U.S. suppliers only with express written authorization of DOC/BIS on a case-by-case basis where the procurement is deemed to be in the U.S. national defense interest. Special rules apply to the use of rated orders in the U.S. by the Canadian Government and authorized Canadian contractors. Sections 700.56 and 700.57 provide more information regarding these provisions.*

Q: Who is authorized to include priority ratings on contracts and purchase orders?

A: *Certain U.S. Government agencies and the Canadian Government are authorized by the DOC to include priority ratings on contracts and orders placed with U.S. contractors and suppliers in support of approved national defense programs. DPAS Schedule 1 lists the currently approved programs and the agency responsible for each program.*

Q: Must a rated order be in writing or may I give it verbally to my supplier over the phone? May it be placed electronically?

A: *Rated orders may be placed with suppliers either in writing or electronically. Regardless of common industry practice, if the order is given verbally, it must be followed-up immediately either in writing or electronically. The elements of a rated order are discussed in 15 CFR § 700.12.*

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DPAS
Contact Information

U.S. Department of Commerce
Bureau of Industry and Security
Office of Strategic Industries &
Economic Security
Defense Programs Division
(202) 482-3634
DPAS@bis.doc.gov
www.bis.doc.gov/dpas

U.S. Department of Defense
Office of the Under Secretary of Defense
Acquisition, Technology, & Logistics
Manufacturing & Industrial
Base Policy
(571) 372-6279
DPAS@osd.mil
www.acq.osd.mil/mibp/titleOne

U.S. Department of Homeland Security
Federal Emergency Management Agency
Office of Policy & Program Analysis
Defense Production Act Program Division
FEMA-OPPA-DPA@fema.dhs.gov

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End of Training Course

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Appendix A:

Overview of Priorities and Allocations Authorities

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Defense Production Act

- The DPA was enacted at the start of the Korean War as part of a broad war and civil defense mobilization effort. The DPA was created to ensure the availability of the country's industrial resources to address national security requirements.

- The DPA authorities are time-limited and undergo periodic amendment and reauthorization. The DPA Reauthorization of 2014 is through September 30, 2019.

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Defense Production Act

Under Title I of the DPA, the President is authorized to require:

- Preferential acceptance and performance of contracts or orders (other than contracts of employment) supporting certain approved national defense and energy programs

- To allocate materials, services, and facilities in such a manner as to promote these approved programs

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Defense Production Act

The DPA's definition of "national defense" includes programs for:

- Military and energy production or construction
- Military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity

The definition also includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, et seq.) and critical infrastructure protection and restoration.

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Defense Production Act

Title 1 of the DPA is the statutory basis for the National Defense Resources Preparedness Executive Order (Executive Order 13603) and the DPAS Regulation (15 CFR Part 700).

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Executive Order 13603

- The purpose of the National Defense Resources Preparedness executive order (Executive Order 13603) is to delegate authority and address national defense resource programs and policies under the DPA.

- Executive Order 13603 provides the framework for the allocation of resources, services, and materials to promote the national defense.

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Executive Order 13603

Section 201 of Executive Order 13603 delegates the authority granted to the President by the DPA (i.e., to require preferential acceptance and performance of contracts/orders for approved programs, and to allocate materials, services, and facilities to promote these approved programs) to the following Federal agencies:

	Agriculture (USDA) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer		**Defense (DOD)** Water Resources
	Energy (DOE) All Forms of Energy		**Transportation (DOT)** All Forms of Civil Transportation
	Health and Human Services (HHS) Health Resources		**Commerce (DOC)** All Other Materials, Services, and Facilities (including Construction Materials) Generally called "Industrial Resources"

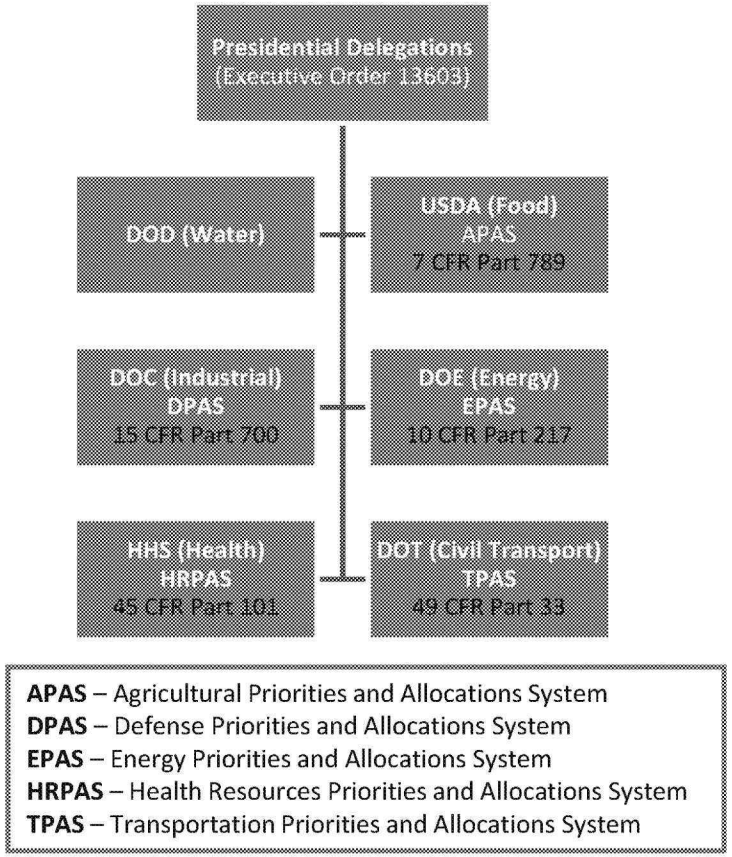
DPAS

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Executive Order 13603

Each department, except the Department of Defense (DOD), that has been delegated DPA authority has issued regulations. Each department's regulation covers only their delegated resources outlined in Section 201. For example, health resources are outside DPAS jurisdiction.

The figure to the right lists the citations for each department's regulation.



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Executive Order 13603

Section 202 of Executive Order 13603 authorizes three agencies to make the determination that a program is necessary or appropriate to promote the national defense:

- Defense – regarding military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense (DOD), space, and directly related activities

- Energy – regarding energy production and construction, distribution and use, and directly related activities

- Homeland Security – regarding all other national defense programs, including civil defense and continuity of Government.

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Executive Order 13603

- Section 201 of Executive Order 13603 authorizes the Secretary of Commerce to re-delegate the authority for the priority rating of contracts and orders for all industrial materials, services, and facilities needed in support of programs approved under Section 202.

- The DOC implements this authority through the DPAS regulation (15 CFR Part 700).

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DPAS Regulation: 15 CFR Part 700

- The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

- The DPAS regulation establishes procedures which requires preferential acceptance and performance of contracts or orders for industrial resources supporting certain national defense and energy programs. The regulation also instructs the public on the DPAS process and their obligations.

- This regulation is administered by DOC's Bureau of Industry and Security (BIS), and is used, as authorized by DOC/BIS, by other Federal departments, agencies, and industry.

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Appendix B:

Guide to Applying the DPAS to Contracts and Orders – Additional Information

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Step 1

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

- A rated order is a prime contract, a subcontract, or a purchase order issued in accordance with the provisions of the DPAS regulation that supports an approved program.
- U.S. companies are required by law to accept "rated orders" and provide preferential scheduling if necessary to meet required delivery date(s).
- Rated orders take preference over all unrated orders as necessary to meet required delivery dates; therefore, persons are required to reschedule unrated orders if they conflict with performance against a rated order.
- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill these orders.
- To learn about rated orders, click here.

Prime Contract/Purchase Order

When a company is awarded a U.S. Government (USG) contract or purchase order, it must determine whether the contract/purchase order is rated.

Subcontract/Flow-Down Purchase Order

When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.

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Step 1: What is a Rated Order and What Does it Mean for My Company?

Prime Contract/Purchase Order

- For a prime contract/purchase order, a company will most likely receive a standard acquisition form known as the SF-33 (Solicitation, Offer and Award Form).
- On a SF-33, a company can determine whether they have received a rated order by looking at Block 1 of the form. If it is a rated order, a priority rating will be given. Click here for an example of this form.
- *NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating must be given. Certain exceptions apply.*

Subcontract/Flow-Down Purchase Order

- When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.
- For a subcontract/flow-down purchase order, there should be language in the contract/purchase order indicating that it is rated order and a priority rating should be given.

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Rated Order: Important Notes

- DPAS provisions are a standard part of U.S. defense contracting process.
- The DPAS is a standard clause in DOD contracts/orders.
- The DOD uses DPAS authority delegated to it by the DOC to place ratings on approximately 300,000 contracts annually. The Departments of Commerce and Defense estimate that, in addition, approximately 400,000 rated orders are "flowed down" annually through the supply chain to support those rated orders.
- Orders through DOD's Foreign Military Sales program are usually priority rated.
- Direct commercial sales to foreign persons are NOT priority rated unless authorized by DOC.



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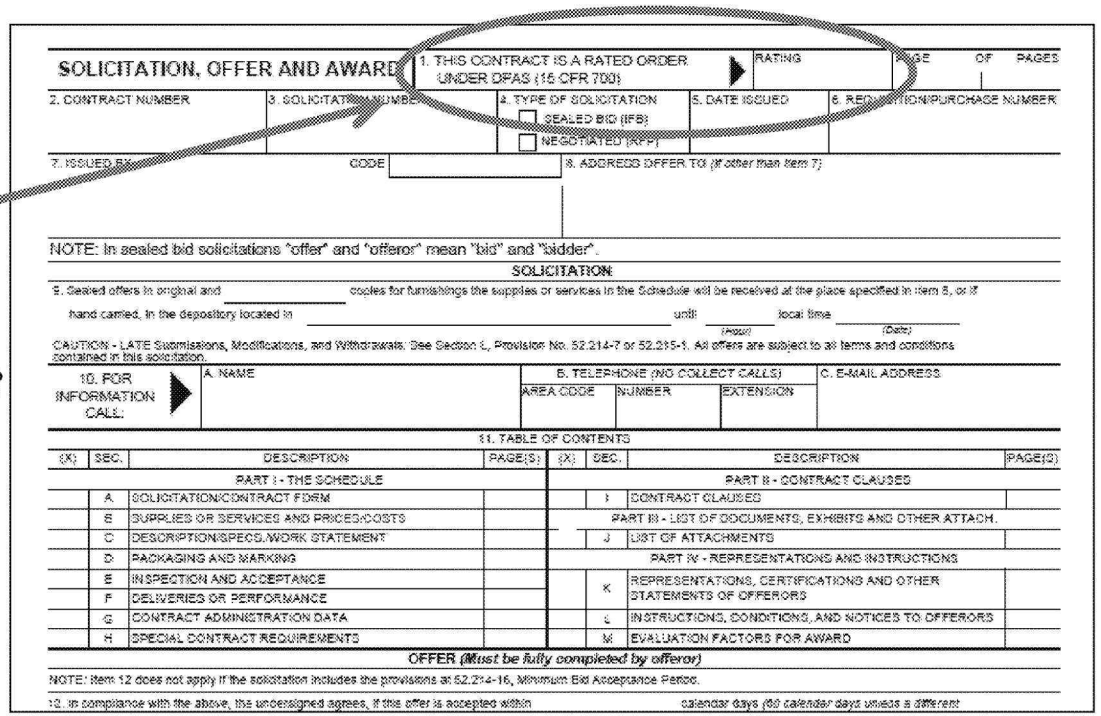
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Example of SF-33

Block 1 of the SF-33 indicates if the contract/purchase is a rated order.

NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating should be given.



SOLICITATION, OFFER AND AWARD | 1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) | RATING | PAGE OF PAGES

2. CONTRACT NUMBER | 3. SOLICITATION NUMBER | 4. TYPE OF SOLICITATION ☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP) | 5. DATE ISSUED | 6. REQUISITION/PURCHASE NUMBER

7. ISSUED BY | CODE | 8. ADDRESS OFFER TO (If other than Item 7)

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and ____ copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in ____ until ____ (Hour) local time ____ (Date)

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL: | A. NAME | B. TELEPHONE (NO COLLECT CALLS) AREA CODE / NUMBER / EXTENSION | C. E-MAIL ADDRESS

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if the offer is accepted within ____ calendar days (60 calendar days unless a different

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Step 2

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Step 2: Identify Key Elements of Rated Order

If a company is in receipt of a rated contract or purchase order, the company must identify the four key elements of a rated order outlined in 15 CFR § 700.12 and listed below. These four elements must appear on every contract, purchase order, or delivery order. If they do not appear, the company should request a completed rated order from the customer.

To learn more about these key elements, select an element:

1. Priority Rating
2. Required Delivery Date(s)
3. Authorized Written or Digital Signature
4. A Certification Statement

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Priority Rating

15 CFR § 700.11

Rated orders are identified by a priority rating. A priority rating consists of the rating symbol and a program identification symbol.

Priority Rating = (Rating Symbol) + (Program ID Symbol)

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Priority Rating

15 CFR § 700.11

There are two levels of priority established by the DPAS regulation, identified by the rating symbols "DX" and "DO":

1. DX – All DX rated orders have equal priority and take preference over DO and unrated orders (based on shipment schedule).

2. DO – All DO rated orders have equal priority and take preference over unrated orders (based on shipment schedule).

Note: DX ratings can only be approved by the Secretary of Defense or the Deputy Secretary of Defense. For a list of programs authorized to use DX industrial priority ratings, click here.

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DOD List of DX-Rated Programs

DOD components are currently authorized to use DX industrial priority ratings in support of the following programs:

Department of Defense:
- Program 390
- Integrated Ballistic Missile Defense System

Department of Navy:
- Presidential Helicopters (VH-3D, VH-60N)
- Fleet Ballistic Missile Weapons System, Trident System
- Program 341

Department of Air Force:
- Space-Based Infrared System (SBIRS) High
- Intercontinental Ballistic Missile, Minuteman III
- B-2 Stealth Bomber
- VC-25A Presidential Aircraft

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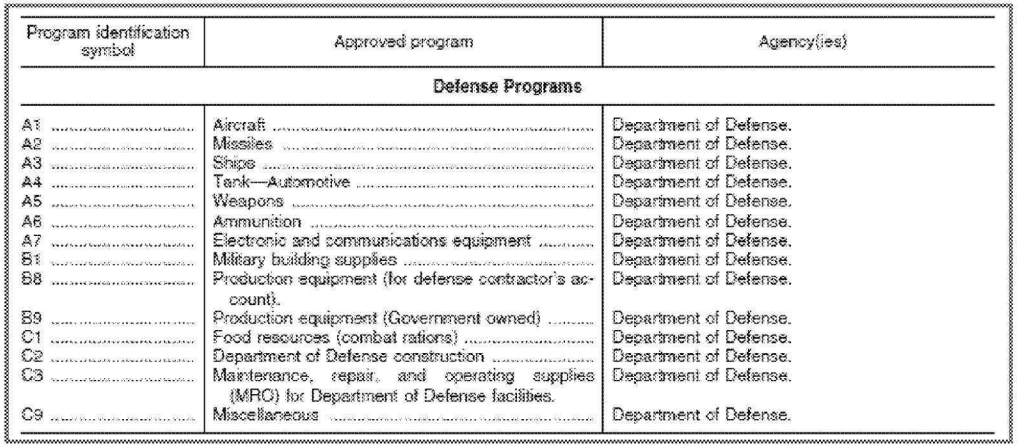
Priority Rating

15 CFR § 700.11

Program identification symbols indicates which approved program is being supported by a rated order.

- The list of approved programs and their identification symbols are listed in Schedule 1 of the DPAS regulation (15 CFR Part 700). Companies must ensure the symbol used is valid.
- It is also important to note that program identification symbols, in themselves, do not connote any priority.

Below are examples of program identification symbols for defense programs. You can find the complete list by clicking the image below.



Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.

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Schedule I to Part 700

Approved Programs and Delegate Agencies

Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.
	Military Assistance to Canada	
D1	Canadian military programs	Department of Commerce.
D2	Canadian production and construction	Department of Commerce.
D3	Canadian atomic energy program	Department of Commerce.
	Military Assistance to Other Foreign Nations	
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export.	Department of Commerce.
G2	Certain direct defense needs of foreign governments other than Canada.	Department of Commerce.
G3	Foreign nations (other than Canada) production and construction.	Department of Commerce.

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Schedule I to Part 700

Approved Programs and Delegate Agencies (continued)

Critical Infrastructure Assistance to Foreign Nations		
G4	Foreign critical infrastructure programs	Department of Commerce.
Co-Production		
J1	F–16 Co-Production Program	Departments of Commerce and Defense.
Atomic Energy Programs		
E1	Construction	Department of Energy.
E2	Operations—including maintenance, repair, and operating supplies (MRO).	Department of Energy.
E3	Privately owned facilities	Department of Energy.
Domestic Energy Programs		
F1	Exploration, production, refining, and transportation.	Department of Energy.
F2	Conservation	Department of Energy.
F3	Construction, repair, and maintenance	Department of Energy.
Other Defense, Energy, and Related Programs		
H1	Certain combined orders (see section 700.17(c))	Department of Commerce.
H5	Private domestic production	Department of Commerce.
H6	Private domestic construction	Department of Commerce.
H7	Maintenance, repair, and operating supplies (MRO).	Department of Commerce.
H8	Designated Programs	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Program identification symbol	Approved program	Agency(ies)
K1	Federal supply items	General Services Administration.
	Homeland Security Programs	
N1	Federal emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N3	Intelligence and warning systems	Department of Homeland Security.
N4	Border and transportation security	Department of Homeland Security.
N5	Domestic counter-terrorism, including law enforcement.	Department of Homeland Security.
N6	Chemical, biological, radiological, and nuclear countermeasures.	Department of Homeland Security.
N7	Critical infrastructure protection and restoration	Department of Homeland Security.
N8	Miscellaneous	Department of Homeland Security.

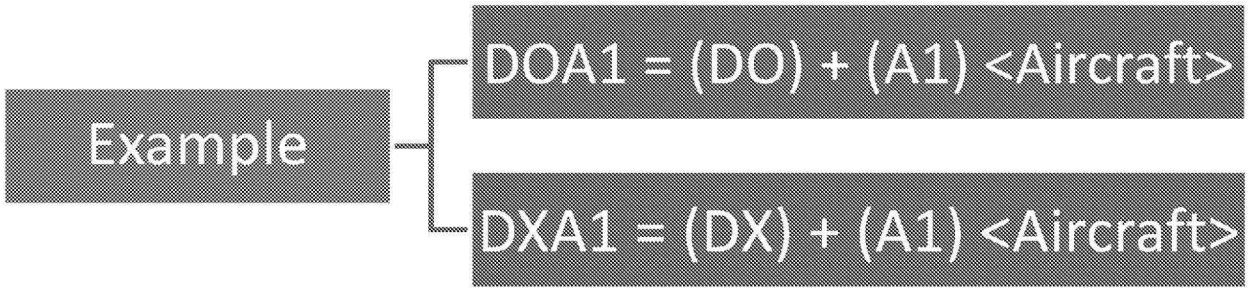
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Priority Rating

15 CFR § 700.11

Example of a Priority Rating:

If a company receives a rated order on a contract for the production of an aircraft, the order will will contain a DO-A1 or DX-A1 priority rating.



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Required Delivery Date(s)

- Rated orders are required to have a delivery date or dates.
- The words “immediately” or “as soon as possible” do not constitute a delivery date.
- A ‘‘requirements contract’’, ‘‘basic ordering agreement’’, ‘‘prime vendor contract’’, or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items from time-to-time or within a stated period against specific purchase orders, such as ‘‘calls’’, ‘‘requisitions’’, and ‘‘delivery orders’’.
  - These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document.

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Authorized Written or Digital Signature

- The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order is required.

- The signature or use of the name certifies that the rated order is authorized under the DPAS regulation and that the requirements of the DPAS regulation are being followed.

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Certification Statement

A certification statement is required on the rated order and should read in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR Part 700).

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Certification Statement

If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in §700.13(d)(2)].

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Step 3

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Step 3: Accept or Reject the Rated Order

Once a company has identified that they have received a rated order, the company must either accept or reject the order and provide customer notification according to the instructions provided in the DPAS regulation (15 CFR § 700.13).

Please select one of the topics below to learn more:

- Mandatory Acceptance
- Mandatory Rejection
- Optional Rejection
- Customer Notification Requirements

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Mandatory Acceptance

15 CFR § 700.13 (a)

- Any company in the United States must accept and fill a rated order for items that the company normally supplies.
- A company may not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.
- If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.

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Mandatory Rejection

15 CFR § 700.13 (b)

- A company may not accept a rated order for delivery on a specific date it is unable to meet that date.
  - However, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date.

- The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order.

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Optional Rejection

15 CFR § 700.13 (c)

A company may reject a rated order in any of the following cases as long as it does not discriminate among customers:

1. If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
2. If the order is for an item not supplied or a service not performed.
3. If the order is for an item produced, acquired, or provided only for the company's own use for which no orders have been filled for two years prior to the date of the receipt of the rated order. If, however, the company has sold some of these items, it must accept rated orders up to the quantity or portion of production, whichever is greater, sold within the past two years.
4. If the customer placing the order, other than the U.S. Government, makes the item or performs the service being ordered.

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Customer Notification Requirements

15 CFR § 700.13 (d)(1)

- A company must accept or reject a rated order in writing (hard copy), or in electronic format, to the customer placing the order within 15 working days after receipt of a DO rated order and 10 working days after receipt of a DX rated order.

- If the order is rejected, a company must provide the reasons in writing for the rejection.

- If a company has accepted a rated order and subsequently finds that the shipment or performance will be delayed, the company must notify the customer immediately, give the reasons for the delay, and advise of new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

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Customer Notification Requirements

15 CFR § 700.13 (d)(2)

- If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, and the order includes the statement set forth in 700.12(b), a company must accept or reject the rated order (in writing or electronically).
  - If the order is issued by an authorized person in response to a hazard that has occurred, the minimum time for acceptance or rejection is six hours after receipt.
  - If the order is issued by an authorized person to prepare for an imminent hazard, the minimum time for acceptance or rejection is 12 hours after receipt.

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Step 4

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Step 4: Preferential Scheduling

- Once a company has accepted a rated order, it must then schedule operations, including the acquisition of all needed production items, in order to satisfy the delivery requirements of each rated order.
- Companies are required to reschedule unrated orders if they conflict with performance against a rated order and must reschedule DO rated orders if they conflict with performance against a DX rated order.
- The DPAS regulation (15 CFR § 700.14) describes the requirements for preferential scheduling in further detail.
- Click here for examples of how preferential scheduling would be applied.

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Preferential Scheduling Examples

Below are examples of how preferential scheduling would be applied:

- Example 1: If a company receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed.

- Example 2: If a DX rated order is received calling for delivery on July 15 and a company has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order.

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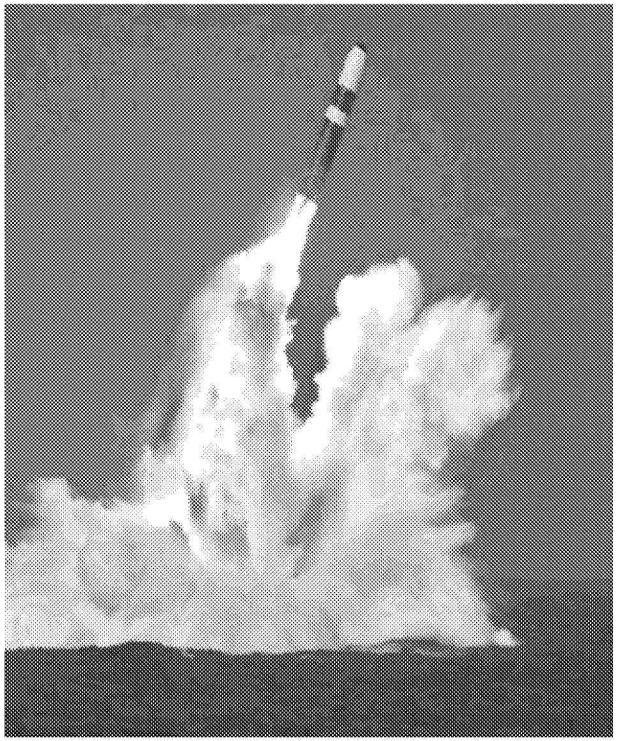
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Step 5

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Step 5: Extension of Priority Ratings

- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the rated orders.
- This continues from contractor to subcontractor to supplier throughout the entire supply chain.
- Companies must use the priority rating indicated on the customer's rated order, except as otherwise provided in the DPAS regulation or as directed by the DOC.



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Step 5: Extension of Priority Ratings

- A person is not required to place a priority rating on an order for less than $75,000, or on half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations(FAR)), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

- More information regarding extension of priority ratings can be found in 15 CFR § 700.15.

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Additional Information

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Additional Information

The DPAS Regulation provides additional information that a company in receipt of a rated order should be aware of. Select the topics below to learn more:

- Changes or Cancellations of Priority Ratings and Rated Orders (15 CFR § 700.16)
- Use of Rated Orders (15 CFR § 700.17)
- Limitations on Placing Rated Orders (15 CFR § 700.18)
- Records and Reports (15 CFR § 700.91)

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Additional Information:
Changes or Cancellations

The DPAS Regulation (15 CFR § 700.16) identifies how priority ratings and rated orders may be changed or cancelled. For example:

- The priority rating on a rated order may be charged or cancelled by:
  - An official action of the Department of Commerce
  - Written notification from the person who placed the rated order (including a Delegate Agency)

- If an unrated order is amended to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

- An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 700.13.

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Additional Information:
Changes or Cancellations

Examples continued:

- The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

- If a person no longer needs items to fill a rated order, any rated orders placed with suppliers for the items, or the priority rating on those orders, must be cancelled.

- When a priority rating is added to an unrated order, or is changed or cancelled, all suppliers must be promptly notified in writing.

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Additional Information:
Use of Rated Orders

The DPAS Regulation (15 CFR § 700.17) identifies how rated orders must, and can, be used.

Below are a few examples of the instructions found in 15 CFR § 700.17:

- A company must use rated orders to obtain:
  - Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;
  - Containers or other packaging materials required to make delivery of the finished items against rated orders;
  - Services, other than contracts of employment, needed to fill rated orders; and
  - MRO needed to produce the finished items to fill rated orders.

- A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:
  - The order must be placed within 90 days of the date of use of the inventory.

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Additional Information:
Limitations on Placing Rated Orders

The DPAS regulation (15 CFR § 700.18) outlines limitations on placing rated orders. Such limitations include:

- A person may not place a DO or DX rated order unless entitled to do so under the DPAS regulation.

- Rated orders may not be used to obtain:
  - Delivery on a date earlier than needed,
  - A greater quantity of the item than needed (with exception), or
  - Items in advance of the receipt of a rated order (with exception).

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Additional Information:
Records and Reports

The DPAS regulation (15 CFR § 700.91) outlines the recordkeeping and reporting requirements a company must adhere to.

Below are a few examples of the important requirements:

- A company is required to make and preserve for at least three years, accurate and complete records for any transaction covered by DPAS regulation or an official action.

- Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action.

- Records required to be maintained must be made available for examination on demand by duly authorized representatives of the DOC.

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Important Notes

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Important Notes

- Immediately notify the customer when you can't meet a delivery date, such as a DX request is received that overrides a DO request.

- If a company notifies the customer verbally, they should provide written notification one working day later.
  - This could trigger a Special Priorities Assistance (SPA) Request. SPAs will be covered in this training.

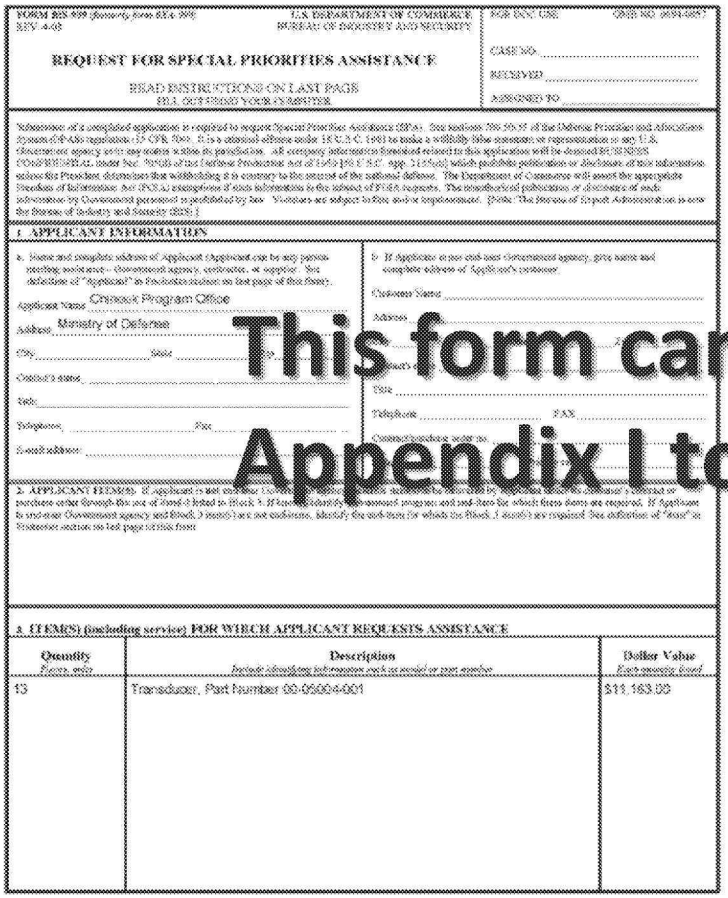
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Appendix C:

Special Priorities Assistance

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Example:
SPA Form BIS-999



FORM BIS-999 (formerly Form ITA-999) REV. 4-05

U.S. DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

FOR INT. USE: OMB NO. 0694-0057

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

READ INSTRUCTIONS ON LAST PAGE
FILL OUT FORM TYPE OR PRINTER

CASE NO.
RECEIVED
ASSIGNED TO

Submission of a completed application is required to support Special Priorities Assistance (SPA). See sections 700.50 et. of the Defense Priorities and Allocations System (DPAS) regulation (15 CFR 700). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency over any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 (50 U.S.C. app. 2155(d)) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Commerce will assert the appropriate exemption of the Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment. [Note: The Bureau of Export Administration is now the Bureau of Industry and Security (BIS).]

1. APPLICANT INFORMATION

a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of "Applicant" in Definitions section on last page of this form).

Applicant Name: Chinook Program Office
Address: Ministry of Defense
City: State:
Contact's name:
Title:
Telephone: Fax:
E-mail address:

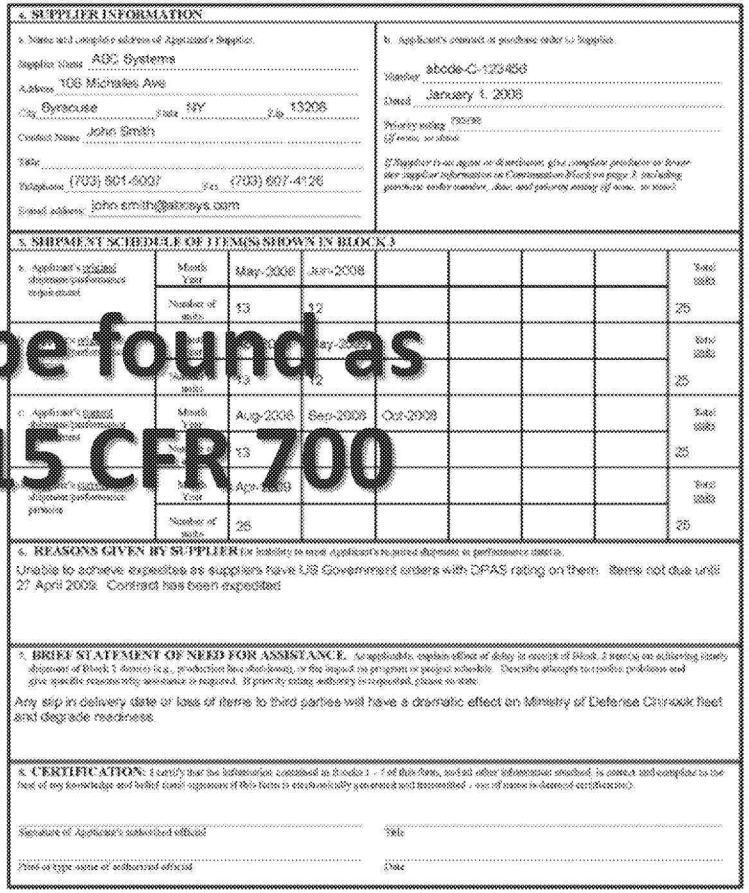
b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.

Customer Name:
Address:
City: State:
Contact's name:
Title:
Telephone: FAX:
Customer's relation with Applicant:

2. APPLICANT ITEMS: If Applicant is not end-user Government agency, complete this section for the items listed in Block 3. Applicant is a supplier receiving an order or purchase order through this use of items listed in Block 3. If Applicant is a subcontractor, identify the end-item for which these items are required. If Applicant is end-user Government agency, and Block 3 item(s) are not end-items, identify the end-item for which the Block 3 item(s) are required. See definition of "end" in Definitions section on last page of this form.

3. ITEM(S) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE

Quantity (Units, pairs)	Description (Include identifying information such as model or part number)	Dollar Value (Each separate item)
13	Transducer, Part Number 60-05004-001	$13,163.00



4. SUPPLIER INFORMATION

a. Name and complete address of Applicant's Supplier.

Supplier Name: AGC Systems
Address: 106 Michales Ave
City: Syracuse State: NY Zip: 13208
Contact Name: John Smith
Title:
Telephone: (703) 801-6007 Fax: (703) 607-4126
E-mail address: john.smith@allcsys.com

b. Applicant's contract or purchase order to Supplier.

Vendor: abcde-C-123456
Dated: January 1, 2008
Priority rating: (DO/DX or blank)

If Supplier is not same as manufacturer, give complete purchase or buyer-supplier information on Continuation Sheet on page 3 including purchase order number, date, and priority rating (if none, so state).

5. SHIPMENT SCHEDULE OF ITEMS SHOWN IN BLOCK 3

a. Applicant's original shipment performance requirement	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
b. Supplier's current shipment performance projection	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
c. Applicant's current shipment performance requirement	Month Year	Aug-2008	Sep-2008	Oct-2008				Total units
	Number of units	13						25
d. Supplier's current shipment performance projection	Month Year	Apr-2009						Total units
	Number of units	25						25

6. REASONS GIVEN BY SUPPLIER for inability to meet Applicant's required shipment or performance needs.

Unable to achieve expedites as suppliers have US Government orders with DPAS rating on them. Items not due until 27 April 2009. Contract has been expedited

7. BRIEF STATEMENT OF NEED FOR ASSISTANCE. If applicable, explain effect of delay in receipt of Block 3 item(s) on achieving timely shipment of Block 5 item(s) (e.g., production line shut-down), or the impact on program or project schedule. Describe attempts to resolve problems and give specific reasons why assistance is required. If priority rating authority is requested, please so state.

Any slip in delivery date or loss of items to third parties will have a dramatic effect on Ministry of Defense Chinook fleet and degrade readiness.

8. CERTIFICATION: I certify that the information contained in Blocks 1 - 7 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief. Each signature of this form to electronically generated and transmitted - use of name is deemed certification.)

