

Executive Order prohibits hoarding of certain scarce supplies

President Trump signed an [Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19](#) (EO) on March 23, 2020. The EO delegates presidential authority under the Defense Production Act (DPA)¹ to prevent hoarding of health and medical resources necessary to respond to the COVID-19 outbreak to Secretary of Health and Human Services (HHS) Alex Azar. This delegation of authority includes the power to identify “scarce materials or materials the supply of which would be threatened” by hoarding and authority to gather information about how such supplies are distributed throughout the nation. Attorney General Barr’s remarks at the press conference announcing the EO indicate that the Department of Justice (DOJ) will cooperate with HHS to identify instances of hoarding and price gouging and bring enforcement actions where warranted.

Anticipate a designation of scarce and threatened materials

The DPA specifically authorizes the president to designate “scarce materials or materials the supply of which would be threatened” by hoarding. *See* 50 U.S.C. § 4512. The DPA further prohibits any person from accumulating such materials “(1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices.” Violations are prosecutable as misdemeanors with penalties of up to US\$10,000, or one year in prison, or both. *See* 50 U.S.C. § 4513.

Although Secretary Azar has not yet formally designated specific products as scarce or threatened by hoarding, the EO references a policy of preventing the hoarding of “personal protective equipment and sanitizing products.” Governors and members of Congress from states hard hit by COVID-19 have reported shortages of personal protective equipment (PPE) such as N95 masks, protective gloves, face masks, eye protection and surgical gowns. Secretary Azar will be designating products as scarce or threatened.

¹ Our Government Contracts Practice Group is offering a webinar on the DPA and the Public Readiness and Emergency Preparedness Act on Thursday, March 26, 2020. You can register [here](#).

Possible DOJ enforcement

At the March 23, 2020 press conference announcing the EO, Attorney General Barr reported that DOJ had seen evidence of hoarding and price gouging amid the pandemic and that DOJ and HHS are working together to identify cases where that conduct is disrupting supplies or hampering COVID-19 response efforts. He further clarified that “[w]e’re not talking about consumers or businesses stockpiling supplies for their own operations. . . . But if you are sitting on a warehouse with . . . surgical masks, you will be hearing a knock on your door.” Attorney General Barr emphasized that it is a crime to engage in such prohibited activity.

Secretary Azar may also be gathering information about these products

The EO also delegates the president’s information-gathering authority under the DPA to Secretary Azar, including authority to gather information about how supplies of medical resources needed to respond to the spread of COVID-19 are distributed throughout the nation. These powers are expansive and include authority to issue subpoenas, inspect books, records and premises, and take sworn testimony of “any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this chapter and the regulations or orders issued thereunder.” *See* 50 U.S.C. § 4555 (a). A failure to comply with such information gathering efforts can also result in a fine of up to US\$10,000, or up to one year in prison, or both. *See* 50 U.S.C. § 4555 (c).

Looking ahead

Attorney General Barr’s statements indicate that DOJ will focus on stopping industrial scale hoarding that seeks to manipulate the market for materials needed to fight the COVID-19 outbreak. Businesses should monitor for HHS announcements that identify specific scarce and threatened medical supplies. Attorney General Barr explained that once specific materials are so designated, “persons are prohibited from accumulating those items in excess of reasonable personal or business needs or for the purpose of selling them in excess of prevailing market prices.” Even before specific products are designated, businesses may want to take steps to ensure their inventories of personal protective equipment needed by medical professionals and disinfectant products are at levels reasonable for their business needs and not in amounts that might signal the hope of selling these materials at higher prices in the future.

Businesses that stock such items should also be prepared to respond to requests for information relating to their inventories by taking steps to ensure their records are well maintained at all times. We will continue to monitor related developments and are ready to address any questions or concerns you may have.

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