

Congress of the United States
Washington, D.C. 20515

July 14, 2020

The Honorable Dr. Mark Esper
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301

The Honorable Alex Azar
Secretary of Health and Human Services
200 Independence Avenue S.W.
Washington D.C. 20201

Dear Secretary Esper and Secretary Azar,

Three months after the passage of the Coronavirus Aid, Relief and Economic Security Act of 2020 (CARES Act),¹ we remain concerned that the Trump Administration's efforts to increase the short-term and long-term domestic production of critically needed medical supplies and equipment is fragmented and uncoordinated, even as we see record number of infections and spikes in hospitalizations. We are writing to seek further clarification of these efforts and to ensure greater transparency into the activities of the Administration.

Since the onset of the coronavirus disease 2019 (COVID-19) pandemic, the United States has faced repeated shortages of critical medical supplies and equipment from diagnostic testing to personal protective equipment (PPE), including N95 respirator masks and other respirator protection.² With new coronavirus cases rising to over 60,000 per day,³ the highest number of cases since the beginning of the pandemic, and infection and hospitalization rates increasing in states such as Arizona, California, Florida, Georgia and Texas,⁴ it is critical to address the shortfalls that are inevitable. Americans are now waiting in lines for hours to get tested in some locations,⁵ and Vice President Pence recently stated that our frontline health workers should reuse PPE,⁶ a practice that health professionals have criticized.⁷ Even before the recent surge in the incidence of COVID-19, the Administration estimated that the United States will need 3.3 billion respirator

¹ P.L. 116-136.

² See, e.g., Another PPE shortage? Protective gear for medical workers begins to run low again Chicago Sun Times (July 7, 2020) <https://chicago.suntimes.com/coronavirus/2020/7/7/21316726/protective-gear-for-medical-workers-shortage-pppe>; Natalia V. Navarro. *Colorado Still Has A Serious Shortage Of Personal Protective Equipment*. Colorado Public Radio. Jun. 12, 2020.

³ Cases in the U.S., Centers for Disease Control, (visited July 13, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

⁴ See, e.g., States Restore Restrictions as cases and hospitalizations spike across U.S. Washington Post, A6 (July 7, 2020); Virus Cases Take no Holiday, Washington Post, A1 (July 5, 2020)

⁵ Rush to Reopen caused case spikes, officials say, Washington Post A2 (July 6, 2020)

⁶ Press Briefing by Vice President Pence and Members of the Coronavirus Task Force, July 8, 2020,

<https://www.whitehouse.gov/briefings-statements/press-briefing-vice-president-pence-members-coronavirus-task-force-july-8-2020/>

⁷See. e.g. Nurses: Reuse, Decontamination of Masks Endangers Health Care Workers,

<https://www.nationalnursesunited.org/press/nurses-reuse-decontamination-masks-endangers-health-care-workers>

masks for the rest of 2020 to address the overall needs of the United States.⁸ This estimate is consistent with the increasing efforts to reopen businesses, schools and other institutions across the country, the increasing incidence of COVID-19 in states that reopened in May, and the forecasts of a second wave of infections later this year.⁹

We are concerned that the Administration has not allocated sufficient funds to boost short-term and long-term domestic production of critical medical supplies and equipment to meet the overall public health needs of the United States. Over the last three months, Congress has passed legislation to provide significant funding to broadly boost production of medical supplies and equipment, including the production of N95 respirator masks, and diagnostic testing equipment. More specifically, Congress appropriated \$1 billion in the CARES Act to increase production of medical supplies and equipment under the Defense Production Act (DPA).¹⁰ The Department of Defense (DOD), acting as the agent for Federal Emergency Management Agency (FEMA) and the Department of Health and Human Services (HHS), identified over \$2 billion in needs for increased production.¹¹ To date, however, the Department of Defense has only allocated \$212 million for traditional uses of Title III of the DPA, such as grants and purchases of long-lead time equipment, and is proposing to use \$688 million to support companies within the defense industrial base.¹² Further, your Departments have not clearly articulated how they will meet current and future demand for medical supplies and equipment. During the initial response to COVID-19, the federal government's lack of coordinated effort resulted in critical shortages as state and local governments and hospitals were forced to compete against one another for medical supplies.

We are also concerned about the recently proposed programming of \$100 million allocated from these DPA funds to make loans under the DPA to private companies, an authority that has not been used for decades.¹³ The President's decision to delegate the loan authority under sections 302 and 303 of the DPA to the International Development Finance Corporation (DFC)¹⁴ raises a number of questions, given that the DFC's mission is to support developing countries and is unrelated to increasing production of medical supplies and equipment within the United States.¹⁵ Given the open-ended nature of the President's delegated authority to the DFC,¹⁶ we continue to emphasize that these funds be used for health-related activities.¹⁷ In addition, it is unclear how much, if any, of the \$100 million can be loaned under this authority until the Administration

⁸ Department of Defense Spend Plan for the Coronavirus Aid, Relief and Economic Security "CARES" Act, Public Law 116-136, submitted to the Pandemic Response Accountability Committee. May 29, 2020. See also, An Emerging Disease Threat: Hearing Before the Senate Health, Education, Labor and Pensions Committee, 116th Congress, 2nd Sess. (March 3, 2020) (Dr. Kadlec indicating that in severe pandemic the United States would need 3.5 billion masks).

⁹ Institute for Health Metrics and Evaluation. *IHME models show second wave of COVID-19 beginning September 15 in US*. Jun. 11, 2020.

¹⁰ Defense Production Act Purchases, Title III, Division B, of P.L. 116-136.