Signature of Applicant's authorized official Title

Print or type name of authorized official Date

This form can be found as Appendix I to 15 CFR 700

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SPA: Requests for Priority Rating Authority

- If a rated order is likely to be delayed because a person is unable to obtain items not normally rated under 15 CFR Part 700, the person may request the authority to use a priority rating in ordering the needed items. Examples include:
  - Production or construction equipment;
  - Computers when not used as production items; and
  - Expansion, rebuilding, or replacing plant facilities.

- In certain cases and upon specific request, the DOC, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract.

- For more information, see 15 CFR § 700.51.

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SPA: Examples of Assistance

While special priorities assistance may be provided for any reason in support of 15 CFR 700, it is usually provided in situations where:

- There is difficulty in obtaining delivery against a rated order by the required delivery date.
- Delivery conflicts need to be resolved.

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SPA: Criteria for Assistance

Requests for special priorities assistance should be timely, that is, the request has been submitted promptly and enough time exists for the Delegate Agency or Commerce to effect a meaningful resolution to the problem, and must establish that:

- There is an urgent need for the item
- The applicant has made a reasonable effort to resolve the problem

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SPA: Instances Where Assistance May Not Be Provided

Examples of when assistance may not be provided:

- Secure a price advantage
- Obtain delivery prior to the time required to fill a rated order
- Gain competitive advantage
- Overcome a supplier's regularly established terms of sale or conditions of doing business

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SPA: Assistance Programs with Canada and Other Nations

- To promote military assistance to foreign nations, this section provides for authorizing priority ratings to persons in Canada and in other foreign nations to obtain items in the United States in support of approved programs.

- Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance from countries that the U.S. Government has security of supply arrangements with in support for approved programs.

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SPA: Assistance Programs with Canada and Other Nations

- Security of supply is a non-binding arrangement concluded by the U.S. Government with a foreign partner to provide reciprocal priorities support.

- The U.S. Government has security of supply arrangements with the following countries:
  - Australia
  - Canada (MOU)
  - Finland
  - Italy
  - The Netherlands
  - Spain
  - Sweden
  - United Kingdom

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SPA: Assistance Programs with Canada and Other Nations

- Arrangements establish a process to request priority acceptance and performance of contracts, subcontracts, and purchase orders to address national defense needs.
  - Provides U.S. assurance of meeting requests via the DPAS
  - Provides foreign assurance via an Industry Code of Conduct

- Assistance can be requested by Governments, contractors, subcontractors, or suppliers.

- Not limited to crises, emergency, or armed conflict.

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Appendix D:
Official Actions

AMERICAN OVERSIGHT

Official Actions: Rating Authorization

An official action granting specific priority rating authority that permits a person to place a priority rating on an order for an item not normally ratable under this regulation, or authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

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Official Actions: Directives

- An official action requiring a company to deliver an item or take other action within a specified time frame.

- A company must comply with each Directive issued, however, a company may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

- Directives take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

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Official Actions: Letters of Understanding

- An official action which may be issued in resolving SPA requests to reflect an agreement reached by all parties (DOC, the Delegate Agency, the supplier, and the customer).

- A Letter of Understanding is used to confirm production or shipping schedules which do not require modifications to other rated orders.

- A Letter of Understanding is NOT used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this regulation, or to take other official actions.

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The Defense Priorities and Allocations System Training Course

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4/26/2017

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Course Overview

This course introduces the Defense Priorities and Allocations System (DPAS), a regulation administered by the Department of Commerce (DOC) that implements the priorities and allocations authority contained in Title 1 of the Defense Production Act (DPA) of 1950.

The primary purpose of the DPAS regulation (15 CFR Part 700) is to ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements.

NOTE: To navigate to other pages, make a selection on the bottom right or left corners of the screen.

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Primary Audience

The primary audience for this course are individuals who work for companies that receive contracts, subcontracts, or purchase orders from the U.S. Government or from U.S. Government contractors.

In order to ensure the effectiveness of the DPAS, it is essential that any individual who works for a company that receives or places a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

This training outlines some of the basic requirements that a company must adhere to when accepting DPAS rated orders.

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Course Outline

The goal of this course is to provide a basic understanding of the DPAS and its implementation. The course includes the major topics listed below. Please select a topic to begin.

1. What is the DPAS?
2. Overview of the Priorities and Allocations Authorities
3. Who has been delegated DPAS rating authority from the DOC?
4. Step by Step Guide: Processing Rated Orders
5. Who must comply with the DPAS?
6. How do I get assistance in the event of a problem?
7. What official actions does DOC utilize to implement/enforce the DPAS Provisions?
8. How does the DOC ensure compliance with the DPAS regulation?
9. How does the DPAS provide me protection against claims?
10. Examples of DPAS Assistance
11. How is the DPAS used for Energy Programs?
12. Course Review
13. Frequently Asked Questions
14. DPAS Contact Information

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What is the DPAS?

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What is the DPAS?

The Defense Priorities and Allocations System (DPAS) is a regulation administered by the Department of Commerce (DOC).

The DPAS implements the Title 1 priorities and allocations authority contained in the Defense Production Act (DPA) of 1950, that has been delegated to the Secretary of Commerce.

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What is the DPAS?

- The DPAS is used to prioritize national defense-related contracts/orders throughout the U.S. supply chain in order to support:
  - military programs
  - energy programs
  - homeland security
  - emergency preparedness
  - critical infrastructure

- The use of the DPAS is not limited to crises, emergency, or armed conflict.

- The DPAS can also be used to provide military or critical infrastructure assistance to foreign nations.

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What is the DPAS?

The purpose of the DPAS is to:

- Ensure the timely availability of industrial resources (and associated services) to meet current national defense and emergency preparedness program requirements
- Provide authority to U.S. Government agencies (and other authorized persons/entities) to order priority performance (i.e., delivery) on contracts and orders as well as allocate materials to meet national security requirements
- Provide an operating system to support rapid industrial response in a national emergency
- Minimize disruption to normal commercial activities

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Overview of the Priorities and Allocations Authorities

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Overview of the Priorities and Allocations Authorities

The graphic below provides an overview of the priorities and allocations authorities. Select a box to learn more.

Defense Production Act of 1950, 50 U.S.C. 4501, et seq.

Title 1 of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, et seq.) is the President's primary authority to expedite production/delivery of critical industrial items from the private sector.

Executive Order 13603

The National Defense Resources Preparedness Executive Order (E.O. 13603) delegates this authority to various agencies and addresses national defense resource programs and policies under the DPA.

DPAS Regulation 15 CFR Part 700

The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

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Who has been delegated DPAS rating authority from the DOC?

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Who has been delegated DPAS rating authority from the DOC?

The DOC has delegated the authority to place priority ratings on contracts/orders (rated orders) necessary or appropriate to promote the national defense, in accordance with the DPAS regulation (15 CFR Part 700) to:

- Department of Defense (DOD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS)
  - Federal Emergency Management Agency (FEMA) is the DPAS lead agency within DHS
- General Services Administration (GSA)

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Who has been delegated DPAS rating authority from the DOC?

- The DOC may also authorize other persons (including U.S. government agencies; foreign governments; U.S. and foreign contractors, subcontractors, and suppliers; or owners/operators of critical infrastructure) to place rated orders on a *case-by-case basis.*

- Such requests must first be determined as necessary or appropriate to promote the national defense by DOD, DOE, or DHS.



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Step by Step Guide:
Processing Rated Orders

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Step by Step Guide:
Processing Rated Orders

Below are the five important steps to processing rated orders. Select each step to learn more.

Step 1: What is a Rated Order and What Does it Mean for My Company?
Step 2: Identify Key Elements of Rated Order
Step 3: Accept or Reject the Rated Order
Step 4: Preferential Scheduling
Step 5: Extension of Priority Ratings

To learn additional information and important notes, please select the topics below:

- Additional Information
- Important Notes

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Who must comply with the DPAS?

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Who must comply with the DPAS?

- All companies in the United States must comply with the provisions of the DPAS regulation.

- Any person who places or receives a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

The following slides will provide additional information regarding the DPAS as well as a representation of the basic requirements that a person must adhere to when accepting DPAS rated orders.

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How do I get assistance in the event of a problem?

Special Priorities Assistance

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Special Priorities Assistance

- The DPAS is designed to be largely self-executing; however, problems may arise from time-to-time.
- In the event of a problem, a person should immediately contact the appropriate contact administration officer for guidance or assistance.
- If additional formal aid is needed, special priorities assistance (SPA) should be sought from the Delegate Agency through the contract administration officer.

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Special Priorities Assistance

- SPA can be provided for any reason in support of the DPAS regulation, such as:
  - Assisting in obtaining timely deliveries of items needed to satisfy rated orders
  - Authorizing the use of priority ratings on orders to obtain items not normally ratable under this regulation

- A request for special priorities assistance or priority rating authority must be submitted on Form BIS-999 to the local contract administration representative.
  - Form BIS-999 may be obtained from the Delegate Agency representative or from the Department of Commerce.
  - A sample of Form BIS-999 can be found here.

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Special Priorities Assistance

The following topics are covered in the DPAS regulation regarding SPA. Please select a topic to learn more:

- Requests for Priority Rating Authority (15 CFR § 700.51)
- Examples of Assistance (15 CFR § 700.52)
- Criteria for Assistance (15 CFR § 700.53)
- Instances where assistance will not be provided (15 CFR § 700.54)
- Assistance programs with Canada and other nations (15 CFR § 700.56)

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What official actions does DOC utilize to implement/enforce the DPAS Provisions?

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Official Actions

When necessary, the Department of Commerce may take specific official actions to implement or enforce the DPAS regulation, including the issuance of:

- Rating Authorization (15 CFR Part § 700.61)
- Directives (15 CFR Part § 700.62)
- Letters of Understanding (15 CFR Part § 700.63)

Please select on each topic above for more information.

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How does the DOC ensure compliance with the DPAS regulation?

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DPAS Compliance

Compliance with the DPAS regulation is outlined in 15 CFR § 700.70-75:

- DOC works closely with the DPAS Delegate Agencies (DOD, DOE, and DHS) to ensure compliance with DPAS regulation.

- Willful violation of the provisions of Title I or Sections 705 or 707 of the DPA, the priorities provisions of the Selective Service Act and related statutes or this part is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the DPA is $10,000 fine, or one year in prison, or both.

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How does the DPAS provide me protection against claims?

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Protection Against Claims

Protection against claims related to DPAS implementation is outlined in 15 CFR § 700.90:

- A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with the DPAS or official DPAS action.

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Examples of DPAS Assistance

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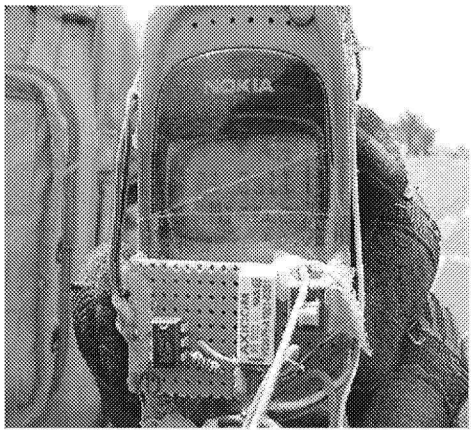
Examples of DPAS Assistance

DOC works closely with DOD to ensure materials to support critical programs receive appropriate priority.

<u>Examples of DPAS assistance in Iraq and Afghanistan:</u>

- Body Armor
- Mine Resistant Ambush Protected vehicles
- Counter-Improvised Explosive Devices







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Examples of DPAS Assistance

Foreign Requests:

- Resolving delivery delays for critical items (e.g., night vision/thermal imaging equipment, ammunition, aircraft spare parts)
- Supporting NATO operations in Afghanistan and counter-terrorism activities
- Requests supporting non-binding *"Security of Supply"* arrangements with foreign partners that provide for reciprocal priorities support
- Requests from non-Security of Supply foreign partners





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Examples of FEMA Approved Assistance

- Federal emergency preparedness, mitigation, response, and recovery
- State, local, tribal government emergency preparedness, mitigation, response, and recovery
- Intelligence and warning systems
- Border and transportation security
- Domestic counter-terrorism, including law enforcement
- Chemical, biological, radiological, and nuclear countermeasures
- Critical infrastructure protection and restoration



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How is the DPAS used for Energy Programs?

Industrial Priorities for Energy Programs

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Industrial Priorities for Energy Programs

The DPA authorizes the use of priority ratings for projects which maximize domestic energy supplies. These projects are outlined in the DPAS regulation (15 CFR § 700.20) and include:

- Those which maintain or further domestic energy exploration, production, refining, and transportation;
- Maintain or further the conservation of energy; or
- Are involved in the construction or maintenance of energy facilities.

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Industrial Priorities for Energy Programs

The DPAS regulation (15 CFR § 700.21) outlines the application process for a priority rating authorization for an energy program.

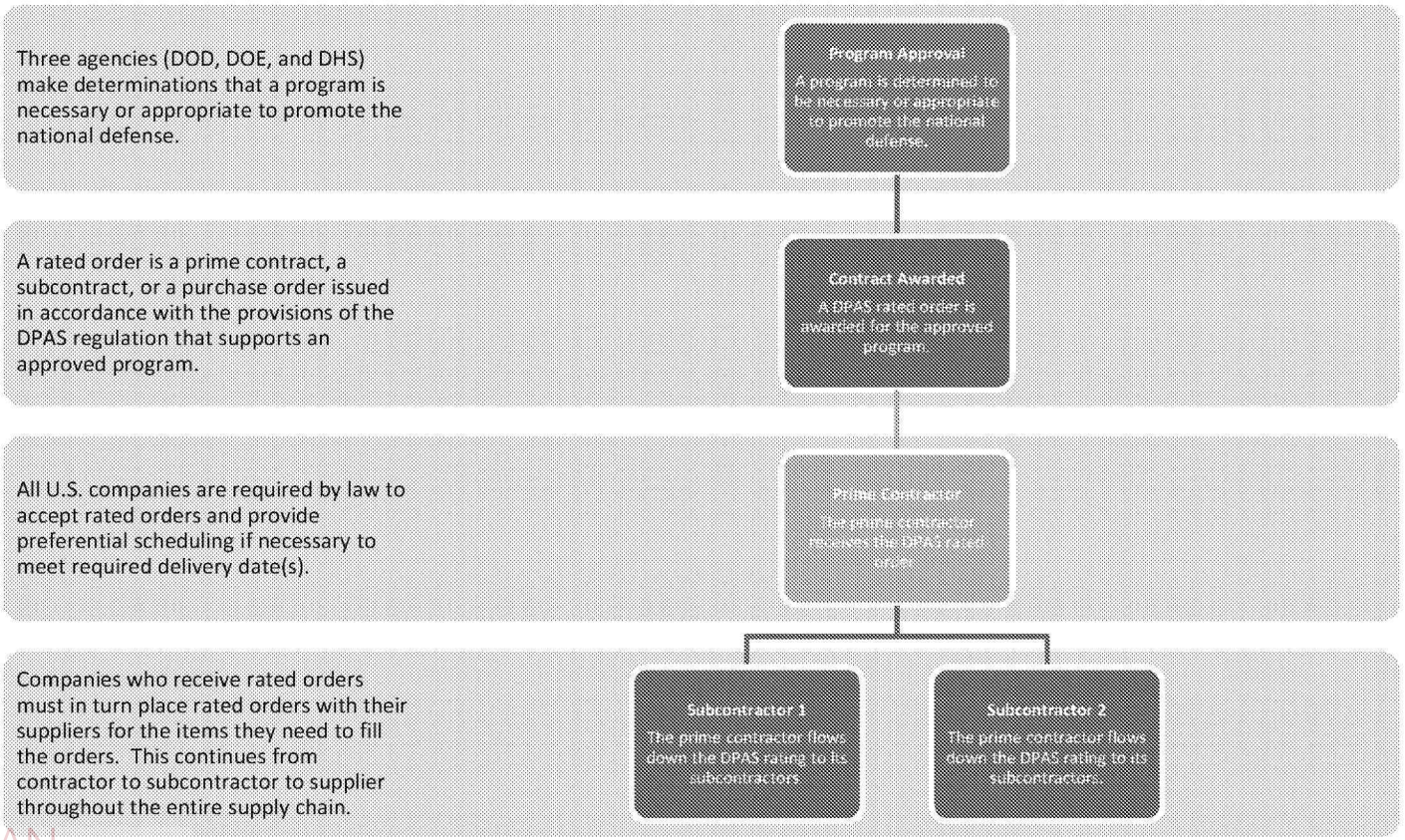
- For projects believed to maximize domestic energy supplies, a person may request priority authority for scarce, critical, and essential supplies of materials, equipment, and services (related to the production of materials or equipment, or the installation, repair, or maintenance of equipment) by submitting a request to the DOE.
- If the DOE notifies the DOC that the project maximizes domestic energy supplies and that the materials, equipment, or services are critical and essential, the DOC will determine whether the items in question are scarce, and, if they are scarce, whether there is a need to use the priority rating.
- After the DOC has conducted its analysis, it will advise the DOE of its findings as outlined in the regulation. If the findings are satisfied, the DOC will authorize the DOE to grant the use of a priority rating to the applicant.
- Schedule I of the DPAS regulation includes a list of approved programs to support the maximization of domestic energy supply. A DOE regulation setting forth the procedures and criteria used by the DOE in making its determination and findings is published in 10 CFR Part 216.

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Course Review

Below is a quick review of the rated contract or order process. To review other specific topics, you may return to the Course Outline by clicking below.



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Frequently Asked Questions

Q: May I accept a rated order contingent upon obtaining necessary production materials or equipment?

A: *No. Rated orders may not be accepted on a contingent basis. If you cannot meet the required delivery date, you must inform your customer of the earliest date on which delivery can be made, and offer to accept the order on the basis of that date.*

Q: If I encounter production or shipment conflicts following acceptance of several rated orders of equal priority status that will result in delayed delivery or performance against one or more orders, which of the conflicting orders should be given delivery or performance preference?

A: *You should give preference to order or orders in the sequence in which delivery or performance is required. For conflicting rated orders received on the same day, you should give preference to the order or orders with the earliest receipt date. If you cannot otherwise resolve the delivery or performance conflict, or if your customer objects to the rescheduling of the delayed order, you should promptly request special priorities assistance (SPA). For any order that will be delayed, you must notify your customer as provided in 15 CFR § 700.13(d)(3) of the DPAS regulation. Conflicting rated orders are discussed in section 700.14(c) of the DPAS regulation.*

Q: Can my suppliers charge a higher price to produce, deliver, or perform against my rated order?

A: *No. Your supplier may not discriminate against your rated order in any manner. Nor may the supplier impose any different terms or conditions than for comparable unrated orders.*

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Frequently Asked Questions

Q: May I use a rated order to purchase finished items, components, or production materials from a foreign supplier?

A: *No. The DPAS, and therefore priority ratings, has no legal standing outside of the United States. However, if you need assistance to obtain items from a supplier in Canada, you must submit a request through the Delegate Agency to the DOC/BIS's Office of Strategic Industries and Economic Security (SIES) on form BIS-999.*

If you need assistance to obtain items from a supplier in Australia, Finland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom, you should contact the Department of Defense DPAS Lead in the Office of Deputy Assistant Security of Defense for Manufacturing and Industrial Base Policy (MIBP). Please see 15 CFR § 700.57 (c) for more information.

Q: If my supplier refuses to accept or comply with a rated order, what should I do?

A: *You should attempt to obtain the reason for the refusal in writing. If the reason conforms to any of the provisions in section 700.13 (b) or (c) of the DPAS regulation, you should first seek an alternative source of supply. If there is no alternative source that can meet your requirements, you should promptly contact your customer or DOC/BIS. If the supplier refuses to give a reason or the reason does not conform to the provisions of section 700.13, you should promptly contact your customer or DOC/BIS.*

Q: Must I accept a rated contract or order from a customer with whom I have never done business?

A: *Yes. Except as provided in the DPAS in 15 CFR § 700.13, you must accept and fill all rated orders you receive.*

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Frequently Asked Questions

Q: If by accepting a rated order I must delay delivery against unrated orders, am I protected against claims for my customers for damages caused by this delay?

A: *Yes. Such protection is provided under Section 707 of the Defense Production Act of 1950. See section 700.90 of the DPAS. You may not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the statute, the DPAS, or a Directive issued by DOC/BIS.*

Q: If I use inventoried items to fill a rated order, may I replace those items by using a rated order?

A: *Yes. You may use a rated order to replace inventoried items if you place the order with your supplier within 90 days of the date of use of the items. However, you may only use the DO rating symbol on the order, even if the customer's order was DX.*

Q: To Fill a rated order, I need to purchase a quantity of items that is less than my supplier's minimum (commercially procurable) quantity. Is my supplier obligated to accept and fill a rated order for such quantity?

A: *No. However, as provided in section 700.17(e) of the DPAS and if reasonable to do so, you may place a rated order for the minimum commercially procurable quantity. If possible, you must combine rated orders to the supplier as provided in section 700.17(c) and (d).*

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Frequently Asked Questions

Q: May foreign entities (government agencies or contractors) place rated orders with U.S. suppliers?

A: *Yes. Foreign entities may place rated orders with U.S. suppliers only with express written authorization of DOC/BIS on a case-by-case basis where the procurement is deemed to be in the U.S. national defense interest. Special rules apply to the use of rated orders in the U.S. by the Canadian Government and authorized Canadian contractors. Sections 700.56 and 700.57 provide more information regarding these provisions.*

Q: Who is authorized to include priority ratings on contracts and purchase orders?

A: *Certain U.S. Government agencies and the Canadian Government are authorized by the DOC to include priority ratings on contracts and orders placed with U.S. contractors and suppliers in support of approved national defense programs. DPAS Schedule 1 lists the currently approved programs and the agency responsible for each program.*

Q: Must a rated order be in writing or may I give it verbally to my supplier over the phone? May it be placed electronically?

A: *Rated orders may be placed with suppliers either in writing or electronically. Regardless of common industry practice, if the order is given verbally, it must be followed-up immediately either in writing or electronically. The elements of a rated order are discussed in 15 CFR § 700.12.*

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DPAS
Contact Information

U.S. Department of Commerce
Bureau of Industry and Security
Office of Strategic Industries &
Economic Security
Defense Programs Division
(202) 482-3634
DPAS@bis.doc.gov
www.bis.doc.gov/dpas

U.S. Department of Defense
Office of the Under Secretary of Defense
Acquisition, Technology, & Logistics
Manufacturing & Industrial
Base Policy
(571) 372-6279
DPAS@osd.mil
www.acq.osd.mil/mibp/titleOne

U.S. Department of Homeland Security
Federal Emergency Management Agency
Office of Policy & Program Analysis
Defense Production Act Program Division
FEMA-OPPA-DPA@fema.dhs.gov

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End of Training Course

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Appendix A:

Overview of Priorities and Allocations Authorities

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Defense Production Act

- The DPA was enacted at the start of the Korean War as part of a broad war and civil defense mobilization effort. The DPA was created to ensure the availability of the country's industrial resources to address national security requirements.

- The DPA authorities are time-limited and undergo periodic amendment and reauthorization. The DPA Reauthorization of 2014 is through September 30, 2019.

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Defense Production Act

Under Title I of the DPA, the President is authorized to require:

- Preferential acceptance and performance of contracts or orders (other than contracts of employment) supporting certain approved national defense and energy programs

- To allocate materials, services, and facilities in such a manner as to promote these approved programs

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Defense Production Act

The DPA's definition of "national defense" includes programs for:

- Military and energy production or construction
- Military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity

The definition also includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, et seq.) and critical infrastructure protection and restoration.

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Defense Production Act

Title 1 of the DPA is the statutory basis for the National Defense Resources Preparedness Executive Order (Executive Order 13603) and the DPAS Regulation (15 CFR Part 700).

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Executive Order 13603

- The purpose of the National Defense Resources Preparedness executive order (Executive Order 13603) is to delegate authority and address national defense resource programs and policies under the DPA.

- Executive Order 13603 provides the framework for the allocation of resources, services, and materials to promote the national defense.

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Executive Order 13603

Section 201 of Executive Order 13603 delegates the authority granted to the President by the DPA (i.e., to require preferential acceptance and performance of contracts/orders for approved programs, and to allocate materials, services, and facilities to promote these approved programs) to the following Federal agencies:

	Agriculture (USDA) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer		**Defense (DOD)** Water Resources
	Energy (DOE) All Forms of Energy		**Transportation (DOT)** All Forms of Civil Transportation
	Health and Human Services (HHS) Health Resources		**Commerce (DOC)** All Other Materials, Services, and Facilities (including Construction Materials) Generally called "Industrial Resources"

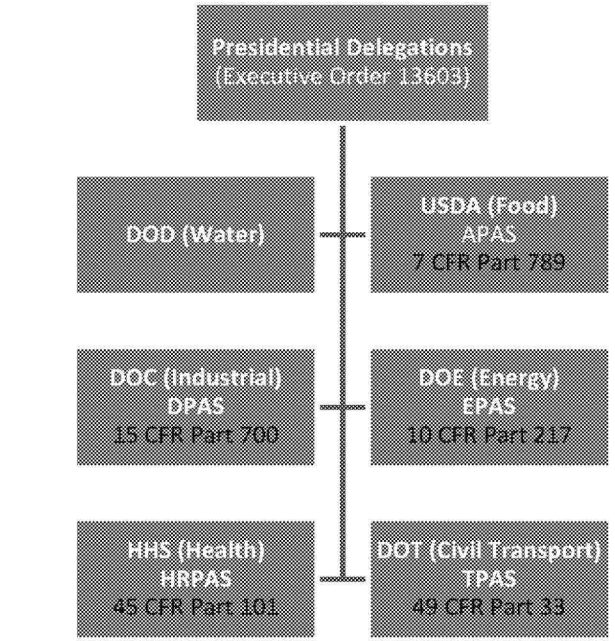
DPAS

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Executive Order 13603

Each department, except the Department of Defense (DOD), that has been delegated DPA authority has issued regulations. Each department's regulation covers only their delegated resources outlined in Section 201. For example, health resources are outside DPAS jurisdiction.

The figure to the right lists the citations for each department's regulation.



APAS – Agricultural Priorities and Allocations System
DPAS – Defense Priorities and Allocations System
EPAS – Energy Priorities and Allocations System
HRPAS – Health Resources Priorities and Allocations System
TPAS – Transportation Priorities and Allocations System

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Executive Order 13603

Section 202 of Executive Order 13603 authorizes three agencies to make the determination that a program is necessary or appropriate to promote the national defense:

- Defense – regarding military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense (DOD), space, and directly related activities

- Energy – regarding energy production and construction, distribution and use, and directly related activities

- Homeland Security – regarding all other national defense programs, including civil defense and continuity of Government.

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Executive Order 13603

- Section 201 of Executive Order 13603 authorizes the Secretary of Commerce to re-delegate the authority for the priority rating of contracts and orders for all industrial materials, services, and facilities needed in support of programs approved under Section 202.

- The DOC implements this authority through the DPAS regulation (15 CFR Part 700).

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DPAS Regulation: 15 CFR Part 700

- The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

- The DPAS regulation establishes procedures which requires preferential acceptance and performance of contracts or orders for industrial resources supporting certain national defense and energy programs. The regulation also instructs the public on the DPAS process and their obligations.

- This regulation is administered by DOC's Bureau of Industry and Security (BIS), and is used, as authorized by DOC/BIS, by other Federal departments, agencies, and industry.

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Appendix B:

Guide to Applying the DPAS to Contracts and Orders – Additional Information

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Step 1

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

- A rated order is a prime contract, a subcontract, or a purchase order issued in accordance with the provisions of the DPAS regulation that supports an approved program.
- U.S. companies are required by law to accept "rated orders" and provide preferential scheduling if necessary to meet required delivery date(s).
- Rated orders take preference over all unrated orders as necessary to meet required delivery dates; therefore, persons are required to reschedule unrated orders if they conflict with performance against a rated order.
- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill these orders.
- To learn about rated orders, click here.

Prime Contract/Purchase Order

When a company is awarded a U.S. Government (USG) contract or purchase order, it must determine whether the contract/purchase order is rated.

Subcontract/Flow-Down Purchase Order

When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

Prime Contract/Purchase Order

- For a prime contract/purchase order, a company will most likely receive a standard acquisition form known as the SF-33 (Solicitation, Offer and Award Form).
- On a SF-33, a company can determine whether they have received a rated order by looking at Block 1 of the form. If it is a rated order, a priority rating will be given. Click here for an example of this form.
- *NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating must be given. Certain exceptions apply.*

Subcontract/Flow-Down Purchase Order

- When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.
- For a subcontract/flow-down purchase order, there should be language in the contract/purchase order indicating that it is rated order and a priority rating should be given.

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Rated Order: Important Notes

- DPAS provisions are a standard part of U.S. defense contracting process.
- The DPAS is a standard clause in DOD contracts/orders.
- The DOD uses DPAS authority delegated to it by the DOC to place ratings on approximately 300,000 contracts annually. The Departments of Commerce and Defense estimate that, in addition, approximately 400,000 rated orders are "flowed down" annually through the supply chain to support those rated orders.
- Orders through DOD's Foreign Military Sales program are usually priority rated.
- Direct commercial sales to foreign persons are NOT priority rated unless authorized by DOC.



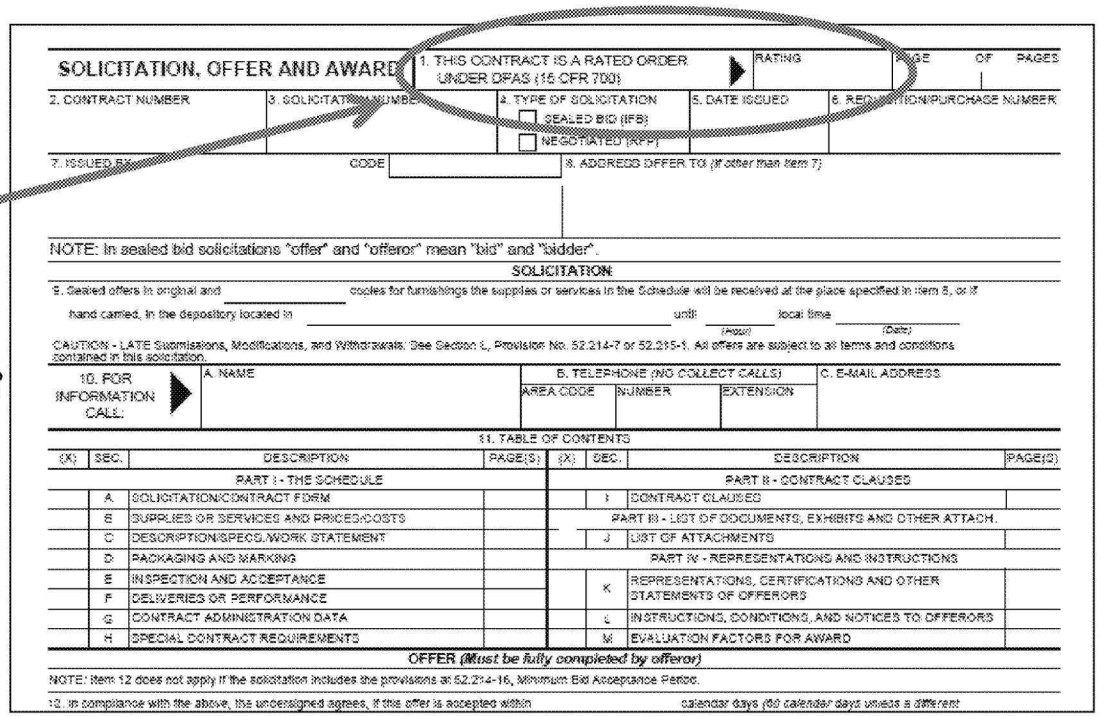
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Example of SF-33

Block 1 of the SF-33 indicates if the contract/purchase is a rated order.

NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating should be given.



SOLICITATION, OFFER AND AWARD | 1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) | RATING | PAGE OF PAGES

2. CONTRACT NUMBER | 3. SOLICITATION NUMBER | 4. TYPE OF SOLICITATION ☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP) | 5. DATE ISSUED | 6. REQUISITION/PURCHASE NUMBER

7. ISSUED BY | CODE | 8. ADDRESS OFFER TO (If other than Item 7)

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and ____ copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in ____ until ____ (Hour) local time ____ (Date)

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL: | A. NAME | B. TELEPHONE (NO COLLECT CALLS) AREA CODE / NUMBER / EXTENSION | C. E-MAIL ADDRESS

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if the offer is accepted within ____ calendar days (60 calendar days unless a different

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Step 2

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Step 2: Identify Key Elements of Rated Order

If a company is in receipt of a rated contract or purchase order, the company must identify the four key elements of a rated order outlined in 15 CFR § 700.12 and listed below. These four elements must appear on every contract, purchase order, or delivery order. If they do not appear, the company should request a completed rated order from the customer.

To learn more about these key elements, select an element:

1. Priority Rating
2. Required Delivery Date(s)
3. Authorized Written or Digital Signature
4. A Certification Statement

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Priority Rating

15 CFR § 700.11

Rated orders are identified by a priority rating. A priority rating consists of the rating symbol and a program identification symbol.

Priority Rating = (Rating Symbol) + (Program ID Symbol)

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Priority Rating

15 CFR § 700.11

There are two levels of priority established by the DPAS regulation, identified by the rating symbols "DX" and "DO":

1. DX – All DX rated orders have equal priority and take preference over DO and unrated orders (based on shipment schedule).

2. DO – All DO rated orders have equal priority and take preference over unrated orders (based on shipment schedule).

Note: DX ratings can only be approved by the Secretary of Defense or the Deputy Secretary of Defense. For a list of programs authorized to use DX industrial priority ratings, click here.

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DOD List of DX-Rated Programs

DOD components are currently authorized to use DX industrial priority ratings in support of the following programs:

Department of Defense:
- Program 390
- Integrated Ballistic Missile Defense System

Department of Navy:
- Presidential Helicopters (VH-3D, VH-60N)
- Fleet Ballistic Missile Weapons System, Trident System
- Program 341

Department of Air Force:
- Space-Based Infrared System (SBIRS) High
- Intercontinental Ballistic Missile, Minuteman III
- B-2 Stealth Bomber
- VC-25A Presidential Aircraft

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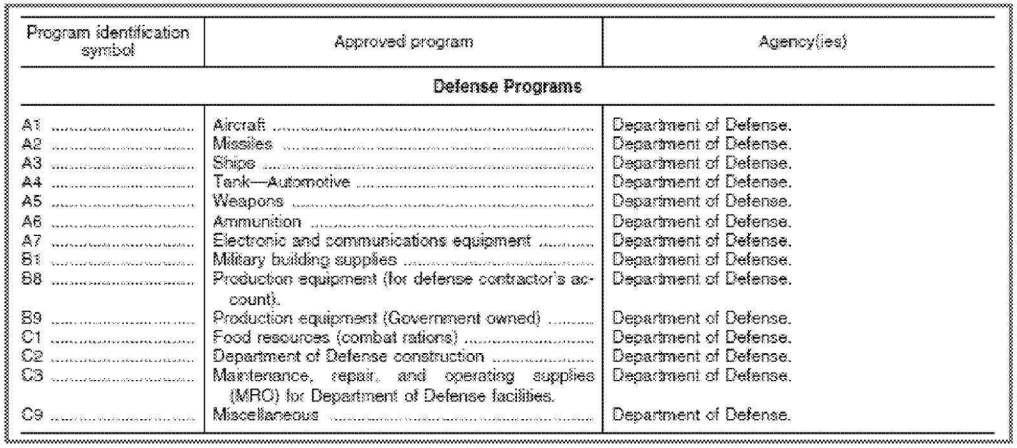
Priority Rating

15 CFR § 700.11

Program identification symbols indicates which approved program is being supported by a rated order.

