

Defense Production Act (DPA) Title III

The Defense Production Act (DPA or the Act) is an existing legislative mechanism which has the potential to support the financing of renewable energy technologies deemed essential for national defense. DPA was enacted into law on September 8, 1950 as a result of the Korean War, and has been used in various instances throughout history to assist with the strategic commercialization of innovative defense-related technologies. For example, the Act played a vital role in the establishment of the domestic aluminum and titanium industries in the 1950s, and in the 1980s the Act was used as an innovation tool to ensure the survival of the U.S. semiconductor base. Since its inception, the Act has been periodically reauthorized and amended, with the titles most relevant to the energy sector still in effect today.


Main Provisions. Title I authorizes the President to demand priority for defense-related products by issuing and prioritizing contracts or orders. Title III authorizes the President to "create assured, affordable, and commercially viable production capabilities and capacities for items essential for national defense." Effectively, Title III authorizes the President to provide incentives related to creation, expansion, or preservation of defense productive capacity, including:

- Government purchases and purchase commitments;
- Installation of production equipment;
- Development of substitutes and related research and development support; and
- Loans and loan guarantees

Title III is the portion of the Act best-suited to support energy technology grants, contracts, and/or loan guarantees and has also been used most frequently since the 1970's. However, there are certain restrictions in the loan and loan guarantee sections of the existing regulation which will serve to limit wide-scale use of the Act across all technologies. Sections 2091, 2092 and 2095 of the Defense Production Act state the following:

Except during periods of national emergency declared by the Congress or the President, a guarantee or loan may be entered into under this section only if the President determines that:

- I. The guaranteed contract, activity, or loan is for industrial resources or a critical technology item which is essential to national defense;*
- II. Without the guarantee or loan, United States industry cannot reasonably be expected to provide the needed industrial resources or critical technology item in a timely manner;*
- III. The guarantee or loan is the most cost-effective, expedient, and practical alternative for meeting the need involved; and*
- IV. The combination of the United States national defense demand and foreseeable nondefense demand is not less than the output of domestic industrial capability, as determined by the President, including the output to be established through the guarantee.*



The above-outlined requirements leave a fairly narrow scope of eligibility. However, if Congress and the President aspire to use the Act to play a significant role in meeting the DOD's various energy-related goals, it may be feasible to expand certain provisions.

Organization. Although DPA authority can be extended to all federal agencies, it has primarily been used by DOD. The DPA Title III Program Office is organized as a DOD-wide program, housed within the Office of the Secretary of Defense (OSD) and specifically within the Director of Defense Research and Engineering (DDR&E). While DDR&E is currently supporting several innovative energy-related technology grants and contracts using Title III authority, the DPA Program Office has not administered (nor has any other federal agency) a loan or loan guarantee using DPA authority in recent years.

Future Opportunities. In a March 30, 2011 speech at Georgetown University, President Obama announced support for "four next-generation biorefineries – each with a capacity of more than 20 million gallons per year" by mid-decade. The Obama Administration initially tasked DOE and USDA with funding the development of biorefineries, but with the current status of the DOE Title XVII Loan Program and the USDA Biorefinery Assistance Loan Program, neither agency currently has adequate funding to lead such efforts. Accordingly, Obama Administration officials are looking to the authority granted under Title III of the DPA as a vehicle for supporting this initiative. The DPA's Title III has the authority to support this effort, but funding must be formally allocated to this legislative vehicle.

To obtain funding for new Title III DPA efforts, the President can request funding in a budget request or budget amendment, Congress can encourage the President to allocate funding to DPA efforts and initiatives, or agencies can provide funding directly through offsets (re-allocating funds from other programs). Defense agencies as well as other Federal Agencies can offset the cost of initiating specific Title III efforts. Approximately \$300 - \$500 million has been identified between DOD, USDA and DOE budgets, although these funds have not yet been formally announced. Various sources have indicated that the aforementioned funds are likely to fund four to six biorefineries, but it is important to remember that the DPA also remains a potentially powerful vehicle for supporting other defense-related energy technology applications in the future.

The notion of utilizing DPA authority has support from important members of Congress and high-ranking officials within the Obama Administration, but the critical element of formally allocating funding to Title III remains. There is potentially the will to remedy this situation, but companies will play a critical role and will need to engage with Washington legislators and officials to encourage the use of DPA for commercializing fuels, and other energy-related technologies necessary to defense.

Please contact a WSGR Senior Advisor for additional information on how to position your company to pursue upcoming DPA opportunities.

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