



# Defense Production Act: Purpose and Scope

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## Summary

The Defense Production Act (DPA) was created at the outset of the Korean War to ensure the availability of the nation's industrial resources to meet the national security needs of the United States by granting the President powers to ensure the supply and timely delivery of products, materials, and services to military and civilian agencies.

The DPA codifies a robust legal authority given the President to force industry to give priority to national security production and is the statutory underpinning of governmental review of foreign investment in U.S. companies.

DPA authorities are not permanent. Rather, they are time-limited, undergoing periodic amendment and reauthorization. Of the seven titles contained within the original Act, four have been repealed. In 2008, Congress reauthorized the remaining titles of the DPA through September 30, 2009.

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## Introduction

The Defense Production Act (DPA) of 1950 (50 U.S.C. Appx § 2061 *et seq.*), as amended, confers upon the President authority to force private industry to give priority to defense and homeland security contracts and to allocate the resources needed. The original act was inspired by a message sent to Congress by President Harry S Truman at the outbreak of war in Korea in mid-1950. In his message, President Truman stated that the United States and the United Nations were responding to a military invasion of the Republic of Korea by forces from north of the 38<sup>th</sup> parallel, that the nation urgently needed additional military manpower, supplies, and equipment, and that the nation's military and economic preparedness were inseparable. He urged Congress to pass legislation that would guarantee the prompt supply of adequate quantities of needed military and civilian goods, including measures to help compensate for manufacturing demand growth caused by military expansion.

A number of factors encouraged President Truman to propose such legislation. Both the armed services and the defense industry supporting the nation's war effort had demobilized during the late 1940s after the cessation of World War II hostilities. With the return of peace, the Administration cut back military expenditures significantly. President Truman accentuated these cuts by placing heavy reliance on atomic weapons to provide for the nation's defense. The perceived power of the atomic arsenal justified, in the eyes of the Administration, substantial cuts in expensive, manpower-intensive conventional military capabilities. This enabled the President to propose and Congress to pass much-reduced defense appropriations.

In addition, the nation had recently experienced substantial economic and industrial turmoil. Demand for housing and consumer products, unleashed by the expiration of wartime economic controls, precipitated a series of postwar labor strikes. These reached their height in 1946 in a nationwide shutdown of passenger and freight rail service, leading President Truman to threaten to seize control of the railways and draft striking rail workers into the armed forces, placing them under military discipline. Though the presidential threats were never carried out, the strike served to illustrate the economic context in which the nation approached the Korean War.

## DPA Provisions and Jurisdiction

Much of what President Truman initially proposed affected national economic policies. As enacted on September 8, 1950 (H.R. 9176, P.L. 81-774), the DPA contained seven titles:

- **Title I: Priorities and Allocations** (authority to demand priority for defense-related products)
- **Title II: Authority to Requisition** (authority to requisition materials, property, and facilities for national defense, terminated in 1953)
- **Title III: Expansion of Productive Capacity and Supply** (authority to provide incentives to develop, modernize, and expand defense productive capacity)
- **Title IV: Price and Wage Stabilization** (authority to ration consumer goods, to solicit voluntary labor/industry cooperation on wage and price stability, and to fix wage and price ceilings, terminated in 1953)

- **Title V: Settlement of Labor Disputes** (authority to force settlement of labor disputes affecting national defense, terminated in 1953)
- **Title VI: Control of Consumer and Real Estate Credit** (authority to exercise consumer credit controls, to regulate real estate construction credit and loans, and to establish down-payment requirements on veterans' homes, terminated in 1953)
- **Title VII: General Provisions** (antitrust protection for voluntary industry agreements serving defense interests, and established a voluntary reserve of trained private sector executives available for emergency federal employment, among other authorities)

Prior to 1975, House rules did not permit bills to be referred to two or more committees. Precedents in both chambers did not allow divided or joint referrals, regardless of bill content. Instead, bills were assigned to committees based on the preponderance of their subject matter. Because much of the President's proposal dealt with economic policy, what became the Defense Production Act was assigned in 1950 to the House and Senate Committees on Banking and Currency (their successors are the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs). Although those parts of the Act dealing with the requisitioning of materials, wages and prices, labor, and credit are no longer in force, these committees have retained jurisdiction.

## Use of DPA Authorities

During the half-century that the DPA has existed, its authorities have been invoked in a variety of circumstances.