- The list of approved programs and their identification symbols are listed in Schedule 1 of the DPAS regulation (15 CFR Part 700). Companies must ensure the symbol used is valid.
- It is also important to note that program identification symbols, in themselves, do not connote any priority.

Below are examples of program identification symbols for defense programs. You can find the complete list by clicking the image below.



Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.

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Schedule I to Part 700

Approved Programs and Delegate Agencies

Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.
	Military Assistance to Canada	
D1	Canadian military programs	Department of Commerce.
D2	Canadian production and construction	Department of Commerce.
D3	Canadian atomic energy program	Department of Commerce.
	Military Assistance to Other Foreign Nations	
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export.	Department of Commerce.
G2	Certain direct defense needs of foreign governments other than Canada.	Department of Commerce.
G3	Foreign nations (other than Canada) production and construction.	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Critical Infrastructure Assistance to Foreign Nations		
G4	Foreign critical infrastructure programs	Department of Commerce.
Co-Production		
J1	F–16 Co-Production Program	Departments of Commerce and Defense.
Atomic Energy Programs		
E1	Construction	Department of Energy.
E2	Operations—including maintenance, repair, and operating supplies (MRO).	Department of Energy.
E3	Privately owned facilities	Department of Energy.
Domestic Energy Programs		
F1	Exploration, production, refining, and transportation.	Department of Energy.
F2	Conservation	Department of Energy.
F3	Construction, repair, and maintenance	Department of Energy.
Other Defense, Energy, and Related Programs		
H1	Certain combined orders (see section 700.17(c))	Department of Commerce.
H5	Private domestic production	Department of Commerce.
H6	Private domestic construction	Department of Commerce.
H7	Maintenance, repair, and operating supplies (MRO).	Department of Commerce.
H8	Designated Programs	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Program identification symbol	Approved program	Agency(ies)
K1	Federal supply items	General Services Administration.
	Homeland Security Programs	
N1	Federal emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N3	Intelligence and warning systems	Department of Homeland Security.
N4	Border and transportation security	Department of Homeland Security.
N5	Domestic counter-terrorism, including law enforcement.	Department of Homeland Security.
N6	Chemical, biological, radiological, and nuclear countermeasures.	Department of Homeland Security.
N7	Critical infrastructure protection and restoration	Department of Homeland Security.
N8	Miscellaneous	Department of Homeland Security.

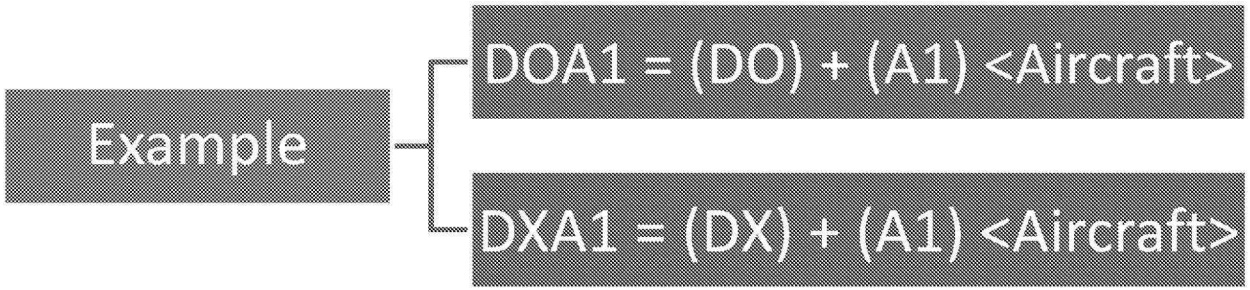
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Priority Rating

15 CFR § 700.11

Example of a Priority Rating:

If a company receives a rated order on a contract for the production of an aircraft, the order will will contain a DO-A1 or DX-A1 priority rating.



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Required Delivery Date(s)

- Rated orders are required to have a delivery date or dates.
- The words “immediately” or “as soon as possible” do not constitute a delivery date.
- A ‘‘requirements contract’’, ‘‘basic ordering agreement’’, ‘‘prime vendor contract’’, or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items from time-to-time or within a stated period against specific purchase orders, such as ‘‘calls’’, ‘‘requisitions’’, and ‘‘delivery orders’’.
  - These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document.

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Authorized Written or Digital Signature

- The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order is required.

- The signature or use of the name certifies that the rated order is authorized under the DPAS regulation and that the requirements of the DPAS regulation are being followed.

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Certification Statement

A certification statement is required on the rated order and should read in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR Part 700).

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Certification Statement

If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in §700.13(d)(2)].

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Step 3

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Step 3: Accept or Reject the Rated Order

Once a company has identified that they have received a rated order, the company must either accept or reject the order and provide customer notification according to the instructions provided in the DPAS regulation (15 CFR § 700.13).

Please select one of the topics below to learn more:

- Mandatory Acceptance
- Mandatory Rejection
- Optional Rejection
- Customer Notification Requirements

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Mandatory Acceptance

15 CFR § 700.13 (a)

- Any company in the United States must accept and fill a rated order for items that the company normally supplies.
- A company may not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.
- If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.

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Mandatory Rejection

15 CFR § 700.13 (b)

- A company may not accept a rated order for delivery on a specific date it is unable to meet that date.
  - However, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date.

- The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order.

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Optional Rejection

15 CFR § 700.13 (c)

A company may reject a rated order in any of the following cases as long as it does not discriminate among customers:

1. If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
2. If the order is for an item not supplied or a service not performed.
3. If the order is for an item produced, acquired, or provided only for the company's own use for which no orders have been filled for two years prior to the date of the receipt of the rated order. If, however, the company has sold some of these items, it must accept rated orders up to the quantity or portion of production, whichever is greater, sold within the past two years.
4. If the customer placing the order, other than the U.S. Government, makes the item or performs the service being ordered.

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Customer Notification Requirements

15 CFR § 700.13 (d)(1)

- A company must accept or reject a rated order in writing (hard copy), or in electronic format, to the customer placing the order within 15 working days after receipt of a DO rated order and 10 working days after receipt of a DX rated order.

- If the order is rejected, a company must provide the reasons in writing for the rejection.

- If a company has accepted a rated order and subsequently finds that the shipment or performance will be delayed, the company must notify the customer immediately, give the reasons for the delay, and advise of new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

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Customer Notification Requirements

15 CFR § 700.13 (d)(2)

- If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, and the order includes the statement set forth in 700.12(b), a company must accept or reject the rated order (in writing or electronically).
  - If the order is issued by an authorized person in response to a hazard that has occurred, the minimum time for acceptance or rejection is six hours after receipt.
  - If the order is issued by an authorized person to prepare for an imminent hazard, the minimum time for acceptance or rejection is 12 hours after receipt.

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Step 4

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Step 4: Preferential Scheduling

- Once a company has accepted a rated order, it must then schedule operations, including the acquisition of all needed production items, in order to satisfy the delivery requirements of each rated order.
- Companies are required to reschedule unrated orders if they conflict with performance against a rated order and must reschedule DO rated orders if they conflict with performance against a DX rated order.
- The DPAS regulation (15 CFR § 700.14) describes the requirements for preferential scheduling in further detail.
- Click here for examples of how preferential scheduling would be applied.

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Preferential Scheduling Examples

Below are examples of how preferential scheduling would be applied:

- Example 1: If a company receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed.

- Example 2: If a DX rated order is received calling for delivery on July 15 and a company has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order.

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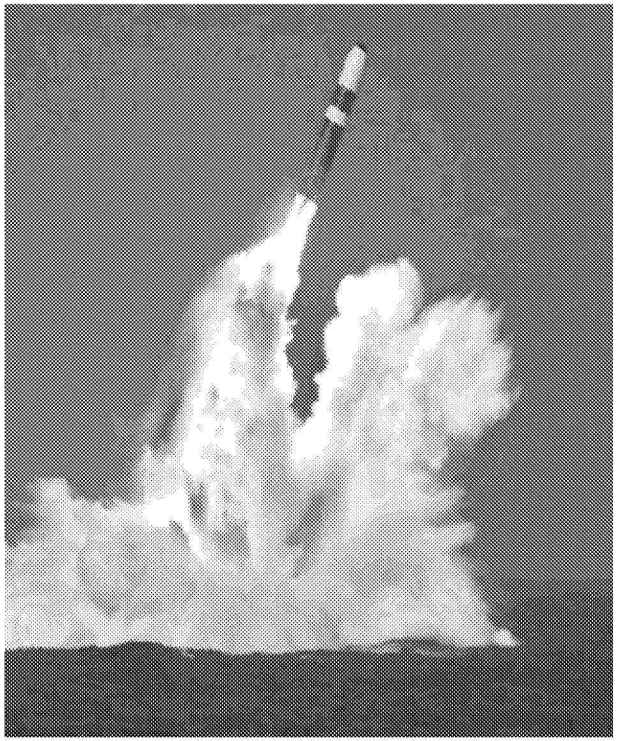
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Step 5

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Step 5: Extension of Priority Ratings

- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the rated orders.
- This continues from contractor to subcontractor to supplier throughout the entire supply chain.
- Companies must use the priority rating indicated on the customer's rated order, except as otherwise provided in the DPAS regulation or as directed by the DOC.



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Step 5: Extension of Priority Ratings

- A person is not required to place a priority rating on an order for less than $75,000, or on half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations(FAR)), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

- More information regarding extension of priority ratings can be found in 15 CFR § 700.15.

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Additional Information

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Additional Information

The DPAS Regulation provides additional information that a company in receipt of a rated order should be aware of. Select the topics below to learn more:

- Changes or Cancellations of Priority Ratings and Rated Orders (15 CFR § 700.16)
- Use of Rated Orders (15 CFR § 700.17)
- Limitations on Placing Rated Orders (15 CFR § 700.18)
- Records and Reports (15 CFR § 700.91)

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Additional Information:
Changes or Cancellations

The DPAS Regulation (15 CFR § 700.16) identifies how priority ratings and rated orders may be changed or cancelled. For example:

- The priority rating on a rated order may be charged or cancelled by:
  - An official action of the Department of Commerce
  - Written notification from the person who placed the rated order (including a Delegate Agency)

- If an unrated order is amended to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

- An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 700.13.

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Additional Information:
Changes or Cancellations

Examples continued:

- The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

- If a person no longer needs items to fill a rated order, any rated orders placed with suppliers for the items, or the priority rating on those orders, must be cancelled.

- When a priority rating is added to an unrated order, or is changed or cancelled, all suppliers must be promptly notified in writing.

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Additional Information:
Use of Rated Orders

The DPAS Regulation (15 CFR § 700.17) identifies how rated orders must, and can, be used.

Below are a few examples of the instructions found in 15 CFR § 700.17:

- A company must use rated orders to obtain:
  - Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;
  - Containers or other packaging materials required to make delivery of the finished items against rated orders;
  - Services, other than contracts of employment, needed to fill rated orders; and
  - MRO needed to produce the finished items to fill rated orders.

- A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:
  - The order must be placed within 90 days of the date of use of the inventory.

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Additional Information:
Limitations on Placing Rated Orders

The DPAS regulation (15 CFR § 700.18) outlines limitations on placing rated orders. Such limitations include:

- A person may not place a DO or DX rated order unless entitled to do so under the DPAS regulation.

- Rated orders may not be used to obtain:
  - Delivery on a date earlier than needed,
  - A greater quantity of the item than needed (with exception), or
  - Items in advance of the receipt of a rated order (with exception).

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Additional Information:
Records and Reports

The DPAS regulation (15 CFR § 700.91) outlines the recordkeeping and reporting requirements a company must adhere to.

Below are a few examples of the important requirements:

- A company is required to make and preserve for at least three years, accurate and complete records for any transaction covered by DPAS regulation or an official action.

- Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action.

- Records required to be maintained must be made available for examination on demand by duly authorized representatives of the DOC.

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Important Notes

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Important Notes

- Immediately notify the customer when you can't meet a delivery date, such as a DX request is received that overrides a DO request.

- If a company notifies the customer verbally, they should provide written notification one working day later.
  - This could trigger a Special Priorities Assistance (SPA) Request. SPAs will be covered in this training.

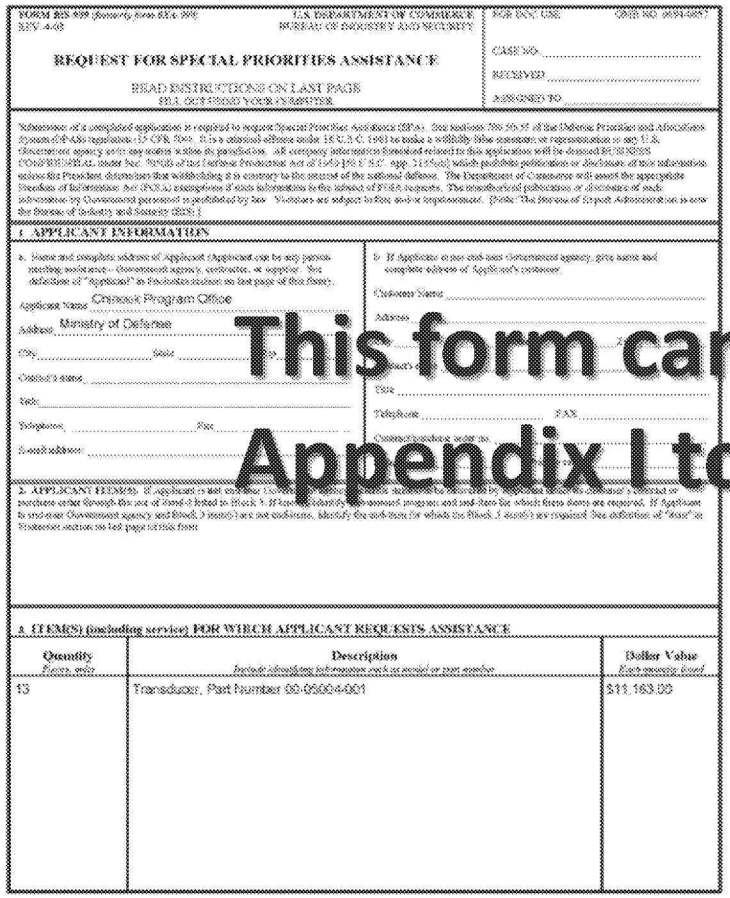
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Appendix C:

Special Priorities Assistance

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Example:
SPA Form BIS-999



FORM BIS-999 (formerly Form ITA-999) REV. 4-05

U.S. DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

FOR INT. USE: OMB NO. 0694-0057

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

READ INSTRUCTIONS ON LAST PAGE
FILL OUT FORM TYPE OR PRINTER

CASE NO.
RECEIVED
ASSIGNED TO

Submission of a completed application is required to request Special Priorities Assistance (SPA). See sections 700.50 et. of the Defense Priorities and Allocations System (DPAS) regulation (15 CFR 700). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency over any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 (50 U.S.C. app. 2155(d)) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Commerce will assert the appropriate exemptions to the Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment. [Note: The Bureau of Export Administration is now the Bureau of Industry and Security (BIS).]

1. APPLICANT INFORMATION

a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of "Applicant" in Definitions section on last page of this form).

Applicant Name: Chinook Program Office
Address: Ministry of Defense
City: State:
Contact's name:
Title:
Telephone: Fax:
E-mail address:

b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.

Customer Name:
Address:
City: State:
Contact's name:
Title:
Telephone: FAX:
Customer's order or ref. no.:

2. APPLICANT ITEMS: If Applicant is not end-user Government agency, identify the end-item for which the Block 3 item(s) are required or purchase order through the use of which listed in Block 3. If more than one shipment/ end-item for which items are required. If Applicant is end-user Government agency, and Block 3 item(s) are for customers, identify the end-item for which the Block 3 item(s) are required. See definition of "end" in Definitions section on last page of this form.

3. ITEM(S) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE

Quantity (Units, pcs)	Description (Include identifying information such as model or part number)	Dollar Value (Each separate item)
13	Transducer, Part Number 60-06004-001	$13,163.00

4. SUPPLIER INFORMATION

a. Name and complete address of Applicant's Supplier.

Supplier Name: AGC Systems
Address: 106 Michales Ave
City: Syracuse State: NY Zip: 13208
Contact Name: John Smith
Title:
Telephone: (703) 801-6007 Fax: (703) 607-4126
E-mail address: john.smith@allcsys.com

b. Applicant's contract or purchase order to Supplier.

Number: abcde-C-123456
Dated: January 1, 2008
Priority rating: (DO/DX (if none, so state))

If Supplier is not same as manufacturer, give complete purchase or buyer order information on Continuation Sheet on page 3 including purchase order number, date, and priority rating (if none, so state).

5. SHIPMENT SCHEDULE OF ITEMS SHOWN IN BLOCK 3

a. Applicant's required shipment/performance requirement	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
b. Supplier's proposed shipment/performance	Month Year		Sep-2008					Total units
	Number of units	13	12					25
c. Applicant's revised shipment/performance required	Month Year	Aug-2008	Sep-2008	Oct-2008				Total units
	Number of units	13						25
d. Supplier's revised shipment/performance promise	Month Year	Apr-2009						Total units
	Number of units	25						25

6. REASONS GIVEN BY SUPPLIER for inability to meet Applicant's required shipment or performance needs.

Unable to achieve expedites as suppliers have US Government orders with DPAS rating on them. Items not due until 27 April 2009. Contract has been expedited

7. BRIEF STATEMENT OF NEED FOR ASSISTANCE. As applicable, explain effect of delay in receipt of Block 3 item(s) on achieving timely shipment of Block 5 item(s) (e.g., production line shut-down), or the impact on program or project schedule. Describe attempts to resolve problems and give specific reasons why assistance is required. If priority rating authority is requested, please so state.

Any slip in delivery date or loss of items to third parties will have a dramatic effect on Ministry of Defense Chinook fleet and degrade readiness.

8. CERTIFICATION: I certify that the information contained in Blocks 1 - 7 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief (such signature of this form by electronically generated and transmitted - use of name is deemed certification).

Signature of Applicant's authorized official: Title:

Print or type name of authorized official: Date:

This form can be found as Appendix I to 15 CFR 700

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SPA: Requests for Priority Rating Authority

- If a rated order is likely to be delayed because a person is unable to obtain items not normally rated under 15 CFR Part 700, the person may request the authority to use a priority rating in ordering the needed items. Examples include:
  - Production or construction equipment;
  - Computers when not used as production items; and
  - Expansion, rebuilding, or replacing plant facilities.

- In certain cases and upon specific request, the DOC, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract.

- For more information, see 15 CFR § 700.51.

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SPA: Examples of Assistance

While special priorities assistance may be provided for any reason in support of 15 CFR 700, it is usually provided in situations where:

- There is difficulty in obtaining delivery against a rated order by the required delivery date.
- Delivery conflicts need to be resolved.

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SPA: Criteria for Assistance

Requests for special priorities assistance should be timely, that is, the request has been submitted promptly and enough time exists for the Delegate Agency or Commerce to effect a meaningful resolution to the problem, and must establish that:

- There is an urgent need for the item
- The applicant has made a reasonable effort to resolve the problem

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SPA: Instances Where Assistance May Not Be Provided

Examples of when assistance may not be provided:

- Secure a price advantage
- Obtain delivery prior to the time required to fill a rated order
- Gain competitive advantage
- Overcome a supplier's regularly established terms of sale or conditions of doing business

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SPA: Assistance Programs with Canada and Other Nations

- To promote military assistance to foreign nations, this section provides for authorizing priority ratings to persons in Canada and in other foreign nations to obtain items in the United States in support of approved programs.

- Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance from countries that the U.S. Government has security of supply arrangements with in support for approved programs.

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SPA: Assistance Programs with Canada and Other Nations

- Security of supply is a non-binding arrangement concluded by the U.S. Government with a foreign partner to provide reciprocal priorities support.

- The U.S. Government has security of supply arrangements with the following countries:
  - Australia
  - Canada (MOU)
  - Finland
  - Italy
  - The Netherlands
  - Spain
  - Sweden
  - United Kingdom

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SPA: Assistance Programs with Canada and Other Nations

- Arrangements establish a process to request priority acceptance and performance of contracts, subcontracts, and purchase orders to address national defense needs.
  - Provides U.S. assurance of meeting requests via the DPAS
  - Provides foreign assurance via an Industry Code of Conduct

- Assistance can be requested by Governments, contractors, subcontractors, or suppliers.

- Not limited to crises, emergency, or armed conflict.

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Appendix D:
Official Actions

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Official Actions: Rating Authorization

An official action granting specific priority rating authority that permits a person to place a priority rating on an order for an item not normally ratable under this regulation, or authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

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Official Actions: Directives

- An official action requiring a company to deliver an item or take other action within a specified time frame.

- A company must comply with each Directive issued, however, a company may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

- Directives take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

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Official Actions: Letters of Understanding

- An official action which may be issued in resolving SPA requests to reflect an agreement reached by all parties (DOC, the Delegate Agency, the supplier, and the customer).

- A Letter of Understanding is used to confirm production or shipping schedules which do not require modifications to other rated orders.

- A Letter of Understanding is NOT used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this regulation, or to take other official actions.

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DEPUTY CLERK

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

ZTE CORPORATION

NO.

3-17CR-0120K

PLEA AGREEMENT

ZTE Corporation (ZTEC), the defendant, by and through its attorneys Clifford Chance, LLP, and Burleson, Pate &Gibson, LLP, and the United States Attorney's Office for the Northern District of Texas and the United States Department of Justice, National Security Division (collectively, the "Department") agree as follows:

1. **Rights of the defendant:** ZTEC understands that it has the rights:

   a. to grand jury indictment;

   b. to plead not guilty;

   c. to have a trial by jury;

   d. to have its guilt proven beyond a reasonable doubt; and

   e. to confront and cross-examine witnesses and to call witnesses in its defense.

2. **Waiver of rights and plea of guilty**: ZTEC waives these rights and pleads guilty to the offenses alleged in the Information: Count 1, Conspiracy to Unlawfully Export, in violation of 50 U.S.C. § 1705(c), 31 CFR Part 560, 15 C.F.R.

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§ 764.2(a)-(e); Count 2, Obstruction of Justice, in violation of 18 U.S.C. § 1503(a); and Count 3, False Statements to Federal Investigators, in violation of 18 U.S.C. § 1001(a). ZTEC understands the nature and elements of the crimes to which it is pleading guilty, and agrees that the Factual Resume it has signed, incorporated herein, is true and will be submitted as evidence.

3. **Sentence:** The minimum and maximum penalties the Court can impose include:

Count One

a. A maximum fine, pursuant to 18 U.S.C. § 3571, of the greatest of $1,000,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense.

b. A mandatory special assessment of $400;

Count Two

a. A maximum fine, pursuant to 18 U.S.C. § 3571, of the greatest of $500,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense.

b. A mandatory special assessment of $400;

Count Three

a. A maximum fine, pursuant to 18 U.S.C. § 3571, of the greatest of $500,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense.

b. A mandatory special assessment of $400;

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4. **Sentencing guidelines**: The parties agree that, consistent with the principles set forth in § 3D1.2 of the Sentencing Guidelines, the counts will be grouped together and, in accordance with § 3D1.3 of the Sentencing Guidelines, the highest offense level will be the applicable offense level. Among the three counts, Conspiracy to Unlawfully Export produces the greatest fine amount. Although Conspiracy to Unlawfully Export is covered by U.S.S.G. § 2M5.1, Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism, that Guideline is not listed under U.S.S.G. § 8C2.1, which governs criminal fines for organizations. Therefore, the parties agree that ZTEC's sentence is not governed by the Fine Guidelines (§§ 8C2.2 – 8C2.9) of the Sentencing Guidelines. Instead, pursuant to U.S.S.G. § 8C2.10, the sentence is determined by applying 18 U.S.C. §§ 3553 and 3572.

5. **Sentencing agreement:** Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, ZTEC and the Department agree that a $286,992,532 criminal fine and a period of three years of corporate probation (more fully described in paragraph 7) is an appropriate sentence and should be imposed by the Court in connection with ZTEC's guilty plea to the Information, taking into account the inapplicability of the Sentencing Guidelines, the nature and circumstances of the offense, the need for the sentence imposed to reflect the seriousness of the offense, and the need for the sentence to promote respect for the law, to provide just punishment for the offense, and to afford adequate deterrence to other criminal conduct, as well as for the sentence imposed to protect the public from further crimes. 18 U.S.C. § 3553(a)(1). ZTEC and the Department agree that this is a reasonable and appropriate sentence, which

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is sufficient, but not greater than necessary, to achieve the purposes of sentencing in light of the factors set forth under 18 U.S.C. §§ 3553(a) and 3572. ZTEC agrees that no portion of the criminal fine is deductible on any Federal, State, or foreign income tax or information return.

a. ZTEC further agrees to the entry of a forfeiture money judgment of $143,496,266[1] against it (the "Forfeiture Amount"), as discussed below in Paragraph 13. The criminal fine and Forfeiture Amount shall be paid to the United States no later than ninety (90) days after the date of sentencing.

b. ZTEC also agrees that it shall pay a $1,200.00 special assessment.

c. ZTEC agrees that if at any time while it has obligations under this Plea Agreement the defendant sells, merges, or transfers all or substantially all of its business operations as they exist as of the date of this Plea Agreement, whether such sale is structured as a stock or asset sale, merger, or transfer, ZTEC shall include in any contract for sale, merger, or transfer a provision fully binding the purchaser(s) or any successor(s) in interest thereto to the guarantees and obligations described in this Plea Agreement.

d. Pursuant to Rule 32(c)(1)(A)(ii) of the Federal Rules of Criminal Procedure (F.R.C.P.), ZTEC agrees to waive a pre-sentence investigation and report and

1 ZTEC has also agreed to pay the Department of Commerce $361,000,000 and the Department of the Treasury's Office of Foreign Assets Control $100,871,266 pursuant to settlement agreements with those agencies. The Department of Commerce has also suspended an additional $300,000,000 fine that will be imposed if ZTEC violates its agreement with the Department of Commerce. The total overall forfeiture and fine amount that ZTEC will be paying the U.S. Government, therefore, is $892,360,064, with an additional $300,000,000 suspended.

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consents to the Court conducting a sentencing hearing and imposing the sentence on the same date as the entry of the guilty plea.

6. **Rejection of agreement:** Pursuant to Rule 11(c)(5), F.R.C.P., if the Court rejects this Plea Agreement, the Court shall afford ZTEC the opportunity to withdraw its plea, and shall advise ZTEC that, if it persists in its guilty pleas, the Court is not bound by this Plea Agreement and the disposition of the case may be less favorable than that contemplated by this Plea Agreement.

7. **Defendant's Agreement:** ZTEC agrees to the following provisions:

a. ZTEC agrees that it and its subsidiaries, divisions, segments, and affiliates will not commit any felony violation of United States Federal law during the three-year term of corporate probation.

b. ZTEC agrees that it has implemented and will continue to implement and maintain throughout the term of probation a compliance and ethics program designed to prevent and detect violations of sanctions and export controls pursuant to the International Emergency Economic Powers Act ("IEEPA"), the Iranian Transactions and Sanctions Regulations ("ITSR"), the Export Administration Regulations ("EAR"), and other applicable U.S. export control laws (collectively "U.S. Export Control Laws") throughout ZTEC's operations, including those of its subsidiaries, divisions, segments, and affiliates. Implementation of these policies and procedures shall not be construed in any future criminal proceeding initiated by the Government as providing immunity or amnesty to ZTEC for any crimes not disclosed to the Government as of the date of the signing of this Plea Agreement for which ZTEC otherwise would be responsible.

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c. During the period of probation, ZTEC shall continue to cooperate fully with the Department, the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), and the Department of Commerce in any and all matters concerning any act within the scope of or related to the conduct described in the Factual Resume or related to other potential violations of U.S. Export Control Laws occurring during the period of probation, subject to applicable law and regulations. At the request of the Department, ZTEC shall also cooperate fully with other U.S. or foreign law enforcement authorities and agencies in any investigation of ZTEC, its affiliates, or any of its present and former officers, directors, employees, agents, and consultants, or any other party in any and all matters concerning any act within the scope of or related to the conduct described in the Factual Resume or relating to potential violations of U.S. Export Control Laws that occur during the probation period. ZTEC agrees that its cooperation shall include, but is not limited to, the following:

i. ZTEC shall truthfully disclose all factual information not protected by a valid claim of attorney-client privilege, work product doctrine protection, or People's Republic of China ("PRC") state secrets privilege with respect to its activities, those of its affiliates, and those of its present and former directors, officers, employees, agents, and consultants concerning all matters relating to the conduct described in the Factual Resume or relating to other potential violations of U.S. Export Control Laws about which ZTEC has any knowledge or about which the Department may inquire. This obligation of truthful disclosure includes the obligation of ZTEC to provide

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to the Department, upon request, any non-privileged or non-protected document, record or other tangible evidence.

ii. ZTEC shall use its best efforts to make available for interview, deposition pursuant to Rule 15 of the Fed. R. Crim. P., or other sworn testimony, as required by the Department or other U.S. or foreign law enforcement authorities and agencies, present or former officers, directors, employees, agents, and consultants concerning the conduct described in the Factual Resume or related to any potential violations of U.S. Export Control Laws occurring during the probation period;

iii. ZTEC shall notify the Department of credible evidence of any violations of U.S. Export Control Laws occurring during the probation period committed by ZTEC or any of its subsidiaries or affiliates worldwide. ZTEC further agrees that it will provide the requisite notification to the Department of potential violations of U.S. Export Control Laws promptly upon learning of the underlying credible evidence.

iv. ZTEC waives all defenses based on issues germane to statute of limitations, venue (for purposes of the Plea Agreement only, ZTEC concedes jurisdiction in the Northern District of Texas), speedy trial under the United States Constitution and Speedy Trial Act, and any and all constitutional and non-jurisdictional defenses with respect to any prosecution of ZTEC for violations of U.S. Export Control Law that is not time-barred on the date this Plea Agreement is signed.

d. ZTEC further agrees to cooperate fully with the Department regarding any criminal investigation by U.S. law enforcement authorities ("criminal

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investigation"), including investigations of third parties, during the three-year period of probation in a manner set forth below:

i. ZTEC shall truthfully disclose to the Government all factual information not protected by a valid claim of attorney-client privilege, work-product doctrine protection, or PRC state secrets privilege concerning any act within the scope of or related to the criminal investigation.

ii. ZTEC shall provide to the Government, upon request, any document, record, or other materials not protected by a valid claim of attorney-client privilege, work-product doctrine protection, or PRC state secrets privilege concerning any act within the scope of or related to the criminal investigation.

iii. ZTEC shall use its best efforts to make available for interviews or testimony, as requested by the Government, present or former officers, directors, employees, agents, and consultants, in any and all matters concerning any act within the scope of or related to the criminal investigation. This obligation includes, but is not limited to, sworn testimony before federal grand juries or federal trials, as well as interviews with U.S. law enforcement. Cooperation under this paragraph shall include, at the request of the Department, identification of witnesses who, to ZTEC's knowledge, may have material information concerning any act within the scope of or related to the criminal investigation.

e. ZTEC agrees to retain an independent, third-party compliance monitor (the "Monitor") to review and assess in a professionally independent and objective fashion ZTEC's processes, policies, and procedures related to compliance with

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U.S. Export Control Laws, as well as ZTEC's compliance with the terms of this Plea Agreement. The Monitor's duties, powers, and responsibilities are set forth in Attachment A, which is incorporated herein. ZTEC agrees that it will retain the Monitor for the entire three-year-term of corporate probation. ZTEC agrees that it will engage the Monitor within ninety (90) calendar days, as described in Attachment A, from the date of the acceptance of this Plea Agreement by the Court.

f. ZTEC agrees that annually during the term of probation, including between thirty (30) and sixty (60) days before the expiration of the term of probation, the General Counsel of ZTEC shall execute, under the penalty of perjury, and provide to the Government, a certification that to the best of the General Counsel's knowledge, after reasonable inquiry, ZTEC is in compliance with the terms of this Plea Agreement. This certification shall also include the General Counsel's attestation that ZTEC has continued to maintain its compliance and ethics program designed to prevent and detect violations of U.S. Export Control Laws throughout its operations, including those of its subsidiaries, divisions, segments, and affiliates.

g. The General Counsel's certifications, the Monitor's Reports as detailed in Attachment A, and ZTEC's disclosures of information related to violations will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of these materials could discourage cooperation and thus undermine the objectives of this Plea Agreement's reporting requirements. Accordingly, these materials are intended to remain and shall remain non-public, except as otherwise agreed to by the Government and ZTEC in writing, or except

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to the extent the Government determines in its sole discretion that disclosure would be in furtherance of the Government's discharge of its duties and responsibilities or is otherwise required by law, and in such circumstances gives notice to ZTEC.

h. ZTEC agrees that the four employees identified as having signed the document described in paragraphs 40-41 of the Factual Resume have resigned or will resign or will be terminated, along with any and all payment obligations owed to them. ZTEC further agrees that it will accomplish this within six months of signing this Plea Agreement and that it shall provide the Department corroborating documentation of these actions.

i. ZTEC agrees that if it or any of its direct or indirect affiliates or subsidiaries issue a press release in connection with this Plea Agreement, ZTEC shall first consult the Department and the Department of Commerce to determine whether (a) the text of the release is true and accurate with respect to matters between the Department and the defendant; and (b) the Department and Department of Commerce have no objection to the release. Statements made by ZTEC at any press conference or other public speaking event shall be consistent with the approved press release.

j. ZTEC agrees that these undertakings shall be binding upon any acquirer or successor in interest to ZTEC or substantially all of ZTEC's assets and liabilities or business.

k. ZTEC waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without

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limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552(a).

8. **Government's agreement**: The government will not bring any additional charges against ZTEC or any of its present or former subsidiaries or affiliates, for conduct that (i) arises from or relates in any way to the conduct of the defendant or its present and former employees, consultants and agents alleged in the accompanying Information and Factual Resume, or (ii) that arises from or relates in any way to information disclosed by the defendant to the Department prior to the date of this Plea Agreement or otherwise known to the Department prior to the date of this Agreement. This Agreement is limited to the United States Attorney's Office for the Northern District of Texas and the U.S. Department of Justice, National Security Division, and does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against ZTEC or any property. This paragraph does not provide any protection against prosecution for any violations of U.S. criminal law if made in the future by ZTEC, or any of its then officers, directors, employees, agents or consultants, whether or not disclosed by the defendant pursuant to the terms of this Agreement. This Plea Agreement will not close or preclude the investigation or prosecution of any natural persons, including any current or former officers, directors, employees, stockholders, consultants or agents of ZTEC, who may have been involved in any of the matters set forth in the accompanying Factual Resume or in any other matters.

