



# The Role of Section 708 of the Defense Production Act in the Federal Government's Response to COVID-19: Antitrust Considerations

August 24, 2020

Section 708 of the [Defense Production Act of 1950 \(DPA\)](#) authorizes the President to “consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with approval of the President, of voluntary agreements and plans of action to help provide for the national defense.” The DPA [defines](#) national defense broadly to include, among other things, preparedness for, responding to, and recovery from national emergencies such as the Coronavirus Disease 2019 ([COVID-19](#)) [pandemic](#). Section 708 also [establishes](#) a special defense that may shield companies cooperating under the DPA from antitrust liability “with respect to any action taken to develop or carry out any voluntary agreement or plan of action.”

On March 27, 2020, President Trump issued [Executive Order \(EO\) 13911](#) (Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19) as part of the federal government's COVID-19 response. In that EO, the President invoked Section 708 to authorize the Secretary of Health and Human Services (HHS) to “provide for the making of voluntary agreements and plans of action by the private sector.” As the President [explained](#), such voluntary agreements could “enable greater cooperation among private businesses in expanding production of and distributing” essential health and medical resources.

This Legal Sidebar examines the scope of Section 708's antitrust defense. The Sidebar begins by providing background on Section 708. Next, it discusses a draft voluntary agreement recently unveiled by the Federal Emergency Management Agency (FEMA) that, if approved by the Attorney General, would create a Committee for the Distribution of Healthcare Resources Necessary to Respond to a Pandemic. This committee of government and industry representatives would provide a forum for participants to solve supply chain bottlenecks and improve distribution methods for essential medical resources. In certain situations, the draft agreement would also extend antitrust protections to private companies that assist in the federal government's COVID-19 response. As FEMA Administrator Peter Gaynor [noted](#), the antitrust defense incorporated into the draft agreement may alleviate potential participants' concerns about

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LSB10534

certain litigation risks posed by cooperation under the DPA and provide them with increased regulatory certainty. However, Section 708 likely would not apply to other types of potential liability arising under state consumer protection laws. Accordingly, this Sidebar concludes with a discussion of some considerations for Congress. Because potential exposure to liability under state consumer protection laws might be a disincentive for some private firms considering whether to cooperate under the DPA, Congress could amend Section 708 to enlarge the scope of its antitrust defense to encompass this broader class of claims.

## Antitrust Law and Section 708

As CRS [has explained](#), contemporary antitrust doctrine proceeds from the premise that “economic competition optimizes the allocation of scarce resources by inducing firms to adopt the most efficient production methods and price their products at or near their costs of production.” While antitrust law does not prohibit coordination among competing firms, courts evaluate most types of coordination under the [Rule of Reason](#), a totality-of-the-circumstances balancing test to determine whether the challenged act is, on balance, good or bad for competition. However, some types of coordinated behavior, such as “naked” price-fixing and market-division agreements, are deemed categorically unreasonable, and thus are *per se* [unlawful](#).

Section 708 [authorizes](#) the President to approve voluntary agreements and plans of action among competing businesses when they may help provide for the national defense. The President may delegate this authority “to individuals who are appointed by and with the advice and consent of the Senate, or are holding office by which they have been appointed by and with the advice and consent of the Senate.”

Section 708 [establishes precise criteria](#) for when and how the President may authorize a voluntary agreement or plan of action. The President must first find that “conditions exist which may pose a direct threat to the national defense or its preparedness programs.” Further, government officials must collaborate with private companies in developing any voluntary agreement, and companies are subject to ongoing government oversight. FEMA regulations [require](#), for example, that a government sponsor “initiate, or approve in advance, each meeting of the participants ... held to discuss problems, determine policies, recommend actions, and make decisions necessary to carry out the agreement.” Additionally, participants [must agree](#) to maintain records, data, and communications pertaining to the carrying out of a voluntary agreement and must make such records available to the sponsor, FEMA, the Attorney General, and the Chairman of the FTC upon request.

When first enacted, Section 708 [granted](#) the President [sweeping powers](#) to immunize companies from antitrust liability for any “act or omission to act ... if requested by the President pursuant to a voluntary agreement or program.” In 1975, Congress [amended](#) Section 708 by, among other things, removing the President’s power to grant companies blanket antitrust immunity, and replacing it with a litigation defense that private firms may raise in civil and criminal antitrust actions. In a Senate report discussing the amendments, Congress acknowledged the need to grant businesses antitrust immunity in situations relating to the creation or implementation of voluntary agreements under the DPA, but it specified that “immunity from antitrust laws should never be granted except in language that limits and narrows the extraordinary exempting language.”

