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## **PART 700—DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM**

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SOURCE: 49 FR 30414, July 30, 1984, unless otherwise noted. Redesignated at 54 FR 601, Jan. 9, 1989.

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## Subpart A—Purpose

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### §700.1 Purpose of this part.

This part implements the Defense Priorities and Allocations System (DPAS) that is administered by the Department of Commerce, Bureau of Industry and Security. The DPAS implements the priorities and allocations authority of the Defense Production Act, including use of that authority to support emergency preparedness activities pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*), and the priorities authority of the Selective Service Act and related statutes, all with respect to industrial resources. The DPAS establishes procedures for the placement, acceptance, and performance of priority rated contracts and orders and for the allocation of materials, services, and facilities. The guidance and procedures in this part are generally consistent with the guidance and procedures provided in other regulations issued under Executive Order 13603 authority.

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## Subpart B—Overview

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### §700.2 Introduction.

(a) Certain national defense and energy programs (including military, emergency preparedness, homeland security, and critical infrastructure protection and restoration activities) are approved for priorities and allocations support. A complete list of currently approved programs is provided at schedule I to this part.

(b) The Department of Commerce administers the DPAS and may exercise priorities and allocations authority to ensure the timely delivery of industrial items to meet approved program requirements.

(c) The Department of Commerce has delegated authority to place priority ratings on contracts or orders necessary or appropriate to promote the national defense to certain government agencies that issue such contracts or orders. Such delegations include authority to authorize recipients of rated orders to place ratings on contracts or orders to contractors, subcontractors, and suppliers. Schedule I to this part includes a list of agencies to which the Department of Commerce has delegated authority.

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### §700.3 Priority ratings and rated orders.

(a) Rated orders are identified by a priority rating and a program identification symbol. Rated orders take precedence over all unrated orders as necessary to meet required delivery dates. Among rated orders, DX rated orders take precedence over DO rated orders. Program identification symbols indicate which approved program is attributed to the rated order.

(b) Persons receiving rated orders must give them preferential treatment as required by this part.

(c) All rated orders must be scheduled to the extent possible to ensure delivery by the required delivery date.

(d) Persons who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the orders. This provision ensures that suppliers will give priority treatment to rated orders from contractor to subcontractor to suppliers throughout the procurement chain.

(e) Persons may place a priority rating on orders only when they are in receipt of a rated order, have been explicitly authorized to do so by the Department of Commerce or a Delegate Agency, or are otherwise permitted to do so by this part.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31921, June 11, 1998; 79 FR 47563, Aug. 14, 2014]

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## §§700.4-700.7 [Reserved]

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## Subpart C—Definitions

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### §700.8 Definitions.

The definitions in this section apply throughout this part:

*Allocation.* The control of the distribution of materials, services or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allocation order.* An official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allotment.* An official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

*Approved program.* A program determined as necessary or appropriate for priorities and allocations support to promote the national defense by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act and Executive Order 13603, or the Selective Service Act and Executive Order 12742.

*Construction.* The erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

*Critical infrastructure.* 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.

*Defense Production Act.* The Defense Production Act of 1950, as amended (50 U.S.C. App. 2061, *et seq.*).

*Delegate Agency.* A government agency authorized by delegation from the Department of Commerce to place priority ratings on contracts or orders needed to support approved programs.

*Directive.* An official action which requires a person to take or refrain from taking certain actions in accordance with its provisions.

*Emergency preparedness.* All activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Emergency preparedness includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population);

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications); and

(3) Measures to be undertaken following a hazard (including activities for firefighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

*Hazard.* An emergency or disaster resulting from:

(1) A natural disaster, or

(2) An accidental or man-caused event.

*Homeland security.* Includes efforts:

(1) To prevent terrorist attacks within the United States;

- (2) To reduce the vulnerability of the United States to terrorism;
- (3) To minimize damage from a terrorist attack in the United States; and
- (4) To recover from a terrorist attack in the United States.

*Industrial resources.* All materials, services, and facilities, including construction materials, the authority for which has not been delegated to other agencies under Executive Order 13603. This term also includes the term "item" as defined and used in this part.

*Item.* Any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

*Maintenance and repair and/or operating supplies (MRO).* (1) *Maintenance* is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) *Repair* is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) *Operating supplies* are any items carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

*National defense.* Programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

*Official action.* An action taken by the Department of Commerce under the authority of the Defense Production Act, the Selective Service Act and related statutes, and this part. Such actions include the issuance of rating authorizations, directives, letters of understanding, demands for information, inspection authorizations, administrative subpoenas and allocation orders.

*Person.* Any individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof; or any authorized State or local government or agency thereof; and for purposes of administration of this part, includes the United States Government and any authorized foreign government or international organization or agency thereof, delegated authority as provided in this part.

*Priorities authority.* The authority of the Department of Commerce, pursuant to Section 101 of the Defense Production Act, to require priority performance of contracts and orders for industrial resource items for use in approved programs.

*Priority rating.* An identifying code assigned by a Delegate Agency or authorized person placed on all rated orders and consisting of the rating symbol and the program identification symbol.

*Production equipment.* Any item of capital equipment used in producing materials or furnishing services that has a unit acquisition cost of \$2,500 or more, an anticipated service life in excess of one year, and the potential for maintaining its integrity as a capital item.

*Program identification symbols.* Abbreviations used to indicate which approved program is supported by a rated order.

*Rated order.* A prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

*Selective Service Act.* Section 18 of the Selective Service Act of 1948 (50 U.S.C. app. 468).

*Set-aside.* An official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

*Stafford Act.* Title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195, *et seq.*).