9. **Violation of agreement:** ZTEC understands that if it violates any provision of this Agreement, or if any guilty plea is vacated or withdrawn, the

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government will be free from any obligations of this Agreement and free to prosecute ZTEC for all offenses of which it has knowledge. In such event, ZTEC waives any objections based upon delay in prosecution. If any plea is vacated or withdrawn for any reason other than a finding that it was involuntary, ZTEC also waives objection to the use against it of any information or statements it has provided to the Department, and any resulting leads.

10. **Voluntary plea:** These pleas of guilty are freely and voluntarily made and are not the result of force or threats, or of promises apart from those set forth in this Plea Agreement. There have been no guarantees or promises from anyone as to what sentences the Court will impose. Upon entry of ZTEC's plea, the Department of Justice will not oppose ZTEC's removal from the Entity List and the Department of Justice will use its best efforts to move for an expeditious entry of this Plea Agreement.

11. **Waiver of right to appeal or otherwise challenge sentence**: ZTEC waives its rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from its convictions and sentences. ZTEC further waives its right to contest its convictions and sentences in any collateral proceeding, including proceedings under 28 U.S.C. § 2255. ZTEC, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing; (b) to challenge the voluntariness of its pleas of guilty or this waiver; and (c) to bring a claim of ineffective assistance of counsel.

12. **Representation of counsel**: ZTEC has thoroughly reviewed all legal and factual aspects of this case with its lawyer and is fully satisfied with that lawyer's legal

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representation. ZTEC has received from its lawyer explanations satisfactory to it concerning each paragraph of this Plea Agreement, each of its rights affected by this Agreement, and the alternatives available to it other than entering into this agreement. Because ZTEC concedes that it is guilty, and after conferring with its lawyer, ZTEC has concluded that it is in its best interest to enter into this Plea Agreement and all its terms, rather than to proceed to trial in this case.

13. **Forfeiture**

a. ZTEC agrees to the Forfeiture Allegation in the Criminal Information to which it is pleading guilty.

b. Specifically, ZTEC agrees to pay the United States a forfeiture money judgment in the amount of $143,496,266. ZTEC agrees that the Factual Resume supporting its guilty plea is sufficient evidence to support this forfeiture. ZTEC agrees that the Court may enter a preliminary Consent Order of Forfeiture for this property at the time of ZTEC's guilty plea or at any time before sentencing. ZTEC agrees that this Order will become final as to ZTEC when it is issued and will be part of the sentence pursuant to Rule 32.2(b)(4)(A), F.R.C.P.

c. ZTEC agrees that, if ZTEC does not pay the United States a forfeiture money judgment in the amount of $143,496,266 within ninety (90) days after the date of sentencing, this Plea Agreement permits the Government to seek to forfeit any of ZTEC's assets, or any assets of its U.S. subsidiary, ZTE USA, Inc., real or personal, that are subject to forfeiture under any federal statute, whether or not this Agreement specifically identifies the asset. Regarding any asset or property, ZTEC agrees to

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forfeiture of all interest in: (1) any and all property, real or personal, which constitutes or is derived from proceeds traceable to the violation to which it is pleading guilty; and (2) any substitute assets for property otherwise subject to forfeiture. *See* 18 U.S.C. § 981(a)(1)(C); 28 U.S.C. § 2461; 21 U.S.C. § 853(p).

d. ZTEC agrees that, if ZTEC does not pay the United States a forfeiture money judgment in the amount of $143,496,266 within ninety (90) days after the date of sentencing, the Government may choose in its sole discretion how it wishes to accomplish forfeiture of the property whose forfeiture ZTEC has consented to in this Plea Agreement, whether by criminal or civil forfeiture, using judicial or non-judicial forfeiture processes. If the Government chooses to effect the forfeiture provisions of this Plea Agreement through the criminal forfeiture process, ZTEC agrees to the entry of orders of forfeiture for such property and waives the requirements of Rule 32.2, F.R.C.P., regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. ZTEC understands that the forfeiture of assets is part of the sentence that may be imposed in this case.

e. ZTEC agrees to waive all constitutional and statutory challenges in any manner (including, but not limited to, direct appeal) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment.

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14. **Entirety of agreement**: This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties.

AGREED TO AND SIGNED this 6TH day of MARCH, 2017.

JOHN R. PARKER
UNITED STATES ATTORNEY

Defendant
By: 赵先明/Zhao Xianming
Its: Chairman and President of ZTE Corporation

J. MARK PENLEY
Assistant U.S. Attorney

GARY C. TROMBLAY
Deputy Criminal Chief

WENDY WYSONG by permission
Attorney for Defendant

LISA J. DUNN
Criminal Chief

ELIZABETH L. D. CANNON
Trial Attorney, National Security Division

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CERTIFICATE

I have read or had read to me this Plea Agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

Defendant

3/2/2017
Date

I am the defendant's counsel. I have carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge and belief, my client=s decision to enter into this Plea Agreement is an informed and voluntary one.

Wendy L. Wysong
Attorney for Defendant

3/6/17
Date

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ATTACHMENT A
INDEPENDENT CORPORATE COMPLIANCE MONITOR

1. Within ninety (90) calendar days from the date of acceptance of this Plea Agreement by the Court, ZTE Corporation ("ZTEC" or the "Company") agrees to engage an independent corporate monitor (the "Monitor") for a period not to exceed three (3) years from the date of acceptance of this Plea Agreement by the Court. The Monitor's primary responsibility is to assess and monitor the Company's compliance with the terms of this agreement so as to specifically address and reduce the risk of any recurrence of the Company's misconduct, including evaluating the Company's corporate compliance program with respect to the International Emergency Economic Powers Act ("IEEPA"), the Iran Transactions and Sanctions Regulations ("ITSR"), the Export Administration Regulations ("EAR"), and other relevant export control laws, and making recommendations for improvement. Within forty-five (45) calendar days after the signing of this agreement, and after consultation with the Department, the Company will propose to the Department three candidates to serve as the Monitor. The Monitor candidates shall have (a) at a minimum, the qualifications and experience sufficient in the opinion of the Department to properly discharge the Monitor's duties; (b) the ability to access and deploy appropriate internal ZTEC resources as necessary to discharge the Monitor's duties as described herein; and (c) sufficient independence from the Company to ensure effective and impartial performance of the Monitor's duties as described in the agreement.

2. The Department retains the right, in its sole discretion, to accept or reject the Monitor candidates proposed by the Company. The Monitor's term shall be three (3) years from the date of acceptance of this Plea Agreement by the Court. The Monitor's

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duties and authority, and the obligations of the Company with respect to the Monitor and the Department, are set forth below.

3. The Company agrees that it will not employ or be affiliated with the Monitor for a period of not less than two years from the date the Monitor's work has ended.[1]

4. The Monitor will review and evaluate the effectiveness of the Company's internal controls, record-keeping, and existing or new procedures as they relate to the Company's compliance with the IEEPA, ITSR, EAR, and other applicable export control laws (the "Export Control Policies and Procedures"). This review and evaluation shall include an assessment of the Export Control Policies and Procedures as actually implemented. The retention agreement between the Company and the Monitor will reference this Plea Agreement and include it as an attachment so the Monitor is fully apprised of his or her duties and responsibilities.

5. The Company shall cooperate fully with the Monitor and the Monitor shall have the authority to take such reasonable steps as, in his or her view, may be necessary to be fully informed about the compliance program of the Company within the scope of his or her responsibilities under this Agreement. To that end, the Company shall provide the Monitor with access to all information, documents, records, facilities and/or

1 The Department recognizes that the Company has signed a Settlement Agreement with the Department of Commerce related to the conduct that is the subject of this Plea Agreement. Pursuant to that Settlement Agreement, the Company has to provide annual audits to the Department of Commerce for a period of six years. For the first three years, the Monitor will be responsible for providing those audits. If the Department of Commerce and the Company agree, the Monitor may continue to serve as the auditor pursuant to the Company's Settlement Agreement with the Department of Commerce. Upon completion of those audits, the two-year period described in Paragraph 3 of this Attachment will commence.

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employees that fall within the scope of responsibilities of the Monitor under this Agreement, subject to the following limitations:

a. In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, and/or employees of ZTEC that may be subject to a valid claim of attorney-client privilege, attorney-work-product doctrine, or applicable state secrets, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.

b. If the matter cannot be resolved, at the request of the Monitor, the Company shall promptly provide written notice to the Monitor and to the Department. Such notice shall include a non-privileged description of the nature of the information, documents, records, facilities and/or employees that are being withheld, as well as the basis for the claim. The Department may then consider whether to make a further request for access to such information, documents, records, facilities and/or employees.

6. The parties agree that the Monitor is an independent third-party, not an employee or agent of the Company or the Department, and that no attorney-client relationship shall be formed between the Company and the Monitor.

7. Any disclosure by the Company to the Monitor concerning export control violations, as previously defined in this Plea Agreement, shall not relieve the Company of its obligation truthfully to disclose such matters to the Department.

8. During the three (3)-year term, the Monitor shall conduct an initial review and prepare an initial report, followed by two follow-up reviews and reports as described below:

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a. With respect to each of the three (3) reviews, after initial consultations with the Company and the Department, the Monitor shall prepare a written work plan for each review, which shall be submitted in advance to the Company and the Department for comment. In order to conduct an effective initial review of the Company's Export Control Policies and Procedures, the Monitor's initial work plan shall include such steps as are reasonably necessary to develop an understanding of the facts and circumstances surrounding any violations that may have occurred, but the parties do not intend that the Monitor will conduct his or her own investigation into those historical events. Any disputes between the Company and the Monitor with respect to the work plan shall be decided by the Department.

b. In connection with the initial review, the Monitor shall issue a written report within one hundred twenty (120) calendar days of the approval of the Monitor by the Department setting forth the Monitor's assessment and, if appropriate and necessary, making recommendations reasonably designed to improve the Company's Export Control Policies and Procedures. The Monitor shall provide the report to the Board of Directors of the Company and contemporaneously transmit copies to the Counterintelligence and Export Control Section, National Security Division, U.S. Department of Justice; U.S. Attorney's Office for the Northern District of Texas; Office of Export Enforcement, U.S. Department of Commerce, and Office of Foreign Assets Control, Treasury Department of the Treasury.

c. Within one hundred twenty (120) calendar days after receiving the Monitor's report, the Company shall consider, in good faith, adopting the

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recommendations set forth in the report. Within sixty (60) calendar days after receiving the report, the Company shall advise the Monitor and the Department in writing of any recommendations that the Company considers unduly burdensome, impractical, costly or otherwise inadvisable. As to any recommendation on which the Company and the Monitor ultimately do not agree, the views of the Company and the Monitor shall promptly be brought to the attention of the Department. The Department may consider the Monitor's recommendation and the Company's reasons for not adopting the recommendation in determining whether to bring relevant facts to the attention of other parts of the U.S. government.

d. The Monitor shall undertake two follow-up reviews to further monitor and assess whether the Company's Export Control Policies and Procedures are reasonably designed to detect and prevent violations of the IEEPA, ITSR, EAR, and other applicable export control laws.

e. Within sixty (60) calendar days of initiating each follow-up review, the Monitor shall:

i) Complete the review;

ii) Certify whether the Company's Export Control Policies and Procedures are appropriately designed and implemented to ensure compliance with the IEEPA, ITSR, EAR, and other applicable export control laws; and

iii) Report on the Monitor's findings in the same fashion as with respect to the initial review.

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f. The first follow-up review and report shall be completed by one year after the initial review. The second follow-up review and report shall be completed by one year after the completion of the first follow-up review.

g. The Monitor may extend the time period for submission of the follow-up reports with prior written approval of the Department.

9. In undertaking the assessments and reviews described above, the Monitor shall formulate conclusions based on:

a. inspection of relevant documents, including the policies and procedures relating to the Company's Export Control Policies and Procedures;

b. on-site observation and testing of the Company's systems and procedures, including its internal controls, record-keeping, and internal audit procedures;

c. meetings with, and interviews of, relevant employees, directors and other persons at mutually convenient times and places; and

d. analyses, studies and testing of the Company's Export Control Policies and Procedures, including its export control computer systems and networks.

10. Should the Monitor, during the course of his or her engagement, discover credible evidence that potentially unlawful transactions were not reported pursuant to applicable export control laws, the Monitor shall promptly report such conduct to the Company's General Counsel for further investigation, unless the Monitor believes, in the exercise of his or her discretion, that such disclosure should be made directly to the Department. If the Monitor refers the matter only to the Company's General Counsel, the General Counsel shall promptly report the same to the Department and

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contemporaneously notify the Monitor that such report has been made. If the Company fails to make disclosure to the Department within fourteen (14) business days of the Monitor's report of such conduct to the Company, the Monitor shall independently disclose his or her findings to the Department.

11. Further, in the event that the Company, or any entity or person working directly or indirectly for the Company, refuses to provide information necessary for the performance of the Monitor's responsibilities, the Monitor shall promptly disclose that fact to the Department. The Company shall not take any action to retaliate against the Monitor for any such disclosures or for any other reason.

12. At least annually, and more frequently if appropriate, representatives of the Company and the Department will meet together to discuss the monitorship and any suggestions, comments or proposals for improvement the Company may wish to discuss with the Department.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	NO. 3:17-CR-0120-K
	§	
ZTE CORPORATION	§	
	§	
Defendant.	§	

ORDER MODIFYING CONDITIONS OF PROBATION

Before the Court is the Second Supplemental Report of Third-Party Corporate Compliance Monitor, Submission of Year 2 Work Plan, and Recommendation to Modify Conditions of Probation (Doc. No. 62). In light of the Monitor's recommendations, the Court issues this Order Modifying Conditions of Probation ("Order").

As set forth in the Bureau of Industry and Security ("BIS"), Department of Commerce's April 15, 2018 Order Activating Suspended Denial Order relating to Defendant ZTE Corporation ("ZTEC" or "Defendant") and the June 7, 2018 Superseding Settlement Agreement with BIS, Defendant admits that it made false statements to the United States Government in a letter dated July 20, 2017. ZTEC later provided a copy of that letter to the Monitor, thereby relaying the same false statements to the Monitor. In providing those false statements to the Monitor, ZTEC failed to cooperate with the Monitor in violation of the first standard condition of supervision (Doc. No. 15). As a result, the Monitor recommends modifying ZTEC's probation pursuant to Fed. R. Crim. P. 32.1(c).

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Because ZTEC furnished the Monitor with false statements, the Court finds that Defendant violated a condition of its corporate probation. Given this finding, Defendant's acceptance of the proposed modifications, Defendant's agreement and waiver of hearing, and consideration of the relevant factors set forth in 18 U.S.C. § 3553(a), the Court MODIFIES the terms of Defendant's conditions of probation as fully detailed below.

I. Legal Standard

"If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in Section 3553(a) to the extent that they are applicable . . . continue [the defendant] on probation, with or without extending the term or modifying or enlarging the conditions." 18 U.S.C. § 3565(a). Under Fed. R. Crim. P. 32.1(c)(2)(A), a hearing is not required if "the person waives the hearing." In felony cases, terms of probation of up to five years are permitted. 18 U.S.C. § 3561(c). Here, Defendant's current term of probation is three years. Therefore, the term of probation can be extended up to an additional two years.

II. Defendant's Express Waiver

Defendant expressly waives a hearing and the opportunity to make a statement or present additional information in mitigation of an extension of Defendant's original term of probation. *See* FED. R. CRIM. P. 32.1(c)(2)(A).

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III. The Court's Modification of the Conditions of Probation

The Court finds that Defendant violated a condition of its probation as referenced above. After considering the factors set forth in Section 3553(a) to the extent they are applicable and the Monitor's Second Supplemental Report, the Court MODIFIES Defendant's probation as follows:

1. Defendant shall retain the Monitor through March 22, 2022.

2. The Monitor shall continually monitor and assess ZTEC's compliance with U.S. export laws, including the Export Control Reform Act of 2018 (the "Act") and the Export Administration Regulations (the "Regulations"), and the terms of this Order, the Court's Order Appointing the Monitor, the Plea Agreement, and Attachment A (Modified) to the Plea Agreement. This includes the compliance of ZTEC's subsidiaries and affiliates worldwide with U.S. export laws. The Monitor's assessments and reports shall encompass, without limitation, ZTEC's compliance program and all related policies, practices, procedures, and systems regarding all exports, reexports, or transfers (in-country) or other activities that are subject to the Act, the Regulations, and the prevention, detection, and reporting of violations of U.S. export controls. To the extent this Order expands the scope of the monitorship, as defined in Attachment A (Modified) to the Plea Agreement and the Court's Order Appointing the Monitor, including by eliminating the 60-day defined review periods for the Monitor's follow-up reviews, the terms described herein are additional terms of probation.

3. The Monitor shall submit four annual follow-up reports to the Court

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containing its findings, conclusions, and recommendations. The Monitor shall file the first follow-up report by July 19, 2019, the second report by July 20, 2020, the third report by July 20, 2021, and the fourth report by March 22, 2022.

4. The Monitor will provide the Court with interim reports, in the Monitor's discretion, regarding ZTEC's compliance with the Act, the Regulations, and the terms of this Order, the Court's Order Appointing the Monitor, the Plea Agreement, and Attachment A (Modified) to the Plea Agreement.

5. Within twenty one days of the date of this Order, ZTEC shall provide to the directors, officers, and employees of ZTEC and its subsidiaries and affiliates written notice, in language approved by the Monitor, of the terms of the Monitor's appointment, a description of the Monitor's duties and responsibilities under this Court's orders, and a directive to fully cooperate with the Monitor. This notice shall remain posted on ZTEC's internal website and be included in all employee compliance manuals or similar documents created and distributed during the probationary period.

6. Consistent with the procedures detailed in this Order, the Monitor shall have complete access to all data and information of ZTEC, however maintained or stored, including personnel, books, records, systems, documents, audits, reports, facilities, and technical information related to compliance with the Act, the Regulations, and this Court's orders. With the understanding that nothing in this Order shall be interpreted to compel waiver of applicable attorney-client or work product protections, the Monitor shall have full and complete access to all personnel, books, records, systems, documents, audits, reports, facilities, and

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technical information related to compliance with the Act, the Regulations, and this Court's orders. The Monitor is a court-appointed adjunct. As such, no attorney-client relationship shall be formed between ZTEC and the Monitor. ZTEC understands and agrees that it will not assert attorney-client or attorney work product protections over its personnel, books, records, systems, documents, audits, reports, facilities and technical information related to compliance with the Act, the Regulations, and this Court's orders that the Monitor will seek to access.

7. Moreover, although the Monitor is not investigating ZTEC's past violations of United States law, Defendant shall provide the Monitor with complete access to information related to historical violations to evaluate the current effectiveness of ZTEC's export control compliance program.

8. ZTEC agrees to provide the Monitor with the same access to personnel, books, records, systems, documents, audits, reports, facilities, and technical information as it provides to the Special Compliance Coordinator under the Superseding Settlement Agreement. The Monitor's access shall be granted no later than that of the Special Compliance Coordinator. Without limitation, ZTEC shall provide the Monitor with all information that it provides or should provide to BIS and the Special Compliance Coordinator under the terms of the Superseding Settlement Agreement with BIS. If contemporaneous transmission is not practical, ZTEC shall provide this information to the Monitor promptly, but no later than three (3) days after it provides such information to the BIS and the Special Compliance Coordinator.

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9. ZTEC withdraws its Motion to Disapprove the Monitor's Proposed Work Plan and Enforce the Parties' Plea Agreement (Doc. 36) as well as all objections stated in its Response (Doc. No. 49) to the scope of the monitorship. ZTEC withdraws, without prejudice to making future objections, its objections to the recommendations made in the Monitor's First Report.

10. The Monitor shall notify the Court of any future objections or if it encounters any difficulties in exercising its duties and responsibilities. Defendant agrees that the Court's determination shall be final.

11. Defendant acknowledges and understands the broad scope of its compliance obligations and related oversight and other authority of the Monitor under this Order. Defendant further understands and acknowledges that its compliance-related expenditures may increase from current levels because of its obligations and commitments under this Order. Defendant understands and agrees that failure to cooperate fully with the Monitor constitutes a material breach of this Order and a violation of its probation.

12. In fulfilling the duties and responsibilities set forth in this Order, the Plea Agreement, Attachment A (Modified) thereto, and the order appointing the Monitor, the Monitor may, at its sole discretion, present any compliance or compliance-program related issue directly to the Defendant's Board of Directors, its Chair, any special audit or compliance committee of the ZTEC Board, or to ZTEC's chief executive officer, chief financial officer, chief legal officer, or chief operating officer. ZTEC understands and agrees that the Monitor reports to the Court and thus may, in the Monitor's sole

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discretion or at the request of the Court, raise any such issue with the Court. Should the Monitor discover credible evidence that potential unlawful transactions were not reported under the Act, the Regulations, this Court's orders, or other applicable law, the Monitor shall promptly notify the Court, ZTEC, and the Department of Justice.

The Court ORDERS the foregoing modifications to the terms of ZTEC's probation. The terms described herein are additional terms of probation and expand the scope of the monitorship beyond the scope described in the Plea Agreement, Attachment A (Modified) thereto, and the Court's previous Order Appointing the Monitor.

SO ORDERED.

Signed October _____, 2018.

ED KINKEADE
UNITED STATES DISTRICT JUDGE

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Agreed to and signed on this the_____ day of September 2018.

ZTE CORPORATION:

_____

Xu Ziyang, President

_____

Shen Nan, Chief Legal Officer

HOGAN LOVELLS US LLP:

_____

J. Evans Rice
Stephen Propst

BURLESON, PATE & GIBSON, LLP

_____

Michael P. Gibson

Attorneys for Defendant

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From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 3/3/2020 2:37:31 AM
To: Curtis, Deborah (Federal) [DCurtis@doc.gov]
Subject: Test

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From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 3/17/2020 6:21:00 PM
To: Meredith, Ethan (Federal) [EMeredith@doc.gov]; Olson, Stephanie (Federal) [SOlson@doc.gov]
CC: Preston, Robert (Federal) [RPreston@doc.gov]
Subject: DPAS Training Slides Final - Locked Full Screen for Public.pdf
Attachments: DPAS Training Slides Final - Locked Full Screen for Public.pdf; ATT00001.htm

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The Defense Priorities and Allocations System Training Course

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4/26/2017

Click here to begin

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Course Overview

This course introduces the Defense Priorities and Allocations System (DPAS), a regulation administered by the Department of Commerce (DOC) that implements the priorities and allocations authority contained in Title 1 of the Defense Production Act (DPA) of 1950.

The primary purpose of the DPAS regulation (15 CFR Part 700) is to ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements.

NOTE: To navigate to other pages, make a selection on the bottom right or left corners of the screen.

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Primary Audience

The primary audience for this course are individuals who work for companies that receive contracts, subcontracts, or purchase orders from the U.S. Government or from U.S. Government contractors.

In order to ensure the effectiveness of the DPAS, it is essential that any individual who works for a company that receives or places a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

This training outlines some of the basic requirements that a company must adhere to when accepting DPAS rated orders.

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Course Outline

The goal of this course is to provide a basic understanding of the DPAS and its implementation. The course includes the major topics listed below. Please select a topic to begin.

1. What is the DPAS?
2. Overview of the Priorities and Allocations Authorities
3. Who has been delegated DPAS rating authority from the DOC?
4. Step by Step Guide: Processing Rated Orders
5. Who must comply with the DPAS?
6. How do I get assistance in the event of a problem?
7. What official actions does DOC utilize to implement/enforce the DPAS Provisions?
8. How does the DOC ensure compliance with the DPAS regulation?
9. How does the DPAS provide me protection against claims?
10. Examples of DPAS Assistance
11. How is the DPAS used for Energy Programs?
12. Course Review
13. Frequently Asked Questions
14. DPAS Contact Information

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What is the DPAS?

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What is the DPAS?

The Defense Priorities and Allocations System (DPAS) is a regulation administered by the Department of Commerce (DOC).

The DPAS implements the Title 1 priorities and allocations authority contained in the Defense Production Act (DPA) of 1950, that has been delegated to the Secretary of Commerce.

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What is the DPAS?

- The DPAS is used to prioritize national defense-related contracts/orders throughout the U.S. supply chain in order to support:
  - military programs
  - energy programs
  - homeland security
  - emergency preparedness
  - critical infrastructure

- The use of the DPAS is not limited to crises, emergency, or armed conflict.

- The DPAS can also be used to provide military or critical infrastructure assistance to foreign nations.

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What is the DPAS?

The purpose of the DPAS is to:

- Ensure the timely availability of industrial resources (and associated services) to meet current national defense and emergency preparedness program requirements
- Provide authority to U.S. Government agencies (and other authorized persons/entities) to order priority performance (i.e., delivery) on contracts and orders as well as allocate materials to meet national security requirements
- Provide an operating system to support rapid industrial response in a national emergency
- Minimize disruption to normal commercial activities

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Overview of the Priorities and Allocations Authorities

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Overview of the Priorities and Allocations Authorities

The graphic below provides an overview of the priorities and allocations authorities. Select a box to learn more.

Defense Production Act of 1950, 50 U.S.C. 4501, et seq.

Title 1 of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, et seq.) is the President's primary authority to expedite production/delivery of critical industrial items from the private sector.

Executive Order 13603

The National Defense Resources Preparedness Executive Order (E.O. 13603) delegates this authority to various agencies and addresses national defense resource programs and policies under the DPA.

DPAS Regulation 15 CFR Part 700

The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

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Who has been delegated DPAS rating authority from the DOC?

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Who has been delegated DPAS rating authority from the DOC?

The DOC has delegated the authority to place priority ratings on contracts/orders (rated orders) necessary or appropriate to promote the national defense, in accordance with the DPAS regulation (15 CFR Part 700) to:

- Department of Defense (DOD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS)
  - Federal Emergency Management Agency (FEMA) is the DPAS lead agency within DHS
- General Services Administration (GSA)

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Who has been delegated DPAS rating authority from the DOC?

- The DOC may also authorize other persons (including U.S. government agencies; foreign governments; U.S. and foreign contractors, subcontractors, and suppliers; or owners/operators of critical infrastructure) to place rated orders on a *case-by-case basis.*

- Such requests must first be determined as necessary or appropriate to promote the national defense by DOD, DOE, or DHS.



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Step by Step Guide:
Processing Rated Orders

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Step by Step Guide:
Processing Rated Orders

Below are the five important steps to processing rated orders. Select each step to learn more.

Step 1: What is a Rated Order and What Does it Mean for My Company?
Step 2: Identify Key Elements of Rated Order
Step 3: Accept or Reject the Rated Order
Step 4: Preferential Scheduling
Step 5: Extension of Priority Ratings

To learn additional information and important notes, please select the topics below:

- Additional Information
- Important Notes

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Who must comply with the DPAS?

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Who must comply with the DPAS?

- All companies in the United States must comply with the provisions of the DPAS regulation.

- Any person who places or receives a rated order should be thoroughly familiar with, and must comply with, the provisions of the DPAS regulation.

The following slides will provide additional information regarding the DPAS as well as a representation of the basic requirements that a person must adhere to when accepting DPAS rated orders.

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How do I get assistance in the event of a problem?

Special Priorities Assistance

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Special Priorities Assistance

- The DPAS is designed to be largely self-executing; however, problems may arise from time-to-time.
- In the event of a problem, a person should immediately contact the appropriate contact administration officer for guidance or assistance.
- If additional formal aid is needed, special priorities assistance (SPA) should be sought from the Delegate Agency through the contract administration officer.

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Special Priorities Assistance

- SPA can be provided for any reason in support of the DPAS regulation, such as:
  - Assisting in obtaining timely deliveries of items needed to satisfy rated orders
  - Authorizing the use of priority ratings on orders to obtain items not normally ratable under this regulation

- A request for special priorities assistance or priority rating authority must be submitted on Form BIS-999 to the local contract administration representative.
  - Form BIS-999 may be obtained from the Delegate Agency representative or from the Department of Commerce.
  - A sample of Form BIS-999 can be found here.

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Special Priorities Assistance

The following topics are covered in the DPAS regulation regarding SPA. Please select a topic to learn more:

- Requests for Priority Rating Authority (15 CFR § 700.51)
- Examples of Assistance (15 CFR § 700.52)
- Criteria for Assistance (15 CFR § 700.53)
- Instances where assistance will not be provided (15 CFR § 700.54)
- Assistance programs with Canada and other nations (15 CFR § 700.56)

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What official actions does DOC utilize to implement/enforce the DPAS Provisions?

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Official Actions

When necessary, the Department of Commerce may take specific official actions to implement or enforce the DPAS regulation, including the issuance of:

- Rating Authorization (15 CFR Part § 700.61)
- Directives (15 CFR Part § 700.62)
- Letters of Understanding (15 CFR Part § 700.63)

Please select on each topic above for more information.

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How does the DOC ensure compliance with the DPAS regulation?

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DPAS Compliance

Compliance with the DPAS regulation is outlined in 15 CFR § 700.70-75:

- DOC works closely with the DPAS Delegate Agencies (DOD, DOE, and DHS) to ensure compliance with DPAS regulation.
- Willful violation of the provisions of Title I or Sections 705 or 707 of the DPA, the priorities provisions of the Selective Service Act and related statutes or this part is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the DPA is $10,000 fine, or one year in prison, or both.

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How does the DPAS provide me protection against claims?

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Protection Against Claims

Protection against claims related to DPAS implementation is outlined in 15 CFR § 700.90:

- A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with the DPAS or official DPAS action.

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Examples of DPAS Assistance

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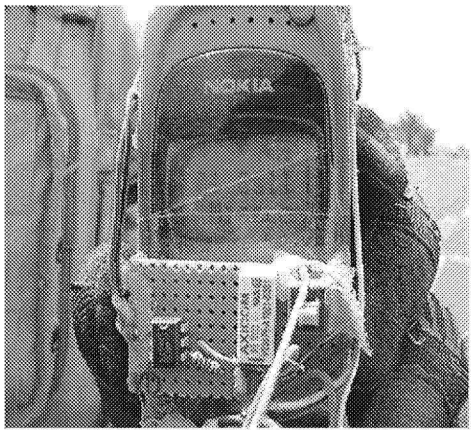
Examples of DPAS Assistance

DOC works closely with DOD to ensure materials to support critical programs receive appropriate priority.

<u>Examples of DPAS assistance in Iraq and Afghanistan:</u>

- Body Armor
- Mine Resistant Ambush Protected vehicles
- Counter-Improvised Explosive Devices







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Examples of DPAS Assistance

Foreign Requests:

- Resolving delivery delays for critical items (e.g., night vision/thermal imaging equipment, ammunition, aircraft spare parts)
- Supporting NATO operations in Afghanistan and counter-terrorism activities
- Requests supporting non-binding *"Security of Supply"* arrangements with foreign partners that provide for reciprocal priorities support
- Requests from non-Security of Supply foreign partners





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Examples of FEMA Approved Assistance

- Federal emergency preparedness, mitigation, response, and recovery
- State, local, tribal government emergency preparedness, mitigation, response, and recovery
- Intelligence and warning systems
- Border and transportation security
- Domestic counter-terrorism, including law enforcement
- Chemical, biological, radiological, and nuclear countermeasures
- Critical infrastructure protection and restoration



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How is the DPAS used for Energy Programs?

Industrial Priorities for Energy Programs

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Industrial Priorities for Energy Programs

The DPA authorizes the use of priority ratings for projects which maximize domestic energy supplies. These projects are outlined in the DPAS regulation (15 CFR § 700.20) and include:

- Those which maintain or further domestic energy exploration, production, refining, and transportation;
- Maintain or further the conservation of energy; or
- Are involved in the construction or maintenance of energy facilities.

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Industrial Priorities for Energy Programs

The DPAS regulation (15 CFR § 700.21) outlines the application process for a priority rating authorization for an energy program.

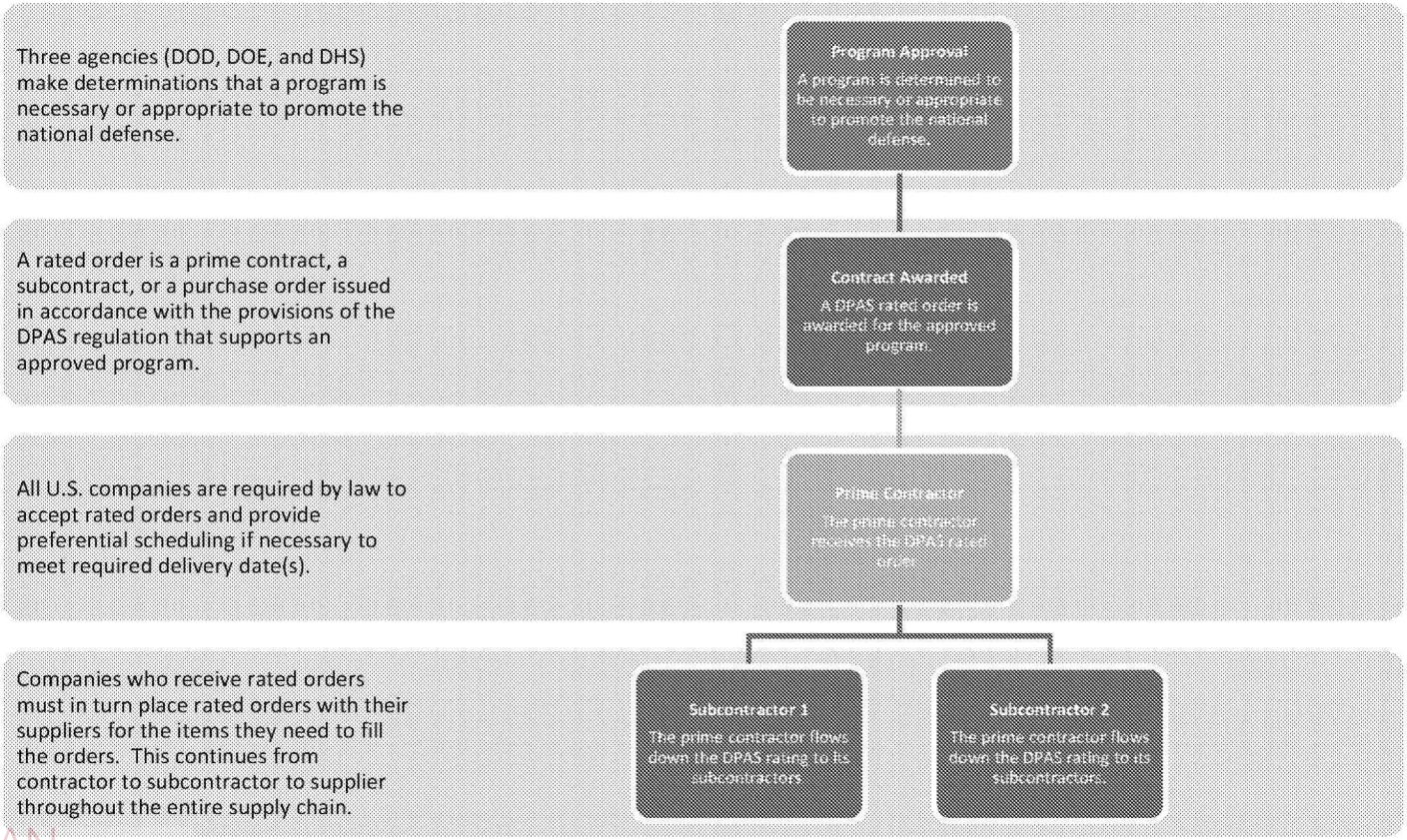
- For projects believed to maximize domestic energy supplies, a person may request priority authority for scarce, critical, and essential supplies of materials, equipment, and services (related to the production of materials or equipment, or the installation, repair, or maintenance of equipment) by submitting a request to the DOE.
- If the DOE notifies the DOC that the project maximizes domestic energy supplies and that the materials, equipment, or services are critical and essential, the DOC will determine whether the items in question are scarce, and, if they are scarce, whether there is a need to use the priority rating.
- After the DOC has conducted its analysis, it will advise the DOE of its findings as outlined in the regulation. If the findings are satisfied, the DOC will authorize the DOE to grant the use of a priority rating to the applicant.
- Schedule I of the DPAS regulation includes a list of approved programs to support the maximization of domestic energy supply. A DOE regulation setting forth the procedures and criteria used by the DOE in making its determination and findings is published in 10 CFR Part 216.

