



June 16, 2023

Ms. Linda Neilson
Director, Defense Acquisition Regulations Systems
U.S. Department of Defense
Alexandria, VA 22350

Re: Request for Comment on Defense Federal Acquisition Regulation Supplement: Restriction on Certain Metal Products (DFARS Case 2021-D015) (88 Fed. Reg. 25609-25612, April 27, 2023)

Dear Ms. Neilson:

The U.S. Chamber of Commerce (Chamber) submits the following comments in response to the Department of Defense's (Department) notice of proposed rulemaking to implement Section 844 of the National Defense Authorization Act for Fiscal Year 2021¹ (FY21 NDAA), which provides restrictions on the acquisition of certain covered materials from North Korea, the People's Republic of China, Russia, and Iran.

A significant component of Chamber members participating in contracting and supplier relationships with the Federal Government have provided input. These comments are informed by this vast range of industries and showcase concerns of the Government's most valued partners.

Concern:

Prior to the FY21 NDAA, 10 USC 2533c prohibited the Secretary of Defense from purchasing samarium-cobalt and neodymium-iron-boron magnets produced in China. In Section 844 of the FY 2021 NDAA, Congress expanded the prohibition to prohibit the acquisition of *magnets mined, refined, separated, or melted in China*². Due to concerns that no magnet producers could compliantly produce under this prohibition, the effective date for the expanded prohibition was set at five years after enactment (January 1, 2026). The Chamber applauds investments made by the Department to assist industry in reaching compliance by incentivizing domestic sources and taking steps to establish secure supply chains for these and other rare earth materials.

However, the Chamber is concerned that despite this harmonized line of effort made by the Department, the United States Government and industry have not secured a sufficient supply of aerospace-grade rare earth elements magnets that comply with the expanded prohibition and will therefore be unable to meet the needs of the Department by January 1, 2026.

¹ Public Law 116-283.

² Public Law 116-238 also renumbered 10 USC 2533c as 10 USC 4872 (Section 1870)

Proposal:

Without guaranteeing such sources of compliant magnet producers in advance of implementing the current rulemaking, the Department jeopardizes delivery of its critical systems. In order to address this risk to the warfighter, and also to advance the underlying policy objectives of Section 844, the Chamber strongly recommends that the Department advocate to Congress a modification to Section 844 of the FY21 NDAA by striking the effective date of prohibition (January 1, 2026) and replacing it with an effective date of 180 days after the Secretary of Defense certifies there are sufficient secure sources of compliant magnet producers to meet the needs of the Department.

This method was used by Congress in Section 857 of the FY23 NDAA², when it imposed an effective date for limiting the Department's use of strategic and critical materials from China to after the Secretary of Defense certifies that commercially viable providers of these materials exist outside of China.

Recommended Amendments or Clarification to the Proposed Rule:

As it applies to *neodymium-iron-boron magnets*, proposed rule provides that the "restriction includes [the] entire supply chain from mining of neodymium, iron, and boron through production of finished magnets." However, the proposed rule also provides that the restriction does not apply to an end item containing a covered material that is a neodymium-iron-boron magnet manufactured from recycled material if the milling of the recycled material and sintering of the final magnet takes place in the United States. It is encouraging that the DOD is taking initiative in the area of sustainability by ensuring materials recycled in the US are not subject to the conditions of the rule.

The Chamber recommends, in the interest of furthering sustainability and consistent policy, the same exception provision be applied to the other magnets that are subject to this restriction.

In addition, the Chamber notes that Section 844 revises the commercially available off-the-shelf (COTS) items exception to the restriction of 50 percent or more by weight to now include all covered material and remove the individual exception to only tungsten. While likely well-intended, implementation will be quite problematic given the challenge of determining a percentage content of covered material by weight in a COTS item as packaged and sold in commercial markets. Therefore, clarification is needed in the rulemaking to provide a consistent methodology for contractors to determine qualification criteria under the proposed exception at (c)(1)(i)(A) of proposed DFARS clause 252.225-7052. The Chamber acknowledges that this matter may be best taken up alongside the other recommended changes to Section

² H.R.7776 - James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 117th Congress (2021-2022).

844, and looks forward to working with the Department of Defense in assuring the exceptions clause can be effectively and efficiently implemented.

Conclusion:

For the health and protection of the Department's most critical systems, the Chamber urges the Department to support a revision to the effective date of prohibition stated in Section 844 of the FY21 NDAA accordingly. Thank you for the opportunity to comment; our members recognize and support the warfighter's mission and appreciate the Department's effort to include the industrial base in the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Webster", with a long horizontal flourish extending to the right.

Keith Webster
President, Defense and Aerospace Council &
Federal Acquisition Council
U.S. Chamber of Commerce