*Working day.* Any day that the recipient of an order is open for business.

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## Subpart D—Industrial Priorities

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### §700.10 Authority.

(a) *Delegations to the Department of Commerce.* The priorities and allocations authorities of the President under Title I of the Defense Production Act with respect to industrial resources have been delegated to the Secretary of Commerce under Executive Order 13603 of March 16, 2012 (3 CFR, 2012 Comp., p. 225). The priorities authorities of the President under the Selective Service Act and related statutes with respect to industrial resources have also been delegated to the Secretary of Commerce under Executive Order 12742 of January 8, 1991 (3 CFR, 1991 Comp. 309).

(b) *Delegations by the Department of Commerce.* The Department of Commerce has authorized the Delegate Agencies to assign priority ratings to orders for industrial resources needed for use in approved programs.

(c) *Jurisdiction limitations.* (1) The priorities and allocations authority for certain items have been delegated under Executive Order 13603, other executive orders, or Interagency Memoranda of Understanding between other agencies. Unless otherwise agreed to by the concerned agencies, the provisions of this part are not applicable to those other items which include:

(i) Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer (delegated to the Department of Agriculture);

(ii) All forms of energy (delegated to the Department of Energy);

(iii) Health resources (delegated to the Department of Health and Human Services);

(iv) All forms of civil transportation (delegated to the Department of Transportation); and

(v) Water resources (delegated to the Department of Defense/U.S. Army Corps of Engineers).

(2) The priorities and allocations authority set forth in this part may not be applied to communications services subject to Executive Order 13618 of July 6, 2012—Assignment of National Security and Emergency Preparedness Communications Functions (3 CFR, 2012 Comp., p. 273).

[79 FR 47565, Aug. 14, 2014]

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#### **§700.11 Priority ratings.**

(a) *Levels of priority.* (1) There are two levels of priority established by this regulation, identified by the rating symbols “DO” and “DX”.

(2) All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see §700.14(c).)

(3) In addition, a Directive issued by Commerce takes preference over any DX rated order, DO rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see §700.62.)

(b) *Program identification symbols.* Program identification symbols indicate which approved program is being supported by a rated order. The list of approved programs and their identification symbols is found in schedule I to this part. For example, A1 identifies defense aircraft programs and A7 signifies defense electronic programs. Program identification symbols, in themselves, do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol—DO and DX—and the program identification symbol, such as A1, C2, or N1. Thus, a contract for the production of an aircraft will contain a DO-A1 or DX-A1 priority rating. A contract for a radar set will contain a DO-A7 or DX-A7 priority rating.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31922, June 11, 1998; 71 FR 39528, July 13, 2006; 79 FR 47565, Aug. 14, 2014]

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#### **§700.12 Elements of a rated order.**



(a) *Elements required for all rated orders.* (1) The appropriate priority rating and program identification symbol (e.g., DO-A1, DX-A4, DO-N1).

(2) A required delivery date or dates. The words “immediately” or “as soon as possible” do not constitute a delivery date. When a “requirements contract,” “basic ordering agreement,” “prime vendor contract,” or similar procurement document bearing a priority rating contains no specific delivery date or dates, but provides for the furnishing of items from time-to-time or within a stated period against specific purchase orders, such as “calls,” “requisitions,” and “delivery orders,” the purchase orders supporting such contracts or agreements must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document.

(3) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature, manual or digital, certifies that the rated order is authorized under this part and that the requirements of this part are being followed.

(4) A statement that reads in substance: “This is a rated order certified for national defense use and you are required to follow all the provisions of the Defense Priorities and Allocations System regulations (15 CFR part 700).”

(b) *Additional element required for certain emergency preparedness rated orders.* If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order: “This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within [Insert a time limit no less than the minimum applicable time limit specified in §700.13(d)(2)].”

[79 FR 47565, Aug. 14, 2014]

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### **§700.13 Acceptance and rejection of rated orders.**

(a) *Mandatory acceptance.* (1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by Commerce:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO rated order for delivery on a date which would interfere with delivery of any previously accepted DO or DX rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX rated order for delivery on a date which would interfere with delivery of any previously accepted DX rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(c) *Optional rejection.* Unless otherwise directed by Commerce, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not performed;

(3) If the order is for an item produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items, the supplier is obligated to accept rated orders up to that quantity or portion of production, whichever is greater, sold within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Commerce issued under the authority of the Defense Production Act or the Selective Service Act and related statutes [See §700.75].

(d) *Customer notification requirements.* (1) Except as provided in paragraph (d)(2) of this section, a person must accept or reject a rated order in writing (hard copy), or in electronic format, within fifteen (15) working days after receipt of a DO rated order and within ten (10) working days after receipt of a DX rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements and the order includes the statement set forth in §700.12(b), a person must accept or reject the rated order and transmit the acceptance or rejection in writing or in an electronic format within the time specified in the rated order. The minimum times for acceptance or rejection that such orders may specify are six (6) hours after receipt of the order if the order is issued by an authorized person in response to a hazard that has occurred, or twelve (12) hours after receipt if the order is issued by an authorized person to prepare for an imminent hazard.

(3) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for

the delay, and advise of a new shipment or performance date. If notification is given verbally, written (hard copy) or electronic confirmation must be provided within one working day of the verbal notice.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31922, June 11, 1998; 70 FR 10864, Mar. 7, 2005; 79 FR 47565, Aug. 14, 2014]

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#### **§700.14 Preferential scheduling.**

(a) A person must schedule operations, including the acquisition of all needed production items, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery against unrated orders. Similarly, DX rated orders must be given preference over DO rated orders and unrated orders.