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Course Review

Below is a quick review of the rated contract or order process. To review other specific topics, you may return to the Course Outline by clicking below.



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Frequently Asked Questions

Q: May I accept a rated order contingent upon obtaining necessary production materials or equipment?

A: *No. Rated orders may not be accepted on a contingent basis. If you cannot meet the required delivery date, you must inform your customer of the earliest date on which delivery can be made, and offer to accept the order on the basis of that date.*

Q: If I encounter production or shipment conflicts following acceptance of several rated orders of equal priority status that will result in delayed delivery or performance against one or more orders, which of the conflicting orders should be given delivery or performance preference?

A: *You should give preference to order or orders in the sequence in which delivery or performance is required. For conflicting rated orders received on the same day, you should give preference to the order or orders with the earliest receipt date. If you cannot otherwise resolve the delivery or performance conflict, or if your customer objects to the rescheduling of the delayed order, you should promptly request special priorities assistance (SPA). For any order that will be delayed, you must notify your customer as provided in 15 CFR § 700.13(d)(3) of the DPAS regulation. Conflicting rated orders are discussed in section 700.14(c) of the DPAS regulation.*

Q: Can my suppliers charge a higher price to produce, deliver, or perform against my rated order?

A: *No. Your supplier may not discriminate against your rated order in any manner. Nor may the supplier impose any different terms or conditions than for comparable unrated orders.*

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Frequently Asked Questions

Q: May I use a rated order to purchase finished items, components, or production materials from a foreign supplier?

A: *No. The DPAS, and therefore priority ratings, has no legal standing outside of the United States. However, if you need assistance to obtain items from a supplier in Canada, you must submit a request through the Delegate Agency to the DOC/BIS's Office of Strategic Industries and Economic Security (SIES) on form BIS-999.*

If you need assistance to obtain items from a supplier in Australia, Finland, Italy, the Netherlands, Spain, Sweden, and the United Kingdom, you should contact the Department of Defense DPAS Lead in the Office of Deputy Assistant Security of Defense for Manufacturing and Industrial Base Policy (MIBP). Please see 15 CFR § 700.57 (c) for more information.

Q: If my supplier refuses to accept or comply with a rated order, what should I do?

A: *You should attempt to obtain the reason for the refusal in writing. If the reason conforms to any of the provisions in section 700.13 (b) or (c) of the DPAS regulation, you should first seek an alternative source of supply. If there is no alternative source that can meet your requirements, you should promptly contact your customer or DOC/BIS. If the supplier refuses to give a reason or the reason does not conform to the provisions of section 700.13, you should promptly contact your customer or DOC/BIS.*

Q: Must I accept a rated contract or order from a customer with whom I have never done business?

A: *Yes. Except as provided in the DPAS in 15 CFR § 700.13, you must accept and fill all rated orders you receive.*

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Frequently Asked Questions

Q: If by accepting a rated order I must delay delivery against unrated orders, am I protected against claims for my customers for damages caused by this delay?

A: *Yes. Such protection is provided under Section 707 of the Defense Production Act of 1950. See section 700.90 of the DPAS. You may not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the statute, the DPAS, or a Directive issued by DOC/BIS.*

Q: If I use inventoried items to fill a rated order, may I replace those items by using a rated order?

A: *Yes. You may use a rated order to replace inventoried items if you place the order with your supplier within 90 days of the date of use of the items. However, you may only use the DO rating symbol on the order, even if the customer's order was DX.*

Q: To Fill a rated order, I need to purchase a quantity of items that is less than my supplier's minimum (commercially procurable) quantity. Is my supplier obligated to accept and fill a rated order for such quantity?

A: *No. However, as provided in section 700.17(e) of the DPAS and if reasonable to do so, you may place a rated order for the minimum commercially procurable quantity. If possible, you must combine rated orders to the supplier as provided in section 700.17(c) and (d).*

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Frequently Asked Questions

Q: May foreign entities (government agencies or contractors) place rated orders with U.S. suppliers?

A: *Yes. Foreign entities may place rated orders with U.S. suppliers only with express written authorization of DOC/BIS on a case-by-case basis where the procurement is deemed to be in the U.S. national defense interest. Special rules apply to the use of rated orders in the U.S. by the Canadian Government and authorized Canadian contractors. Sections 700.56 and 700.57 provide more information regarding these provisions.*

Q: Who is authorized to include priority ratings on contracts and purchase orders?

A: *Certain U.S. Government agencies and the Canadian Government are authorized by the DOC to include priority ratings on contracts and orders placed with U.S. contractors and suppliers in support of approved national defense programs. DPAS Schedule 1 lists the currently approved programs and the agency responsible for each program.*

Q: Must a rated order be in writing or may I give it verbally to my supplier over the phone? May it be placed electronically?

A: *Rated orders may be placed with suppliers either in writing or electronically. Regardless of common industry practice, if the order is given verbally, it must be followed-up immediately either in writing or electronically. The elements of a rated order are discussed in 15 CFR § 700.12.*

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DPAS
Contact Information

U.S. Department of Commerce
Bureau of Industry and Security
Office of Strategic Industries &
Economic Security
Defense Programs Division
(202) 482-3634
DPAS@bis.doc.gov
www.bis.doc.gov/dpas

U.S. Department of Defense
Office of the Under Secretary of Defense
Acquisition, Technology, & Logistics
Manufacturing & Industrial
Base Policy
(571) 372-6279
DPAS@osd.mil
www.acq.osd.mil/mibp/titleOne

U.S. Department of Homeland Security
Federal Emergency Management Agency
Office of Policy & Program Analysis
Defense Production Act Program Division
FEMA-OPPA-DPA@fema.dhs.gov

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End of Training Course

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Appendix A:

Overview of Priorities and Allocations Authorities

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Defense Production Act

- The DPA was enacted at the start of the Korean War as part of a broad war and civil defense mobilization effort. The DPA was created to ensure the availability of the country's industrial resources to address national security requirements.

- The DPA authorities are time-limited and undergo periodic amendment and reauthorization. The DPA Reauthorization of 2014 is through September 30, 2019.

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Defense Production Act

Under Title I of the DPA, the President is authorized to require:

- Preferential acceptance and performance of contracts or orders (other than contracts of employment) supporting certain approved national defense and energy programs

- To allocate materials, services, and facilities in such a manner as to promote these approved programs

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Defense Production Act

The DPA's definition of "national defense" includes programs for:

- Military and energy production or construction
- Military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity

The definition also includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, et seq.) and critical infrastructure protection and restoration.

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Defense Production Act

Title 1 of the DPA is the statutory basis for the National Defense Resources Preparedness Executive Order (Executive Order 13603) and the DPAS Regulation (15 CFR Part 700).

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Executive Order 13603

- The purpose of the National Defense Resources Preparedness executive order (Executive Order 13603) is to delegate authority and address national defense resource programs and policies under the DPA.

- Executive Order 13603 provides the framework for the allocation of resources, services, and materials to promote the national defense.

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Executive Order 13603

Section 201 of Executive Order 13603 delegates the authority granted to the President by the DPA (i.e., to require preferential acceptance and performance of contracts/orders for approved programs, and to allocate materials, services, and facilities to promote these approved programs) to the following Federal agencies:

	Agriculture (USDA) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer		**Defense (DOD)** Water Resources
	Energy (DOE) All Forms of Energy		**Transportation (DOT)** All Forms of Civil Transportation
	Health and Human Services (HHS) Health Resources		**Commerce (DOC)** All Other Materials, Services, and Facilities (including Construction Materials) Generally called "Industrial Resources"

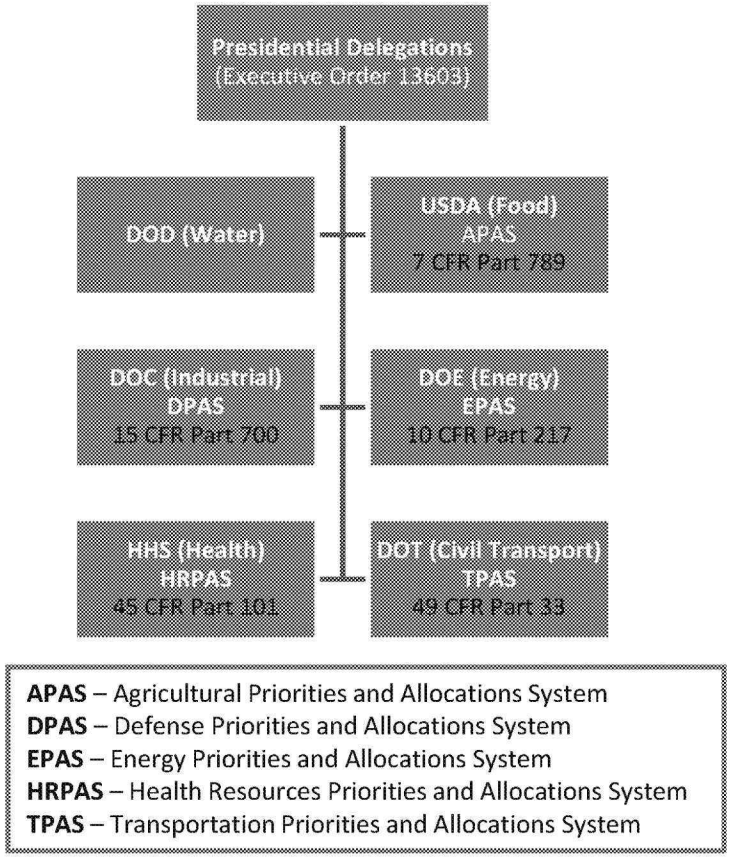
DPAS

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Executive Order 13603

Each department, except the Department of Defense (DOD), that has been delegated DPA authority has issued regulations. Each department's regulation covers only their delegated resources outlined in Section 201. For example, health resources are outside DPAS jurisdiction.

The figure to the right lists the citations for each department's regulation.



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Executive Order 13603

Section 202 of Executive Order 13603 authorizes three agencies to make the determination that a program is necessary or appropriate to promote the national defense:

- Defense – regarding military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense (DOD), space, and directly related activities

- Energy – regarding energy production and construction, distribution and use, and directly related activities

- Homeland Security – regarding all other national defense programs, including civil defense and continuity of Government.

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Executive Order 13603

- Section 201 of Executive Order 13603 authorizes the Secretary of Commerce to re-delegate the authority for the priority rating of contracts and orders for all industrial materials, services, and facilities needed in support of programs approved under Section 202.

- The DOC implements this authority through the DPAS regulation (15 CFR Part 700).

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DPAS Regulation: 15 CFR Part 700

- The DPAS regulation (15 CFR Part 700) implements the priorities and allocations authority of the DPA with respect to industrial resources.

- The DPAS regulation establishes procedures which requires preferential acceptance and performance of contracts or orders for industrial resources supporting certain national defense and energy programs. The regulation also instructs the public on the DPAS process and their obligations.

- This regulation is administered by DOC's Bureau of Industry and Security (BIS), and is used, as authorized by DOC/BIS, by other Federal departments, agencies, and industry.

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Appendix B:

Guide to Applying the DPAS to Contracts and Orders – Additional Information

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Step 1

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

- A rated order is a prime contract, a subcontract, or a purchase order issued in accordance with the provisions of the DPAS regulation that supports an approved program.
- U.S. companies are required by law to accept "rated orders" and provide preferential scheduling if necessary to meet required delivery date(s).
- Rated orders take preference over all unrated orders as necessary to meet required delivery dates; therefore, persons are required to reschedule unrated orders if they conflict with performance against a rated order.
- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill these orders.
- To learn about rated orders, click here.

Prime Contract/Purchase Order

When a company is awarded a U.S. Government (USG) contract or purchase order, it must determine whether the contract/purchase order is rated.

Subcontract/Flow-Down Purchase Order

When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.

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Step 1:
What is a Rated Order and What Does it Mean for My Company?

Prime Contract/Purchase Order

- For a prime contract/purchase order, a company will most likely receive a standard acquisition form known as the SF-33 (Solicitation, Offer and Award Form).
- On a SF-33, a company can determine whether they have received a rated order by looking at Block 1 of the form. If it is a rated order, a priority rating will be given. Click here for an example of this form.
- *NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating must be given. Certain exceptions apply.*

Subcontract/Flow-Down Purchase Order

- When a company is awarded a subcontract or receives a purchase order from another company, it must determine whether the contract/purchase order is rated.
- For a subcontract/flow-down purchase order, there should be language in the contract/purchase order indicating that it is rated order and a priority rating should be given.

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Rated Order: Important Notes

- DPAS provisions are a standard part of U.S. defense contracting process.
- The DPAS is a standard clause in DOD contracts/orders.
- The DOD uses DPAS authority delegated to it by the DOC to place ratings on approximately 300,000 contracts annually. The Departments of Commerce and Defense estimate that, in addition, approximately 400,000 rated orders are "flowed down" annually through the supply chain to support those rated orders.
- Orders through DOD's Foreign Military Sales program are usually priority rated.
- Direct commercial sales to foreign persons are NOT priority rated unless authorized by DOC.



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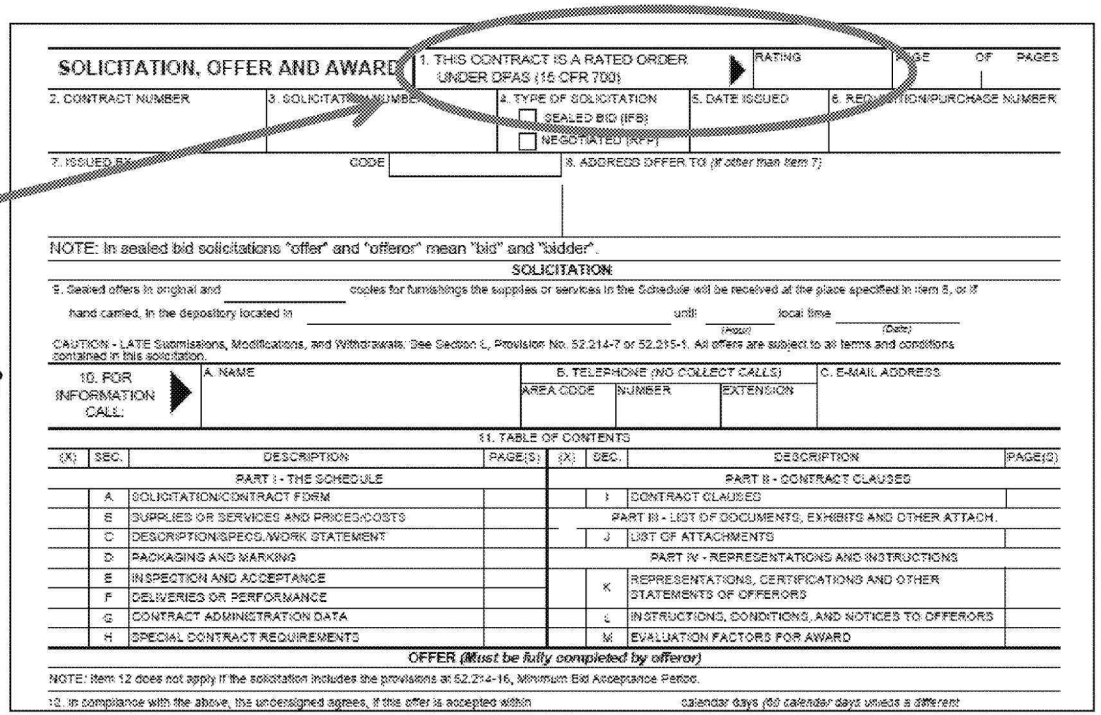
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Example of SF-33

Block 1 of the SF-33 indicates if the contract/purchase is a rated order.

NOTE: If you do not receive a SF-33 form, there should be language in the contact/purchase order indicating it is rated and a priority rating should be given.



SOLICITATION, OFFER AND AWARD

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) | RATING | PAGE OF PAGES

2. CONTRACT NUMBER | 3. SOLICITATION NUMBER | 4. TYPE OF SOLICITATION ☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP) | 5. DATE ISSUED | 6. REQUISITION/PURCHASE NUMBER

7. ISSUED BY | CODE | 8. ADDRESS OFFER TO (If other than Item 7)

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and ____ copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in ____ until ____ (Hour) local time ____ (Date)

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL: | A. NAME | B. TELEPHONE (NO COLLECT CALLS) AREA CODE / NUMBER / EXTENSION | C. E-MAIL ADDRESS

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if the offer is accepted within ____ calendar days (60 calendar days unless a different

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Back

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Step 2

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Step 2: Identify Key Elements of Rated Order

If a company is in receipt of a rated contract or purchase order, the company must identify the four key elements of a rated order outlined in 15 CFR § 700.12 and listed below. These four elements must appear on every contract, purchase order, or delivery order. If they do not appear, the company should request a completed rated order from the customer.

To learn more about these key elements, select an element:

1. Priority Rating
2. Required Delivery Date(s)
3. Authorized Written or Digital Signature
4. A Certification Statement

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Priority Rating

15 CFR § 700.11

Rated orders are identified by a priority rating. A priority rating consists of the rating symbol and a program identification symbol.

Priority Rating = (Rating Symbol) + (Program ID Symbol)

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Priority Rating

15 CFR § 700.11

There are two levels of priority established by the DPAS regulation, identified by the rating symbols "DX" and "DO":

1. DX – All DX rated orders have equal priority and take preference over DO and unrated orders (based on shipment schedule).

2. DO – All DO rated orders have equal priority and take preference over unrated orders (based on shipment schedule).

Note: DX ratings can only be approved by the Secretary of Defense or the Deputy Secretary of Defense. For a list of programs authorized to use DX industrial priority ratings, click here.

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DOD List of DX-Rated Programs

DOD components are currently authorized to use DX industrial priority ratings in support of the following programs:

Department of Defense:
- Program 390
- Integrated Ballistic Missile Defense System

Department of Navy:
- Presidential Helicopters (VH-3D, VH-60N)
- Fleet Ballistic Missile Weapons System, Trident System
- Program 341

Department of Air Force:
- Space-Based Infrared System (SBIRS) High
- Intercontinental Ballistic Missile, Minuteman III
- B-2 Stealth Bomber
- VC-25A Presidential Aircraft

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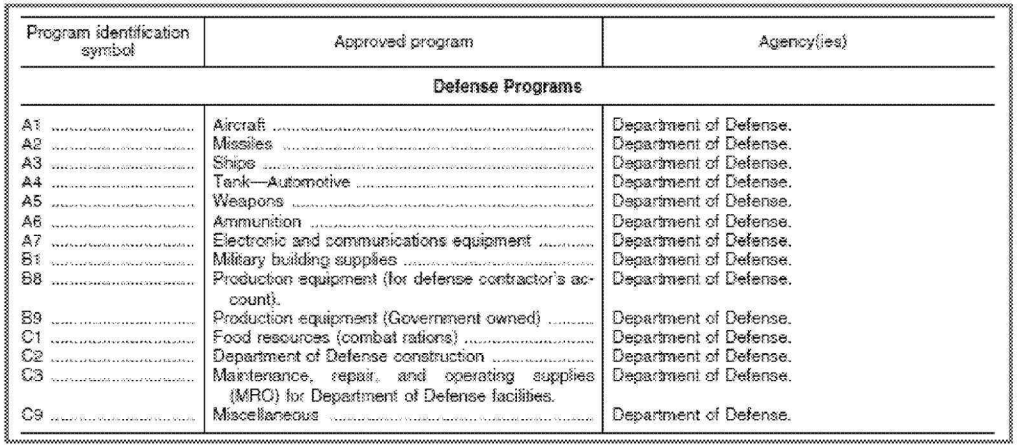
Priority Rating

15 CFR § 700.11

Program identification symbols indicates which approved program is being supported by a rated order.

- The list of approved programs and their identification symbols are listed in Schedule 1 of the DPAS regulation (15 CFR Part 700). Companies must ensure the symbol used is valid.
- It is also important to note that program identification symbols, in themselves, do not connote any priority.

Below are examples of program identification symbols for defense programs. You can find the complete list by clicking the image below.



Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.

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Schedule I to Part 700

Approved Programs and Delegate Agencies

Program identification symbol	Approved program	Agency(ies)
	Defense Programs	
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account).	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.
C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities.	Department of Defense.
C9	Miscellaneous	Department of Defense.
	Military Assistance to Canada	
D1	Canadian military programs	Department of Commerce.
D2	Canadian production and construction	Department of Commerce.
D3	Canadian atomic energy program	Department of Commerce.
	Military Assistance to Other Foreign Nations	
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export.	Department of Commerce.
G2	Certain direct defense needs of foreign governments other than Canada.	Department of Commerce.
G3	Foreign nations (other than Canada) production and construction.	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Critical Infrastructure Assistance to Foreign Nations		
G4	Foreign critical infrastructure programs	Department of Commerce.
Co-Production		
J1	F–16 Co-Production Program	Departments of Commerce and Defense.
Atomic Energy Programs		
E1	Construction	Department of Energy.
E2	Operations—including maintenance, repair, and operating supplies (MRO).	Department of Energy.
E3	Privately owned facilities	Department of Energy.
Domestic Energy Programs		
F1	Exploration, production, refining, and transportation.	Department of Energy.
F2	Conservation	Department of Energy.
F3	Construction, repair, and maintenance	Department of Energy.
Other Defense, Energy, and Related Programs		
H1	Certain combined orders (see section 700.17(c))	Department of Commerce.
H5	Private domestic production	Department of Commerce.
H6	Private domestic construction	Department of Commerce.
H7	Maintenance, repair, and operating supplies (MRO).	Department of Commerce.
H8	Designated Programs	Department of Commerce.

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Schedule I to Part 700
Approved Programs and Delegate Agencies (continued)

Program identification symbol	Approved program	Agency(ies)
K1	Federal supply items	General Services Administration.
	Homeland Security Programs	
N1	Federal emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery.	Department of Homeland Security.
N3	Intelligence and warning systems	Department of Homeland Security.
N4	Border and transportation security	Department of Homeland Security.
N5	Domestic counter-terrorism, including law enforcement.	Department of Homeland Security.
N6	Chemical, biological, radiological, and nuclear countermeasures.	Department of Homeland Security.
N7	Critical infrastructure protection and restoration	Department of Homeland Security.
N8	Miscellaneous	Department of Homeland Security.

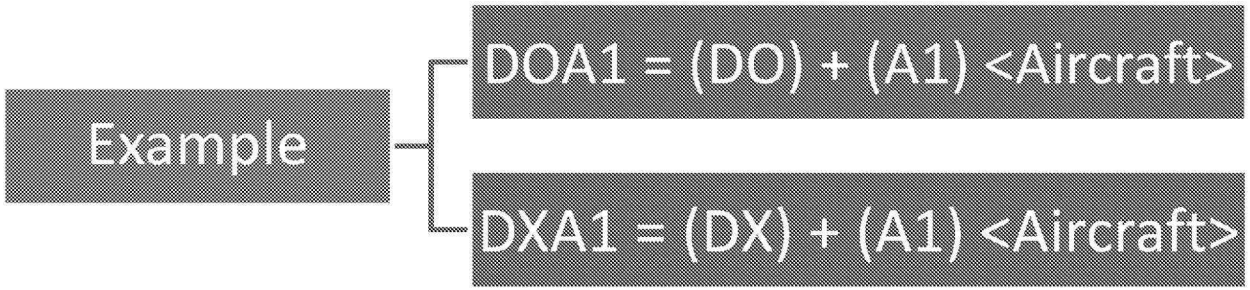
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Priority Rating

15 CFR § 700.11

Example of a Priority Rating:

If a company receives a rated order on a contract for the production of an aircraft, the order will will contain a DO-A1 or DX-A1 priority rating.



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Required Delivery Date(s)

- Rated orders are required to have a delivery date or dates.
- The words “immediately” or “as soon as possible” do not constitute a delivery date.
- A ‘‘requirements contract’’, ‘‘basic ordering agreement’’, ‘‘prime vendor contract’’, or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items from time-to-time or within a stated period against specific purchase orders, such as ‘‘calls’’, ‘‘requisitions’’, and ‘‘delivery orders’’.
  - These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document.

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Authorized Written or Digital Signature

- The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order is required.

- The signature or use of the name certifies that the rated order is authorized under the DPAS regulation and that the requirements of the DPAS regulation are being followed.

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Certification Statement

A certification statement is required on the rated order and should read in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR Part 700).

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Certification Statement

If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in §700.13(d)(2)].

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Step 3

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Step 3: Accept or Reject the Rated Order

Once a company has identified that they have received a rated order, the company must either accept or reject the order and provide customer notification according to the instructions provided in the DPAS regulation (15 CFR § 700.13).

Please select one of the topics below to learn more:

- Mandatory Acceptance
- Mandatory Rejection
- Optional Rejection
- Customer Notification Requirements

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Mandatory Acceptance

15 CFR § 700.13 (a)

- Any company in the United States must accept and fill a rated order for items that the company normally supplies.
- A company may not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.
- If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.

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Mandatory Rejection

15 CFR § 700.13 (b)

- A company may not accept a rated order for delivery on a specific date it is unable to meet that date.
  - However, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date.

- The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order.

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Optional Rejection

15 CFR § 700.13 (c)

A company may reject a rated order in any of the following cases as long as it does not discriminate among customers:

1. If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
2. If the order is for an item not supplied or a service not performed.
3. If the order is for an item produced, acquired, or provided only for the company's own use for which no orders have been filled for two years prior to the date of the receipt of the rated order. If, however, the company has sold some of these items, it must accept rated orders up to the quantity or portion of production, whichever is greater, sold within the past two years.
4. If the customer placing the order, other than the U.S. Government, makes the item or performs the service being ordered.

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Customer Notification Requirements

15 CFR § 700.13 (d)(1)

- A company must accept or reject a rated order in writing (hard copy), or in electronic format, to the customer placing the order within 15 working days after receipt of a DO rated order and 10 working days after receipt of a DX rated order.

- If the order is rejected, a company must provide the reasons in writing for the rejection.

- If a company has accepted a rated order and subsequently finds that the shipment or performance will be delayed, the company must notify the customer immediately, give the reasons for the delay, and advise of new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

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Customer Notification Requirements

15 CFR § 700.13 (d)(2)

- If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, and the order includes the statement set forth in 700.12(b), a company must accept or reject the rated order (in writing or electronically).
  - If the order is issued by an authorized person in response to a hazard that has occurred, the minimum time for acceptance or rejection is six hours after receipt.
  - If the order is issued by an authorized person to prepare for an imminent hazard, the minimum time for acceptance or rejection is 12 hours after receipt.

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Step 4

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Step 4: Preferential Scheduling

- Once a company has accepted a rated order, it must then schedule operations, including the acquisition of all needed production items, in order to satisfy the delivery requirements of each rated order.
- Companies are required to reschedule unrated orders if they conflict with performance against a rated order and must reschedule DO rated orders if they conflict with performance against a DX rated order.
- The DPAS regulation (15 CFR § 700.14) describes the requirements for preferential scheduling in further detail.
- Click here for examples of how preferential scheduling would be applied.

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Preferential Scheduling Examples

Below are examples of how preferential scheduling would be applied:

- Example 1: If a company receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed.

- Example 2: If a DX rated order is received calling for delivery on July 15 and a company has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order.

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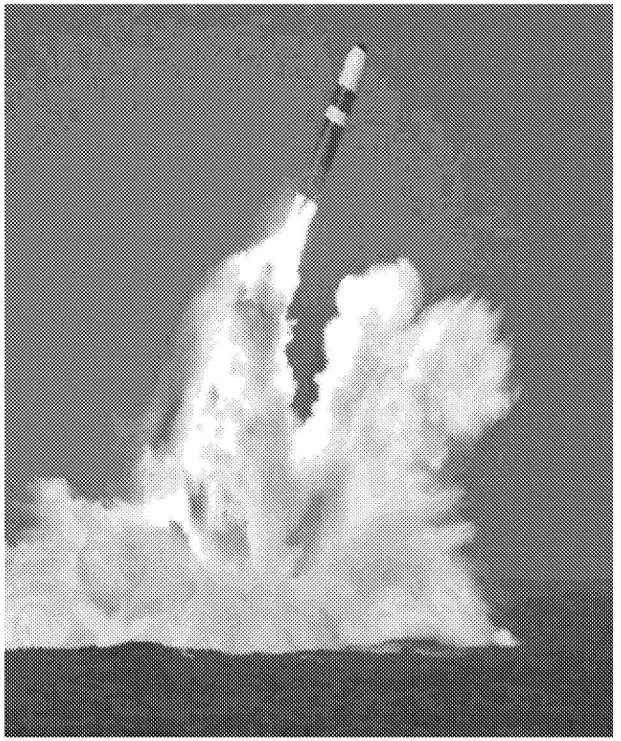
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Step 5

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Step 5: Extension of Priority Ratings

- Companies who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the rated orders.
- This continues from contractor to subcontractor to supplier throughout the entire supply chain.
- Companies must use the priority rating indicated on the customer's rated order, except as otherwise provided in the DPAS regulation or as directed by the DOC.



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Step 5: Extension of Priority Ratings

- A person is not required to place a priority rating on an order for less than $75,000, or on half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations(FAR)), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

- More information regarding extension of priority ratings can be found in 15 CFR § 700.15.

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Additional Information

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Additional Information

The DPAS Regulation provides additional information that a company in receipt of a rated order should be aware of. Select the topics below to learn more:

- Changes or Cancellations of Priority Ratings and Rated Orders (15 CFR § 700.16)
- Use of Rated Orders (15 CFR § 700.17)
- Limitations on Placing Rated Orders (15 CFR § 700.18)
- Records and Reports (15 CFR § 700.91)

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Additional Information:
Changes or Cancellations

The DPAS Regulation (15 CFR § 700.16) identifies how priority ratings and rated orders may be changed or cancelled. For example:

- The priority rating on a rated order may be charged or cancelled by:
  - An official action of the Department of Commerce
  - Written notification from the person who placed the rated order (including a Delegate Agency)

- If an unrated order is amended to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

- An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 700.13.

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Additional Information:
Changes or Cancellations

Examples continued:

- The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

- If a person no longer needs items to fill a rated order, any rated orders placed with suppliers for the items, or the priority rating on those orders, must be cancelled.

- When a priority rating is added to an unrated order, or is changed or cancelled, all suppliers must be promptly notified in writing.

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Additional Information:
Use of Rated Orders

The DPAS Regulation (15 CFR § 700.17) identifies how rated orders must, and can, be used.

Below are a few examples of the instructions found in 15 CFR § 700.17:

- A company must use rated orders to obtain:
  - Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;
  - Containers or other packaging materials required to make delivery of the finished items against rated orders;
  - Services, other than contracts of employment, needed to fill rated orders; and
  - MRO needed to produce the finished items to fill rated orders.

- A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:
  - The order must be placed within 90 days of the date of use of the inventory.

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Additional Information:
Limitations on Placing Rated Orders

The DPAS regulation (15 CFR § 700.18) outlines limitations on placing rated orders. Such limitations include:

- A person may not place a DO or DX rated order unless entitled to do so under the DPAS regulation.

- Rated orders may not be used to obtain:
  - Delivery on a date earlier than needed,
  - A greater quantity of the item than needed (with exception), or
  - Items in advance of the receipt of a rated order (with exception).

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Additional Information:
Records and Reports

The DPAS regulation (15 CFR § 700.91) outlines the recordkeeping and reporting requirements a company must adhere to.

Below are a few examples of the important requirements:

- A company is required to make and preserve for at least three years, accurate and complete records for any transaction covered by DPAS regulation or an official action.

- Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action.

- Records required to be maintained must be made available for examination on demand by duly authorized representatives of the DOC.

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Important Notes

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Important Notes

- Immediately notify the customer when you can't meet a delivery date, such as a DX request is received that overrides a DO request.

- If a company notifies the customer verbally, they should provide written notification one working day later.
  - This could trigger a Special Priorities Assistance (SPA) Request. SPAs will be covered in this training.

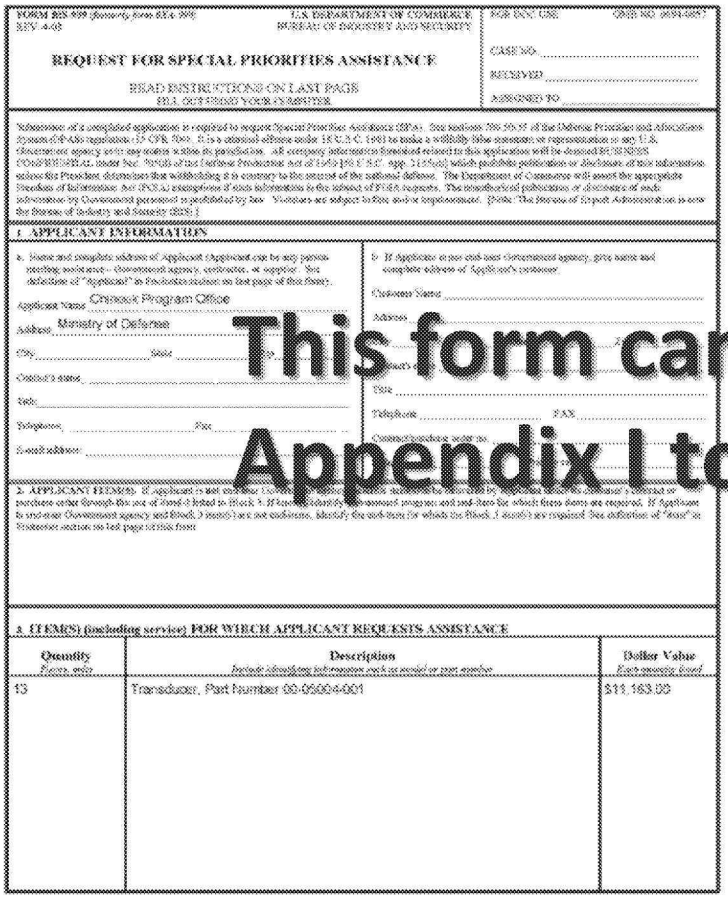
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Appendix C:

Special Priorities Assistance

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Example:
SPA Form BIS-999



FORM BIS-999 (formerly Form ITA-999) REV. 4-05

U.S. DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

FOR INT. USE: OMB NO. 0694-0057

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

READ INSTRUCTIONS ON LAST PAGE
FILL OUT FORM TYPE OR PRINTER

CASE NO.
RECEIVED
ASSIGNED TO

Submission of a completed application is required to request Special Priorities Assistance (SPA). See sections 700.50 et. of the Defense Priorities and Allocations System (DPAS) regulation (15 CFR 700). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency over any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 (50 U.S.C. app. 2155(d)) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Commerce will assert the appropriate exemptions of the Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment. [Note: The Bureau of Export Administration is now the Bureau of Industry and Security (BIS).]