### Application of Title I

Title I authorities have occasionally been employed to give priority to certain defense systems. This has been done in order to ensure that companies do not divert design or production capacity from government contracts to potentially more lucrative commercial contracts, disrupting weapon development or production. For example, during the 1970s, the highest priority rating, "DX," was assigned to the M1 *Abrams* tank program.<sup>1</sup> Under development by Chrysler Corp., a company then suffering severe financial difficulties, the *Abrams*'s DX rating ensured that the program would continue to receive full company support. During January 2001, both Presidents William J. Clinton and George W. Bush invoked DPA powers, in conjunction with those granted in the Natural Gas Policy Act of 1978 (P.L. 95-621, 92 Stat. 3350), to ensure that emergency supplies of electrical power and natural gas continued flowing to California utilities, deflecting threatened electrical blackouts.<sup>2</sup> More recently, Title I was used in 2003 to prioritize supply of Precision Lightweight Global Positioning System Receivers to British military forces operating in Iraq.<sup>3</sup>

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<sup>1</sup> All prime contracts, subcontracts, or purchase orders supporting an authorized DOD program are assigned a priority rating under the Defense Priorities and Allocation System (DPAS). A DX rating, which must be approved by the President, is reserved for programs of the highest national priority. Those considered vital to national defense may be assigned a DO priority by the Secretary of Defense. All other contracts and orders are considered unrated. The Department of *Defense Priorities and Allocations Manual* (DOD 4400.1-M) explains the system in detail.

<sup>2</sup> Unattributed, "Bush Administration Extends Emergency Orders Requiring Electricity and Natural Gas Shippers to Continue Supplying California Utilities," *Foster Electric Report* 209, January 31, 2001, p. 6. The use of these (continued...)

## Application of Title III

Title III deals with expansion of national defense productive capacity and supply. The various sections generally authorize the President provide or guarantee loans to industry in order to expedite deliveries or expand discovery and production of essential materials, purchase industrial items or technologies for installation in government or private industrial facilities, and to encourage development of synthetic fuels.<sup>4</sup>

Congress funded DPA purchases at \$62.9 million for FY2007 and \$94.2 million for FY2008. DOD requested \$36.4 million for DPA purchases in FY2009, but Congress appropriated \$100.6 million. In recent years, DPA funding has been used for a Beryllium Supply Industrial Base Project, a Silicon Carbide Monolithic Microwave Integrated Circuits (MMIC) Device Production Project, a Traveling Wave Tube Amplifiers for Space Project, and a Power and Energy Initiative. An Advanced Structural and Armor Materials for Combat Vehicles Project is scheduled to begin as a DPA-funded procurement in FY2011. Purchases are funded through the Procurement – Defense-Wide appropriations account in the annual Defense Appropriation Act.<sup>5</sup>

Since the enactment of a 1984 amendment, Title III has also required the Secretary of Commerce to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade.<sup>6</sup> In the most recent report, released in December 2008, ten U.S. defense contractors reported having entered into 43 defense export sales contracts during Calendar Year (CY) 2007 with 18 countries valued at \$6.74 billion. These contracts included a reported 290 direct and 297 indirect discrete offset transactions.<sup>7</sup>

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authorities was criticized by some as improper. Bart Jansen, “Gramm Raps Cold War Law,” *San Antonio Express-News*, February 10, 2001, p. 19A. DPA prioritization and allocation authorities were not available to support military deployments during *Operations Desert Shield* and *Desert Storm* in 1990 and 1991. DPA authority expired on October 20, 1990, and Congress did not reauthorize the statute until August 17, 1991, long after the cessation of hostilities. In issuing Executive Order 12742 on January 8, 1991, “to achieve prompt delivery of articles, products, and materials to meet national security requirements,” President George H.W. Bush cited different law (50 U.S.C. Appx 468, 10 U.S.C. 4501 and 9501, and 50 U.S.C. 82). Executive Order 12742, “National Security Industrial Responsiveness,” 56 *Federal Register* 1079, January 8, 1991.

<sup>3</sup> Mark Selinger, “DHS Preparing Guidance for Using Defense Production Act,” *Aerospace Daily*, June 6, 2003, p. 5.

<sup>4</sup> Sec. 2096 of Title III grants the President additional authorities to procure synthetic fuel supplies when he determines the existence of a petroleum product shortage and bars the courts from reviewing that determination.

<sup>5</sup> Sec. 2094 created a Defense Production Act Fund into which appropriations and proceeds from other DPA activities are funneled. The statute limits the Fund to a year-end maximum balance of \$400 million, with any excess required to be turned over to the general Treasury.