*Examples:* If a person receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX rated order is received calling for delivery on July 15 and a person has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order. However, if business operations cannot be altered to meet both the June 3 and July 15 delivery dates, then the DX rated order must be given priority over the DO rated order.

(c) *Conflicting rated orders.* (1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give preference to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting rated orders are scheduled to be delivered or performed on the same day, the person shall give preference to those orders which have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in subpart H of this part. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in subpart H of this part. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in §700.13(d)(3).

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in §700.17(b).

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31922, June 11, 1998; 79 FR 47566, Aug. 14, 2014]

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#### **§700.15 Extension of priority ratings.**

(a) A person must use rated orders with suppliers to obtain items needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Commerce.

*Example:* If a person is in receipt of a DO-A3 rated order for a navigation system and needs to purchase semiconductors for its manufacture, that person must use a DO-A3 rated order to obtain the needed semiconductors.

(b) The priority rating must be included on each successive order placed to obtain items needed to fill a customer's rated order. Therefore, the inclusion of the rating will continue from contractor to subcontractor to supplier throughout the entire supply chain.

(c) A person must use rated orders with suppliers to obtain items needed to fill an emergency preparedness rated order. That person must require acceptance or rejection, and transmission of that acceptance or rejection by the supplier within the time limit stated in the rated order that is being filled.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47566, Aug. 14, 2014]

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#### **§700.16 Changes or cancellations of priority ratings and rated orders.**

(a) The priority rating on a rated order may be changed or cancelled by:

(1) An official action of the Department of Commerce; or

(2) Written notification from the person who placed the rated order (including a Delegate Agency).

(b) If an unrated order is amended so as to make it a rated order, or a DO, rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of §700.13.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design (prior to the start of production); or a change which is agreed upon between the supplier and the customer.

(e) A person must cancel any rated orders that the person (or a predecessor in interest) has placed with suppliers or cancel the priority ratings on those orders if the person no longer needs the items in those orders to fill a rated order.

(f) A person adding a rating to an unrated order, or changing or cancelling a priority rating must promptly notify all suppliers to whom the order was sent of the addition, change or cancellation.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47566, Aug. 14, 2014]

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### **§700.17 Use of rated orders.**

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed, or converted into scrap or by-products, in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders. However, for MRO, the priority rating used must contain the program identification symbol H7 along with the rating symbol contained on the customer's rated order. For example, a person in receipt of a DO-A3 rated order, who needs MRO, would place a DO-H7 rated order with the person's supplier.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating symbol and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating symbol may not be used even if the inventory was used to fill a DX rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol H1 must be used (i.e., DO-H1).

(c) A person may combine DX and DO rated orders from one customer or several customers if the items covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol H1 (i.e., DO-H1 or DX-H1).

(d) *Combining rated and unrated orders.* (1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The elements of a rated order, as required by §700.12, are included on the order with the statement required in §700.12(a)(4) modified to read in substance: "This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulations (15 CFR part 700) as it pertains to the rated quantities."

(2) A supplier must accept or reject the rated portion of the purchase order as provided in §700.13 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to give preferential treatment to the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this regulation or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under §700.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than \$75,000, or one half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR)) (see FAR section 2.101), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31923, June 11, 1998; 79 FR 47566, Aug. 14, 2014]

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#### **§700.18 Limitations on placing rated orders.**

(a) *General limitations.* (1) A person may not place a rated order pursuant to this part unless the person is in receipt of a rated order, has been explicitly authorized to do so by the Department of Commerce or a Delegate Agency or is otherwise permitted to do so by this part.

(2) Rated orders may not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item than needed, except to obtain a minimum procurable quantity;

(iii) Items in advance of the receipt of a rated order, except as specifically authorized by the Department of Commerce (see §700.41(c) for information on obtaining authorization for a priority rating in advance of a rated order); or

(iv) Any of the following items unless specific priority rating authority has been obtained from a Delegate Agency or the Department of Commerce:

(A) Items for plant improvement, expansion or construction, unless they will be physically incorporated into a construction project covered by a rated order; or

(B) Production or construction equipment or items to be used for the manufacture of production equipment (for information on requesting priority rating authority, see §700.41).

(v) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(3) Separate rated orders may not be placed solely for obtaining minimum procurable quantities on each order if the minimum procurable quantity would be sufficient to cover more than one rated order.

(b) *Specific item limitations.* Notwithstanding any authorization or requirement to place a rated order stated elsewhere in this part, no person may place a rated order to obtain the following items unless such order is authorized by an official action of the Department of Commerce.

(1) Copper raw materials.

(2) Crushed stone.

(3) Gravel.

(4) Sand.

(5) Scrap.

(6) Slag.

(7) Steam heat, central.

(8) Waste paper.

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## Subpart E—Industrial Priorities for Energy Programs

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### §700.20 Use of priority ratings.

(a) Section 101(c) of the Defense Production Act authorizes the use of priority ratings for projects which maximize domestic energy supplies.

(b) Projects which maximize domestic energy supplies include those which maintain or further domestic energy exploration, production, refining, and transportation; maintain or further the conservation of energy; or are involved in the construction or maintenance of energy facilities.

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### §700.21 Application for priority rating authority.

(a) For projects believed to maximize domestic energy supplies, a person may request priority rating authority for scarce, critical, and essential supplies of materials, equipment, and services (related to the production of materials or equipment, or the installation, repair, or maintenance of equipment) by submitting a request to the Department of Energy. Further information may be

obtained from the Department of Energy, Office of Electricity Delivery and Energy Reliability, 1000 Independence Avenue SW., Washington, DC 20585.

