

## **Building a Public Pandemic Production Facility**

More than 800,000 Americans have died from COVID-19. President Biden can ask pharmaceutical corporations to serve the national defense and meet the needs of the once-in-a-century crisis by equipping a government-owned contract-operated facility with mRNA technology. If the manufacturers prove unwilling, the Biden administration can use the Defense Production Act.<sup>1</sup>

### Option 1: Priorities Authority

**Under Title I of the DPA, the federal government can require corporations to accept and prioritize contracts to promote the national defense.**<sup>2</sup>

- The U.S. has previously contracted with manufacturers to transfer technology for domestic production. For example, as part of its contract with the federal government, Pfizer agreed to transfer the know-how from its partner BioNTech in Europe to U.S.-based plants. The President can use the DPA to go a step further and require the acceptance and prioritization of a technology transfer contract to a GOCO facility.

### Option 2: Allocations Authority

**Under Title I of the DPA, the federal government can also directly “allocate materials, services, and facilities” to promote the national defense.**<sup>3</sup>

- “Materials” includes “commodities,” “products,” “articles” and “any *technical information* or *services* ancillary to the use of any such materials.” “Services” includes “any effort that is needed for or incidental to the development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item.”<sup>4</sup>
- The President must find the material is a “scarce and critical material essential to the national defense.”
- The President can find that mRNA coronavirus vaccines—and, if needed, Omicron-specific vaccines—are scarce materials critical to national defense. The President could then issue an Allocation Directive requiring technical information and technology transfer services from mRNA corporations.

### Promoting the National Defense

A GOCO facility would give the government the flexibility, oversight and control needed to address this pandemic and future viral threats. To protect against legal challenges, the federal government could reasonably compensate corporations for transferring know-how to a GOCO, taking into account the risk-adjusted value of federal investments and technology. If needed, the government could seek an injunction to enforce compliance.<sup>5</sup> The DPA is an extraordinarily powerful tool that could help the federal government stand up a GOCO facility for pandemic response.

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<sup>1</sup> Zain Rizvi, Jishian Ravinthiran Amy Kapczynski, Sharing The Knowledge: How President Joe Biden Can Use The Defense Production Act To End The Pandemic Worldwide, HEALTH AFFAIRS BLOG.

<sup>2</sup> This excludes contracts of employment by individuals, but it does not preclude corporate performance of *services* like technology transfer. Defense Production Act, Hearings before the U.S. Senate Committee on Banking and Currency (1950) (The counsel for National Security Resources Board noted that “it is to avoid the suggestion that this would be a manpower control, that you could go to a man and say ‘You will take a contract of employment with General Electric.’”)

<sup>3</sup> HHS policy is that the allocations authority can only be used when there is insufficient supply to satisfy national defense requirements through using the priorities authority.

<sup>4</sup> Critical technologies are those designated by the President as essential to the national defense.

<sup>5</sup> 45 CFR § 101.74 - Violations, penalties, and remedies (including \$10,000 fine or imprisonment).