<sup>6</sup> Offsets are defined as industrial “compensation practices required as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act [AECA] and the International Traffic in Arms Regulations [ITAR].” Offsets can be *direct*, where offsetting sales of goods and services are related to the military export sale being contracted, or *indirect*, where they are not. See 15 C.F.R. § 701.2. This report is prepared by the Department of Commerce Bureau of Industry and Security (BIS) and is posted online at <http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/offsets/default.htm>.

<sup>7</sup> U.S. firms are required to report annually to BIS on contracts for the sale of defense-related items or defense-related services to foreign governments or foreign firms that are subject to offset agreements exceeding \$5,000,000 in value. The BIS does not assess the overall economic impact of offsets, but notes that the greatest portion, by value, of offset transactions took the form of purchases or subcontracts (59.3%) in 2007. Technology transfers, a transaction that could represent a loss of domestic competitive advantage, represented 16.7% of offset value.

## **Application of Title IV**

Title IV authorized the President to impose wage and price controls as needed for the national defense. Immediately after enactment on September 8, 1950, President Truman did so as part of the Administration's effort to support anticipated defense needs in Korea, creating the Economic Stabilization Agency (ESA) to resurrect the kind of economic controls that had moderated market disruptions during World War II.

Disputes arising from the controls placed on wages and prices soon embroiled ESA's subsidiary Wage Stabilization Board (WSB) in a contract dispute between labor unions and steel manufacturers. The WSB proved unable to bring the sides to agreement, and the unions announced a nationwide steel strike beginning on April 9, 1952. Truman issued an executive order on April 8 nationalizing the steel industry and averting the strike.<sup>8</sup> The Supreme Court, though, found that the President had overreached his authority.<sup>9</sup> When the mills were returned to their owners in June, the unions struck, precipitating an industrial crisis across a number of supply and manufacturing sectors of the nation's economy. Congress terminated Titles II, IV, V, and VI of the DPA in 1953.

## **Application of Title VII**

The general provisions of Title VII support a number of programs and commercial activities. For example, one section immunizes companies against liability for legal damages or penalties that result from complying with rules or regulations authorized by the DPA, such as giving priority to fulfilling government contracts, even if that rule or regulation is later held to be invalid. Another protects companies taking part in voluntary agreements for preparedness programs and expansion of production capability and supply against antitrust litigation.

It is this latter provision (50 U.S.C. Appx § 2158), for example, that enables U.S.-flag commercial carriers to join the Voluntary Intermodal Sealift Agreement (VISA). VISA provides an opportunity for operators of militarily useful coastal and seagoing vessels to pre-negotiate contracts with DOD's U.S. Transportation Command (USTRANSCOM) and the Maritime Administration (MARAD) in order to commit assets (such as tug/barge combinations) to government use if contingencies warrant. The VISA arrangements are the maritime analogue to the more familiar Civil Reserve Air Fleet (CRAF), also created under the DPA umbrella, to which U.S. airlines dedicate certain aircrew and aircraft to supply government airlift when required.

Another section of Title VII (50 U.S.C. Appx § 2170) grants the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such action. The statute empowers the President to suspend for any period he considers appropriate, or to prohibit, transactions found to threaten impairment of national security. This is the so-called Exon-Florio Amendment, which designates a pre-existing interagency body, the Committee on Foreign Investment in the United States (CFIUS) chaired by the Secretary of the Treasury, as the organ through which the President acts.<sup>10</sup>

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<sup>8</sup> Executive Order 10340, "Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies," 17 *Federal Register* 3139, April 10, 1952.

<sup>9</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>10</sup> CFIUS, a cabinet-level body, was created by executive order on May 7, 1975 (Executive Order 11858, "Foreign (continued...)



