



DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2020-0016]

Meetings to Implement Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Announcement of meetings.

SUMMARY: The Federal Emergency Management Agency (FEMA) held two meetings to implement the Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic.

DATES: The first meeting took place on Tuesday, September 21, 2021, from 10 a.m. to 12 p.m. Eastern Time (ET). The second meeting took place on Thursday, September 23, 2021, from 10 a.m. to 12 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Robert Glenn, Office of Business, Industry, Infrastructure Integration, via email at OB3I@fema.dhs.gov or via phone at (202) 212-1666.

SUPPLEMENTARY INFORMATION: Notice of these meetings is provided as required by section 708(h)(8) of the Defense Production Act (DPA), 50 U.S.C. 4558(h)(8), and consistent with 44 CFR part 332.

The DPA authorizes the making of “voluntary agreements and plans of action” with representatives of industry, business, and other interests to help provide for the national defense.¹ The President’s authority to facilitate voluntary agreements with

¹ 50 U.S.C. 4558(c)(1).

respect to responding to the spread of COVID-19 within the United States was delegated to the Secretary of Homeland Security in Executive Order 13911.² The Secretary of Homeland Security further delegated this authority to the FEMA Administrator.³

On August 17, 2020, after the appropriate consultations with the Attorney General and the Chairman of the Federal Trade Commission, FEMA completed and published in the *Federal Register* a “Voluntary Agreement, Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic” (Voluntary Agreement).⁴ Unless terminated earlier, the Voluntary Agreement is effective until August 17, 2025, and may be extended subject to additional approval by the Attorney General after consultation with the Chairman of the Federal Trade Commission. The Agreement may be used to prepare for or respond to any pandemic, including COVID-19, during that time.

On December 7, 2020, the first plan of action under the Voluntary Agreement – the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Personal Protective Equipment (PPE) to Respond to COVID-19 (PPE Plan of Action) – was finalized.⁵ The PPE Plan of Action established several sub-committees under the Voluntary Agreement, focusing on different aspects of the PPE Plan of Action.

On May 24, 2021, four additional plans of action under the Voluntary Agreement – the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Diagnostic Test Kits and other Testing Components to respond to COVID-19, the Plan of Action to Establish a National Strategy for the Manufacture,

² 85 FR 18403 (Apr. 1, 2020).

³ DHS Delegation 09052, Rev. 00.1 (Apr. 1, 2020); DHS Delegation Number 09052 Rev. 00 (Jan. 3, 2017).

⁴ 85 FR 50035 (Aug. 17, 2020). The Attorney General, in consultation with the Chairman of the Federal Trade Commission, made the required finding that the purpose of the voluntary agreement may not reasonably be achieved through an agreement having less anticompetitive effects or without any voluntary agreement and published the finding in the *Federal Register* on the same day. 85 FR 50049 (Aug. 17, 2020).

⁵ See 85 FR 78869 (Dec. 7, 2020). See also 85 FR 79020 (Dec. 8, 2020).

Allocation, and Distribution of Drug Products, Drug Substances, and Associated Medical Devices to respond to COVID-19, the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Medical Devices to respond to COVID-19, and the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Medical Gases to respond to COVID-19 – were finalized.⁶ These plans of action established several sub-committees under the Voluntary Agreement, focusing on different aspects of each plan of action.

The meetings were chaired by the FEMA Administrator or her delegate and attended by the Attorney General and the Chairman of the Federal Trade Commission or their delegates. In implementing the Voluntary Agreement, FEMA adheres to all procedural requirements of 50 U.S.C. 4558 and 44 CFR part 332.

Meeting Objectives: The objectives of the meetings were as follows:

1. Gather committee Participants and Attendees to ask targeted questions for situational awareness related to the active Plans of Action (PPE, Drug Products and Drug Substances, Diagnostic Test Kits, Medical Devices, and Medical Gases).
2. Establish priorities for COVID-19 response under the Voluntary Agreement.
3. Identify tasks that should be completed under the appropriate Sub-Committee.
4. Identify information gaps and areas that merit sharing (both from FEMA to the private sector and vice versa).

Meetings Closed to the Public: By default, the DPA requires meetings held to implement a voluntary agreement or plan of action be open to the public.⁷ However, attendance may be limited if the Sponsor⁸ of the voluntary agreement finds that the matter to be discussed

⁶ See 86 FR 27894 (May 24, 2021). See also 86 FR 28851 (May 28, 2021).

⁷ See 50 U.S.C. 4558(h)(7).

⁸ “[T]he individual designated by the President in subsection (c)(2) [of section 708 of the DPA] to administer the voluntary agreement, or plan of action.” 50 U.S.C. 4558(h)(7).

at a meeting falls within the purview of matters described in 5 U.S.C. 552b(c), such as trade secrets and commercial or financial information. The Sponsor of the Voluntary Agreement, the FEMA Administrator, found that these meetings to implement the Voluntary Agreement involved matters which fall within the purview of matters described in 5 U.S.C. 552b(c) and the meetings were therefore closed to the public.

Specifically, these meetings to implement the Voluntary Agreement may have required participants to disclose trade secrets or commercial or financial information that is privileged or confidential. Disclosure of such information allows for meetings to be closed pursuant to 5 U.S.C. 552b(c)(4). In addition, the success of the Voluntary Agreement depends wholly on the willing and enthusiastic participation of private sector participants. Failure to close these meetings could have had a strong chilling effect on private sector participation and caused a substantial risk that sensitive information would be prematurely released to the public, leading to participants withdrawing their support from the Voluntary Agreement.

This would have significantly frustrated the implementation of the Voluntary Agreement. Frustration of an agency's objective due to premature disclosure of information allows for the closure of a meeting pursuant to 5 U.S.C. 552b(c)(9)(B).

Deanne Criswell,

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Federal Emergency Management Agency.

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