(b) If the Department of Energy notifies the Department of Commerce that the project maximizes domestic energy supplies and that the materials, equipment, or services are critical and essential, the Department of Commerce will determine whether the items in question are scarce, and, if they are scarce, whether there is a need to use the priorities authority.

(1) Scarcity implies an unusual difficulty in obtaining the materials, equipment, or services in a time frame consistent with the timely completion of the energy project. In determining scarcity, the Department of Commerce may consider factors such as the following:

- (i) Value and volume of material or equipment shipments;
- (ii) Consumption of material and equipment;
- (iii) Volume and market trends of imports and exports;
- (iv) Domestic and foreign sources of supply;
- (v) Normal levels of inventories;
- (vi) Rates of capacity utilization;
- (vii) Volume of new orders; and
- (viii) Lead times for new orders.

(2) In finding whether there is a need to use the priorities authority, the Department of Commerce may consider alternative supply solutions and other measures.

(c) After the Department of Commerce has conducted its analysis, it will advise the Department of Energy whether the two findings have been satisfied. If the findings are satisfied, the Department of Commerce will authorize the Department of Energy to grant the use of a priority rating to the applicant.

(d) Schedule I to this part includes a list of approved programs to support the maximization of domestic energy supplies. A Department of Energy regulation setting forth the procedures and criteria used by the Department of Energy in making its determination and findings is published in 10 CFR part 216.

[79 FR 47567, Aug. 14, 2014]

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## **Subpart F—Allocation Actions**

SOURCE: 63 FR 31923, June 11, 1998, unless otherwise noted.

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### **§700.30 Policy.**

(a) Allocation orders will:

(1) Be used only when there is insufficient supply of a material, service, or facility to satisfy national defense requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

[79 FR 47567, Aug. 14, 2014]

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### **§700.31 General procedures.**

Before the Department of Commerce uses its allocations authority to address a supply problem within its resource jurisdiction, it will develop a plan that includes:

(a) A copy of the written determination made in accordance with section 202 of Executive Order 13603, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list or description of the sources of the materials, services, or facilities that will be subject to the allocation action;

(f) A detailed description of the provisions that will be included in the allocations orders, including the type(s) of allocations orders, the percentages or quantity of capacity or output to be allocated for each purpose, the relationship with previously or subsequently received priority rated and unrated contracts and orders, and the duration of the allocation action (e.g., anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

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### **§700.32 Controlling the general distribution of a material in the civilian market.**

No allocation action by the Department of Commerce may be used to control the general distribution of a material in the civilian market unless the conditions of paragraphs (a), (b), and (c) of this section are met.

(a) The Secretary has made a written finding that:

(1) Such material is a scarce and critical material essential to the national defense, and

(2) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

(b) The Secretary has submitted the finding for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism.

(c) The President has approved the finding.

(d) In this section, the term, "Secretary" means the Secretary of Commerce or his or her designee.

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### **§700.33 Types of allocations orders.**

There are three types of allocations orders available for communicating allocation actions.

(a) *Set-aside*. A set-aside is an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

(b) *Directive*. A directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to: stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another.

(c) *Allotment*. An allotment is an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

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### **§700.34 Elements of an allocation order.**

Allocation orders may be issued directly to the affected persons or by constructive notice to the parties through publication in the FEDERAL REGISTER. This section describes the elements that each order must include.

(a) *Elements to be included in all allocation orders.* (1) A detailed description of the required allocation action(s), including its relationship to previously or subsequently received DX rated orders, DO rated orders and unrated orders.

(2) Specific start and end calendar dates for each required allocation action.

(b) *Elements to be included in orders issued directly to affected persons.* (1) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Defense Priorities and Allocations System regulations (15 CFR part 700)."

(2) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an authorized official or employee of the Department of Commerce.

(c) *Elements to be included in an allocation order that gives constructive notice through publication in the FEDERAL REGISTER.* (1) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the name(s) of the person(s) to whom the order applies or a description of the class of persons to whom the order applies] is (are) required to comply with this order, in accordance with the provisions of the Defense Priorities and Allocations System regulations (15 CFR part 700)."

(2) The order must be signed by an authorized official or employee of the Department of Commerce.

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### **§700.35 Mandatory acceptance of an allocation order.**

(a) Except as otherwise specified in this section, a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Office of Strategic Industries and Economic Security immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within one working day. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Commerce that the order has been changed or cancelled.

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### **§700.36 Changes or cancellations of allocation orders.**

An allocation order may be changed or cancelled by an official action from the Department of Commerce. Notice of such changes or cancellations may be provided directly to persons to whom the order being cancelled or modified applies or constructive notice may be provided by publication in the FEDERAL REGISTER.

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## **Subpart G [Reserved]**

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## **Subpart H—Special Priorities Assistance**

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### **§700.50 General provisions.**

(a) Once a priority rating has been authorized pursuant to this part, further action by the Department of Commerce generally is not needed. However, it is anticipated that from time-to-time problems will occur. In this event, a person should immediately contact the appropriate contract administration officer for guidance or assistance. If additional formal aid is needed, special priorities assistance should be sought from the Delegate Agency through the contract administration officer. If the Delegate Agency is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Delegate Agency may forward the request to the Department of Commerce for action. Special priorities assistance is a service provided to alleviate problems that do arise.

(b) Special priorities assistance can be provided for any reason consistent with this part, such as assisting in obtaining timely deliveries of items needed to satisfy rated orders or authorizing the use of priority ratings on orders to obtain items not otherwise ratable under this part. If the Department of Commerce is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Department of Commerce may forward the request to another agency, identified in §700.10(c), as appropriate, for action.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form BIS-999 (OMB control number 0694-0057) to the local contract administration representative. Form BIS-999 may be obtained from the Delegate Agency representative or from the Department of Commerce. A sample Form BIS-999 is attached at appendix I.