Exon-Florio authority was first used by President George H. W. Bush in early 1990 to force the China National Aero-Technology Import and Export Corp. (CATIC), an export-import company associated with the Ministry of Aerospace Industry of the People's Republic of China, to divest itself of Mamco Manufacturing, Inc., a Seattle, Washington, firm specializing in precision aircraft parts machining.<sup>11</sup> In 2005, the threat of a CFIUS review contributed to the decision by the directors of the China National Offshore Oil Corp. (CNOOC) to drop a planned takeover of Unocal (Union Oil Company of California).<sup>12</sup>

A second example of CFIUS review is that of the acquisition of British firm Peninsular & Oriental Steam Navigation Co. (P&O) in February 2006 by Dubai Ports World (DP World), a company owned by the emirate of Dubai. The transaction elevated DP World to the position of third-largest container-port operator. The CFIUS review was initiated because a number of P&O operations were located within the United States. Although the acquisition was approved, DP World found it necessary to sell its U.S. operation to a New York-based investment management company, AIG Global Investment Group, before the end of the year.<sup>13</sup>

## Amendments to the DPA

The DPA is temporary law requiring reauthorization approximately every two-to-three years, though the most recent extension in 2008 covered a single year.<sup>14</sup> These frequent reviews have offered Congress a number of opportunities to amend the statute, and its current form differs significantly from the original. In the wake of the 1952 steel strike, Congress terminated Titles IV (wage and price stabilization) and V (settlement of labor disputes) on April 30, 1953, and Titles II (authority to requisition) and VI (control of consumer and real estate credit) two months later.

Titles I, III, and VII remain in effect, though they have evolved. A number of provisions relating to energy supplies, such as defining energy as a "strategic and critical material" and preventing the President from unilaterally instituting the rationing of gasoline, have been added over the years. As mentioned earlier, a 1984 amendment requires firms contracting for the sale of weapon systems or defense-related items to report to the government any required offset agreement exceeding a certain threshold value. A 1988 amendment empowers the President, acting through CFIUS, to review certain corporate mergers, acquisitions, and takeovers and to take actions needed to protect the national security of the United States.

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Investment in the United States," 40 *Federal Register* 20263, May 9, 1975). Exon-Florio was enacted on August 23, 1988, as Title V, Subtitle A, Part II, § 5021 of the Omnibus Trade and Competitiveness Act of 1988 (H.R. 4848, P.L. 100-418, 102 Stat. 1425).

<sup>11</sup> Michael Mecham, "Bush Overturns Sale to China of Seattle Parts Supply Firm," *Aviation Week & Space Technology*, February 12, 1990, p. 34.

<sup>12</sup> CNOOC was reported to be 70% owned by the government of the People's Republic of China. Heather Timmons, "China Oil Giant Expected to Vote Today on Unocal Bid," *New York Times*, June 22, 2005, p. 4.

<sup>13</sup> Neil King, Jr., and Greg Hitt, "Dubai Ports World Sells U.S. Assets," *The Wall Street Journal*, December 12, 2006, p. A2.

<sup>14</sup> Defense Production Act Extension and Reauthorization of 2008 (P.L. 110-367, H.R. 6894), enacted on October 8, 2008.

## Expiration of DPA Authorities

50 U.S.C. Appx § 2166 provides for the termination of DPA Titles I, III, and VII on September 30, 2009, with the exception of four sections, which would remain in effect:

- § 2074 – prohibiting the imposition of wage or price controls without prior congressional authorization or the compellance of any private person to assist in the production of chemical or biological warfare capabilities;
- § 2157 – company immunity from liability for complying with DPA-authorized regulations or granting priority to government contracts;
- § 2158 – immunity from antitrust liability for participation in voluntary arrangements for preparedness programs or expansion of production capacity and supply (such as VISA and CRAF); and
- § 2170 – Exon-Florio, giving the President and CFIUS review authority over certain corporate acquisition activities.

Notwithstanding that restriction, the section provides for the earlier termination of the entire Act by concurrent resolution or presidential proclamation or for earlier termination of any section by concurrent resolution.

## Conclusion

The continued use of DPA authorities testify to their utility in support of defense activities and capabilities. The upcoming termination of much of the existing authority may provide an opportunity to examine whether DPA authority would remain useful as both U.S.'s economic policies and the nation's defense industrial base adapt to changing strategic, defense, security, and industrial realities.

The DPA was originally crafted as a comprehensive economic and industrial policy approach to an immediate wartime emergency. Over time, the statute's scope has narrowed considerably while the nature of the threat to national security, the organization of the military services, and the supporting industrial base have fundamentally transformed.

Assessing the future efficacy of the DPA in its current or some amended form would be a difficult and complex undertaking. Some could take a position that the domestic industrial base the Act supports no longer exists, having become part of a globalized system of trade and international relationships, particularly with political allies aligned with the United States. Others might argue that international trade and technology partners, no matter how closely allied with the United States, might prove unreliable in crises, and that the DPA represents the best means to ensure that domestic resources are available when needed most.

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