

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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CODSIA Case – 2022-003

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Defense Acquisition Regulations System
Attn: Ms. Kimberly Bass
OUSD(A–S) DPC/DARS, Room 3B941
3060 Defense Pentagon
Washington, DC 20301–3060
Osd.dfars@mail.mil

Reference: DFARS Case 2021-D015, Restriction on Certain Metal Products

Dear Ms. Bass:

On behalf of the members of the Council of Defense and Space Industry Associations (CODSIA)¹, please accept these comments in response to the proposed rule to implement amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) Restriction on Certain Metal Products (DFARS Case 2021-D015). The global supply chain for rare earth metals and magnets is almost completely dominated by China, which controlled 58% of rare earth mining and 92% of magnet manufacturing in 2020.² The United States produces only 15% of the global supply of raw materials for these magnets,³ and while the nation has several nascent downstream processing and manufacturing efforts, current domestic production is limited. Investments and incentives to boost the domestic supply chain, especially in the

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of six associations—Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), and Professional Services Council (PSC). CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² Seligman, L. (2022, December 14). *China dominates the rare earths market. This U.S. mine is trying to change that.* POLITICO. <https://www.politico.com/news/magazine/2022/12/14/rare-earth-mines-00071102>

³ Seligman, L. (2022, December 14). *China dominates the rare earths market. This U.S. mine is trying to change that.* POLITICO. <https://www.politico.com/news/magazine/2022/12/14/rare-earth-mines-00071102>

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separation and refining phases, point the way to securing stable supplies of these critical components.

CODSIA appreciates the Federal Government’s efforts to mitigate U.S. reliance on certain critical materials from China. The U.S. Department of Defense (DoD), for example, has taken affirmative steps to incentivize domestic companies to establish a secure supply chain for rare earth materials. Approximately \$200M in Defense Production Act (DPA) Title 3 or Industrial Base Analysis and Sustainment (IBAS) funds have been awarded to two companies to design and build separation and processing facilities.⁴ DoD is also working with our allies to build a secure supply chain.

CODSIA encourages the DoD and other federal agencies to continue to support research and development on economical and sustainable processing technologies for rare earth elements, as well as development of alternatives. As DoD acknowledged in its June 2021 report on “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth”—a 100-day review required by Executive Order 14017, “America’s Supply Chains” (<https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>)—the Defense Industrial Base (DIB) has a relatively small number of requirements for rare earth elements and critical materials as compared to the commercial sector. Therefore, it is essential that the U.S. Government promote the development of supply chains that economically address risk for both the commercial and national security sector.

DoD’s June 2021 report also examined U.S. reliance on rare earth minerals from foreign sources and concluded that “Independent of permitting activities, a reasonable industry benchmark for the development of a mineral-based strategic and critical materials project is not less than ten years away.” (See chart below).

⁴ Bureau of Industry and Security, (2022). *FACT SHEET: Biden-Harris Administration Announces Further Actions to Secure Rare Earth Element Supply Chain*. U.S. Department of Commerce. Retrieved from <https://www.bis.doc.gov/index.php/documents/section-232-investigations/3142-2022-09-fact-sheet-biden-harris-administration-announces-actions-to-secure-rare-earth-element/file>.

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Figure 3: Overview of Development Timeline for Greenfield Strategic & Critical Materials Projects¹³

1. Establish Resource (2-5 years)	2. Mineralogy (1-3 years)	3. Scoping Studies (1-3 years)	4. Beneficiation/Extraction/ Separation Pilot Plant (2-10 years)
<ul style="list-style-type: none"> ▪ Establish resource that meets local stock market regulations 	<ul style="list-style-type: none"> ▪ Identification of minerals bearing the target product 	<ul style="list-style-type: none"> ▪ Inferred resource ▪ Bench scale process ▪ Baseline environmental study 	<ul style="list-style-type: none"> ▪ Demonstrate viability ▪ Generate data for feasibility studies ▪ Samples sent for customer evaluation ▪ Generate data for environmental studies
5. Environmental Assessments & Approvals (Variable)	6. Letters of Intent (Concomitant with 1-5 years)	7. Feasibility Study & Funding (2-4 years)	8. Construction & Startup (2-3 years)
<ul style="list-style-type: none"> ▪ Public review 	<ul style="list-style-type: none"> ▪ Integrate operations with customer supply chains 	<ul style="list-style-type: none"> ▪ ±15 percent accuracy for capital expenditure and operating expenditure estimates 	<ul style="list-style-type: none"> ▪ Sophisticated engineering, procurement and construction studies ▪ De-bugging/Optimizing operations

This conclusion contradicts DoD’s statement in the Federal Register that the January 1, 2026, effective date of the proposed prohibitions “provides a reasonable period for industry to develop alternative sources of supply for covered materials from sources other than the People’s Republic of China, the Russian Federation, the Democratic People’s Republic of North Korea, and the Islamic Republic of Iran.”