1. APPLICANT INFORMATION

a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of "Applicant" in Definitions section on last page of this form).

Applicant Name: Chinook Program Office
Address: Ministry of Defense
City: State:
Contact's name:
Title:
Telephone: Fax:
E-mail address:

b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.

Customer Name:
Address:
City: State:
Contact's name:
Title:
Telephone: FAX:
Customer's order or ref. no.:

2. APPLICANT ITEMS: If Applicant is not end-user Government agency, identify the end-item for which the Block 3 item(s) are required or purchase order through the use of which listed in Block 3. If more than one, identify the amount required and end-item for which items listed are required. If Applicant is end-user Government agency and Block 3 item(s) are for end-items, identify the end-item for which the Block 3 item(s) are required. See definition of "end-use" in Definitions section on last page of this form.

3. ITEM(S) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE

Quantity (Units, units)	Description (Include identifying information such as model or part number)	Dollar Value (Each quantity listed)
13	Transducer, Part Number 60-05004-001	$13,163.00

4. SUPPLIER INFORMATION

a. Name and complete address of Applicant's Supplier.

Supplier Name: AGC Systems
Address: 106 Michales Ave
City: Syracuse State: NY Zip: 13208
Contact Name: John Smith
Title:
Telephone: (703) 801-5007 Fax: (703) 607-4126
E-mail address: john.smith@aisays.com

b. Applicant's contract or purchase order to Supplier.

Number: abcde-C-123456
Dated: January 1, 2008
Priority rating: (DO/DX or blank)

If Supplier is not same as manufacturer, give complete purchase or buyer-seller information on Continuation Sheet on page 3 including purchase order number, date, and priority rating (if none, so state).

5. SHIPMENT SCHEDULE OF ITEMS SHOWN IN BLOCK 3

a. Applicant's original shipment performance requirement	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
b. Supplier's current shipment performance projection	Month Year	May-2008	Jun-2008					Total units
	Number of units	13	12					25
c. Applicant's current shipment performance requirement	Month Year	Aug-2008	Sep-2008	Oct-2008				Total units
	Number of units	13						25
d. Supplier's current shipment performance projection	Month Year	Apr-2009						Total units
	Number of units	25						25

6. REASONS GIVEN BY SUPPLIER for inability to meet Applicant's required shipment or performance needs.

Unable to achieve expedites as suppliers have US Government orders with DPAS rating on them. Items not due until 27 April 2009. Contract has been expedited

7. BRIEF STATEMENT OF NEED FOR ASSISTANCE. As applicable, explain effect of delay in receipt of Block 3 item(s) on achieving timely shipment of Block 5 item(s) (e.g., production line shut-down), or the impact on program or project schedule. Describe attempts to resolve problems and give specific reasons why assistance is required. If priority rating authority is requested, please so state.

Any slip in delivery date or loss of items to third parties will have a dramatic effect on Ministry of Defense Chinook fleet and degrade readiness.

8. CERTIFICATION: I certify that the information contained in Blocks 1 - 7 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief (such signature of this form by electronically generated and transmitted - use of name is deemed certification).

Signature of Applicant's authorized official: Title:
Print or type name of authorized official: Date:

This form can be found as Appendix I to 15 CFR 700

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SPA: Requests for Priority Rating Authority

- If a rated order is likely to be delayed because a person is unable to obtain items not normally rated under 15 CFR Part 700, the person may request the authority to use a priority rating in ordering the needed items. Examples include:
  - Production or construction equipment;
  - Computers when not used as production items; and
  - Expansion, rebuilding, or replacing plant facilities.

- In certain cases and upon specific request, the DOC, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract.

- For more information, see 15 CFR § 700.51.

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SPA: Examples of Assistance

While special priorities assistance may be provided for any reason in support of 15 CFR 700, it is usually provided in situations where:

- There is difficulty in obtaining delivery against a rated order by the required delivery date.
- Delivery conflicts need to be resolved.

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SPA: Criteria for Assistance

Requests for special priorities assistance should be timely, that is, the request has been submitted promptly and enough time exists for the Delegate Agency or Commerce to effect a meaningful resolution to the problem, and must establish that:

- There is an urgent need for the item
- The applicant has made a reasonable effort to resolve the problem

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SPA: Instances Where Assistance May Not Be Provided

Examples of when assistance may not be provided:

- Secure a price advantage
- Obtain delivery prior to the time required to fill a rated order
- Gain competitive advantage
- Overcome a supplier's regularly established terms of sale or conditions of doing business

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SPA: Assistance Programs with Canada and Other Nations

- To promote military assistance to foreign nations, this section provides for authorizing priority ratings to persons in Canada and in other foreign nations to obtain items in the United States in support of approved programs.

- Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance from countries that the U.S. Government has security of supply arrangements with in support for approved programs.

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SPA: Assistance Programs with Canada and Other Nations

- Security of supply is a non-binding arrangement concluded by the U.S. Government with a foreign partner to provide reciprocal priorities support.

- The U.S. Government has security of supply arrangements with the following countries:
  - Australia
  - Canada (MOU)
  - Finland
  - Italy
  - The Netherlands
  - Spain
  - Sweden
  - United Kingdom

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SPA: Assistance Programs with Canada and Other Nations

- Arrangements establish a process to request priority acceptance and performance of contracts, subcontracts, and purchase orders to address national defense needs.
  - Provides U.S. assurance of meeting requests via the DPAS
  - Provides foreign assurance via an Industry Code of Conduct

- Assistance can be requested by Governments, contractors, subcontractors, or suppliers.

- Not limited to crises, emergency, or armed conflict.

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Appendix D:
Official Actions

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Official Actions: Rating Authorization

An official action granting specific priority rating authority that permits a person to place a priority rating on an order for an item not normally ratable under this regulation, or authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

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Official Actions: Directives

- An official action requiring a company to deliver an item or take other action within a specified time frame.

- A company must comply with each Directive issued, however, a company may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

- Directives take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

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Official Actions: Letters of Understanding

- An official action which may be issued in resolving SPA requests to reflect an agreement reached by all parties (DOC, the Delegate Agency, the supplier, and the customer).
- A Letter of Understanding is used to confirm production or shipping schedules which do not require modifications to other rated orders.
- A Letter of Understanding is NOT used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this regulation, or to take other official actions.

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From: Curtis, Deborah (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6D127DEC9B64D899FEB0A65F9E206C9-DEBORAH CUR]
Sent: 4/2/2020 5:16:04 PM
To: Bartels, Joe (Federal) [JBartels@doc.gov]
Subject: FW: Document and Agenda for Thursday at 2:00 p.m. Call on ICT Supply Chain
Attachments: 2020 HY 15 CFR Part 7 v10 edits.doc 02.doc

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AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 307

116TH CONGRESS
1ST SESSION

S. 764

[Report No. 116–159]

To provide for congressional approval of national emergency declarations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 12, 2019

Mr. LEE (for himself, Mr. GRASSLEY, Mr. TILLIS, Ms. ERNST, Mr. TOOMEY, Mr. JOHNSON, Mr. MORAN, Mr. ALEXANDER, Mr. SASSE, Mr. BLUNT, Mr. PORTMAN, Mr. YOUNG, Mr. ROMNEY, Mr. CRUZ, Mr. WICKER, Mr. CORNYN, Ms. MCSALLY, Mr. ISAKSON, and Ms. MURKOWSKI) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

NOVEMBER 18, 2019

Reported by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide for congressional approval of national emergency declarations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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COMM-BIS-20-0751-A-000602

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SECTION 1. SHORT TITLE.

This Act may be cited as the "Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act" or the "ARTICLE ONE Act".

SEC. 2. REQUIREMENTS RELATING TO DECLARATION AND RENEWAL OF NATIONAL EMERGENCIES.

Section 201 of the National Emergencies Act (50 U.S.C. 1621) is amended to read as follows:

"SEC. 201. DECLARATIONS AND RENEWALS OF NATIONAL EMERGENCIES.

"(a) AUTHORITY TO DECLARE NATIONAL EMERGENCIES.—With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such a national emergency by proclamation. Such proclamation shall immediately be transmitted to Congress and published in the Federal Register.

"(b) SPECIFICATION OF PROVISIONS OF LAW TO BE EXERCISED.—No powers or authorities made available by statute for use during the period of a national emergency shall be exercised unless and until the President specifies the provisions of law under which the President proposes that the President, or other officers will act in—

"(1) a proclamation declaring a national emergency under subsection (a); or

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"(2) one or more Executive orders relating to the emergency published in the Federal Register and transmitted to Congress.

"(c) TEMPORARY EFFECTIVE PERIODS.—

"(1) IN GENERAL.—A declaration of a national emergency under subsection (a), shall last for 30 days from the issuance of the proclamation (not counting the day on which the proclamation was issued) and shall terminate when that 30-day period expires unless there is enacted into law a joint resolution of approval under section 203 with respect to the proclamation.

"(2) EXERCISE OF POWERS AND AUTHORITIES.—Any power or authority made available under a provision of law described in subsection (a) and specified pursuant to subsection (b) may be exercised for 30 days from the issuance of the proclamation or Executive order (not counting the day on which such proclamation or Executive order was issued). That power or authority cannot be exercised once that 30-day period expires, unless there is enacted into law a joint resolution of approval under section 203 approving—

"(A) the proclamation of the national emergency or the Executive order; and

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"(B) the exercise of the power or authority specified by the President in such proclamation or Executive order.

"(3) EXCEPTION IF CONGRESS IS UNABLE TO CONVENE.—If Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency, the 30-day periods described in paragraphs (1) and (2) shall begin on the first day Congress convenes for the first time after the attack or other emergency.

"(d) RENEWAL OF NATIONAL EMERGENCIES.—A national emergency declared by the President under subsection (a) or previously renewed under this subsection, and not already terminated pursuant to subsection (c) or section 202(a), shall terminate on the date that is one year after the President transmitted to Congress the proclamation declaring the emergency under subsection (a) or Congress approved a previous renewal pursuant to this subsection, unless—

"(1) the President publishes in the Federal Register and transmits to Congress an Executive order renewing the emergency; and

"(2) there is enacted into law a joint resolution of approval renewing the emergency pursuant to sec-

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tion 203 before the termination of the emergency or previous renewal of the emergency.

"(c) EFFECT OF FUTURE LAWS.—No law enacted after the date of the enactment of this Act shall supersede this title unless it does so in specific terms, referring to this title, and declaring that the new law supersedes the provisions of this title.".

SEC. 3. TERMINATION OF NATIONAL EMERGENCIES.

Section 202 of the National Emergencies Act (50 U.S.C. 1622) is amended to read as follows:

"SEC. 202. TERMINATION OF NATIONAL EMERGENCIES.

"(a) IN GENERAL.—Any national emergency declared by the President under section 201(a) shall terminate on the earliest of—

"(1) the date provided for in section 201(c);

"(2) the date on which Congress, by statute, terminates the emergency;

"(3) the date on which the President issues a proclamation terminating the emergency; or

"(4) the date provided for in section 201(d).

"(b) EFFECT OF TERMINATION.—

"(1) IN GENERAL.—Effective on the date of the termination of a national emergency under subsection (a)—

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"(A) except as provided by paragraph (2), any powers or authorities exercised by reason of the emergency shall cease to be exercised;

"(B) any amounts reprogrammed or transferred under any provision of law with respect to the emergency that remain unobligated on that date shall be returned and made available for the purpose for which such amounts were appropriated; and

"(C) any contracts entered into under any provision of law for construction relating to the emergency shall be terminated unless construction commenced under the contract before that date.

"(2) SAVINGS PROVISION.—Except as specifically provided in subparagraph (B) or (C) of paragraph (1), the termination of a national emergency shall not affect—

"(A) any action taken or proceeding pending not finally concluded or determined on the date of the termination under subsection (a);

"(B) any action or proceeding based on any act committed prior to that date; or

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"(C) any rights or duties that matured or penalties that were incurred prior to that date.".

SEC. 4. REVIEW BY CONGRESS OF NATIONAL EMERGENCIES.

Title II of the National Emergencies Act (50 U.S.C. 1621 et seq.) is amended by adding at the end the following:

"SEC. 203. REVIEW BY CONGRESS OF NATIONAL EMERGENCIES.

"(a) JOINT RESOLUTIONS OF APPROVAL.—

"(1) JOINT RESOLUTION OF APPROVAL DEFINED.—For purposes of this section, the term 'joint resolution of approval' means a joint resolution that contains only the following provisions after its resolving clause—

"(A) a provision approving—

"(i) a proclamation of a national emergency made under section 201(a);

"(ii) an Executive order issued under section 201(b)(2); or

"(iii) an Executive order issued under section 201(d); and

"(B) a provision approving a list of all or a portion of the provisions of law specified by

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the President under section 201(b) in the proclamation or Executive order that is the subject of the joint resolution.

"(2) PROCEDURES FOR CONSIDERATION OF JOINT RESOLUTIONS OF APPROVAL.—

"(A) INTRODUCTION.—After the President transmits to Congress a proclamation declaring a national emergency under section 201(a), or an Executive order renewing an emergency under section 201(d) or specifying emergency powers or authorities under section 201(b)(2), a joint resolution of approval may be introduced in either House of Congress by any member of that House.

"(B) REQUESTS TO CONVENE CONGRESS DURING RECESSES.—If, when the President transmits to Congress a proclamation declaring a national emergency under section 201(a), or an Executive order renewing an emergency under section 201(d) or specifying emergency powers or authorities under section 201(b)(2), Congress has adjourned sine die or has adjourned for any period in excess of 3 calendar days, the Speaker of the House of Representatives and the President pro tempore of the Sen-

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ate, if they deem it advisable (or if petitioned by at least one-third of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the proclamation or Executive order and take appropriate action pursuant to this section.

"(C) COMMITTEE REFERRAL.—A joint resolution of approval shall be referred in each House of Congress to the committee or committees having jurisdiction over the emergency authorities invoked by the proclamation or Executive order that is the subject of the joint resolution.

"(D) CONSIDERATION IN SENATE.—In the Senate, the following shall apply:

"(i) REPORTING AND DISCHARGE.—If the committee to which a joint resolution of approval has been referred has not reported it at the end of 10 calendar days after its introduction, that committee shall be automatically discharged from further consideration of the resolution and it shall be placed on the calendar.

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"(ii) PROCEEDING TO CONSIDERATION.—Notwithstanding Rule XXII of the Standing Rules of the Senate, when the committee to which a joint resolution of approval is referred has reported the resolution, or when that committee is discharged under clause (i) from further consideration of the resolution, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion to proceed is subject to 4 hours of debate divided equally between those favoring and those opposing the joint resolution of approval. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business.

"(iii) FLOOR CONSIDERATION.—A joint resolution of approval shall be subject to 10 hours of debate, to be divided evenly

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between the proponents and opponents of the resolution.

"(iv) AMENDMENTS.—

"(I) IN GENERAL.—Except as provided in subclause (II), no amendments shall be in order with respect to a joint resolution of approval.

"(II) AMENDMENTS TO STRIKE OR ADD SPECIFIED PROVISIONS OF LAW.—Subclause (I) shall not apply with respect to any amendment to strike or add from the list required by paragraph (1)(B) a provision or provisions of law specified by the President under section 201(b) in the proclamation or Executive order.

"(v) MOTION TO RECONSIDER FINAL VOTE.—A motion to reconsider a vote on final passage of a joint resolution of approval shall not be in order.

"(vi) APPEALS.—Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

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"(E) CONSIDERATION IN HOUSE OF REPRESENTATIVES.—In the House of Representatives, if any committee to which a joint resolution of approval has been referred has not reported it to the House at the end of 10 calendar days after its introduction, such committee shall be discharged from further consideration of the joint resolution, and it shall be placed on the appropriate calendar. On Thursdays it shall be in order at any time for the Speaker to recognize a Member who favors passage of a joint resolution that has appeared on the calendar for at least 3 calendar days to call up that joint resolution for immediate consideration in the House without intervention of any point of order. When so called up a joint resolution shall be considered as read and shall be debatable for 1 hour equally divided and controlled by the proponent and an opponent, and the previous question shall be considered as ordered to its passage without intervening motion. It shall not be in order to reconsider the vote on passage. If a vote on final passage of the joint resolution has not been taken on or before the close of the tenth calendar day after the

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resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution, such vote shall be taken on that day.

"(F) RECEIPT OF RESOLUTION FROM OTHER HOUSE.—If, before passing a joint resolution of approval, one House receives from the other a joint resolution of approval from the other House, then—

"(i) the joint resolution of the other House shall not be referred to a committee and shall be deemed to have been discharged from committee on the day it is received; and

"(ii) the procedures set forth in subparagraphs (D), (E), and (F), as applicable, shall apply in the receiving House to the joint resolution received from the other House to the same extent as such procedures apply to a joint resolution of the receiving House.

"(G) RULE OF CONSTRUCTION.—The enactment of a joint resolution of approval under this subsection shall not be interpreted to serve

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as a grant or modification by Congress of statutory authority for the emergency powers of the President.

"(b) RULES OF THE HOUSE AND SENATE.—Subsection (a) is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of joint resolutions of approval, and supersede other rules only to the extent that it is inconsistent with such other rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.".

SEC. 5. REPORTING REQUIREMENTS.

Section 401 of the National Emergencies Act (50 U.S.C. 1641) is amended by adding at the end the following:

"(d) REPORT ON EMERGENCIES.—The President shall transmit to Congress, with any proclamation declaring a national emergency under section 201(a), or Execu-

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tive order renewing an emergency under section 201(d) or specifying emergency powers or authorities under section 201(b)(2), a report, in writing, that includes the following:

"(1) A description of the circumstances necessitating the declaration of a national emergency, the renewal of such an emergency, or the use of a new emergency authority specified in the Executive order, as the case may be.

"(2) The estimated duration of the national emergency.

"(3) A summary of the actions the President or other officers intend to take, including any reprogramming or transfer of funds, and the statutory authorities the President and such officers expect to rely on in addressing the national emergency.

"(4) In the case of a renewal of a national emergency, a summary of the actions the President or other officers have taken in the preceding one-year period, including any reprogramming or transfer of funds, to address the emergency.

"(c) PROVISION OF INFORMATION TO CONGRESS.—The President shall provide to Congress such other information as Congress may request in connection with any national emergency in effect under title II.

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"(f) PERIODIC REPORTS ON STATUS OF EMERGENCIES.—If the President declares a national emergency under section 201(a), the President shall, not less frequently than every 180 days for the duration of the emergency, report to Congress on the status of the emergency and the actions the President or other officers have taken and authorities the President and such officers have relied on in addressing the emergency.".

SEC. 6. CONFORMING AMENDMENTS.

(a) NATIONAL EMERGENCIES ACT.—Title III of the National Emergencies Act (50 U.S.C. 1631) is repealed.

(b) INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.—Section 207 of the International Emergency Economic Powers Act (50 U.S.C. 1706) is amended—

(1) in subsection (b), by striking "if the national emergency" and all that follows through "under this section." and inserting the following: "if—

"(1) the national emergency is terminated pursuant to section 202(a)(2) of the National Emergencies Act; or

"(2) a joint resolution of approval is not enacted as required by section 203 of that Act to approve—

"(A) the national emergency; or

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~~"(B) the exercise of such authorities."; and~~

~~(2) in subsection (c)(1), by striking "paragraphs (A), (B), and (C) of section 202(a)" and inserting "section 202(b)(2)".~~

~~SEC. 7. APPLICABILITY.~~

~~(a) IN GENERAL.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect upon enactment.~~

~~(b) APPLICATION TO NATIONAL EMERGENCIES PREVIOUSLY DECLARED.—A national emergency declared under section 201 of the National Emergencies Act before the date of the enactment of this Act shall be unaffected by the amendments made by this Act except that such emergencies shall terminate on the date that is one year after such date of enactment unless the emergency is renewed under subsection (d) of section 201, as amended by section 2 of this Act.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act" or the "ARTICLE ONE Act".

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SEC. 2. CONGRESSIONAL REVIEW OF NATIONAL EMERGENCIES.

Title II of the National Emergencies Act (50 U.S.C. 1621 et seq.) is amended by striking sections 201 and 202 and inserting the following:

"SEC. 201. DECLARATIONS OF NATIONAL EMERGENCIES.

"(a) AUTHORITY TO DECLARE NATIONAL EMERGENCIES.—With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such a national emergency by proclamation. Such proclamation shall immediately be transmitted to Congress and published in the Federal Register.

"(b) SPECIFICATION OF PROVISIONS OF LAW TO BE EXERCISED.—No powers or authorities made available by statute for use during the period of a national emergency shall be exercised unless and until the President specifies the provisions of law under which the President proposes that the President or other officers will act in—

"(1) a proclamation declaring a national emergency under subsection (a); or

"(2) one or more Executive orders relating to the emergency published in the Federal Register and transmitted to Congress.

"(c) PROHIBITION ON SUBSEQUENT ACTIONS IF EMERGENCIES NOT APPROVED.—

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"(1) SUBSEQUENT DECLARATIONS.—If a joint resolution of approval is not enacted under section 203 with respect to a national emergency before the expiration of the 30-day period described in section 202(a), or with respect to a national emergency proposed to be renewed under section 202(b), the President may not, during the remainder of the term of office of that President, declare a subsequent national emergency under subsection (a) with respect to the same circumstances.

"(2) EXERCISE OF AUTHORITIES.—If a joint resolution of approval is not enacted under section 203 with respect to a power or authority specified by the President in a proclamation under subsection (a) or an Executive order under subsection (b)(2) with respect to a national emergency, the President may not, during the remainder of the term of office of that President, exercise that power or authority with respect to that emergency.

"(d) EFFECT OF FUTURE LAWS.—No law enacted after the date of the enactment of this Act shall supersede this title unless it does so in specific terms, referring to this title, and declaring that the new law supersedes the provisions of this title.

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"SEC. 202. EFFECTIVE PERIODS OF NATIONAL EMERGENCIES.

"(a) TEMPORARY EFFECTIVE PERIODS.—

"(1) IN GENERAL.—A declaration of a national emergency shall remain in effect for 30 days from the issuance of the proclamation under section 201(a) (not counting the day on which the proclamation was issued) and shall terminate when that 30-day period expires unless there is enacted into law a joint resolution of approval under section 203 with respect to the proclamation.

"(2) EXERCISE OF POWERS AND AUTHORITIES.—Any emergency power or authority made available under a provision of law specified pursuant to section 201(b) may be exercised pursuant to a declaration of a national emergency for 30 days from the issuance of the proclamation or Executive order (not counting the day on which such proclamation or Executive order was issued). That power or authority may not be exercised after that 30-day period expires unless there is enacted into law a joint resolution of approval under section 203 approving—

"(A) the proclamation of the national emergency or the Executive order; and

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"(B) the exercise of the power or authority specified by the President in such proclamation or Executive order.

"(3) EXCEPTION IF CONGRESS IS UNABLE TO CONVENE.—If Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency, the 30-day periods described in paragraphs (1) and (2) shall begin on the first day Congress convenes for the first time after the attack or other emergency.

"(b) RENEWAL OF NATIONAL EMERGENCIES.—A national emergency declared by the President under section 201(a) or previously renewed under this subsection, and not already terminated pursuant to subsection (a) or (c), shall terminate on the date that is one year after the President transmitted to Congress the proclamation declaring the emergency or Congress approved a previous renewal pursuant to this subsection, unless—

"(1) the President publishes in the Federal Register and transmits to Congress an Executive order renewing the emergency; and

"(2) there is enacted into law a joint resolution of approval renewing the emergency pursuant to section 203 before the termination of the emergency or previous renewal of the emergency.

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"(c) TERMINATION OF NATIONAL EMERGENCIES.—

"(1) IN GENERAL.—Any national emergency declared by the President under section 201(a) shall terminate on the earliest of—

"(A) the date provided for in subsection (a);

"(B) the date provided for in subsection (b);

"(C) the date specified in an Act of Congress terminating the emergency; or

"(D) the date specified in a proclamation of the President terminating the emergency.

"(2) EFFECT OF TERMINATION.—

"(A) IN GENERAL.—Effective on the date of the termination of a national emergency under paragraph (1)—

"(i) except as provided by subparagraph (B), any powers or authorities exercised by reason of the emergency shall cease to be exercised;

"(ii) any amounts reprogrammed or transferred under any provision of law with respect to the emergency that remain unobligated on that date shall be returned and made available for the purpose for which such amounts were appropriated; and

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"(iii) any contracts entered into under any provision of law for construction relating to the emergency shall be terminated.

"(B) SAVINGS PROVISION.—The termination of a national emergency shall not affect—

"(i) any legal action taken or pending legal proceeding not finally concluded or determined on the date of the termination under paragraph (1);

"(ii) any legal action or legal proceeding based on any act committed prior to that date; or

"(iii) any rights or duties that matured or penalties that were incurred prior to that date.

"SEC. 203. REVIEW BY CONGRESS OF NATIONAL EMERGENCIES.

"(a) JOINT RESOLUTION OF APPROVAL DEFINED.—In this section, the term 'joint resolution of approval' means a joint resolution that contains only the following provisions after its resolving clause:

"(1) A provision approving—

"(A) a proclamation of a national emergency made under section 201(a);

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"(B) an Executive order issued under section 201(b)(2); or

"(C) an Executive order issued under section 202(b).

"(2) A provision approving a list of all or a portion of the provisions of law specified by the President under section 201(b) in the proclamation or Executive order that is the subject of the joint resolution.

"(b) PROCEDURES FOR CONSIDERATION OF JOINT RESOLUTIONS OF APPROVAL.—

"(1) INTRODUCTION.—After the President transmits to Congress a proclamation declaring a national emergency under section 201(a), or an Executive order specifying emergency powers or authorities under section 201(b)(2) or renewing a national emergency under section 202(b), a joint resolution of approval may be introduced in either House of Congress by any member of that House.

"(2) REQUESTS TO CONVENE CONGRESS DURING RECESSES.—If, when the President transmits to Congress a proclamation declaring a national emergency under section 201(a), or an Executive order specifying emergency powers or authorities under section 201(b)(2) or renewing a national emergency under section 202(b), Congress has adjourned sine die or has

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adjourned for any period in excess of 3 calendar days, the majority leader of the Senate and the Speaker of the House of Representatives, or their respective designees, acting jointly after consultation with and with the concurrence of the minority leader of the Senate and the minority leader of the House, shall notify the Members of the Senate and House, respectively, to reassemble at such place and time as they may designate if, in their opinion, the public interest shall warrant it.

"(3) COMMITTEE REFERRAL.—A joint resolution of approval shall be referred in each House of Congress to the committee or committees having jurisdiction over the emergency authorities invoked by the proclamation or Executive order that is the subject of the joint resolution.

"(4) CONSIDERATION IN SENATE.—In the Senate, the following shall apply:

"(A) REPORTING AND DISCHARGE.—If the committee to which a joint resolution of approval has been referred has not reported it at the end of 10 calendar days after its introduction, that committee shall be automatically discharged from further consideration of the resolution and it shall be placed on the calendar.

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"(B) PROCEEDING TO CONSIDERATION.—Notwithstanding Rule XXII of the Standing Rules of the Senate, when the committee to which a joint resolution of approval is referred has reported the resolution, or when that committee is discharged under subparagraph (A) from further consideration of the resolution, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion to proceed is subject to 4 hours of debate divided equally between those favoring and those opposing the joint resolution of approval. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business.

"(C) FLOOR CONSIDERATION.—A joint resolution of approval shall be subject to 10 hours of consideration, to be divided evenly between the proponents and opponents of the resolution.

"(D) AMENDMENTS.—

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"(i) IN GENERAL.—Except as provided in clause (ii), no amendments shall be in order with respect to a joint resolution of approval.

"(ii) AMENDMENTS TO STRIKE OR ADD SPECIFIED PROVISIONS OF LAW.—Clause (i) shall not apply with respect to any amendment—

"(I) to strike a provision or provisions of law from the list required by subsection (a)(2); or

"(II) to add to that list a provision or provisions of law specified by the President under section 201(b) in the proclamation or Executive order that is the subject of the joint resolution of approval.

"(E) MOTION TO RECONSIDER FINAL VOTE.—A motion to reconsider a vote on passage of a joint resolution of approval shall not be in order.

"(F) APPEALS.—Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

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"(5) CONSIDERATION IN HOUSE OF REPRESENTATIVES.—In the House of Representatives, if any committee to which a joint resolution of approval has been referred has not reported it to the House at the end of 10 calendar days after its introduction, such committee shall be discharged from further consideration of the joint resolution, and it shall be placed on the appropriate calendar. On Thursdays it shall be in order at any time for the Speaker to recognize a Member who favors passage of a joint resolution that has appeared on the calendar for at least 3 calendar days to call up that joint resolution for immediate consideration in the House without intervention of any point of order. When so called up a joint resolution shall be considered as read and shall be debatable for 1 hour equally divided and controlled by the proponent and an opponent, and the previous question shall be considered as ordered to its passage without intervening motion. It shall not be in order to reconsider the vote on passage. If a vote on final passage of the joint resolution has not been taken on or before the close of the tenth calendar day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees

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have been discharged from further consideration of the resolution, such vote shall be taken on that day.

"(6) RECEIPT OF RESOLUTION FROM OTHER HOUSE.—If, before passing a joint resolution of approval, one House receives from the other a joint resolution of approval from the other House, then—

"(A) the joint resolution of the other House shall not be referred to a committee and shall be deemed to have been discharged from committee on the day it is received; and

"(B) the procedures set forth in paragraphs (3), (4), and (5), as applicable, shall apply in the receiving House to the joint resolution received from the other House to the same extent as such procedures apply to a joint resolution of the receiving House.

"(c) RULE OF CONSTRUCTION.—The enactment of a joint resolution of approval under this section shall not be interpreted to serve as a grant or modification by Congress of statutory authority for the emergency powers of the President.

"(d) RULES OF THE HOUSE AND SENATE.—This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respec-

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tively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of joint resolutions described in this section, and supersedes other rules only to the extent that it is inconsistent with such other rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"SEC. 204. EXCLUSION OF CERTAIN NATIONAL EMERGENCIES INVOKING INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

"(a) IN GENERAL.—In the case of a national emergency described in subsection (b), the provisions of this Act, as in effect on the day before the date of the enactment of the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act, shall continue to apply on and after such date of enactment.

"(b) NATIONAL EMERGENCY DESCRIBED.—

"(1) IN GENERAL.—A national emergency described in this subsection is a national emergency pursuant to which the President proposes to exercise

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emergency powers or authorities made available under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), supplemented as necessary by a provision of law specified in paragraph (2).

"(2) PROVISIONS OF LAW SPECIFIED.—The provisions of law specified in this paragraph are—

"(A) the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.);

"(B) section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)); or

"(C) any provision of law that authorizes the implementation, imposition, or enforcement of economic sanctions with respect to a foreign country.

"(c) EFFECT OF ADDITIONAL POWERS AND AUTHORITIES.—Subsection (a) shall not apply to a national emergency or the exercise of emergency powers and authorities pursuant to the national emergency if, in addition to the exercise of emergency powers and authorities described in subsection (b), the President proposes to exercise, pursuant to the national emergency, any emergency powers and authorities under any other provision of law.".

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SEC. 3. REPORTING REQUIREMENTS.

Section 401 of the National Emergencies Act (50 U.S.C. 1641) is amended by adding at the end the following:

"(d) REPORT ON EMERGENCIES.—The President shall transmit to Congress, with any proclamation declaring a national emergency under section 201(a) or any Executive order specifying emergency powers or authorities under section 201(b)(2) or renewing a national emergency under section 202(b), a report, in writing, that includes the following:

"(1) A description of the circumstances necessitating the declaration of a national emergency, the renewal of such an emergency, or the use of a new emergency authority specified in the Executive order, as the case may be.

"(2) The estimated duration of the national emergency, or a statement that the duration of the national emergency cannot reasonably be estimated at the time of transmission of the report.

"(3) A summary of the actions the President or other officers intend to take, including any reprogramming or transfer of funds, and the statutory authorities the President and such officers expect to rely on in addressing the national emergency.

"(4) In the case of a renewal of a national emergency, a summary of the actions the President or

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other officers have taken in the preceding one-year period, including any reprogramming or transfer of funds, to address the emergency.

"(e) PROVISION OF INFORMATION TO CONGRESS.—The President shall provide to Congress such other information as Congress may request in connection with any national emergency in effect under title II.

"(f) PERIODIC REPORTS ON STATUS OF EMERGENCIES.—If the President declares a national emergency under section 201(a), the President shall, not less frequently than every 6 months for the duration of the emergency, report to Congress on the status of the emergency and the actions the President or other officers have taken and authorities the President and such officers have relied on in addressing the emergency.".

SEC. 4. EXCLUSION OF IMPOSITION OF DUTIES AND IMPORT QUOTAS FROM PRESIDENTIAL AUTHORITIES UNDER INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702) is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following:

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"(c)(1) The authority granted to the President by this section does not include the authority to impose duties or tariff-rate quotas or (subject to paragraph (2)) other quotas on articles entering the United States.

"(2) The limitation under paragraph (1) does not prohibit the President from excluding all articles imported from a country from entering the United States.".

SEC. 5. CONFORMING AMENDMENTS.

(a) NATIONAL EMERGENCIES ACT.—Title III of the National Emergencies Act (50 U.S.C. 1631) is repealed.

(b) INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.—Section 207 of the International Emergency Economic Powers Act (50 U.S.C. 1706) is amended—

(1) in subsection (b), by striking "concurrent resolution" and inserting "joint resolution"; and

(2) by adding at the end the following:

"(e) In this section, the term 'National Emergencies Act' means the National Emergencies Act, as in effect on the day before the date of the enactment of the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act.".

SEC. 6. EFFECTIVE DATE; APPLICABILITY.

(a) IN GENERAL.—This Act and the amendments made by this Act shall—

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(1) take effect on the date of the enactment of this Act; and

(2) except as provided in subsection (b), apply with respect to national emergencies declared under section 201 of the National Emergencies Act on or after that date.

(b) APPLICABILITY TO RENEWALS OF EXISTING EMERGENCIES.—When a national emergency declared under section 201 of the National Emergencies Act before the date of the enactment of this Act would expire or be renewed under section 202(d) of that Act (as in effect on the day before such date of enactment), that national emergency shall be subject to the requirements for renewal under section 202(b) of that Act, as amended by section 2.

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Calendar No. 307

116TH CONGRESS
1ST SESSION

S. 764

[Report No. 116–159]

A BILL

To provide for congressional approval of national emergency declarations, and for other purposes.