[49 FR 30414, July 30, 1984; 49 FR 50171, Dec. 27, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, June 11, 1998; 79 FR 47568, Aug. 14, 2014]

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## **§700.51 Requests for priority rating authority.**

(a) If a rated order is likely to be delayed because a person is unable to obtain items not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items. Examples of items for which priority ratings can be authorized include:

- (1) Production or construction equipment;
- (2) Computers when not used as production items; and
- (3) Expansion, rebuilding or replacing plant facilities.

(b) *Rating authority for production or construction equipment.* (1) A request for priority rating authority for production or construction equipment must be submitted to the appropriate Delegate Agency. The Delegate Agency may establish particular forms to be used for these requests (e.g., Department of Defense Form DD 691.)

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) *Rating authority in advance of a rated prime contract.* (1) In certain cases and upon specific request, the Department of Commerce, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders if these orders have to be cancelled in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from a Delegate Agency and our use of that priority rating with our suppliers in no way commits the Delegate Agency, the Department of Commerce or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, the Department of Commerce will consider, among other things, the following criteria:

- (i) The probability that the prime contract will be awarded;
- (ii) The impact of the resulting rated orders on suppliers and on other authorized programs;
- (iii) Whether the contractor is the sole source;
- (iv) Whether the item being produced has a long lead time; and
- (v) The time period for which the rating is being requested.

(4) Commerce may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47568, Aug. 14, 2014]

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#### **§700.52 Examples of assistance.**

(a) While special priorities assistance may be provided for any reason in support of this regulation, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

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#### **§700.53 Criteria for assistance.**

Requests for special priorities assistance should be timely, *i.e.*, the request has been submitted promptly and enough time exists for the Delegate Agency or the Department of Commerce to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47568, Aug. 14, 2014]

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#### **§700.54 Instances where assistance will not be provided.**

Special priorities assistance is provided at the discretion of the Delegate Agencies and the Department of Commerce when it is determined that such assistance is warranted to meet the objectives of this regulation. Examples where assistance may not be provided include situations when a person is attempting to:

- (a) Secure a price advantage;
- (b) Obtain delivery prior to the time required to fill a rated order;
- (c) Gain competitive advantage;
- (d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or
- (e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, June 11, 1998; 79 FR 47568, Aug. 14, 2014]

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#### **§700.55 Homeland security, emergency preparedness, and critical infrastructure protection and restoration assistance programs within the United States.**

Any person requesting priority rating authority or requiring assistance in obtaining rated items supporting homeland security, emergency preparedness, and critical infrastructure protection and restoration related activities should submit a request for such assistance or priority rating authority to the Office of Policy and Program Analysis, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street SW., Washington, DC 20472; telephone: (202) 646-3520; Fax: (202) 646-4060; Email: [fema-dpas@dhs.gov](mailto:fema-dpas@dhs.gov), Web site: <http://www.fema.gov/defense-production-act-program-division>.

[79 FR 47568, Aug. 14, 2014]

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#### **§700.56 Military assistance programs with Canada.**

(a) To promote military assistance to Canada, this section provides for authorizing priority ratings to persons in Canada to obtain items in the United States in support of approved programs. Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance in Canada in support of approved programs.

(b) The joint United States-Canadian military arrangements for the defense of North America and the integrated nature of the United States and Canadian defense industries require close coordination and the establishment of a means to provide mutual assistance to the defense industries located in both countries.

(c) The Department of Commerce coordinates with the Canadian Public Works and Government Services Canada on all matters of mutual concern relating to the administration of this part.

(d) Any person in the United States ordering defense items in Canada in support of an approved program should inform the Canadian supplier that the items being ordered are to be used to fill a rated order. The Canadian supplier should be informed that if production materials are needed from the United States by the supplier or the supplier's vendor to fill the order, the supplier or vendor should contact the Canadian Public Works and Government Services Canada for authority to place rated orders in the United States: Public Works and Government Services Canada, Acquisitions Branch, Business Management Directorate, Phase 3, Place du Portage, Level 0A1, 11 Laurier Street, Gatineau, Quebec, K1A 0S5, Canada; Telephone: (819) 956-6825; Fax: (819) 956-7827, or electronically at [DGAPrioritesdedefense.ACQBDefencePriorities@tpsgc-pwgsc.gc.ca](mailto:DGAPrioritesdedefense.ACQBDefencePriorities@tpsgc-pwgsc.gc.ca).

(e) Any person in Canada producing defense items for the Canadian government may also obtain priority rating authority for items to be purchased in the United States by applying to the Canadian Public Works and Government Services Canada, Acquisitions Branch, Business Management Directorate, in accordance with its procedures.

(f) Persons in Canada needing special priorities assistance in obtaining defense items in the United States may apply to the Canadian Public Works and Government Services Canada, Acquisitions Branch, Business Management Directorate, for such assistance. Public Works and Government Services Canada will forward appropriate requests to the Department of Commerce.

(g) Any person in the United States requiring assistance in obtaining items in Canada must submit a request through the Delegate Agency to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce on Form BIS-999. The Department of Commerce will forward appropriate requests to the Canadian Public Works and Government Services Canada.

