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SUMMARY OF SELECTED PROVISIONS OF THE DEFENSE PRODUCTION ACT (50 U.S.C. §§4501 ET SEQ.)

The following information is provided as an educational perspective on certain provisions of the Defense Production Act ("DPA"), and is not legal advice. As with any statute, regulation or rule, the interpretation and application of the DPA is subject to a variety of factors and circumstances. Accordingly, we encourage you to contact the following Reed Smith attorneys to discuss the application of the DPA to your particular circumstances:

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OVERVIEW OF THE DPA'S APPLICABILITY TO FOREIGN COMPANIES

There is no definition of "US Company" under the DPA. Nevertheless, the Congressional findings and statement of policy for the DPA establish that the authority granted to the President under the DPA is for the purpose of developing the *domestic* industrial base. *See* 50 U.S.C. 4502. The DPA defines the domestic industrial base as relating to "domestic sources" which, in turn, is defined by the DPA as "a business concern — (A) that performs *in the United States or Canada* substantially all of the research and development, engineering, manufacturing, and production activities required of such business concern under a contract with the United States relating to a critical component or a critical technology item." *Id.*

Accordingly, as it relates to the President's prioritization authority under DPA, such authority is intended to be exercised to develop domestic capability. Companies that are domiciled, headquartered, or organized outside of the United States, but that perform (likely through a US subsidiary) "substantially all of the research and development, engineering, manufacturing, and production activities required of such business concern under a contract with the United States relating to a critical component or a critical technology item" may also be subject to prioritized orders.

Further, it is also possible for the United States to request prioritization assistance relative to foreign sources under certain circumstances. For example, the implementing regulations for the DPA, in recognizing that the DPA has no authority outside of the United States, provides for the ability to request prioritization assistance in situations such as where bilateral security of supply arrangements are in place. (e.g. Australia, Finland, Italy, The Netherlands, Sweden, and the United Kingdom). *See* 15 C.F.R. 700.57

OVERVIEW OF LIMITATIONS ON LIABILITY UNDER THE DPA

Under Section 4557 of the DPA, a contractor has limited protection against liability for damages and penalties "for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to [the DPA]." This includes protection for compliance with rules that are later declared legally invalid. This protection is therefore limited to actions taken to comply with such rules, regulations and orders, and does not provide any blanket liability protection, such as against tort liability to injured third parties. Accordingly, compliance with rules, regulations and orders issued pursuant to the DPA will not necessarily result in indemnification by the government for product injuries to third parties.

The DPA also contains other protections, such as anti-trust protections for certain voluntary industry agreements that may be pursued by the President, such as for coordinating production of personal protective equipment. Such agreements that, for example, coordinate activities between private industry might normally be subject to civil and criminal legal action under anti-trust statutes, but are afforded protection when they occur under the DPA. *See, e.g.* 50 U.S.C. 4558. Such protection is limited and, for example, is not available where the offending action was taken for the purpose of violating the antitrust laws.