

# CLIENT ALERTS

---

## President Trump Invokes Defense Production Act Authority – How Could That Affect the Auto Industry?

3.20.2020

As the number of cases (and deaths related to) COVID-19 continue to spiral globally, local, state and national governments have taken dramatic steps to try and mitigate the spread of the virus and its potential to overwhelm available health care systems and medical supplies. The White House this week invoked Korean War time legislation that serves to provide for the civil defense and to prepare for war mobilization: the Defense Production Act. Implementation of the DPA could affect your current business and its productive capacity as automotive production in the United States crawls to a halt and manufacturers contemplate their next move.

### ***The Defense Production Act***

On March 18, 2020, President Donald Trump finally invoked the much-discussed Defense Production Act (DPA), 50 U.S.C. §§ 4501, *et seq.*, to confront the spiraling COVID-19 crisis. The DPA, first enacted in 1950, is a successor to the War Powers Acts of World War II that gives the President broad authority to influence domestic industry to provide essential materials and goods needed for the national defense.

Current DPA authorities include (but are not limited to):

- Title I: Priorities and Allocations, which allows the President to require persons (including business entities) to (1) prioritize and accept government contracts or “rated orders” for materials and services, and (2) allocate or control the general distribution of materials, services, and facilities as necessary to promote the “national defense,” which is defined in the statute to include not only various military activities, but also “homeland security, stockpiling, space, and any directly related activity,” (50 U.S.C. § 4552) including emergency preparedness activities under the Stafford Act, 42 U.S.C. §§ 5121 *et seq.*, to protect the public health.

### **Related People**

Catherine M. Karol  
Of Counsel

### **Related Services**

Aerospace & Defense Industry  
Team

Aerospace and Defense

## CLIENT ALERTS

---

- Title III: Expansion of Productive Capacity and Supply, which allows the President to incentivize the “defense industrial base” to expand the production and supply of critical materials and goods. Authorized incentives include loans, loan guarantees, direct purchases, and purchase commitments, and the authority to procure and install equipment in private industrial facilities.
- Title VII: General Provisions, which includes key definitions for the DPA and several distinct authorities, including the authority to establish voluntary agreements with private industry; and the authority to employ persons of outstanding experience and ability and to establish a volunteer pool of industry executives who could be called to government service in the interest of the national defense. These are not the exclusive authorities of the DPA, but rather some of the most pertinent because of their historical or current use.

### ***The Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19***

President Trump immediately followed with an “Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19” on March 18, 2020, finding that personal protective equipment and ventilators meet criteria to be considered “scarce and critical material essential to the national defense” under the DPA, and delegating to the Secretary of the U.S. Department of Health and Human Services (HHS) the President’s authority to direct production and distribution of, e.g., personal protective equipment and ventilators, as well as “any additional specific health and medical resources” that meet the criteria of the DPA, as determined by the Secretary of HHS. Exec. Order No. 13909 (to be published in the Federal Register on March 23, 2020).

The Executive Order also provides that HHS shall consult with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, to determine “the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.”

### ***After the Executive Order***

Although the Secretary of HHS had already taken several steps that were consistent with the authorities under the DPA, the Executive Order now directly delegated to him the authority to issue orders, rules, and regulations as necessary to ensure production and distribution of these critical supplies to health care providers. On March 19, 2020, following the March 18 statements and issuance of the Executive Order, President Trump confirmed in his daily COVID-19 briefing that he was not immediately calling on industry to mobilize. He expressed satisfaction that industry was engaging without providing the additional incentives or mandatory call for action.

### ***What this Means for Manufacturers***

## CLIENT ALERTS

---

Many in the healthcare industry fear that supplies of critical medical products including masks, respirators, and ventilators may run out at the beginning of April. Manufacturers of the medical ventilators required to save the lives of many critically ill coronavirus patients are racing to boost production, but there still may not be enough of the crucial machines if cases surge, industry officials say. General Motors Co., Ford Motor Co. and Tesla are all exploring the possibility of making ventilators, spokespeople for the companies said Thursday. And Flavio Volpe, President of the Toronto-based Automotive Parts Manufacturers' Association, believes the shift to medical supplies would be easy enough to do for idled automotive tool and die companies and parts suppliers. He is encouraging manufacturing plants on both sides of the border to produce medical supplies, saying that they could convert back to automotive manufacturing quickly.

The added capacity may eventually help ease the crunch, but it isn't coming fast enough to keep up with mounting demand and may not be sufficient if the number of cases grows rapidly, industry officials and health experts say.

Invoking Title I of the DPA means that if the government places a "rated order" with a private company for any medical equipment to treat the coronavirus — masks, other personal protective equipment (PPE) and ventilators are the prime examples — then that company must promptly notify the Government customer if it accepts the order and, if it does, it would be required to fulfill the government's order(s) before anyone else's.

But while Title I gives the government priority, it does not equate to increased production capacity. The Administration most likely would need to look to the financial incentives of Title III to negotiate with the private sector to expand manufacture of critical medical equipment by companies that don't currently make medical devices.

Switching to production of medical devices would present numerous financial, timing and other challenges to manufacturers, including FDA validation requirements, technical training, availability of auto workers and global supply chain issues. The expansive provisions of Title VII of the DPA could greatly facilitate overcoming these types of challenges.

If the President takes actions under the authorities set forth in the DPA, manufacturers may need to wrestle with several unique challenges. Unfortunately, not all companies are able to quickly shift production to what the government may require as quickly as hoped. New equipment and supply chain issues may arise. Manufacturing components and systems in the healthcare space also may leave a manufacturer facing different regulatory schemes, third party liability issues, and potential labor challenges during a shelter in place regime. Fortunately, even in the face of these challenges, Congress, many Governors, and many private-sector companies are stepping up to the plate.

Butzel Long continues to track, analyze, and advise on a variety of issues surrounding this rapidly evolving situation. Your Butzel attorneys have focused specialties and expertise that cover the broad scope of issues surrounding the Defense Production Act and manufacturing in the healthcare sector. Contact your Butzel attorney for updates or for assistance.

## CLIENT ALERTS

---

**Catherine Karol**

313.225.5308

karol@butzel.com

**Jennifer Dukarski**

734.213.3427

dukarski@butzel.com

**Ira Hoffman**

202.454.2849

hoffmani@butzel.com

Defense Production Act Links:

The Defense Production Act of 1950: History, Authorities, and Considerations for Congress

The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations