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*PRACTICE WITHIN THE DISTRICT OF COLUMBIA
IS LIMITED TO MATTERS AND PROCEEDINGS
BEFORE FEDERAL COURTS AND AGENCIES

MEMORANDUM

April 29, 2020

BY ELECTRONIC MAIL

FROM: Olsson Frank Weeda Terman Matz PC

RE: Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19

On April 28, 2020, President Trump issued an [Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19](#) (the Executive Order).

Under the Executive Order, beef, pork, and poultry are deemed “critical” materials per Section 101(b) of the Defense Production Act (50 U.S.C. § 4511(b)). Section 101(b) allows the President to control the general distribution of any “critical material” in the civilian market if the President “(1) finds that such material is 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 significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.” The Executive Order claims that this designation authorizes the President and his designee, the Secretary of Agriculture, to ensure that meat and poultry plants stay open by requiring them to perform contracts deemed necessary for national security purposes. The Executive Order notes that USDA will ensure these plants operate in accordance with the [CDC/OSHA guidance for meat and poultry workers and employers](#).

The Executive Order authorizes the Secretary of Agriculture to implement the Defense Production Act with respect to food supply chain resources, including meat and poultry. This delegation of authority would allow USDA to publish emergency regulations (without notice-and-comment) to implement the President’s order. The Executive Order also authorizes USDA to, in consultation with other federal agencies, allocate materials, services, and facilities necessary to ensure the continued supply of meat and poultry. This provision allows USDA to direct PPE and face

coverings to meat and poultry establishments. Although the Executive Order directs USDA to require meat and poultry plants to stay in operation, it does not authorize USDA or meat and poultry companies to compel workers to attend work and perform their job tasks.

There have been press reports stating that the Executive Order is intended to have the effect of shielding meat and poultry companies against liability (e.g., workers’ compensation and tort claims for negligence) if workers become sick or die while operations continue pursuant to the Executive Order. Section 707 of the Defense Production Act (50 U.S.C. § 4557) provides “No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act.” Federal courts are split on the extent of the liability shield provided by Section 707. Some federal decisions have interpreted Section 707 to primarily provide immunity against breach of contract claims from third-parties who face delayed or unfulfilled contracts due to a government order.¹ Other cases have interpreted Section 707 may provide some limited protection against product liability claims, but not negligence tort claims.² The U.S. Supreme Court has also held that Section 707 does not require the federal government to indemnify companies for the costs of defending or settling tort claims arising from a Defense Production Act contract.³

OFW is unaware of any reported decisions interpreting Section 707 to provide broad immunity against all forms of tort liability. Also, it is not clear that Section 707 would have any affect against a state or local health authorities order issued pursuant to state law.

Shortly after the Executive Order was published, USDA issued a [press release](#) announcing its intent to implement the Executive Order. The press release states that “[u]nder the Executive Order and the authority of the Defense Production Act, USDA will work with meat processing to affirm they will operate in accordance with the CDC and OSHA guidance, and then work with state and local officials to ensure that these plants are allowed to operate to produce the meat protein that Americans need.” USDA notes that it will continue to work with CDC, OSHA, FDA, and state and local officials to ensure facilities implementing the CDC/OSHA guidance can continue operating.

¹ See *U.S. v. Vertac Chemical Corp.*, 46 F.3d 803, 812 (8th Cir. 1995) (Section 707 does not shield manufacturers fulfilling contracts pursuant to § 101 from the responsibility to comply with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); see also *Hercules, Inc. v. U.S.*, 24 F.3d 188, 204 (Fed. Cir. 1994)(“[T]he intended protection of section 707 is analogous to that provided under the common-law doctrine of impossibility of performance.”).

² See *In re Agent Orange Product Liability Litigation*, 597 F.Supp. 740, 844 (E.D.N.Y. 1984) (“If Section 707 is to be applied to tort claims at all, it should only be read to bar claims for strict liability, not negligence. The former involve holding a defendant liable despite the fact it may not have been at fault and the liability thus truly “result[s] . . . from compliance with . . . this Act.”).

³ See *Hercules, Inc. v. U.S.*, 516 U.S. 471, 426-27 (1996).

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OFW anticipates USDA will be issuing statements, guidance, and other policy issuances in the coming days to implement the Executive Order. We will monitor these developments closely and pass this along to you.

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We trust this update is helpful. Please let us know if you have any questions or if we can assist you on any matter.