[79 FR 47568, Aug. 14, 2014]

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#### **§700.57 Military assistance programs with other nations and international organizations.**

(a) *Scope.* To promote military assistance to foreign nations and international organizations (for example, the North Atlantic Treaty Organization or the United Nations), this section provides for authorizing priority ratings to persons in foreign nations or international organizations to obtain items in the United States in support of approved programs. Although priority ratings have no legal authority outside of the United States, this section also provides information on how persons in the United States may obtain informal assistance in Australia, Finland, Italy, The Netherlands, Spain, Sweden, and the United Kingdom in support of approved programs.

(b) *Foreign nations and international organizations.* (1) Any person in a foreign nation other than Canada, or any person in an international organization, requiring assistance in obtaining items in the United States or priority rating authority for items to be purchased in the United States, should submit a request for such assistance or priority rating authority to: the Department of Defense DPAS Lead in the Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy, 3330 Defense Pentagon, Room 3B854, Washington, DC 20301; Telephone: (703) 697-0051; Fax: (703) 695-4885; Email: [MIBP@osd.mil](mailto:MIBP@osd.mil), Web site: <http://www.acq.osd.mil/mibp>.



(i) If the end product is being acquired by a U.S. Government agency, the request should be submitted to the Department of Defense DPAS Lead through the U.S. contract administration representative.

(ii) If the end product is being acquired by a foreign nation or international organization, the request must be sponsored prior to its submission to the Department of Defense DPAS Lead by the government of the foreign nation or the international organization that will use the end product.

(2) If the Department of Defense endorses the request, it will be forwarded to the Department of Commerce for appropriate action.

(c) *Requesting assistance in Australia, Finland, Italy, The Netherlands, Spain, Sweden, and the United Kingdom.* (1) The Department of Defense has entered into bilateral security of supply arrangements with Australia, Finland, Italy, The Netherlands, Spain, Sweden, and the United Kingdom that allow the Department of Defense to request the priority delivery for Department of Defense contracts, subcontracts, and orders from companies in these countries.

(2) Any person in the United States requiring assistance in obtaining the priority delivery of a contract, subcontract, or order in Australia, Finland, Italy, The Netherlands, Spain, Sweden, or the United Kingdom to support an approved program should contact the Department of Defense DPAS Lead in the Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy for assistance. Persons in Australia, Finland, Italy, The Netherlands, Spain, Sweden, and the United Kingdom should request assistance in accordance with paragraph (b)(1) of this section.

[79 FR 47568, Aug. 14, 2014, as amended at 80 FR 50762, Aug. 21, 2015]

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## **§700.58 Critical infrastructure assistance programs to foreign nations and international organizations.**

(a) *Scope.* To promote critical infrastructure assistance to foreign nations, this section provides for authorizing priority ratings to persons in foreign nations or international organizations (for example the North Atlantic Treaty Organization or the United Nations) to obtain items in the United States in support of approved programs.

(b) *Foreign nations or international organizations.* Any person in a foreign nation or representing an international organization requiring assistance in obtaining items to be purchased in the United States for support of critical infrastructure protection and restoration should submit a request for such assistance or priority rating authority to the Office of Policy and Program Analysis, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street SW., Washington, DC 20472; telephone: (202) 646-3520; Fax: (202) 646-4060; Email: [fema-dpas@dhs.gov](mailto:fema-dpas@dhs.gov), Web site: <http://www.fema.gov/defense-production-act-program-division>.

[79 FR 47568, Aug. 14, 2014]

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## **Subpart I—Official Actions**

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### **§700.60 General provisions.**

(a) The Department of Commerce may, from time-to-time, take specific official actions to implement or enforce the provisions of this part.

(b) Some of these official actions (rating authorizations and letters of understanding) are discussed in this subpart. Official actions that pertain to compliance (administrative subpoenas, demands for information, and inspection authorizations) are discussed in §700.71(c). Directives are discussed in §700.62.

[79 FR 47569, Aug. 14, 2014]

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### **§700.61 Rating authorizations.**

(a) A rating authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item not normally ratable under this regulation; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see §700.51.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47570, Aug. 14, 2014]

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### **§700.62 Directives.**

(a) A directive is an official action which requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each directive issued. However, a person may not use or extend a directive to obtain any items from a supplier, unless expressly authorized to do so in the directive.

(c) Directives take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47570, Aug. 14, 2014]

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### **§700.63 Letters of understanding.**

(a) A letter of understanding is an official action which may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (the Department of Commerce, the Delegate Agency, the supplier, and the customer).

(b) A letter of understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this regulation, or to take other official actions. Rather, letters of understanding are used to confirm production or shipping schedules which do not require modifications to other rated orders.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47570, Aug. 14, 2014]

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## Subpart J—Compliance

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### §700.70 General provisions.

(a) Compliance actions may be taken for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act, the Selective Service Act and related statutes, this part, or an official action. Such actions include audits, investigations, or other inquiries.

(b) Willful violation of any of the provisions of Title I or section 705 of the Defense Production Act, this part, or an official action of the Department of Commerce, is a criminal act, punishable as provided in the Defense Production Act and as set forth in §700.74 of this part.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, June 11, 1998; 79 FR 47570, Aug. 14, 2014]

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### §700.71 Audits and investigations.

(a) Audits and investigations are official actions involving the examination of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act, the Selective Service Act and related statutes, and this part have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit, investigation, or other inquiry, the Department of Commerce shall:

(1) Define the scope and purpose in the official action given to the person under investigation, and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, the Department of Commerce may issue the following documents, which constitute official actions:

(1) *Administrative subpoenas.* An administrative subpoena requires a person to appear as a witness before an official designated by the Department of Commerce to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act, the Selective Service Act and related statutes, or this part. An administrative subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) *Demand for information.* A demand for information requires a person to furnish to a duly authorized representative of the Department of Commerce any information necessary or appropriate to the enforcement or the administration of the Defense Production Act, the Selective Service Act, or this part.

