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Federal Authorities Support the Protection of Essential Components of the Value Chain to Ensure an Uninterrupted Supply of Food to Consumers

The food and agriculture sector has long been designated as a critical infrastructure sector that provides the essential services that underpin American society.¹ This sector must be secured by proactive and coordinated efforts of the federal, state, and local governments.² In the current COVID-19 crisis, these governments are authorized – and obliged – to help ensure the continued sourcing, production and distribution of food products to American consumers, both by supporting the infrastructure surrounding this sector and by waiving or not imposing restrictions that would limit the production and movement of these essential goods.³

President Trump’s declaration of emergency under the Stafford Act⁴ on Friday has the primary effect of unlocking federal assistance to state and local governments that can aid those entities with responding to the emergency. Such assistance is coordinated and provided by FEMA under the National Response Framework. It could take the form of federal funding or the direct provision to or augmentation of services by state and local governments. Funds or services made available to state and local agencies pursuant to the President’s emergency declaration could be used by those agencies to address roadblocks to the provision of certain need inputs. FEMA could use these funds to provide assistance directly to certain organizations that provide critical services surrounding the production and distribution of food, like communications, electric, water, and sewage utilities.⁵

Food regulators should follow the models of their fellow regulators in waiving restrictions, requirements, or other regulations not critically essential for food safety in order to facilitate the continued production and distribution of food. For example, the Federal Communications Commission (FCC) has responded to surging customer demand for broadband communications facilities by granting T-Mobile temporary permission to use additional spectrum bandwidth.⁶ The FCC has also indicated that it is willing to “expedite waivers and experimental licenses” to expand broadband access in underserved communities.⁷ In this vein, the FDA and USDA may need to take a more flexible approach to certain of their food inspection requirements, including at ports of entry, and work to address disruption in essential supply

¹ Presidential Policy Directive 21: Critical Infrastructure Security and Resilience (PPD-21), February 12, 2013; Homeland Security Presidential Directive/HSPD-9–Defense of United States Agriculture and Food, January 30, 2004.

² PPD-21.

³ Additionally, Title III of the Defense Production Act of 1950 might provide tools that the executive branch might use to support the food industry, though that Act is primarily aimed at making resources available for federal government procurement, not for private distribution.

⁴ 42 U.S.C. § 5121 *et seq.*

⁵ Stafford Act § 406(a)(3)(B); 42 U.S.C. § 5172; and 44 CFR § 206.221(e).

⁶ <https://www.fcc.gov/document/fcc-grants-t-mobile-temporary-spectrum-access-during-coronavirus>

⁷ <https://www.fcc.gov/document/commissioner-starks-statement-fccs-response-covid-19>

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chains. This could include prioritizing the inspection of imported foodstuffs and inspecting only the highest-risk products, in order to facilitate the continued importation of needed ingredients and other inputs necessary for food production. Such an approach could be taken in a manner consistent with the overarching authorities and mandates described above, as well as the National Infrastructure Protection Plan (NIPP) Food and Agriculture Sector-Specific Plan for 2015.

Disruptions in trucking, railroad, and aviation services may make it difficult for food producers to obtain inputs and distribute finished food products to retailers. Certain regulatory agencies have already taken steps to address such shortfalls while others may do so. For example, the Department of Transportation's Federal Motor Carrier Safety Administration has issued hours-of-service regulatory relief for commercial drivers, removing restrictions on the hours they may work to facilitate the movement of goods like medical and food supplies to affected areas. Government regulators should continue to consider what additional relief may be necessary or appropriate to help ensure the smooth and timely distribution of necessary food products. The President and the Secretary of Transportation also could consider taking steps to address the allocation of transportation resources, including refrigerated containers and trailers and pallets, under the authorities described above. And as airlines and railroads slash trips to accommodate declining demand, it may be appropriate to consider allowing goods previously transported as cargo to be transported on passenger flights and trains.

Finally, it will be critically important to ensure that food production and distribution facilities continue to operate, even if they are located in locked-down or quarantined areas. Consistent with the federal directives referenced above, federal, state, and local government authorities must work together to ensure that any local quarantines or lockdowns do not disrupt the production and distribution of food products. Workers must be permitted to move through and into quarantined areas if they are needed to assist with manufacturing. Government authorities could also consider granting expedited temporary worker visas to address labor shortages, particularly in the agriculture sector. Clear guidance from the CDC should help food production and distribution facilities make decisions about employee health and safety in a manner that will protect them and the public while not unduly hindering operations.

In sum, federal, state, and local governments have numerous authorities to help facilitate the prompt and continued production and distribution of food products in ample supply, and to waive or modify restrictions or regulatory requirements that are not essential at this time to ensure the continued flow of goods.