

CLIENT ALERT

President Biden Employs Defense Production Act and Tariff Act in Domestic Clean Energy Manufacturing Push

June 7, 2022

On June 6, 2022, President Biden issued a White House Fact Sheet (“Fact Sheet”) outlining President Biden’s [“Bold Executive Action to Spur Domestic Clean Energy Manufacturing”](#) along with five related Defense Production Act (“DPA”) Presidential Determinations^[1] (“Presidential Determinations”) and a [Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Module from Southeast Asia](#) (the “Declaration”). The Fact Sheet states the President is (1) authorizing use of the DPA to accelerate domestic production of clean energy technologies; (2) encouraging domestic solar manufacturing capacity through the use of master supply agreements with enhanced domestic preferences; and (3) creating a two-year trade regulation bridge as domestic manufacturing for solar products scales up. The White House stated that these actions are being taken to lower energy costs, reduce risks to the power grid, and mitigate climate change. The Department of Energy (“DOE”) also [released a statement](#) on June 6 about the DPA Presidential Determinations which describes DOE’s concerns with regard to each material or technology for which a determination was issued. The statements made by the White House and DOE also make clear that these actions to employ the DPA are part of the Administration’s broader “all of government” approach to addressing Environmental Justice, with the intention to “strongly encourage projects with environmental justice outcomes that empower the clean energy transition in low income communities historically overburdened by legacy pollution.”

Defense Production Act

The five Presidential Determinations together assert that insulation, electroliers, fuel cells, platinum group metals, electric heat pumps, transformers, electric power grid components, and solar photovoltaic modules and module components (including ingots, wafers, solar glass, and cells) are industrial resources, materials, or critical technology items essential to the national defense. The Determinations allow the DOE to enter arrangements under Section 303 of the DPA (“Title III”), 50 U.S.C. § 4533, for purposes of developing domestic industry sufficient to meet U.S. requirements for these various products and to avoid product shortfalls that would impair national defense capabilities. Section 303 funding agreements can be for specific purchases of industrial resources or critical technology items for government use or resale; purchase commitments for the same; for the encouragement of exploration, development, and mining of critical and strategic materials or other materials; for development of production capabilities, and for increased use of emerging technologies to support the transition from research and development to commercial or national defense applications.

In 2012, [Executive Order 13603](#) delegated broad DPA authorities to the DOE under Title I (priorities and allocations authorities), Title III (expansion of productive capacity, and supply), and Title VII (voluntary agreements, among other things). The June 6 Presidential Determinations provide additional item determinations and guidance against which DOE can exercise its DPA authority.

The 2-year Solar Tariff Exemption

The Declaration authorizes a 24-month tariff exemption for solar cells and modules, exported from Cambodia, Malaysia, Thailand, and Vietnam, and that are not already subject to an antidumping or countervailing duty order as of June 6, 2022. This action helps to temporarily resolve the uncertainty caused by an ongoing investigation by the Department of Commerce to determine if supply routes to and from these countries were set up to circumvent the tariffs imposed on solar equipment produced in China. The possibility of having to pay retroactive tariffs combined with the overall supply chain and labor challenges related to the global pandemic put many solar development projects on hold and lead to others being cancelled.

New solar projects benefiting from the tariff relief provided by the Declaration could also benefit from the 26% investment tax credit (“ITC”) provided that the projects are started before the end of 2022 and placed in service before January 1, 2026. For projects started in 2023 and placed in service before January 1, 2026, the rate drops to 22%. For commercial projects started after 2023, the rate drops permanently to 10% and residential projects would no longer be eligible for an ITC unless the richer and expanded credit provisions from the late Build Back Better bill are reintroduced as part of other legislation.

Impact

It is unclear what the full impact of the Presidential Determinations will be on the energy industry in general or over what timeline any such impacts will occur. Similar to executive and legislative actions taken at the end of 2020, end of 2021, and beginning of 2022 regarding critical minerals supply chain issues, these presidential actions will support long-term development of certain energy technologies and materials. However, more immediately, given the critical importance of tax equity arrangements in solar project financing, President Biden’s solar tariff relief provides a much needed opening for the solar industry to take advantage of the higher tax credit rates and to rebuild the solar development pipeline.

[1] Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Insulation (Presidential Determination No. 2022-16), June 6, 2022; Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals (Presidential Determination No. 2022-17), June 6, 2022; Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electric Heat Pumps (Presidential Determination 2022-18), June 6, 2022; Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Transformers and Electric Power Grid Components, June 6, 2022; Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Solar Photovoltaic Modules and Module Components, June 6, 2022.

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