¹¹ Department of Defense slide presentation, provided as part of briefing to various committees of the House of Representatives (April 2020) (on file with the Committees on Appropriations, Armed Services and Financial Services)

¹² Department of Defense Spend Plan for the Coronavirus Aid, Relief and Economic Security "CARES" Act, Public Law 116-136, *supra* note 3.

¹³ Congressional Research Service. *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, Mar. 2, 2020.

¹⁴ Executive Order 13922 (May 14, 2020).

¹⁵ See, e.g., section 1412(b), Better Utilization of Investments Leading to Development Act of 2018 (BUILD Act, P.L. 115-254 (providing that the "purpose of the Corporation shall be to mobilize and facilitate the participation of private sector capital and skills in the economic development of less developed countries.")).

¹⁶ Executive Order 13922 *supra* note 7 (providing that the DPA loans may be used for "the national response and recovery to the COVID-19 outbreak; or the resiliency of any relevant domestic supply chains.").

¹⁷ See, e.g., Congressional Record H1850 (Daily Ed. March 27, 2020) (Statement of Representative Maxine Waters).

determines how to apply the requirements of the Federal Credit Reform Act to any loans made under this program. Without proper transparency and execution, the Administration could squander an opportunity to use this authority to prepare against not only the emerging wave of infections in the southern and western parts of the United States, but the next wave as well.

In briefings that we have received, Administration officials have pointed out that Congress also provided funds to HHS that can be used to boost production of medical supplies and equipment, including production of “diagnostic, serologic or other COVID-19 tests or related supplies.”¹⁸ However, the Administration has not indicated how much it is committing to boost long-term domestic production of medical supplies and equipment, including diagnostic or serological testing. While we understand the Administration has used HHS funds to increase production of N95 masks¹⁹ and certain self-administered vaccination technologies,²⁰ we have not received any definitive answers regarding how the Administration will use funds appropriated to HHS to increase production of testing, nor have you provided an estimate of the amounts that will be reserved to increase the production of other critical medical supplies and equipment.

Because there is substantial uncertainty as to agencies’ actions and the funding allocated to boost short-term and long-term domestic production of critical medical supplies and equipment needed to continue protecting the nation against COVID-19 and future pandemics, and in light of the significant increases in COVID-19 infections and spikes in hospitalizations and in advance of further allocating CARES Act appropriated DPA funds, we urge you to provide the following documents and information:

- 1) An assessment on the amount of each of the following categories of materials needed to combat the COVID-19 pandemic as the nation reopens and the data and information the Administration used in making this determination:
 - (a) PPE, including N95 or other respirator protection;
 - (b) diagnostic, serologic or other COVID-19 tests;
 - (c) treatments for COVID-19;
 - (d) vaccines and the methods to deliver them; and
 - (e) other medical supplies and equipment.
- 2) A description of all completed or planned investments by the United States to boost the long-term domestic production to meet the assessed need of each of the categories outlined above, along with an explanation of the source of such funds and the legal authority used to execute each investment.
- 3) The amount of loans that can be carried out under the DPA using the \$100 million DOD has proposed allocating to the DFC.

¹⁸ Second Paragraph under the Heading “Public Health and Social Services Emergency Fund,” Title I, Division B, Paycheck Protection Program and Health Care Enhancement Act, P. L. 106-139. See also Public Health and Social Services Emergency Fund, Title VIII, Division B, CARES Act, *supra* note 1 (providing for using funds to manufacture certain medical supplies and equipment).

¹⁹ We also understand there is a pilot program being conducted on the use of reusable masks that afford respirator protection, such as powered air purifying respirators (PAPRs) and elastomeric respirators, which could lead to the need for additional investment in the production of these technologies.

²⁰ Statement by the Department of Defense, “DoD Awards \$138 Million Contract, Enabling Prefilled Syringes for Future COVID-19 Vaccine,” (May 12, 2020)

<https://www.defense.gov/Newsroom/Releases/Release/Article/2184808/dod-awards-138-million-contract-enabling-prefilled-syringes-for-future-covid-19/source/GovDelivery/>

We also request that you commit to:

- a. Using the proposed \$100 million allocated to carry out the unconventional and long-unused loan authorities by the DFC only for the purpose of increasing domestic production of medical equipment and supplies; and
- b. Notifying Congress in advance of the specific purposes for which DFC financing would be used; and,
- c. For all DFC financing commitments supported with DPA funds, notifying Congress in advance consistent with the notification procedures in the BUILD Act.

Please provide the requested information no later than July 31, 2020. We further request that you make your staff available to meet and confer with committee staff within five days of your receipt of this letter.

Sincerely,



The Honorable Maxine Waters
Chairwoman
House Committee on Financial Services



The Honorable Eliot L. Engel
Chairman
House Committee on Foreign Affairs



The Honorable Adam Smith
Chairman
House Committee on Armed Services



The Honorable Bennie Thompson
Chairman
House Committee on Homeland Security



The Honorable Frank Pallone, Jr.
Chairman
House Committee on Energy and Commerce

Cc: Vice President Michael Pence

The Honorable Peter T. Gaynor, Administrator, Federal Emergency Management Agency

The Honorable Adam Bohler, Chief Executive Officer, International Development
Finance Corporation

The Honorable Patrick McHenry, Ranking Member, House Committee on Financial Services

The Honorable Michael McCaul, Ranking Member, House Committee on Foreign Affairs

The Honorable Mac Thornberry, Ranking Member, House Committee on Armed Services

The Honorable Mike Rogers, Ranking Member, House Committee on Homeland Security

The Honorable Greg Walden, Ranking Member, House Committee on Energy and Commerce