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**COMMENTARY**

*COMBATING COVID-19:*

*HOW THE BIDEN ADMINISTRATION PLANS TO USE THE DEFENSE PRODUCTION ACT TO  
BOOST N95 MASK, COVID-19 VACCINE, AND HEALTHCARE SUPPLY PRODUCTION*

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The Defense Production Act (DPA), a Korean War era law, gives certain powers to the President of the United States to compel companies to produce goods and prioritize government contracts in times of emergency.<sup>1</sup> While the DPA is often invoked to address natural disasters or defense concerns, the COVID-19 pandemic's impact on the supply chains of necessary equipment for healthcare workers, particularly N95 masks, have caused both the former and current administration to grapple with how to use this power to combat the health crisis.<sup>2</sup> Additionally, rolling out the vaccine to ensure every American has access to preventative immunization is a new challenge that requires collaboration between the federal government and private industry.

While President Trump took a cautioned approach to invoking the DPA,<sup>3</sup> President Biden's COVID-19 response plan includes invoking the Defense Production Act more aggressively.<sup>4</sup> This policy change could mean that COVID-19 vaccines and healthcare supplies would become more readily and widely available if the government is compelling major health supply and pharmaceutical conglomerates to cooperate to meet the steady demand for essential supplies.

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<sup>1</sup> Barron Avery, Brian Johnson & Orga Cadet, *Impact of the President's Invocation of the Defense Production Act on Federal Contractors*, BAKER & HOSTETLER LLP. (2020), <https://www.bakerlaw.com/alerts/impact-of-the-presidents-invocation-of-the-defense-production-act-on-federal-contractors#4>.

<sup>2</sup> Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html>.

<sup>3</sup> CONGRESSIONAL RESEARCH SERVICE, DEFENSE PRODUCTION ACT (DPA): RECENT DEVELOPMENTS IN RESPONSE TO COVID-19 (2020), <https://fas.org/sgp/crs/natsec/IN11470.pdf>.

<sup>4</sup> Jessie Hellmann, *Biden releases national COVID strategy, will order agencies to use Defense Production Act*, THE HILL (Jan. 21, 2021, 5:00 AM), <https://thehill.com/policy/healthcare/535157-biden-to-order-agencies-to-use-defense-production-act-in-coronavirus-fight>.

Here's a quick guide to what this shift could mean for businesses grappling with economic fallout from the lockdowns.

## I. THE TRUMP ADMINISTRATION'S APPROACH: CAUTIONED AND NARROW USE OF DPA

On March 18th, President Trump signed an executive order activating the Defense Production Act.<sup>5</sup> As the country entered into a "new normal" of lockdowns and social distancing, Trump's invocation of the DPA powers were often targeted at particular businesses. Trump targeted 3M and Honeywell for their production of N95 masks, and GM for its production of ventilators.<sup>6</sup> The Trump administration also provided Honeywell, 3M, and other major PPE and mask producers antitrust protection, so they can coordinate mask distribution on a wider scale while avoiding antitrust lawsuits.<sup>7</sup>

Peter Navarro, in an interview in August, described the Trump administration's use of DPA as "talking softly and carrying a big D.P.A. stick," noting that Trump would call on private industries to collaborate to ramp up production when necessary.<sup>8</sup> However, critics of Trump cite this targeted and decentralized approach as a failure of leadership because bottlenecks in supply chains led to shortages in medical supplies which forced nearly 90 percent of nurses surveyed to reuse PPE, exposing them to a higher risk of infection.<sup>9</sup>

## II. THE BIDEN ADMINISTRATION'S APPROACH: AGGRESSIVE USE OF DPA

The Biden administration has already invoked the DPA more than the Trump administration, signing executive orders targeted to nationalize the COVID-19 Response. According to Tim Manning, President Biden's COVID-19 Supply Chain Coordinator, shortfalls in the supply of PPE, testing materials like cotton swabs, and gloves are a major concern for obtaining national control of the virus.<sup>10</sup> "Where we can produce more, we will. Where we need to use the Defense Production Act to help more be made, we'll do that too," said Manning.<sup>11</sup>

Another key member of Biden's White House Covid-19 Response team is Bechara Choucair, who serves as Biden's COVID-19 Vaccine Coordinator.<sup>12</sup> Choucair noted that Biden will likely also use the DPA to encourage faster vaccine roll out.<sup>13</sup> "The team will work with the

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<sup>5</sup> Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 (Mar. 18, 2020).

