

# Use of Defense Production Act Authorities to Respond to the U.S. Infant Formula Shortage

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On May 18, 2022, as part of a broader response to a domestic shortage of infant formula, President Joseph R. Biden, Jr. issued [Presidential Determination 2022-13](#) (the Determination), delegating several authorities under the Defense Production Act of 1950 (DPA; [50 U.S.C. §§ 4501 \*et seq.\*](#)) to the Secretary of Health and Human Services (HHS) to ensure availability of infant formula. This Insight summarizes the Determination, provides background on use of the DPA to address food supply chain issues, and explores potential considerations for Congress.

## DPA Background

The DPA provides [presidential authorities to mobilize domestic industry](#) to promote *national defense*, as defined by statute ([50 U.S.C. § 4552\(14\)](#)). Congress has expanded this definition several times since 1950, with the scope of the DPA now extending beyond U.S. military preparedness to encompass “homeland security ... emergency preparedness activities conducted under Title VI of the [Robert T. Stafford Disaster Relief and Emergency Assistance Act](#) and [critical infrastructure](#) protection and restoration” ([50 U.S.C. §4552\(14\)](#)). The DPA defines critical infrastructure (CI) as “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” ([50 U.S.C. §4552\(2\)](#)).

## Presidential Determination 2022-13

In the Determination, President Biden first establishes that the “national infant formula supply chain” is “critical infrastructure that is essential to the national defense, including to public health and safety.” President Biden then invokes Title I of the DPA’s authorities by determining, as required by section 101(b) ([50 U.S.C. §4511\(b\)](#)), that the ingredients necessary to manufacture infant formula are:

- Scarce and critical materials;
- Essential to the national defense; and that

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- Requirements for such materials cannot otherwise be met absent a significant dislocation of the civilian market's normal distribution of such materials.

Title I allows the President to require entities to (1) prioritize and accept government contracts for materials and services, and (2) allocate or control the general distribution of materials, services, and facilities as necessary. Through the Determination, President Biden delegates Title I authorities to the HHS Secretary for all health resources, including the ingredients necessary to manufacture infant formula. The HHS Secretary is then directed to use these authorities, in consultation with the Secretary of Agriculture and other appropriate agency heads, to determine “the proper nationwide priorities and allocation of all ingredients necessary to manufacture infant formula, including controlling the distribution of such materials (including applicable services) in the civilian market.” The HHS Secretary is also delegated certain authorities under Title VII of the DPA, including authorities for establishing a [volunteer body](#) of industry executives that could step into senior federal positions in the event of an emergency requiring the activation of such an advisory body.

On May 22, the [Administration announced](#) the first related actions, with two manufacturers granted authorization to place prioritized orders for raw materials and consumables used in the production of infant formula.

## Prior Use of DPA Authorities for Food Supply Chain Issues

The domestic food supply chains and its components are not explicitly referenced within the DPA's statutory language. However, President Barack H. Obama's [Executive Order \(E.O.\) 13603](#), which delegates DPA authorities across the executive branch, acknowledges that the DPA might be used to address food resource issues, and delegates related authorities to the Secretary of Agriculture. “[Food and Agriculture](#)” is also one of 16 CI sectors established by [Presidential Policy Directive \(PPD\) 21](#) in 2013, with the Department of Agriculture designated as the corresponding sector-specific agency.

Use of the DPA to address general food supply chain disruptions is relatively rare; however, the DPA has been used to prioritize contracts for [food distribution to disaster survivors](#) and [responders in hazard areas](#). Additionally, the Trump Administration issued [E.O. 13917](#) in 2020 to ensure a “continued supply of meat and poultry” during the COVID-19 public health emergency. E.O. 13917 designated the U.S. “national meat and poultry supply chain” [as a component of domestic CI](#), and delegated authority under Title I of the DPA to the Secretary of Agriculture. E.O. 13917 has been the subject of some [political](#) and [legal controversy](#).

## Considerations for Congress

- Recent invocations of the DPA in response to shortages in the civilian economy have provoked controversy, most notably with respect to [perceived seizures](#) of scarce medical supplies following the placement of priority government contracts during the COVID-19 pandemic. The federal government also [faced challenges](#) in distributing scarce supplies. Congress may monitor how the Administration uses DPA authorities in its response to the current infant formula scarcity, with particular attention to factors such as the degree to which actions under the DPA contribute to the alleviation of consumer shortages.
- Congress may consider whether appropriations for HHS staffing and operations are sufficient to oversee a response under the DPA to the infant formula shortage, or whether to appropriate additional funds for related activities. Infant formula is not covered by

- existing DPA allocations to HHS made by the American Rescue Plan Act of 2021 (ARPA; P.L. 117-2), which are limited to medical supplies and equipment.
- Some [congressional discussion](#) and [expert](#) analysis suggests that the DPA’s definition of CI may include all elements of the U.S. domestic food supply chain; however, this definition does not expressly apply to food items or associated supply chains. Congress may consider amending the DPA’s definition of “critical infrastructure” to clarify its scope.
- The DPA’s definition of “national defense” may invite broader applications of the DPA to address supply chain shortages. Congress may consider whether the DPA, as written or as amended, is an appropriate tool to resolve such shortages in the domestic economy, or whether to pursue establishing an alternative mechanism to respond to civilian scarcities. Congress may also review the root causes of commercial market disruptions and the effectiveness of using DPA authorities to address such disruptions relative to other policy options.

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