(3) *Inspection authorizations.* An inspection authorization requires a person to permit a duly authorized representative of the Department of Commerce to interview the person's employees or agents, to inspect books, records, documents, other writings and information in the person's possession or control at the place where that person usually keeps them, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act, the Selective Service Act, or this part.

(d) The production of books, records, documents, other writings and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the administrative subpoena or demand for information, a duly authorized official of the Department of Commerce is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of the Department of Commerce as to the content of the material.

(e) An administrative subpoena, demand for information, or inspection authorization shall include the name, title or official position of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the administrative subpoena, demand for information, or inspection authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a demand for information or inspection authorization shall be made personally, or by certified mail—return receipt requested at the person's last known address. Service of an administrative subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years of age at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or older may serve an administrative subpoena, demand for information, or inspection authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the

issuing officer. In case of failure to make service, the reasons for the failure shall be stated on the original document.

[79 FR 47570, Aug. 14, 2014]

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### **§700.72 Compulsory process.**

(a) If a person refuses to permit a duly authorized representative of the Department of Commerce to have access to any premises or source of information necessary to the administration or enforcement of the Defense Production Act or this part, the Department of Commerce may seek compulsory process. Compulsory process means the institution of appropriate legal action, including *ex parte* application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of the Director of the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, in consultation with the Chief Counsel for Industry and Security, U.S. Department of Commerce, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, June 11, 1998; 67 FR 45633, July 10, 2002; 71 FR 39528, July 13, 2006; 79 FR 47570, Aug. 14, 2014]

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### **§700.73 Notification of failure to comply.**

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, the Department of Commerce may inform the person in writing where compliance with the requirements of the Defense Production Act, the Selective Service Act and related statutes, or this part were not met.

(b) In cases where the Department of Commerce determines that failure to comply with the provisions of the Defense Production Act, the Selective Service Act and related statutes, or this part was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act, this part, or an official action.

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### **§700.74 Violations, penalties, and remedies.**

(a) Willful violation of the provisions of Title I or Sections 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act and related statutes or this part is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the Defense Production Act is a \$10,000 fine, or one year in prison, or both. The

maximum penalty provided by the Selective Service Act is a \$50,000 fine, or three years in prison, or both.

(b) The government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act, this part, and official actions, the following are prohibited (see section 704 of the Defense Production Act; see also, for example, sections 2 and 371 of Title 18 United States Code):

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act, this part, or an official action.

(3) No person shall deliver any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act, this part, or an official action. In such instances, the person must immediately notify the Department of Commerce that, in accordance with this section, delivery has not been made.

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#### **§700.75 Compliance conflicts.**

If compliance with any provision of the Defense Production Act, the Selective Service Act and related statutes, this regulation, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act, this regulation, or an official action, the person must immediately notify the Department of Commerce for resolution of the conflict.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, June 11, 1998]

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### **Subpart K—Adjustments, Exceptions, and Appeals**

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#### **§700.80 Adjustments or exceptions.**

(a) A person may submit a request to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequence of following a provision of this part or an official action is contrary to the intent of the Defense Production Act, the Selective Service Act and related statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provisions of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Office of Strategic Industries and Economic Security. The Office of Strategic Industries and Economic Security shall respond to requests for adjustment of or exceptions to compliance with the provisions of this part or an official action within 25 (twenty-five) days, not including Saturdays, Sundays or Government holidays, of the date of receipt.

(d) A decision of the Office of Strategic Industries and Economic Security under this section may be appealed to the Assistant Secretary for Export Administration, U.S. Department of Commerce. (For information on the appeal procedure, see §700.81.)

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, 31925, June 11, 1998; 79 FR 47571, Aug. 14, 2014]

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### **§700.81 Appeals.**

(a) Any person who has had a request for adjustment or exception denied by the Office of Strategic Industries and Economic Security under §700.80, may appeal to the Assistant Secretary for Export Administration, Department of Commerce, who shall review and reconsider the denial. Such appeals should be submitted to the Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Room 3886, Washington, DC 20230, Ref: DPAS Appeals.

(b) Appeals of denied requests for exceptions from or adjustments to compliance with the provisions of this part or an official action must be received by the Assistant Secretary for Export Administration no later than 45 days after receipt of a written notice of denial from the Office of Strategic Industries and Economic Security. After this 45-day period, an appeal may be accepted at the discretion of the Assistant Secretary for Export Administration.

(c) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the action appealed from and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Assistant Secretary for Export Administration.

(e) When a hearing is granted, the Assistant Secretary for Export Administration may designate an employee of the Department of Commerce to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations

deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Assistant Secretary for Export Administration may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to the Department of Commerce, or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provisions of this part or official action in question while the appeal is being considered, unless such relief is granted in writing by the Assistant Secretary for Export Administration.

(h) The decision of the Assistant Secretary for Export Administration shall be made within a reasonable time after receipt of the appeal and shall be the final administrative action. It shall be issued to the appellant in writing with a statement of the reasons for the decision.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31925, June 11, 1998; 71 FR 39528, July 13, 2006; 79 FR 47571, Aug. 14, 2014]

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## Subpart L—Miscellaneous Provisions

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### **§700.90 Protection against claims.**

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47571, Aug. 14, 2014]

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### **§700.91 Records and reports.**

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part (OMB control number 0694-0053) or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of the Department of Commerce as provided in §700.71.



(d) In addition, persons must develop, maintain, and submit any other records and reports to the Department of Commerce that may be required for the administration of the Defense Production Act, the Selective Service Act and related statutes, and this part.