In its current form, Section 708 provides private firms engaged in coordinated activity under the DPA with [a defense](#) against civil or criminal claims “brought under the antitrust laws (or any similar law of any State) with respect to any action taken to develop or carry out any voluntary agreement or plan of action.” However, companies must make several showings in order to invoke the defense. Among other things, companies must [show](#) that they (1) fully complied with the DPA and related regulations, (2) “acted in accordance with terms of the voluntary agreement or plan of action,” and (3) did not engage in conduct “for the purpose of violating the antitrust laws.”

## FEMA's Draft Voluntary Agreement

On May 19, 2020, FEMA [published](#) a draft voluntary agreement for cooperation under the DPA, after consulting with the Secretary of HHS, the Attorney General, and the Chairman of the Federal Trade Commission (FTC). As FEMA Administrator Peter Gaynor [explained](#) during a public meeting held on May 21, 2020:

What we seek to do with this agreement is to provide all of us the space to conduct potentially valuable and expedient conversations to find supply chain bottlenecks, identify insufficient distribution methods, and locate additional resources for critical healthcare resource production. The voluntary agreement will be a transparent organizing mechanism to address national needs in a pandemic as identified by FEMA for the manufacture and distribution of critical healthcare resources.

If approved by the Attorney General, the agreement [would create](#) a Committee for the Distribution of Healthcare Resources Necessary to Respond to a Pandemic to “maximize the effectiveness of the manufacture and distribution of Critical Healthcare Resources nationwide.” According to the agreement, committee members [would include](#) (1) a FEMA senior executive, appointed by FEMA’s administrator, who would chair the Committee; (2) representatives from HHS, FEMA, the Department of Justice (DOJ), and other government agencies; (3) attendees “invited by the Chairperson as subject matter experts to provide technical advice, or to represent the issues of other government agencies or interested parties,” and (4) participants from private industry with “substantive capacities, resources or expertise” related to the production of medical resources. Committee activities [would be limited to](#), among other things, (1) sharing information relating to manufacturing and supply chain issues, (2) identifying, prioritizing, and validating critical healthcare resource requirements, (3) sharing information about future demand for healthcare resources, (4) cooperating in the manufacture, allocation, and distribution of healthcare resources, and (5) “carrying out any other activities identified by the Committee that, as determined and directed by FEMA, are necessary to address the pandemic’s direct threat to the national defense.”

The agreement [would also provide](#) that Committee participants can raise Section 708’s defense “with respect to any act or omission to act necessary to develop or carry out this Agreement,” including acts related to Committee work. But it [would limit](#) the scope of the defense in several ways. The agreement [specifies](#), for example, that the defense would be available only for acts taken “with the oversight and approval by the Chairperson or other designated FEMA official.” It also specifies that Section 708’s defense would not be available for acts taken before a company joins the agreement or for acts taken after it withdraws.

## Considerations for Congress

Some commentators [warn](#) that, because companies may only raise Section 708’s defense in civil or criminal actions brought under state and federal antitrust laws and “any similar law of any State,” the defense would likely not be available in actions brought under state consumer protection laws.

Consumer protection laws [vary from state to state](#) but [generally prohibit](#) fraud, deception, and unfair business practices. In *In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, for example, a district court allowed state law antitrust and consumer protection claims to proceed against generic drug manufacturers for allegedly agreeing to fix the price of generic drugs. Some commentators [suggest that](#), because consumer protection claims may serve as “antitrust substitutes,” these claims may be “similar” to antitrust claims, and thus fall within the scope of Section 708’s defense.

This interpretation presents several difficulties. In particular, Section 708 [defines](#) the term “antitrust laws” to exclude laws concerning “unfair or deceptive acts or practices.” As the FTC [has explained](#), “unfair or deceptive acts or practices” generally refer to consumer protection violations. If Congress believes that

the goals of the DPA would be better served by granting companies a defense from these types of liability for “any action taken to develop or carry out any voluntary agreement or plan of action,” it could amend Section 708 to expand the scope of the statute’s antitrust defense to include consumer protection claims.

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