<sup>6</sup> Jacobs, *supra* note 2.

<sup>7</sup> Austen Hufford, *Mask Makers Work With FEMA, Get Antitrust Protection*, WALL ST. J. (Jan. 15, 2021, 7:00 AM), <https://www.wsj.com/articles/mask-makers-work-with-fema-get-antitrust-protection-11610712009>.

<sup>8</sup> Jacobs, *supra* note 2.

<sup>9</sup> Jacobs, *supra* note 2. See also Jessica Glenza, *Survey finds 87% of America's nurses forced to reuse protective equipment*, THE GUARDIAN (May 20, 2020), <https://www.theguardian.com/world/2020/may/20/survey-finds-87-of-americas-nurses-are-forced-to-reuse-protective-equipment>.

<sup>10</sup> Robin Foster & Ernie Mundell, *Biden Unveils Details of National Pandemic Response Plan*, CONSUMER HEALTH NEWS (Jan. 21, 2021), <https://consumer.healthday.com/1-21-biden-unveils-details-of-national-pandemic-response-plan-2650052863.html>.

<sup>11</sup> Foster & Mundell, *supra* note 10.

<sup>12</sup> Adam Cancryn, *Biden picks 3 coordinators for Covid-19 response*, POLITICO (Dec. 29, 2020, 5:03 PM), <https://www.politico.com/news/2020/12/29/biden-coronavirus-response-coordinators-451996>.

<sup>13</sup> Hellman, *supra* note 4.

states and the manufacturers to ensure that we're using the DPA as aggressively as needed to accelerate the supply of the vaccine," said Choucair.<sup>14</sup>

### III. HOW BIDEN'S AGGRESSIVE APPROACH COULD IMPACT BUSINESSES

A more aggressive federal approach to rollout could mean a faster economic recovery, if the United States could more quickly achieve herd immunity.<sup>15</sup> This could mean business could get back to normal in a shorter period of time, a key goal of the Biden administration.<sup>16</sup> Additionally, more coordination among suppliers of necessary medical supplies could make supply chains more efficient, lowering the chance of bottlenecks that would expose healthcare and other essential workers to greater risk of infection.<sup>17</sup>

However, the Chamber of Commerce has noted that the DPA is a "blunt instrument" and emphasized that requiring businesses like GM, M3, and Honeywell to go against their financial interests for public interests could be "counterproductive," "unhelpful," and "risky."<sup>18</sup> For example, GM may be required to prioritize ventilator production, where their profit margins are smaller, than their production of other, more profitable goods.

While it is too early to know the full impact of Biden's aggressive approach to invoking DPA, in the next few months, the shift from a decentralized to federal approach with respect to supply chains will likely be felt in all sectors of the American economy.

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<sup>14</sup> Hellman, *supra* note 4.

<sup>15</sup> WORLD HEALTH ORGANIZATION, *Coronavirus disease (COVID-19): Herd immunity, Lockdowns and COVID-19*, (Dec. 31, 2020), <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

<sup>16</sup> President-elect Joseph R. Biden, Remarks after receiving a COVID-19 briefing in Wilmington, Delaware. (Nov. 9, 2020). (noting that "[t]he goal [of his COVID-19 response] is to get back to normal as fast as possible.").

<sup>17</sup> Gavin Bade, *Days after ventilator DPA order, White House has done little to push GM*, POLITICO (Apr. 4, 2020), <https://www.politico.com/news/2020/04/02/white-house-general-motors-defense-production-act-161833>.

<sup>18</sup> Letter from Neil L. Bradley, Executive Vice President and Chief Policy Officer, U.S. Chamber of Commerce, to Elizabeth Warren, Sen., U.S. Senate (Mar. 25, 2020) (available at <https://www.uschamber.com/letters-congress/defense-production-act-response-letter>). It is important to note that key producers of PPE sit on the board of the Chamber of Commerce. See PUBLIC ACCOUNTABILITY INITIATIVE, *Unmasked: The Corporations Backing a Lobbying Campaign Against the Use of the Defense Production Act*, (Apr. 16, 2020), <https://public-accountability.org/wp-content/uploads/2020/04/UnmaskedReport.pdf>.