(e) Section 705(d) of the Defense Production Act provides that information obtained under this section which the President deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the President determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to the Department of Commerce in connection with the enforcement or administration of the Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Act and shall not be published or disclosed except as required by law.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 63 FR 31924, 31925, June 11, 1998; 79 FR 47571, Aug. 14, 2014]

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#### **§700.92 Applicability of this part and official actions.**

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any state, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by the Department of Commerce, or any outstanding contracts or orders placed pursuant to any of the regulations, orders, schedules or delegations of authority under the Defense Materials System and Defense Priorities System previously issued by the Department of Commerce. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

(d) The repeal of any provision of this part, orders, schedules and delegations of authority of the Defense Materials System (DMS) and Defense Priorities System (DPS) shall not have the effect to release or extinguish any penalty or liability incurred under the DMS/DPS. The DMS/DPS shall be treated as still remaining in force for the purpose of sustaining any action for the enforcement of such penalty or liability.

[49 FR 30414, July 30, 1984. Redesignated at 54 FR 601, Jan. 9, 1989, as amended at 79 FR 47571, Aug. 14, 2014]

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#### **§700.93 Communications.**

General communications concerning this part, including how to obtain copies of this part and explanatory information, requests for guidance or clarification, may be addressed to the Office of Strategic Industries and Economic Security, Room 3876, Department of Commerce, Washington, DC 20230, Ref: DPAS; telephone (202) 482-3634, email [DPAS@bis.doc.gov](mailto:DPAS@bis.doc.gov). Request for priorities

assistance under §700.50, adjustments or exceptions under §700.80, or appeals under §700.81, must be submitted in the manner specified in those sections.

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### Schedule I to Part 700—Approved Programs and Delegate Agencies

The programs listed in this schedule have been approved for priorities support under this part by the Department of Defense,<sup>1</sup> the Department of Energy or the Department of Homeland Security, in accordance with section 202 of Executive Order 13603. They have equal preferential status. The Department of Commerce has authorized the delegate agencies listed in the third column to use this part in support of those programs assigned to them, as indicated below.<sup>2</sup>

<sup>1</sup>Department of Defense includes: The Office of the Secretary of Defense, the Military Departments, the Joint Staff, the Combatant Commands, the Defense Agencies, the Defense Field Activities, all other organizational entities in the Department of Defense, and, for purposes of this part, the Central Intelligence Agency and the National Aeronautics and Space Administration as associated agencies.

<sup>2</sup>The Department of Commerce is also listed as an agency in the third column for programs where its authorization is necessary to place rated orders.

<b>Program identification symbol</b>	<b>Approved program</b>	<b>Agency(ies)</b>
<b>Defense Programs</b>		
A1	Aircraft	Department of Defense.
A2	Missiles	Department of Defense.
A3	Ships	Department of Defense.
A4	Tank—Automotive	Department of Defense.
A5	Weapons	Department of Defense.
A6	Ammunition	Department of Defense.
A7	Electronic and communications equipment	Department of Defense.
B1	Military building supplies	Department of Defense.
B8	Production equipment (for defense contractor's account)	Department of Defense.
B9	Production equipment (Government owned)	Department of Defense.
C1	Food resources (combat rations)	Department of Defense.
C2	Department of Defense construction	Department of Defense.

C3	Maintenance, repair, and operating supplies (MRO) for Department of Defense facilities	Department of Defense.
C9	Miscellaneous	Department of Defense.
<b>Military Assistance to Canada</b>		
D1	Canadian military programs	Department of Commerce.
D2	Canadian production and construction	Department of Commerce.
D3	Canadian atomic energy program	Department of Commerce.
<b>Military Assistance to Other Foreign Nations</b>		
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export	Department of Commerce.
G2	Certain direct defense needs of foreign governments other than Canada	Department of Commerce.
G3	Foreign nations (other than Canada) production and construction	Department of Commerce.
<b>Critical Infrastructure Assistance to Foreign Nations</b>		
G4	Foreign critical infrastructure programs	Department of Commerce.
<b>Co-Production</b>		
J1	F-16 Co-Production Program	Departments of Commerce and Defense.
<b>Atomic Energy Programs</b>		
E1	Construction	Department of Energy.
E2	Operations—including maintenance, repair, and operating supplies (MRO)	Department of Energy.
E3	Privately owned facilities	Department of Energy.
<b>Domestic Energy Programs</b>		
F1	Exploration, production, refining, and transportation	Department of Energy.
F2	Conservation	Department of Energy.
F3	Construction, repair, and maintenance	Department of Energy.

<b>Other Defense, Energy, and Related Programs</b>		
H1	Certain combined orders (see section 700.17(c))	Department of Commerce.
H5	Private domestic production	Department of Commerce.
H6	Private domestic construction	Department of Commerce.
H7	Maintenance, repair, and operating supplies (MRO)	Department of Commerce.
H8	Designated Programs	Department of Commerce.
K1	Federal supply items	General Services Administration.
<b>Homeland Security Programs</b>		
N1	Federal emergency preparedness, mitigation, response, and recovery	Department of Homeland Security.
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery	Department of Homeland Security.
N3	Intelligence and warning systems	Department of Homeland Security.
N4	Border and transportation security	Department of Homeland Security.
N5	Domestic counter-terrorism, including law enforcement	Department of Homeland Security.
N6	Chemical, biological, radiological, and nuclear countermeasures	Department of Homeland Security.
N7	Critical infrastructure protection and restoration	Department of Homeland Security.
N8	Miscellaneous	Department of Homeland Security.

[79 FR 47572, Aug. 14, 2014]