NOVEMBER 18, 2019

Reported with an amendment

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From: Curtis, Deborah (Federal) [dcurtis@doc.gov]
Sent: 4/9/2020 8:27:16 PM
To: Curtis, Deborah (Federal) [DCurtis@doc.gov]
Subject: TEST Hi- don't open this message yet

TEST Hi- don't open this message yet



Skype for Business

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NONCONFIDENTIAL

UNITED STATES COURT OF INTERNATIONAL TRADE

PRIMESOURCE BUILDING PRODUCTS, INC. Plaintiff, v. THE UNITED STATES, DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF COMMERCE; UNITED STATES DEPARTMENT OF COMMERCE; MARK A. MORGAN, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.	Ct. No. 20-00032

FIRST AMENDED COMPLAINT

Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), by and through its counsel alleges as follows:

I. SUMMARY

1. The procedural predicates to the President imposing tariffs under Section 232 of the Trade Expansion Act of 1962 ("Section 232") are unequivocal. The President must first receive a report from the Secretary of the U.S. Department of Commerce (the "Secretary" or "Commerce") determining whether the article under investigation is being imported into the United States "in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A) (2018).

2. The President must then, within 90 days of receipt of Commerce's report, "determine the nature and duration of the action that, in the judgment of the President, must be

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taken to adjust the imports of the {subject} article and its derivatives so that such imports will not threaten to impair the national security." Id. § 1862(c)(1)(A)(ii) (emphasis supplied).

3. If the President concurs with Commerce's report and determines to take action, the President is statutorily required to implement such action within 15 days of his decision. See id. § 1862(c)(1)(B). These deadlines are clearly stated, unambiguous, and unequivocal. See Transpacific Steel LLC v. United States, No. 19-00009, 2019 Ct. Intl. Trade LEXIS 142, at *9 (Ct. Int'l Trade Nov. 15, 2019) ("The statute's clear and unambiguous steps—of investigation, consultation, report, consideration, and action—require timely action from the Secretary of Commerce and the President.").

4. Proclamation No. 9980, titled Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5,281 (Jan 29, 2020) (attached as Ex. 1), is unlawful and unconstitutional for the following reasons:

a. First, the imposition of duties in Proclamation 9980 is procedurally deficient under the plain terms of the statute and regulations because Commerce did not provide reasonable notice to PrimeSource nor hold public hearings whereby PrimeSource could present information and advice relevant to the investigation, as Commerce had in the investigation it conducted in 2017 related to steel and aluminum articles upon which Proclamation 9980 bases its statutory authority. Commerce's regulations set forth the detailed procedures it must follow in the context of an investigation under Section 232. See 15 C.F.R. pt. 705 (2019). Commerce followed none of them in providing its "assessment" to the President that the HTSUS should be modified to subject derivative steel articles to an additional 25 percent duty. Commerce violated the rulemaking provisions of the Administrative

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Procedures Act and its imposition of additional duties without a properly developed record is arbitrary and capricious.

b. Second, as of the date of this complaint, it has been 754 days since the President received Commerce's report, 664 days since the 90-day window closed for the President to determine what action must be taken, and 649 days since the 15-day window to implement such action expired. Nevertheless, on January 24, 2020, the President announced the imposition of tariffs of 25 percent and 10 percent on imports of steel- and aluminum-derivative products, respectively, 638 days after the period to adjust imports lapsed. In light of the clear untimeliness of the President's action, the imposition of duties pursuant to Proclamation 9980, scheduled to become effective on February 8, 2020, violates the statutory procedural requirements that Congress duly enacted under Section 232 of the Trade Expansion Act of 1962.

c. Third, in making "assessments", "determinations" and by providing "information" to the President identifying specific HTSUS codes for additional national security duties, the Secretary of Commerce violated all of the statutory provisions of Section 232 of the Trade Expansion Act of 1962.

d. Fourth, the imposition of duties in Proclamation 9980 is both procedurally deficient under the plain terms of the statute and unconstitutional because Commerce did not provide reasonable notice to PrimeSource nor hold public hearings whereby PrimeSource could present information and advice relevant to the investigation. In the 2017 investigation of steel and aluminum imports, Commerce decided that public input was appropriate and provided notice to interested parties regarding the

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potential imposition of duties, prescribed a procedure for interested parties to comment on whether steel and aluminum impact national security, and held public hearings. By contrast, the President issued Proclamation 9980 without any notice to affected importers and failed to provide any administrative process for interested parties to comment on the impact of such duties. By failing to provide for its participation prior to imposing tariffs, PrimeSource was deprived of its Fifth Amendment due process rights.

e. In addition, Section 232 is unconstitutional because it represents an unlawful delegation of legislative authority from Congress to the President. In particular, Congress improperly transferred its Constitutional authority "{t}o lay and collect {t}axes, {d}uties, {i}mposts and {e}xcises," U.S. CONST. art. 1, § 8, cl. 1., to the President without setting forth an intelligible limiting principle as required by J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Such an improper delegation of power violates the U.S. Constitution and separation of powers doctrine, which mandate that Congress, not the Executive, makes law.

II. JURISDICTION

5. This Court has jurisdiction over the instant action pursuant to 28 U.S.C. § 1581(i)(2), (4) and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 704, 706 and 28 U.S.C. § 2631(i).

6. 28 U.S.C. § 1581 provides that "the U.S. Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandize for reasons other than the raising of revenue," 28

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U.S.C. § 1581(i)(2), and "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section." Id. § 1581(i)(4).

7. The Commerce Department is a federal agency and in his official capacity, Secretary Wilbur Ross provided "assessments" to the President leading to the President's imposition of duties on imports of derivative steel products in Proclamation 9980. This Court has jurisdiction over laws "providing for …tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." This action thus arises out of a law described in 28 U.S.C. § 1581(i)(2).

8. U.S. Customs and Border Protection is a federal agency, and in his official capacity, Acting Commissioner Mark A. Morgan will enforce Proclamation 9980 by requiring additional import duties to be paid by importers for covered goods entering the United States on or after February 8, 2020. The Court has jurisdiction over U.S. Customs and Border Protection's implementation of duties under because implementation of duties under Section 232 constitutes "administration and enforcement" under 28 U.S.C. § 1581(i)(4).

9. The Secretary of Commerce failed to follow its regulations in providing the "assessments" to the President, referenced in Proclamation 9980. The "assessments" recommended changes to the HTSUS to impose a 25 percent duty on derivative steel products. Changes to the HSTUS constituted a rulemaking outside the bounds of the regulations. The Court reviews such regulatory violations pursuant to the APA. The APA provides for broad judicial review of agency actions brought by "person{s} suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702.

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10. Section 232 of the Trade Expansion Act of 1962 is a law, "providing for tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," as well as for "administration and enforcement with respect to" such tariffs, duties and fees. Therefore, this matter involves the administration and enforcement of matters referred to in, inter alia, 28 U.S.C. § 1581(i)(2), (4).

11. On January 24, 2020, the President abruptly announced the imposition of new tariffs on imports of steel- and aluminum- derivative products, effective February 8, 2020. However, the statutory deadline for the President to determine what action to take as a result of Commerce's report was April 19, 2018, 90 days after receipt of Commerce's report. Because "the President has violated an explicit statutory mandate" prescribed under 19 U.S.C. § 1862, this Court has jurisdiction to hear PrimeSource's challenge as established by case law of the Federal Circuit. See Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (citing Motion Sys. Corp. v. Bush, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc)).

12. This Court has jurisdiction to hear constitutional challenges to laws affecting imports and has recognized such jurisdiction under 28 U.S.C. § 1581(i)(2) and (i)(4) in other challenges to Presidential and agency actions under Section 232 of the Trade Expansion Act of 1962. See, e.g., Am. Inst. for Int'l Steel, Inc. v. United States, __ CIT __, 376 F. Supp. 3d 1335 (2019).

13. Proclamation 9980 does not constitute a determination reviewable under this Court's jurisdiction established at 28 U.S.C. § 1581(a)–(h). Accordingly, the Court has subject matter jurisdiction of this action under 28 U.S.C. § 1581(i) and may order the relief requested pursuant to 28 U.S.C. § 2643.

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III. PARTIES

14. Plaintiff PrimeSource is a corporation organized under the laws of the State of Delaware, with its principal place of business in 1321 Greenway Drive, Irving, TX 75038-2504. PrimeSource is one of the largest purveyors of fasteners in the world, and imports and distributes various steel-derivative products affected by Proclamation 9980, including, for example, its exclusive Grip-Rite® steel nails sold nationwide.

15. The Defendant United States of America is the federal government to which Section 232 tariff increases are paid and is the statutory defendant under 28 U.S.C. § 1581(i)(2), (4).

16. Defendant Donald J. Trump is the President of the United States. He issued Proclamation 9980 that is the subject of this Complaint. He is sued in his official capacity only.

17. Defendant U.S. Department of Commerce is the agency responsible for initiating and conducting investigations under Section 232 and for providing findings and recommendations to the President of the United States.

18. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is sued in his official capacity only.

19. Defendant U.S. Customs and Border Protection is the agency that administers and enforces tariffs imposed under Section 232, including the 25 percent tariffs ordered to be imposed on derivative steel products under Proclamation 9980.

20. Defendant Mark A. Morgan is the Acting Commissioner of U.S. Customs and Border Protection. He is sued in his official capacity only.

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IV. STANDING

21. Plaintiff brings this action challenging the President's unlawful imposition of tariffs under 19 U.S.C. § 1862, the Section 232 statute, based on violations of the APA, violations of Plaintiff's due process rights under the U.S. Constitution, violations of the Section 232 statute, and, in the alternative, a facial challenge to 19 U.S.C. § 1862 as an unconstitutional over-delegation of legislative power to the President.

22. Plaintiff has statutory standing to bring this action under 28 U.S.C. § 2631(i), which provides "{a}ny civil action of which the Court of International Trade has jurisdiction… may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i).

23. Plaintiff has both constitutional and statutory standing to file this action as a U.S. importer and distributor of steel-derivative products named in Annex II to Proclamation 9980. Plaintiff has suffered actual and irreparable harm by virtue of the Secretary of Commerce's violations of the APA in bypassing all of the important investigative and consultative procedures outlined throughout 15 C.F.R. part 705. Plaintiff was deprived of the right to provide written comments and in-person testimony regarding the imposition of 25 percent duties on its products at the present time, based on public notice provided to similarly situated importers of primary steel products more than two years ago in the investigation underlying Proclamation 9980. In Gilda Industries, Inc. v. United States, the court reviewed a challenged to the composition of a retaliation list issued under Section 301 and found that "the failure to conduct review and revision of the list injured Gilda by depriving it of at least an opportunity to have those products removed." Gilda Industries, Inc. v. United States, 446 F.3d 1271, 1279 (Fed. Cir. 2006). Here, Plaintiff suffered similar injury due to the Secretary of Commerce's failure to follow its regulations and provide an

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opportunity for PrimeSource to make its case that steel nails should not be subjected to import duties under Section 232. Such injury could be prevented by the issuance of injunctive relief to preserve the status quo.

24. As importer of record, Plaintiff will have to pay millions of dollars of unexpected duties on derivative steel products. Plaintiff calculates that the imposition of the 25 percent duties on HTS codes covered by Proclamation 9980 will increase Plaintiff's costs by approximately [■■■] million over the next year. Affidavit of PrimeSource Official at ¶ 8 (attached as Ex. 2). Plaintiff expects [■■■

President and its imports of items named in Annex II will result in imposition of 25 percent duties on such items. Additionally, in the event that the Court does not enjoin the imposition of duties under Proclamation 9980, as an importer of products subject to such duties, Plaintiff has standing to seek recovery of unlawfully collected duties should the Court determine they were unlawfully required. Recovery of duties that were unlawfully collected do not constitute "monetary damages" foreclosed in cases based on the APA. See, e.g., Giorgio Foods, Inc. v. United States, __ CIT __, __, 804 F. Supp. 2d 1315, 1324 (2011) (citing Bowen v. Massachusetts, 487 U.S. 879, 893 (1988)).

27. Plaintiff, therefore, qualifies as a "person" adversely affected or aggrieved by an agency action within the meaning of 5 U.S.C. § 702, and as an "individual" aggrieved by regulatory and statutory violations, as well as by the unconstitutionality of Section 232 under 28 U.S.C. § 2631(i).

V. TIMELINESS OF THIS ACTION

28. This action has been filed within two years of January 24, 2020, the date the President issued Proclamation 9980. This filing is therefore timely because it is filed within two years after the cause of action first accrued. See 28 U.S.C. § 2636(i).

VI. STATEMENT OF FACTS

A. Section 232 of the Trade Expansion Act of 1962

29. Section 232, titled "Safeguarding National Security," authorizes the President "to take action to adjust imports of an article and its derivatives" only if certain procedural requirements are met.

30. First, a Section 232 action may only begin upon the request for such an investigation from "the head of any department or agency, upon application of an interested party" or on the Secretary's "own motion." 19 U.S.C. § 1862(b)(1)(A).

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31. Following such a request, the statute requires the Secretary immediately to initiate an investigation "to determine the effects on the national security of imports of {an} article." During such investigation, the Secretary of Commerce must consult with the Secretary of the Department of Defense and other U.S. officials, as appropriate, to determine the effects of the specified imports on the national security. Id. § 1862(b)(2)(A)(i)-(ii).

32. The Secretary of Commerce must also "if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Id. § 1862(b)(2)(A)(iii).

33. Under the statute, the Secretary then has 270 days from the date the investigation was initiated, to submit a report to the President. The report must contain "the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under th{e} section." Id. § 1862(b)(3)(A).

34. While Section 232 does not explicitly define "national security," it does provide a non-exhaustive list of factors that the Secretary and President must consider, including:

> domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use.

Id. § 1862(d).

35. Upon receipt of Commerce's report, the President has 90 days – and no more – to both "determine whether the President concurs with the finding of the Secretary" and, if the President concurs, "determine the nature and duration of the action that, in the judgment of the

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President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." Id. § 1862(c)(1)(A)(ii).

36. After reaching a determination, the President has 15 days – and no more – to implement the chosen action. See id. § 1862(c)(1)(B). Alternatively, under the statute, the President may "negotiat{e} … an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security…" Id. § 1862(c)(3)(A)(i).

37. If the President chooses to negotiate an article-specific agreement, but either "no such agreement is entered into" within 180 days or the resulting agreement "is not being carried out or is ineffective," the President must "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." Id. § 1862(c)(3)(A)(ii) (emphasis added).

38. Within 30 days after "the date on which the President makes any determinations," the President "shall submit to the Congress a written statement" explaining "why the President has decided to take action, or refused to take action." Id. § 1862(c)(2).

39. The procedural predicates detailed above are unambiguously stated and must be duly followed for the President's actions to be lawful. See Transpacific Steel LLC, 2019 Ct. Intl. Trade LEXIS 142, at *14 (noting "after the time periods set by Congress {under Section 232} for Presidential action had passed, the President lacked power to take new action.").

B. Commerce's 2017 Investigation Under Section 232

40. On April 19, 2017, the Secretary initiated an investigation into the effects of aluminum and steel imports on the national security of the United States.

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41. On April 21, 2017, the Secretary published a notice inviting public comment on "imports of steel." Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017) (attached as Ex. 3). That notice stated that the Secretary "is particularly interested in comments and information…related to the importation of steel." Id. at 19,206. The notice invited public testimony to "assist the Department in determining whether imports of steel threaten to impair the national security." Id. The notice did not mention nails specifically, or any derivative articles generally. Id. None of the public comments advocated for the tariffs to be applied to, or exempted from, imported steel nails. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Steel on the National Security at app. G, (Jan. 11, 2018) ("Steel Report"), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf (app. G directs to the Steel 232 Investigation Public Comments Library). The word "nails" does not appear anywhere in the transcript of the public hearing held on May 24, 2017. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, Steel 232 Investigation Public Hearing Transcript (May 24, 2017), https://www.bis.doc.gov/index.php/documents/section-232-investigations/232-steel-public-comments/1927-steel-232-investigation-public-hearing-transcript/file (attached as Ex. 4). No representatives from the domestic producers involved in the numerous nails antidumping/countervailing duty cases attended the hearing or filed comments, in contrast to numerous representatives of domestic steel producers who attended and testified of their history filing unfair trade cases on steel products. See generally U.S. DEPARTMENT OF COMMERCE, Section 232 Investigation on the Effect of Imports of Steel on U.S. National Security,

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https://www.commerce.gov/section-232-investigation-effect-imports-steel-us-national-security (last visited Feb. 4, 2020) (attached as Ex. 5).

42. That steel nails and other derivative products were not considered in the 2017 Section 232 investigation leading to the January 11, 2018 Report is no surprise. Frequently Asked Question Number 1 on the Secretary of Commerce's website for its 2017/2018 Section 232 Steel investigation states:

> **What is the purpose of a Section 232 Investigation?**
> Section 232 investigations are initiated to determine the effects of imports of any articles on national security. In this case, the Commerce Department is determining the effect of steel imports on the national security. Generally, steel products fall into one of the following five categories (including but not limited to): Flat products, long products, pipe and tube products, semi-finished products, and stainless products.

Id. (emphasis added). Steel nails and other "derivative" products do not fall into any of those categories, a fact confirmed by the President and Secretary of Commerce's current challenged action to add Section 232 duties because those products were not included in the original investigation.

43. PrimeSource regularly makes legal filings and provides comment to various federal agencies. Affidavit of PrimeSource Official at ¶ 6-7 (attached as Ex. 11). See also Exs. 12-20 (providing examples of PrimeSource's active engagement with federal government entities in response to proper public notification requesting comment). Based on numerous references in the notice to "steel," PrimeSource had no reason to believe that its products would be subject to the investigation. Affidavit of PrimeSource Official at ¶ 8 (attached at Ex. 11). PrimeSource, therefore, did not submit file comments or request to appear at hearing. Id.

44. On January 11, 2018 and January 17, 2018, the Secretary transmitted its reports to the President detailing its findings and recommendations with regards to steel and aluminum imports respectively. See Steel Report; see also U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. &

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SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Aluminum on the National Security (Jan. 17, 2018), https://bis.doc.gov/index.php/documents/aluminum/2223-the-effect-of-imports-of-aluminum-on-the-national-security-with-redactions-20180117/file.

45. In its reports, Commerce relied on an expansive definition of "national security," which incorporated the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government." Steel Report at 1, 13-15.

46. Concluding that the U.S. domestic steel industry was in decline, Commerce further concluded that "the present quantities and circumstance of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232." Id. at 5. In its report, Commerce clearly emphasized the threat of raw steel imports, as opposed to steel products individually, stating "U.S. steel production capacity has remained flat since 2001, while other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined." Id. at 16.

47. Notably, the term "nails" appears only once in the 262-page report, in a list of civilian articles made from cold finished steel bar. Steel Report, app. F at 134. Part V of the report, the "Findings," refers to antidumping and countervailing duty actions on "unfairly traded steel products." Id. at 28. Appendix K to the Report lists the antidumping and countervailing duty cases on "steel" but does not include any of the numerous antidumping/countervailing duty cases on nails. Id., app. K at 1-4.

48. Following its analysis, Commerce, in its Steel Report, recommended that the President take immediate action to adjust the level of steel imports through quotas or tariffs. Id. at 58-61. Commerce specifically proposed three actions, which would enable the U.S. steel

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industry to operate at an average capacity utilization rate of 80 percent or better. Id. One of the recommendations was a global tariff of 24 percent on "all imported steel products, in addition to any antidumping or countervailing duty collections applicable to any imported steel product." Id. at 59.

49. On February 18, 2018, roughly one month after Commerce issued its Steel Report, the Secretary of Defense provided views on the impact of steel and aluminum on national security, stating "U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production." Mem. from the Sec'y of Defense to Sec'y of Commerce re: Resp. to Steel and Aluminum Policy Recommendation at 1 (Feb. 18, 2018) (attached at Ex. 6). On this basis, the Secretary of Defense concluded that the "DoD does not believe that the findings in the reports {by Commerce} impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Id.

C. The 2018 Section 232 Proclamations On Steel and Aluminum

50. On March 8, 2018, the President issued Proclamations 9704 and 9705, which concurred with the Secretary of Commerce's findings, referred to the recommended global tariff of 24 percent, and determined to adjust the imports of steel and aluminum by subjecting such articles to 25 percent and 10 percent ad valorem tariffs, respectively. See Proclamation No. 9704, Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 11,619, 11,621 (Mar. 15, 2018) (attached as Ex. 7); see also Proclamation No. 9705, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) (attached as Ex. 8). The President exempted certain countries from the imposition of measures. See Proclamation No. 9740, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 20,683, 20,685 (May 7, 2018) (exempting South Korea from steel tariffs announced in Proclamation 9705) (attached as Ex. 9);

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see also Proclamation No. 9894, Adjusting Imports of Steel Into the United States, 84 Fed. Reg. 23,987, 23,988 (May 23, 2019) (exempting Canada and Mexico from steel tariffs announced in Proclamation 9705) (attached as Ex. 10).

51. Neither nails nor any other derivative steel article was listed in the annex of steel articles covered by the initial 2018 Section 232 action. See Proclamation No. 9704, 83 Fed. Reg. at 11,629.

D. The 2020 Section 232 Proclamation on "Derivative" Steel and Aluminum Articles

52. On January 24, 2020, nearly two years after the initial Proclamations imposing tariffs on steel and aluminum, without notice, the President issued Proclamation 9980, imposing additional tariffs of 25 and 10 percent respectively on certain steel- and aluminum-derivative products. See Proclamation No. 9980, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5,281 (Jan 29, 2020) ("Proclamation 9980"). The President claimed that "domestic steel producers' utilization ha{d} not stabilized for an extended period of time at or above the 80 percent capacity utilization level" as the reason for imposing additional tariffs on imports of certain derivatives of steel and aluminum articles. Id. Proclamation 9980 did not cover imports from countries previously exempted from the 2018 Section 232 measures.

53. Paragraph 1 of Proclamation 9980 states that its legal authority is based on the investigation conducted by Commerce in 2017, leading to the January 11, 2018 report by the Secretary of Commerce. See id. As noted above, that investigation and report did not include nails or any derivative steel or aluminum product.

54. The Secretary of Commerce did not conduct a new investigation under the statute. The statute states that "the Secretary shall immediately provide notice to the Secretary of Defense,"

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19 U.S.C. § 1862(b)(1)(B), but the Secretary did not do so. The Secretary of Commerce did not consult with the Secretary of Defense as required by the statute. Id. § 1862(b)(2)(A)(i). The Secretary of Commerce did not "submit to the President a report on the findings of such investigation." Id. § 1862(b)(3)(A). Nor did the Secretary of Commerce publish a report in the Federal Register, as required by 19 U.S.C. § 1862(b)(3)(B).

55. The Secretary of Commerce did not follow any of its regulations codified in 15 C.F.R. part 705, setting forth important investigative and consultative procedures and public comment opportunities that were duly followed in the original Section 232 investigation proceeding. The Secretary's resulting "assessment" to alter the HSTUS to impose 25 percent duties on imports of derivative steel products constitutes unlawful rulemaking.

56. Neither the President nor the Secretary of Commerce solicited public comment from interested parties regarding whether steel- and aluminum-derivative products impact national security, as was done during the initial 2017/18 Section 232 investigations on steel and aluminum imports.

57. Instead, the President claimed that the Secretary of Commerce informed him that "certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas" and the "net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." Proclamation 9980, 85 Fed. Reg. at 5,282. Not one of the legal and procedural requirements of Section 232 was met by the Secretary of Commerce in that he failed to conduct an investigation into new articles not covered by the 2017 investigation. To

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date, the Secretary of Commerce's communication "informing" the President that derivative articles impair the national security has not been released to the public.

58. The President promulgated Proclamation 9980 638 days after the window to take action had lapsed, constituting a clear violation of the statutory constraints under Section 232. See Transpacific Steel, 2019 Ct. Intl. Trade LEXIS 142, at *11 ("the statute… cabins the President's power… procedurally, by setting the time in which to act.").

59. PrimeSource, based on the references to "derivative" articles of steel in Proclamation 9980, began its internal process to decide whether to take action to protect its interests. Affidavit of PrimeSource Official at ¶ 10 (attached as Ex. 11). As Proclamation 9980 constituted final action, however, PrimeSource was unable to participate at the agency level. Id. at ¶ 11.

60. On January 29, 2020, the Executive Office of the President published Annexes in the Federal Register listing the products covered by Proclamation 9980. See Proclamation 9980, 85 Fed. Reg. at 5,286, 5,290. The covered products included steel nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar derivative steel articles as well as aluminum stranded wire, cables, plaited bands and bumper and body stampings.

61. On February 4, 2020, PrimeSource filed the present action to protect its rights after being denied an opportunity to comment at the agency level. Affidavit of PrimeSource Official at ¶ 11 (attached as Ex. 11).

VII. STATEMENT OF CLAIMS

COUNT 1

62. PrimeSource incorporates by reference paragraphs 1-61 of this Complaint.

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63. Congress has the exclusive "power to lay and collect taxes, duties, imposts and excises" and "to regulate Commerce with foreign nations." U.S. CONST. art. 1, § 8. Section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862 delineates the particular circumstances of when and how the President may take action to address imports that threaten to impair the national security of the United States. See 19 U.S.C. § 1862. The statute requires an investigation by the Secretary of Commerce, including notification to the Secretary of Defense, and sets forth the factors the Secretary of Commerce shall consider, culminating in a mandated "report" due to the President within 270 days after the commencement of an investigation. See id. § 1862(b). Following public notice-and-comment, the Secretary of Commerce promulgated regulations establishing the procedures the Secretary of Commerce will follow in conducting such an investigation. 19 C.F.R. pt. 705.

64. The Department of Commerce is a federal agency governed by the APA.

65. The President based his action in Proclamation 9980 on "assessments" provided by the Secretary of Commerce regarding an alleged threat to national security by reason of imports of derivative steel and aluminum products. Those "assessments" recommended changes to HTSUS codes to impose 25 percent duties, an action constituting a rulemaking under the APA. See 5 U.S.C. § 551(4)-(5).

66. In providing such "assessments", undisclosed as of this time, the Secretary of Commerce violated its regulations because it, *inter alia*:

a. failed to initiate an investigation pursuant to 15 C.F.R. § 705.3(a);

b. failed to notify the Secretary of Defense of the initiation of an investigation pursuant to 15 C.F.R. § 705.3(b);

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c. failed to provide proper notification to parties interested in derivative steel products of a public comment period and opportunity to appear at a hearing after the Secretary determined that such information and advice was appropriate with respect to the steel and aluminum articles resulting in the report upon which the President relies in Proclamation 9980 pursuant to 15 C.F.R. § 705.7(a);

d. failed to comply with 15 C.F.R. § 705.8(a)(1) by neglecting to notify parties interested in derivative steel and aluminum products that the date, time, place and subject matter of hearings held in 2017 on steel and aluminum products was the public notice of hearings on the potential for tariffs to be imposed on derivative products subject to Proclamation 9980, more than two years later; and

e. failed to prepare a report and publish an Executive Summary in the Federal Register pursuant to 15 C.F.R. § 705.10(c).

67. The Secretary of Commerce's "assessments" regarding the alleged national security threat from derivative steel and aluminum articles, referred to throughout Proclamation 9980 as the legal basis for that Proclamation, bypassed the investigative and consultative steps required in the regulations.

68. In bypassing these investigative and consultative steps, Commerce failed to provide interested parties with sufficient notice and an opportunity to comment on the addition of HTSUS codes subject to 25 percent duties in violation of the APA. See 5 U.S.C. § 553.

69. Commerce's failure to provide an reasoned explanation for its "assessments" or underlying report setting forth a definition of a derivative article and the numerical tests for measuring the volume increases in imports that triggered this action is arbitrary and capricious under the APA, and, therefore, not in accordance with law. See 5 U.S.C. §706.

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COUNT 2

70. PrimeSource incorporates by reference paragraphs 1-69 of this Complaint.

71. Congress has the exclusive "power to lay and collect taxes, duties, imposts and excises" and "to regulate Commerce with foreign nations." U.S. CONST. art 1 § 8. Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, delineates the particular circumstances of when and how the President may take action to address imports that threaten to impair the national security of the United States.

72. Section 232 was amended in 1988 to place a time limit on the President's authority to take action against imports. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, title I, § 1501(a), (b)(1), 102 Stat. 1107, 1257-60 (1988) (codified as amended at 19 U.S.C. § 1862). The statute was amended to require the President to act within 90 days of receipt a report by the Secretary of Commerce, and to implement such action within 15 days thereafter, in order to remove all threats to national security identified in the report required by the statute.

73. In issuing Proclamation 9980 a full 653 days since the 90-day window closed for the President to determine what action must be taken and 638 days after the 15-day window to implement such action, the President failed to follow the mandated procedures set forth in Section 232. The President's action to raise duties on imports of new derivative steel and aluminum products violates the statute.

COUNT 3

74. PrimeSource incorporates by reference paragraphs 1-73 of this Complaint.

75. The Fifth Amendment to the Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

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76. PrimeSource has a property interest in its imports of imports of steel derivative products. Section 232 specifies that the Secretary of Commerce "shall… if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(A)(iii)(emphasis added). The Secretary of Commerce originally held hearings on the underlying steel articles, and, therefore deemed such notice and comment period appropriate, thus triggering the requirement that the Secretary of Commerce "shall" hold public hearings. The Federal Circuit has recognized the existence of a property interest for Fifth Amendment due process purposes for importers facing a deprivation of their property by the federal government. See, e.g., NEC Corp. v. United States, 151 F.3d 1361, 1370-71 (Fed. Cir. 1998). And the Supreme Court has dictated that "{d}ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 323 (internal quotation and citation omitted).

77. This particular situation demands such procedural protections where PrimeSource was not on notice that its imports could be subject to duties under to Section 232, more than two years after the investigation cited in Proclamation 9980 as the legal basis for the extension of duties to new products.

78. By failing to provide parties with notice and an opportunity to comment before issuing Proclamation 9980 imposing Section 232 tariffs on steel and aluminum derivative products, the President violated PrimeSource's due process rights protected under the Fifth Amendment.

COUNT 4

79. PrimeSource incorporates by reference paragraphs 1-78 of this Complaint.

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80. Section 232 is unconstitutional and not in accordance with the law because it represents an over-delegation by Congress to the President of its legislative powers by failing to set forth an intelligible principle for the President to follow when implementing Section 232.

COUNT 5

81. PrimeSource incorporates by reference paragraphs 1-80 of this Complaint.

82. The Secretary of Commerce violated Section 232 by making "assessments", "determinations" and providing other "information" to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017-18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

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PRAYER FOR RELIEF

WHEREFORE, and as challenged herein, PrimeSource respectfully prays that this Court:

(1) Enjoin Defendants from implementing or further enforcing Proclamation 9980;

(2) Enter judgment in favor of Plaintiff and declare Proclamation 9980 unlawful;

(3) Refund to PrimeSource any duties that may be collected on its imported articles pursuant to Proclamation 9980;

(4) Award Plaintiff costs and any reasonable attorneys' fees and expenses; and

(5) Grant such additional relief as the Court may deem just and proper.

Respectfully Submitted,

Dated: February 11, 2020

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EXHIBIT LIST TO COMPLAINT

Exhibit	Description
1	*Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, Proclamation No. 9980 of January 24, 2020*, 85 Fed. Reg. 5281 (Jan. 29, 2020)
2	Affidavit of PrimeSource Official
3	*Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19205 (Apr. 26, 2017)
4	Dep't of Commerce, Bureau of Indus. & Sec. (BIS), *The Effect of Imports of Steel on the National Security* (Jan. 11, 2018)
5	Steel 232 Investigation Public Hearing Transcript (May 24, 2017)
6	Memorandum from Sec'y of Def. to Sec'y of Commerce, re: Response to Steel and Aluminum Policy Recommendations (Feb. 18, 2018)
7	*Adjusting Imports of Aluminum Into the United States, Proclamation No. 9704 of March 8, 2018*, 83 Fed. Reg. 11619 (Mar. 15, 2018)
8	*Adjusting Imports of Steel Into the United States, Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11625 (Mar. 15, 2018)
9	*Adjusting Imports of Steel Into the United States, Proclamation No. 9740 of April 30, 2018*, 83 Fed. Reg 20683 (May 7, 2018)
10	*Adjusting Imports of Steel Into the United States, Proclamation No. 9894 of May 19, 2019*, 84 Fed. Reg. 23987 (May 23, 2019)
11	Affidavit of PrimeSource Official
12	Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15028 (April 12, 2019)
13	Public Comments of PrimeSource Building Products, Inc., *in re*: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute (May 28, 2019)
14	Notice of Hearing and Request for Public Comment: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 32248 (July 5, 2019)
15	Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 67992 (December 12, 2019

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16	Public Comments of PrimeSource Building Products, Inc., *in re*: Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute (January 13, 2020
17	Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 22564 (May 17, 2019)
18	Public Comments of PrimeSource Building Products, Inc., *in re*: Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Jun 17, 2019)
19	Certain Collated Steel Staples From China, Korea, and Taiwan; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations, Inv. Nos. 701-TA-626 and 731-TA-1452-1454 (Preliminary), 84 Fed. Reg. 27803 (June 14, 2019)
20	Letter in Lieu of Post-Conference Brief of PrimeSource Building Products, Inc.: Certain Collated Steel Staples From China, Korea, and Taiwan; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations (July 2, 2019)
21	Certain Collated Steel Staples From China, Korea, and Taiwan; Determinations, Inv. Nos. 701-TA-626 and 731-TA-1452-1454 (Preliminary), 84 Fed. Reg. 35884 (July 25, 2019)

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Federal Defendants,

and

NATIONAL SHOOTING SPORTS FOUNDATION, INC., FREDRIC'S ARMS & SMITHS, LLC,

Intervenor-Defendants.

No. 2:20-cv-00111-RAJ

INTERVENOR-DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
February 28, 2020

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Intervenor-Defendants National Shooting Sports Foundation, Inc. ("NSSF") and Fredric's Arms & Smiths, LLC (collectively, "NSSF Parties") submit this response in partial opposition to the motion for a preliminary injunction brought by Plaintiff States. Plaintiffs challenge two agency rules ("Rules") transferring export control jurisdiction over certain firearms, ammunition, and related products and technology to the Commerce Department from the State Department. Plaintiffs' merits arguments focus with laser-like precision on just one of the Rules' myriad effects: the change in regulation of computer files for the production of firearms or their components using a 3D-printer ("3D-Firearm Files"). The vast majority of the Rules have nothing to do with 3D-Firearm Files. Yet Plaintiffs seek a preliminary injunction against the Rules *in their entirety*. Even if the Court determines that Plaintiffs are entitled to relief on their specific claims, there would be no basis for an order enjoining implementation of the Rules wholesale. Instead, at most, the Court should simply order the agencies to maintain the pre-implementation status quo with respect to regulatory restrictions on 3D-Firearm Files (as defined by the Plaintiff States).

Plaintiffs' requested preliminary injunction is wildly overbroad. It would wholly block the implementation of Rules emerging from a comprehensive decade-long effort, first initiated during President Obama's Administration, to improve and simplify controls over exports of many items. These items include firearms and ammunition as well as associated technology, production equipment, and software—almost all of which are entirely unrelated to 3D-Firearm Files. The resulting Rules strengthen national security and create a more efficient regulatory system for businesses around the country, including members of NSSF, the trade association for America's firearms and ammunition industry. For example, the Rules eliminate the annual $2,250 State Department registration fee covering gunsmiths or small firearms manufacturers that do not even export goods (like NSSF member Fredric's Arms). The Rules thus enhance the regulatory framework in numerous ways unrelated to their treatment of 3D-Firearm Files. Indeed, Plaintiffs

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do not point to a single aspect of the Rules, other than their treatment of 3D-Firearm Files, that is unlawful or that threatens any harm.