CODSIA members are not aware of rare earth elements magnet production to the necessary quality or scale to meet aerospace and defense demand—nor of such production that will meet the restrictions of section 844 of the NDAA for FY 2021 and the proposed implementing regulations by January 1, 2026. Furthermore, CODSIA members believe that removing the commercial-off-the shelf (COTS) exceptions and including the entire and most remote aspects of the supply chain represents a nearly inexecutable burden for companies to manage. While this management is theoretically achievable, such an undertaking in today’s operating environment would require an immense expenditure of resources.

CODSIA provides the following recommendations to address identified concerns:

- Class Domestic Non-availability determination (DNAD): CODSIA recommends that DoD utilize its authority to grant a class DNAD until the Department can certify there are viable sources of suppliers that can meet Congressional requirements. (See DFARS 225.7002-2)
- Qualification programs: DoD should plan now and publish guidance on how programs should qualify new compliant material and emerging compliant providers. The DIB and Department have strict requirements for qualifying material into aerospace and defense systems, given the potential impact on performance and safety. As such, qualification programs can take several years for major systems containing multiple covered material applications. With dozens of unique engineering changes required to substitute compliant magnets into DoD systems, the impact of the requirement is monumental, with unknown

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implications for cost and schedule. Direction should be given to the services now to be cognizant of the individual program/system switching costs and make overarching decisions to mitigate the cost and schedule impacts of these developments as soon as possible.

Additionally, the Department should take a centralized DoD approach to qualifying emerging compliant metal and material producers in the Defense Industrial Base. Without a centralized approach, the Department creates an incentive for dozens of programs and sub-tier producers to perform duplicative testing. These significant costs will ultimately be borne by the tax payer.

- Compliant and qualified sources: As compliant sources become available, CODSIA recommends DoD create a certification process, trusted marketplace of commercial suppliers, or qualified producers list of compliant sources. A positive list of compliant sources will significantly ease the burden of implementing the requirement consistently across the DIB.
- Arcane statutory and regulatory requirements. The Federal Register provides a set of scenarios that well demonstrate the complexity of the overlapping restrictions of specialty metals. Taken as a whole, DFARS 225.7003-2 and the clause at DFARS 252.225-7009, along with the current restriction at DFARS 225.7018-2 and the clause at DFARS 252.225-7052 (“Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten), means that most, if not all suppliers, are unlikely to be compliant with this proposed rule. CODSIA strongly recommends DoD engage with Congress and industry to consolidate and clarify sourcing restrictions for rare earth magnets and critical minerals.

In the interim, CODSIA recommends DoD publish more scenarios to clarify applicability of the DFARS restrictions. The current examples are helpful, but they need to be more definitive. For example, the business jet example ends in a statement “potentially noncompliant with the proposed rule.” The term potentially is ambiguous. There is a need for additional unambiguous examples.

Conclusion:

Enhancing the resiliency of strategic and critical material supply chains requires partnerships between industry and DoD. The proposed DFARS rule levies requirements which are not possible to comply with in the proposed timeframe. In addition, this type of requirement works against resilient supply chain practices by forcing the DoD to rely on defense-unique suppliers and procurement practices. DoD must work within the realities of the critical minerals and rare earth magnet marketplace to lay out a path for secure

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sources of supply, accounting for the cost and timeline of 1) standing up new sources of supply; and 2) transitioning critical defense system programs to those sources.

Thank you for your attention to these comments. We welcome the opportunity to discuss them with you and/or the drafting team. If you have any questions or need any additional information, please do not hesitate to contact CODSIA's lead on these comments, Kea Matory, Director of Legislative Policy, National Defense Industry Association. She can be reached at kmatory@ndia.org.

Sincerely,



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