

# CLIENT ALERTS

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## The Defense Production Act – What's Up with That?

3.26.2020

President Donald Trump last week invoked the 1950 Defense Production Act, providing his Administration with the authority to issue directives to private industry to boost the supply of critical materials and items during a war or national emergency. (See Butzel Long Client Alert) Despite the urgent pleadings of numerous state officials and members of Congress, however, the President appears reluctant to use the law to issue any specific directives to industry to deal with the acute shortage of medical equipment and supplies related to the COVID-19 pandemic.

Even though the President formally invoked the law in an executive order last week, apparent pressure from the Chamber of Commerce and business leaders has left him and some of his advisers loath to deploy it, The New York Times reported. "We're a country not based on nationalizing our business," the President said at a briefing on Tuesday. In his Wednesday briefing, the President referred again to companies like General Motors, Ford, and 3M, which have voluntarily stepped forward to begin developing supplies.

On March 25th, over one hundred former national security officials joined the chorus and requested President Trump to fully invoke the powers of the Defense Production Act to combat the Covid-19 coronavirus pandemic, calling the delay "a grave mistake." In a letter obtained by the *Wall Street Journal*, they stated:

"The private sector lacks the ability to process incoming requests, prioritize the most urgent needs and coordinate with other companies absent more concerted government involvement. That is precisely what the DPA is designed to do.... If the ultimate objective is to save American lives, there is no alternative to utilizing the DPA immediately and to the fullest extent."

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While there are numerous other options available under the DPA, the one expressly invoked by the President in his March 18<sup>th</sup> Order is the Title I authority to prioritize and allocate orders for masks and ventilators. The rationale for more aggressive action that is being urged on the President is fairly simple: Utilize the federal government's purchasing power rather than that of the various states, local governments, hospitals, etc., to maximize production, minimize costs and allocate supplies to areas of greatest need.

"The White House is very judiciously looking through what sub-segments of DPA they will use," according to Jennifer Santos, deputy assistant secretary of defense for industrial policy. She said two key elements of the DPA are in the purview of her office and are currently being used to strengthen the defense industrial base: (1) Title I, which "provides the authority to priority-rate defense contracts and to allocate materials in a way that best meets warfighter needs"; and (2) Title III, which "provides the DoD a means to partner with industry to strengthen commercial domestic industrial base capabilities essential to national defense."

She also stated that a new Defense Production Act task force was recently established at the Federal Emergency Management Agency (FEMA) to coordinate an interagency effort to ensure utilization of Title I and Title III "where needed in concert with the whole of government approach to combat coronavirus." Under these authorities, the Pentagon can provide economic incentives to its industry partners to aid in a timely delivery of essential resources and equipment as the nation confronts the COVID-19 outbreak, she said.

However, any implementation of incentives under Title III under the DPA would have serious financial limitations. Currently, there is a \$228 million balance in the Defense Production Act Fund, the designated vehicle for the government to obtain needed supplies from private companies through loans, subsidies or purchases, as of Oct. 1, 2019, according to the latest White House budget report. As part of the Senate bill passed on March 25<sup>th</sup>, the stimulus package will include \$1 billion for the Defense Production Act. See H.R. 748, referred to as the "Coronavirus Aid, Relief, and Economy Security Act, (or "CARES Act), at 647. While the CARES Act has only passed the Senate, Speaker Pelosi expressed confidence in a press conference on March 26<sup>th</sup> that it will pass the House and be signed by the President into law in a matter of days.

Even without more designated funds to incentive increased production of scarce materials, the administration could still use its powers under Title I of the DPA to prioritize other government contracts, as FEMA did to expedite contracts for housing, food, water and electricity in Puerto Rico in the aftermath of Hurricane Maria.

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.

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