Accordingly, if this Court accepts Plaintiffs' claims on the merits about 3D-Firearm Files, it should go only so far as to remedy their alleged harm—and no further. Well-established severability principles support that common-sense result: there is no evidence the agencies would not have adopted the Rules without their change in treatment of 3D-Firearm Files, and the Rules are eminently workable in the absence of that change. *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019). Issuing an order that tailors relief to the asserted legal violation would also be the most appropriate exercise of this Court's equitable authority—particularly considering the harms that Intervenor-Defendants (and countless non-parties) would suffer if the Rules were enjoined completely. *See Nat'l Treasury Emps. Union v. Yeutter*, 918 F.2d 968, 977 (D.C. Cir. 1990). Indeed, a tailored order is needed to comply with Article III limitations on this Court's remedial powers. And implementing such an order would be straightforward: the agencies would maintain the status quo as to regulatory restrictions on 3D-Firearm Files (which the agencies can easily do). This Court should therefore reject Plaintiffs' request for an indiscriminate and needlessly disruptive remedy, and instead ensure that the scope of the Court's relief does not exceed the limited violation or harm alleged.

II. BACKGROUND

A. Statutory and Regulatory Background

Pursuant to its statutory authority to regulate exports, the Department of Commerce has issued and maintained the Export Administration Regulations ("EAR"). *See* Export Control Reform Act of 2018, Pub. L. No. 115-232, 132 Stat. 2208; 15 C.F.R. § 730.1 *et seq.* "The export control provisions of the EAR are intended to serve the national security, foreign policy . . . and other interests of the United States." *Id.* § 730.6. The EAR's Commerce Control List contains "items (i.e., commodities, software, and technology) subject to the export licensing authority" of the Commerce Department's Bureau of Industry and Security. *Id.* § 738.1(a)(1). The Bureau, in

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turn, controls the export of items on the Commerce Control List through a detailed regulatory structure. *See, e.g.*, *id.* § 742.1 *et seq.*

The Commerce Department is not, however, the only agency with regulatory jurisdiction over exports. *See* 15 C.F.R. § 738.1(a)(1). "Defense articles" and "defense services" are instead controlled under the State Department's International Traffic in Arms Regulations ("ITAR"), administered by the Department's Directorate of Defense Trade Controls ("DDTC") pursuant to the Arms Export Control Act ("AECA"). *See* 22 C.F.R. § 120.1. That Act authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services." 22 U.S.C. § 2778(a)(1). To do so, the President "designate[s] those items which shall be considered as defense articles and defense services" on "the United States Munitions List" ("USML"). *Id.* Manufacturers and exporters of designated articles must register with the DDTC and pay an annual fee, now a minimum of $2,250. *See* 22 C.F.R. § 122.1; Dep't of State Directorate of Def. Trade Controls, Registration FAQs (accessed Feb. 24, 2020).[1]

The USML proved to be a blunt regulatory instrument. All manner of guns and ammunition, including items widely available over the counter in retail outlets around the world, were controlled as "defense articles" and essentially regulated equally regardless of their non-military applications, use, sensitivity, or vintage. Given how broadly "defense articles" are defined, small businesses, for example, were in effect required to comply with rules similar to those applicable to manufacturers of fighter jets and tanks. And even "manufacturer[s] who do[] not engage in exporting"—including certain gunsmiths like Fredric's Arms—"must nevertheless register." 22 C.F.R. § 122.1(a).

The complexities and redundancies of the export control regime prompted a comprehensive effort, initiated in 2010 under the Obama Administration, "to modernize the U.S.

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[1] *Available at* https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=138b6d9cdb3d5b4044f9ff621f961905.

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export control regulations to create a simpler, more robust system that eases industry compliance, improves enforceability, and better protects America's most sensitive technologies." Dep't of State, Final Rules for Oversight of Firearms Exports Fact Sheet (Jan. 23, 2020).[2] In April 2010, the White House stated in a press release that "the current U.S. export control system does not sufficiently reduce national security risk based on the fact that its structure is overly complicated, contains too many redundancies, and tries to protect too much." The White House, Fact Sheet on the President's Export Control Reform Initiative (Apr. 20, 2010).[3] The White House explained: "The fragmented system, combined with the extensive list of controlled items which resulted in almost 130,000 licenses last year, dilutes our ability to adequately control and protect those key items and technologies that must be protected for our national security." *Id.*

In July 2011, the White House Chief of Staff highlighted a proposal "by which less militarily significant items (e.g., parts and components) will be transferred from the U.S. Munitions List (USML) to the more flexible Commerce Control List." The White House, White House Chief of Staff Daley Highlights Priority for the President's Export Control Reform Initiative (July 19, 2011).[4] In April 2013, the State Department issued a final rule amending its arms regulations (the ITAR) to transfer certain items on the USML to the jurisdiction of the Commerce Department. Dep't of State, Amendment to the Int'l Traffic in Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740 (Apr. 16, 2013). That rule noted that there would be future changes: "The Department intends to publish final rules implementing the revised [USML] categories and related ITAR amendments periodically,

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[2] *Available at* https://www.state.gov/proposed-rules-for-oversight-of-firearms-exports-published-for-public-comment.

[3] *Available at* https://obamawhitehouse.archives.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative.

[4] *Available at* https://obamawhitehouse.archives.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont.

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beginning with this rule." *Id.* By the end of the Obama Administration, the process of revising the USML to streamline regulation and transfer certain items to the Department of Commerce's jurisdiction had been completed for 18 of the USML's 21 categories—*i.e.*, all but the three categories in the Rules now at issue.

B. The Final Rules

The Rules that the Plaintiffs seek to vacate "are the product of [the] larger effort since 2010." Final Rules for Oversight of Firearms Exports Fact Sheet, *supra.* They complete the export reform control process for items in the remaining three categories on the USML. Specifically, in 2018, the State Department and the Commerce Department issued proposed rules to transfer licensing jurisdiction over certain commercial firearms and related items in these categories, including products widely available in retail outlets, from State to Commerce regulatory jurisdiction. *See* International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198 (proposed May 24, 2018); Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 83 Fed. Reg. 24,166 (proposed May 24, 2018).

Many commenters, including NSSF, supported the new Rules. NSSF explained that the Rules' projected advantages had "been proven thousands of times through the application of similar export control reforms for other sensitive commercial or less sensitive military items that have been transferred to Commerce's jurisdiction over the course of the last eight years." Comment Letter on Proposed Rule on International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III (July 6, 2018).[5] As examples, NSSF noted that "under the Commerce system, there are no fees to apply for licenses. There are no redundant registration requirements for domestic manufacturers. There are no fees for registration. Such fees are bearable for large

[5] *Available at* https://www.pmddtc.state.gov/sys_attachment.do?sys_id=0b4aef81dba31b403b1272131f9619f1, at 109.

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companies, but often not for small- and medium-sized companies. The license application forms are vastly simpler." *Id.* NSSF's comments did not address 3D-Firearm Files or 3D-printing technology.[6]

On January 23, 2020, the State Department and the Commerce Department issued the final Rules that Plaintiffs now challenge. *See* International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3819 (Jan. 23, 2020) (State Rule); Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136 (Jan. 23, 2020) (Commerce Rule). The Rules, the State Department explained, revise the USML to transfer items that do not "provide the United States with a critical military or intelligence advantage or, in the case of weapons, have an inherently military function." 85 Fed. Reg. at 3820. The transferred items include many "that are widely available in retail outlets in the United States and abroad." *Id.*

At the same time, the Rules' transfer of jurisdiction over various items to the Department of Commerce "does not deregulate the export of firearms." 85 Fed. Reg. at 3822. "All firearms and major components being transferred to the [Commerce Control List] will continue to require export authorization from the Department of Commerce," which is "capable of monitoring foreign recipients' compliance with their obligations." *Id.* The Commerce Department "will use its resources and expertise . . . to vet parties involved in transactions subject to the EAR for human rights concerns." 85 Fed. Reg. at 4144. Thus, the firearms, ammunition, and related products at issue will still be controlled for export purposes to achieve, after interagency review, national

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[6] "3D printing" is a reference to additive manufacturing, which is a technique to use data with computer-aided-design software to "direct hardware to deposit material, layer upon layer, in precise geometric shapes. As its name implies, additive manufacturing adds material to create an object. By contrast, when you create an object by traditional means, it is often necessary to remove material through milling, machining, carving, shaping or other means." General Electric, What is Additive Manufacturing?, *available at* https://www.ge.com/additive/additive-manufacturing (accessed Feb. 24, 2020).

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security, foreign policy, and human rights objectives. But these objectives will be achieved in a simpler, more efficient way for non-military manufacturers and exporters, including NSSF members.

The Rules, which together span 68 pages of the Federal Register, contain dozens of provisions adjusting export controls over numerous categories of firearms, ammunition, and related products and technologies. 85 Fed. Reg. at 3819–33; 85 Fed. Reg. at 4136–88. The items added to the Commerce Control List (and thus no longer considered "defense articles" subject to State Department regulation) run the gamut. They include non-automatic and semi-automatic firearms up to .50 caliber; firearms manufactured from 1890 to 1898 and reproductions thereof; certain riflescopes, shotgun shells, and firearm and ammunition production equipment; and many other related products and technologies. *See, e.g.*, 85 Fed. Reg. at 4180–82 (No. 42). In fact, the Department of Commerce estimated that 10,000 current State Department licenses would be affected by the transfer of jurisdiction. *Id.* at 4139.

Further, the Rules contain numerous provisions designed to enhance the Department of Commerce's regulation of firearm exports. For example, the Commerce Rule sets forth multiple grounds to impose license requirements and deny licenses, such as regional stability, national security, and human rights. *See* 85 Fed. Reg. at 4143–44, 4163, 4176. It also "imposes a requirement to file Electronic Export Information . . . for nearly all exports of firearms being moved to the [Commerce Control List]." 85 Fed. Reg. at 4138; *see* 85 Fed. Reg. at 4176–77 (No. 21). On the State Department side, the Rules clarify and revise the categories of firearms and other items that remain on the USML. *See, e.g.*, 85 Fed. Reg. at 3831–32.

C. The Challenged Provisions of the Rules

The provisions of the Rules to which Plaintiffs object constitute a very thin slice of the Rules. Plaintiffs challenge the transfer of "Firearm Files"—characterized as "[c]omputer software for the production of a [USML] Category I firearm or its components using a 3D printer"—from the USML to the jurisdiction of the Commerce Department. *See* Pl. States' Mot. For Preliminary

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Inj. 3 (ECF No. 55) ("PI Mot.").[7] Plaintiffs relatedly object to a section of the Commerce Rule revising the scope of an exception from Commerce regulatory jurisdiction for "published" technology and software in 15 C.F.R. § 734.7. *See* PI Mot. 6–7. Specifically, the Rule provides for the Commerce Department to retain jurisdiction over "software" or "technology" for producing "a firearm, or firearm frame or receiver . . . made available by posting on the internet" and "ready for insertion" into manufacturing equipment. 85 Fed. Reg. at 4172–73 (No. 4).

Plaintiffs do not, however, object to any aspects of the Rules that transfer regulatory control over specified firearm products, manufacturing equipment, or traditional (*i.e.*, non-3D-printing) technology or software. Plaintiffs' objections are thus directed toward an extremely narrow subset of the Rules' many provisions, almost all of which are unrelated to 3D-printing technology or software.

D. The Intervenor-Defendants

Intervenor-Defendants are NSSF and Fredric's Arms. Neither NSSF nor Fredric's Arms is involved in the 3D printing of firearms. The interest of Intervenor-Defendants is to ensure that the remaining bulk of the Rules go into effect on March 9, 2020, regardless of this Court's decision with respect to 3D-Firearm Files.

NSSF is the trade association for America's firearms and ammunition industry. Its membership includes manufacturers, distributors, and retailers that export firearms and ammunition products, and those that do not but are nevertheless subject to the export control regulations. NSSF, on behalf of its members, participated actively in the administrative process

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[7] The Rules effectuate the transfer of 3D-Firearm Files by: (1) removing "[n]onautomatic and semi-automatic firearms to caliber .50 inclusive (12.7 mm)" from Category I of the State Department's USML, such that "[t]echnical data . . . directly related to" these firearms and their associated components are also eliminated from the USML, 22 C.F.R. § 121.1(a), (h), (i); and (2) adding the up-to-.50-caliber firearms and their associated components to a category of the Commerce Control List, such that "technology" and "software" for the production of these items—which includes 3D-Printing technology and software—also moves to the Commerce list. *See* 85 Fed. Reg. at 3830 (No. 2), 85 Fed. Reg. at 4180–81 (No. 42), 4184 (No. 49), 4185 (No. 52).

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leading to the Rules' promulgation. It made clear that, for its members, the Rules "would significantly reduce the overall burden and cost of complying with controls on the export of commercial firearms and ammunition." Comment Letter on Proposed Rule on International Traffic in Arms Regulations, *supra*.

Fredric's Arms, a member of NSSF, is a gunsmith shop co-owned by a married couple in Richland, Washington. As a small business with total annual revenues well under six figures, Fredric's Arms stands to benefit materially from the implementation of the new Rules. Under the current regulatory regime, Fredric's Arms must register with DDTC and pay the $2,250 annual registration fee—even though the business does not export firearms outside the United States. *See* Declaration of Marc Stairet (ECF No. 65) ¶¶ 6–9 ("Stairet Decl."). That is a significant burden on Fredric's Arms. *Id.* ¶¶ 7–9. Once the Rules go into effect on March 9, Fredric's Arms will no longer be required to pay that fee.

III. ARGUMENT

In the event the Court is inclined to grant relief to Plaintiffs, it should deem the Rules' treatment of 3D-Firearm Files severable from the remainder of the Rules and preliminarily enjoin solely those aspects of the Rules that are unlawful. That course would adequately—indeed, completely—preserve the current regulation of 3D-Firearm Files, as Plaintiffs seek, without running afoul of Article III limits or harming Intervenor-Defendants (and thousands of others) through the imposition of an unduly broad and burdensome injunction.

A. The Rules' Treatment of 3D-Firearm Files Is Severable from the Remainder of the Rules

Assuming the Administrative Procedure Act ("APA") applies,[8] APA principles of severability dictate that the Rules' regulation of 3D-Firearm Files can be enjoined separately from

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[8] The Export Control Reform Act of 2018 provides, however, that "the functions exercised under this subchapter shall not be subject to sections 551, 553 through 559, and 701 through 706 of Title 5" (*i.e.*, several provisions of the APA). 50 U.S.C. § 4821(a); *see* Pub. L. No. 115-232.

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the rest of the Rules. "An 'agency action' may be either 'the whole or a part of an agency rule [or] order.'" *Carlson*, 938 F.3d at 351 (quoting 5 U.S.C. § 551(13)). Consequently, although "[t]he APA requires a reviewing court to 'hold unlawful and set aside agency action' that is arbitrary and capricious . . . , the APA permits a court to sever a rule by setting aside only the offending parts of the rule." *Id.* (quoting 5 U.S.C. § 706(2)). In fact, "[i]t would . . . exceed the statutory scope of review for a court to set aside an entire rule where only a part is invalid, and where the remaining portion may sensibly be given independent life." *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994).

"Whether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent." *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (quoting *North Carolina v. FERC*, 730 F.2d 790, 795–96 (D.C. Cir. 1984)); *accord Ctr. for Biological Diversity v. Jewell*, No. 16-cv-94-TUC-JGZ, 2018 WL 1586651, at *22 n.22 (D. Ariz. Mar. 31, 2018). Thus, courts look at two criteria in evaluating severability: (1) whether there is an "indication that the regulation would not have been passed but for [the] inclusion" of the offending provisions, and (2) whether severance will "impair the function" of the remaining provisions "as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). The 3D-Firearm-related provisions of the Rules at issue are severable under both criteria.

1. The Rules would have been promulgated absent their change in treatment of 3D-Firearm Files.

To conclude that an agency intended a "rule to have an all or nothing character," *Catholic Soc. Serv.*, 12 F.3d at 1127, a court must find "substantial doubt" as to whether the agency would have adopted the valid provisions on their own. *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018) (internal quotation marks omitted). Here, there is simply no "indication that the [Rules] would not have been passed but for [the] inclusion" of provisions relating to 3D-Firearm Files. *Davis Cty.*, 108 F.3d at 1460 (quoting *K-Mart*, 486 U.S. at 294) (second alteration in original).

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As recounted above, the Rules emerged from longstanding efforts (originating in the Obama Administration) to streamline the regulatory system for exports of commercial firearms and related products. *See supra* pp. 2–7. The agencies' purposes, stated in the Rules, were to revise the State Department's USML "to describe more precisely the articles that . . . warrant . . . control" on that List and to "complete the initial review of the USML that the [State] Department began in 2011." 85 Fed. Reg. at 3819; *see also* 85 Fed. Reg. at 4136. The agencies have conveyed no intent for every Rules provision to stand or fall together. Unlike in cases in which courts have struck down entire regulations, the agencies did not (i) "reject[]" the option of promulgating the Rules absent their change in treatment of 3D-Firearm Files "in the preamble to [their] final rule[s]," *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 964 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); (ii) "repeatedly emphasize[] the ways in which the [treatment of 3D-Firearm Files] and [the other provisions] were designed to work together," *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012); or (iii) state "during the notice and comment period" that they "would *not* have adopted . . . a rule" that excluded regulatory changes relating to 3D-Firearm Files, *Averett v. Dep't of Health & Human Servs.*, 306 F. Supp. 3d 1005, 1021 (M.D. Tenn. 2018), *aff'd*, 943 F.3d 313 (6th Cir. 2019). Contrary to any idea that 3D-Firearm Files are a central feature of the Rules, one of Plaintiffs' principal complaints is that the agencies' notices of proposed rulemaking failed to put parties on notice that 3D-Firearm Files would be affected at all. PI Mot. 10–16.

Moreover, the contents of the Rules clearly reflect the agencies' focus on countless matters unrelated to 3D-printing of firearms. The Rules transfer regulatory jurisdiction over products affecting an estimated 10,000 State Department licenses. *See* 85 Fed. Reg. at 4139. They also institute numerous provisions designed to enhance regulatory enforcement under the new Commerce Department regime, *see, e.g.*, *id.* at 4176 (No. 17); *id.* at 4176–77 (No. 21), and clarify the categories remaining on the State Department's USML, *see* 85 Fed. Reg. at 3831–32 (No. 2). As in a D.C. Circuit case in which the court declined to strike down a regulation in its entirety, the

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Rules have myriad provisions with "importance beyond the particular . . . program" ruled invalid. *Virginia v. EPA*, 116 F.3d 499, 500 (D.C. Cir. 1997). Thus, "the circumstances indicate the agenc[ies] would have adopted the regulation[s] even without" their change in treatment of 3D-Firearm Files. *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009).

2. Severance will not impair the function of the Rules as a whole.

Were this Court to invalidate the Rules only insofar as they alter current regulatory restrictions on 3D-Firearm Files, there is no doubt that "the remaining portion may sensibly be given independent life." *Catholic Soc. Serv.*, 12 F.3d at 1128. Consistent with such a court order, the agencies could still transfer hundreds of firearms and components, and their associated technology and software, to the Commerce Control List. The agencies could also implement provisions regulating the export of these items to achieve the national security and foreign policy, including human rights, objectives of the Commerce Department's regulations. Such an outcome would not "severely distort the [agencies'] program and produce a rule strikingly different from any [the agencies] ha[ve] ever considered or promulgated." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 23 (D.C. Cir. 2001). Precisely the opposite is true here: the Rules would serve their principal function of creating a more efficient export control regime regardless of whether they change the regulatory regime with respect to 3D-Firearm Files. *See* 85 Fed. Reg. at 3819, 4136.

Because the Rules could "function sensibly" without their change in treatment of 3D-Firearm Files, *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22, it makes no difference that the Rules do not always address 3D-Firearm Files as a wholly separate category of technology.[9] In *Davis County*, for example, the D.C. Circuit rejected an argument against severability grounded

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[9] Although the Commerce Rule contains discrete provisions governing regulation of 3D-printing technology, 85 Fed. Reg. at 4172 (Nos. 1–4), it also includes 3D-Firearm Files within the "technical data" related to items in a USML category that the Rules move to the Commerce Control List, *see id.* at 4181 (No. 42).

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in the contention that "[g]uidelines for existing large [municipal waste combustor] *units* have never been promulgated as such and, therefore, are not severable from the other guidelines." 108 F.3d at 1459 (internal quotation marks omitted) (first alteration in original). "The real question for severability analysis," the court of appeals explained, "is not whether the EPA separately issued standards for existing large units, but rather" how the EPA would have proceeded had it not committed the legal error at issue. *Id.* Here, as noted, there is no reason to think the agencies would have abandoned Rules transferring hundreds of items from State to Commerce jurisdiction had they decided to maintain current regulatory restrictions on 3D-Firearm Files.

In *Yeutter,* the D.C. Circuit again confirmed that an all-or-nothing approach is unwarranted even when the agency regulations do not contain wholly distinct categories of offending and non-offending provisions. *See* 918 F.2d at 977. There, the court of appeals determined that certain regulations licensed drug testing in too broad an array of cases. *Id.* at 974. In particular, the regulations were "unconstitutional insofar as [they] authorize[d] mandatory drug testing of . . . workers who do not hold safety- or security-sensitive jobs, absent reasonable suspicion of on-duty drug use or drug-impaired work performance." *Id.* The D.C. Circuit used these categories of drug use—which came from the case law and did not merely track the language of the regulations—to narrow the scope of the injunction. *See id.* at 973–77. The court rejected the argument that it was "inappropriate to redraw employee categories drawn by [an agency] so as to allow random testing of some employees within those categories while prohibiting testing of others." *Id.* at 977. Instead, the D.C. Circuit remanded to the district court "with instructions to modify the injunction" to block drug testing only under the conditions the court deemed unconstitutional. *Id.*

Here, "[i]f the [agencies] had promulgated two entirely separate rules"—one addressing 3D-Firearm Files and one addressing every other item covered by the Rules—"it is beyond dispute that the latter rule would survive." *Catholic Social Serv.*, 12 F.3d at 1128. And as discussed *infra* pp. 17–20, a court order mandating the maintenance of current regulatory restrictions on 3D-Firearm Files would require the agencies to take minimal steps to implement. 3D-Firearm Files

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are simply not a "linchpin holding together the entire rule." *High Country Conservation Advocates v. Forest Serv.*, 67 F. Supp. 3d 1262, 1266 (D. Colo. 2014). Plaintiffs do not even purport to offer any justification for enjoining the Rules in their entirety.

B. An Injunction Tailored to the Regulation of 3D-Firearm Files Is the Most Appropriate Exercise of This Court's Equitable Authority

Fundamental equitable principles lead to the same result as the severability analysis: any relief for Plaintiffs can and must be tailored to the asserted legal violations. That is particularly true because the preliminary injunction factors weigh against affording any relief extending beyond the harms related to 3D-Firearm Files.

1. This Court should limit any relief to the scope of the alleged harms.

"[I]njunctions issued by federal courts should be narrowly tailored to remedy the harm shown." *Yeutter*, 918 F.2d at 977; *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). In *Yeutter*, the D.C. Circuit applied that established principle to issue a "narrowly tailored remedial order" invalidating an agency rule only in part. 918 F.2d at 977.

This Court should apply a similarly restrained approach here. Each of Plaintiffs' three asserted grounds for a preliminary injunction is targeted at the Rules' alteration of the regulatory framework for 3D-Firearm Files, and not at any other aspect of the Rules. *See, e.g.*, Am. Compl. ¶ 2. In particular, Plaintiffs urge that (1) the agencies violated notice-and-comment procedures because they provided inadequate opportunity to comment on Rules provisions related to 3D-Firearm Files, and because the addition of a provision addressing 3D-printing (15 C.F.R. § 734.7(c)) was not a logical outgrowth of the proposed rules, PI Mot. 10–16; (2) the agencies' decision to "remove [Firearm] files from the Munitions List" was contrary to AECA's purpose and failed to take into account statutory factors, *id.* 16–18; and (3) the Rules' promulgation was arbitrary and capricious because the Rules "are not a logical means of implementing Defendants' stated policy of continuing to regulate 3D-printed guns," *id.* 18–22.

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All of these challenges share one thing in common (as do the related arguments of *amicus* Brady Center): they are focused exclusively on 3D-Firearm Files. For instance, Plaintiffs' allegations of defective process are directed at the procedures the agencies employed in effectuating changes in the regulation of 3D-Firearm Files. Granting relief for the asserted legal violations, therefore, calls solely for an order mandating that the agencies maintain the status quo with respect to regulatory restrictions on 3D-Firearm Files. The Court's injunction would then be tailored to "the nature and extent of the . . . violation." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (quoting *Milliken v. Bradley*, 433 U.S. 267, 270 (1977)) (ellipses in original).

In fact, this Court would face constitutional obstacles to doing any more. The principle that courts must tailor their injunctions to the asserted legal violations is rooted not only in sound equitable practice, but also in Article III. For a federal court to exercise its remedial authority consistent with Article III, "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Plaintiffs must demonstrate Article III standing with respect to each form of relief they seek. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983). Here, Plaintiffs allege standing based on the effects of the Rules' treatment of 3D-Firearm Files on their interests. PI Mot. 8. They are therefore entitled to secure only the relief that would cure their "injury in fact." *Lewis*, 518 U.S. at 357. And while a litigant asserting a procedural violation "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant," *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), here the relevant "injury," "decision," and "harm" all revolve around 3D-Firearm Files. Hence, to the extent Plaintiffs have Article III standing at all,[10] Plaintiffs have not demonstrated standing

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[10] The Department of Justice has previously argued that the Plaintiff States lacked Article III

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to seek relief broader than that necessary to alleviate their asserted injuries—all of which, according to Plaintiffs' allegations, stem directly and exclusively from the Rules' treatment of 3D-Firearm Files.

2. The preliminary injunction factors weigh sharply against extending relief beyond 3D-Firearm Files.

Granting Plaintiffs relief over the Rules as a whole would be particularly unwarranted in the preliminary injunction context. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). As Plaintiffs note, they "must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest." PI Mot. 7 (citing *California v. Dep't of Health & Human Servs.*, 941 F.3d 410, 423–24 (9th Cir. 2019)). Regardless of whether Plaintiffs can satisfy the first factor, each of the remaining preliminary injunction factors cuts against Plaintiffs to the extent they seek any relief beyond what is necessary to remedy the asserted legal violations.

First, the irreparable harms Plaintiffs cite stem exclusively from the prospect that "technical data for designing and producing undetectable weapons using a commercially-available 3D printer [will be] published on the internet." PI Mot. 22 (internal quotation marks omitted); *see id.* 22–24. Accordingly, Plaintiffs will suffer no irreparable harm—in fact, no harm whatsoever—if, as the NSSF Parties argue, this Court simply maintains the status quo as to regulatory restrictions on 3D-Firearm Files rather than enjoining the Rules in their entirety.

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standing to enjoin a temporary USML modification, *see Washington v. Dep't of State*, 318 F. Supp. 3d 1247, 1254 (W.D. Wash. 2018), and the Federal Defendants have signaled their intent to raise an Article III standing objection to Plaintiffs' suit in the instant case, *see* Fed. Defs.' Mot.to File Over-Length Br. in Opp'n to Pls.' Mot. for Prelim. Inj. 1–2 (ECF No. 78).

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Second, the balance of the equities tips in favor of the NSSF Parties, not Plaintiffs, as to any broader relief. An order limited to 3D-Firearm Files would "have no prejudicial effect" on Plaintiffs, because the regulatory standards applicable to 3D-Firearm Files would not change. *Davis Cty.*, 108 F.3d at 1459. By contrast, an order enjoining the Rules in their entirety—even on a preliminary basis—would have inequitable effects on NSSF and its members, including Fredric's Arms. NSSF members would continue to be subject to the increased regulatory burdens of the State Department's USML. Fredric's Arms, for instance, would immediately be required to register with and pay the yearly $2,250 fee to the State Department—a significant cost for Fredric's Arms—even though the small gunsmith shop does not export. Stairet Decl. ¶¶ 6–7. And NSSF members would be forced to bear those kinds of burdens as a result of a ruling directed at the unrelated topic of 3D-Firearm Files.

Third, for similar reasons, Plaintiffs have provided no indication as to why an injunction against the Rules in their entirety, as distinct from an injunction narrowly tailored to 3D-Firearm Files, is in the public interest. Indeed, Plaintiffs have not ventured any injuries whatsoever stemming from the Rules beyond those related to 3D-Firearm Files.

As a consequence, even if the Court determines that it has the constitutional authority to enjoin the Rules in their entirety (despite Plaintiffs' failure to point to any injury stemming from any aspect of the Rules unrelated to 3D-Firearm Files), the Court should still exercise its "equitable discretion" to tailor relief to Plaintiffs' asserted legal violation. *Azar*, 911 F.3d at 575. That measured approach would be "the more equitable and appropriate course." *Davis Cty.*, 108 F.3d at 1459.

C. A Court Order Preserving the Status Quo as to 3D-Firearm Files Would Fully Address Plaintiffs' Objections to the Rules

If this Court determines that Plaintiffs are entitled to any preliminary injunction, then its order should be straightforward: "The State Department and the Commerce Department shall

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maintain the status quo with respect to regulatory restrictions on 3D-Firearm Files (as defined by the Plaintiff States)." The Rules would otherwise go into effect as scheduled.

There are no legal or practical impediments to the agencies' implementation of that court order. As a legal matter, agencies are, of course, required to follow court orders. *See Yamasaki*, 442 U.S. at 705 ("[T]he grant of injunctive relief makes the Secretary's duty to comply enforceable by contempt order."). And courts may require agencies to take affirmative steps to comply with court orders finding APA violations. *See, e.g.*, *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 667 (D.C. Cir. 2016) (remanding to the agency to "determine whether burn-off ovens, soil treatment units, and space heaters" fall under a certain regulatory category "and, if so, to set standards for those types of units"); *see also In re A Cmty. Voice*, 878 F.3d 779, 788 (9th Cir. 2017) (granting a writ of mandamus ordering an agency to issue rules modifying standards to comply with statutory directives related to lead poisoning). In a closely related context, for example, the State Department has previously revised the definition of "technical data" in the ITAR to comply with a Ninth Circuit decision interpreting that phrase narrowly. *See United States v. Edler Indus., Inc.*, 579 F.2d 516, 521 (9th Cir. 1978); Dep't of State, Revision of the International Traffic in Arms Regulations, 49 Fed. Reg. 47,682, 47,683 (Dec. 6, 1984).

As a practical matter, the court's order would merely preserve the status quo with respect to regulatory restrictions on 3D-Firearm Files (which, at bottom, is all that Plaintiffs are concerned about). The agencies have multiple options for how to comply with such an order. For example, 3D-Firearm Files could be kept on the USML subject to existing State Department regulation through a minor amendment to the USML to state explicitly that such files are subject to the ITAR. Alternatively, the Commerce Department could regulate 3D-Firearm Files subject to the same restrictions on publication as though the files had remained on the USML.

The agencies could readily implement either alternative. To the extent an agency believed any rulemaking were necessary to effectuate the court order, one option would be to issue interim rules that take effect immediately. *See, e.g.*, Dep't of State, International Traffic in Arms

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Regulations: Creation of Definition of Activities That Are Not Exports, Reexports, Retransfers, or Temporary Imports; Creation of Definition of Access Information; Revisions to Definitions of Export, Reexport, Retransfer, Temporary Import, and Release, 84 Fed. Reg. 70,887 (Dec. 26, 2019) (interim final rule amending the ITAR); Dep't of Commerce, Addition of Software Specially Designed to Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series, 85 Fed. Reg. 459 (Jan. 6, 2020) (interim final rule amending the EAR). Notably, both the State and Commerce Departments took the position that the Rules were exempt from the APA's notice-and-comment requirements altogether (5 U.S.C. § 553). *See* State Rule, 85 Fed. Reg. at 3828; Commerce Rule, 85 Fed. Reg. at 4172; *see also* note 8, *supra*.

If the agencies decided to keep 3D-Firearms Files on the USML, another option would be temporary modification. The State Department's Deputy Assistant Secretary for Defense Trade Controls "may order the temporary suspension or modification of any or all of the regulations of [the] subchapter," including the USML, "in the interest of the security and foreign policy of the United States." 22 C.F.R. § 126.2. The State Department, for example, is currently using this authority to temporarily control certain items in USML Category XI(b) pending publication of a proposed rule on the topic. *See, e.g.*, Continued Temporary Modification of Category XI of the United States Munitions List, 83 Fed. Reg. 44,228 (Aug. 30, 2018). The State Department could employ that authority to temporarily control 3D-Firearm Files on the USML.

In terms of specific provisions, a key target of Plaintiffs' complaint—and the exclusive focus of *amicus* Brady Center's brief—is the Commerce Rule's addition of 15 C.F.R. § 734.7(c) to regulate certain software or technology related to 3D-printing. *See* PI Mot. 13–16; Brief of *Amicus Curiae* Brady Center 7–12 (ECF No. 80). Intervenors' proposed injunctive relief would necessarily enjoin the operation of 15 C.F.R. § 734.7(c). No further amendments would be required to block that provision.

In sum, this Court can order, and the agencies can easily implement, tailored relief mandating that they preserve the status quo as to regulatory restrictions on 3D-Firearm Files. Such

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a court order would correct the asserted legal violations and entirely protect Plaintiffs from their asserted irreparable harm, while simultaneously shielding the NSSF parties and countless others from harm occasioned by indiscriminately halting numerous unrelated alterations to the firearms export control regime embodied in the Rules.

IV. CONCLUSION

If this Court determines that Plaintiffs are entitled to any preliminary injunction, the Court should limit its order to requiring the State Department and the Commerce Department to maintain the status quo with respect to regulatory restrictions on 3D-Firearm Files (as defined by the Plaintiff States).

DATED this 24th day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on February 24th, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notice of filing to all parties registered in the CM/ECF system for this matter.

DATED: February 24th, 2020

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Ross Siler

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Federal Defendants,

and

NATIONAL SHOOTING SPORTS FOUNDATION, INC., FREDRIC'S ARMS & SMITHS, LLC,

Intervenor-Defendants.

No. 2:20-cv-00111-RAJ

[PROPOSED] ORDER SUBMITTED BY INTERVENOR-DEFENDANTS NATIONAL SHOOTING SPORTS FOUNDATION, INC. AND FREDRIC'S ARMS & SMITHS, LLC

NOTE ON MOTION CALENDAR:
February 28, 2020

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[*This proposed order applies only in the event the Court determines that the Plaintiff States are entitled to any preliminary injunctive relief on their claims.*]

This matter came before the Court on the Plaintiff States' Motion for Preliminary Injunction. The Court has considered all papers and pleadings on file in this matter. Being fully advised, the Court now ORDERS that the Motion for Preliminary Injunction is GRANTED IN PART and DENIED IN PART. The State Department and the Commerce Department shall maintain the status quo with respect to regulatory restrictions on 3D-Firearm Files (as defined by the Plaintiff States). The Rules at issue shall otherwise go into effect as scheduled.

IT IS SO ORDERED.

DATED this ___ day of _____, 2020

_____
THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT COURT JUDGE

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