

**JANUARY 25, 2022**

For more information,
contact:

J. Michael Taylor
+1 202 626 2385
jmtaylor@kslaw.com

Jeffrey M. Telep
+1 202 626 2390
jtelep@kslaw.com

Jamieson L. Greer
+1 202 626 5509
jgreer@kslaw.com

Patrick J. Togni
+1 202 626 2958
ptogni@kslaw.com

Mercedes C. Morno
+1 202 626 8981
mmorno@kslaw.com

Christopher Hyner
+1 202 626 2623
chyner@kslaw.com

Adam Harper
+1 202 393 3799
arharper@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue,
NW
Washington, D.C. 20006-
4707
Tel: +1 202 737 0500

Senators Introduce Bipartisan Bill To End U.S. Dependence On Chinese Rare Earth Elements

Legislation Introduced In The Context Of Significant Federal Attention To Vulnerable Supply Chains, Including Critical Minerals And Materials

On January 14, 2022, Senators Tom Cotton (R-AR) and Mark Kelly (D-AZ) introduced the Restoring Essential Energy and Security Holdings Onshore for Rare Earths (“REEShore”) Act “to protect America from the threat of rare-earth element supply disruptions, encourage domestic production of those elements, and reduce [the United States’] reliance on China.” The Senators stated that “[e]nding America’s dependence on the [Chinese Communist Party] for extraction and processing of these elements is critical to winning the strategic competition against China and protecting our national security” and that the REEShore Act “will strengthen America’s position as a global leader in technology by reducing our country’s reliance on adversaries like China for rare earth elements.”

This bipartisan legislation is designed to support the domestic production of rare earth metals and rare earth metal products in the United States. To that end, the REEShore Act would (1) require the establishment of a rare earth metals strategic reserve, (2) impose disclosure requirements for certain Department of Defense (“DoD”) contractors, (3) prohibit the use of rare earth metals processed or refined in China in DoD contracts, (4) require audits of compliance with the REEShore Act, (5) require the United States Trade Representative (“USTR”) to investigate China’s practices regarding rare earth metals, and (6) require reports on U.S. ally efforts to reduce dependence on rare earth metals from non-allied countries.

As introduced, the REEShore Act defines “rare earth metals” to include the following: beryllium, cerium, cobalt, dysprosium, erbium, europium, gadolinium, graphite, holmium, lanthanum, lithium, lutetium, manganese,



neodymium, praseodymium, promethium, samarium, scandium, tantalum, terbium, thulium, tungsten, ytterbium, and yttrium.

The REEShore Act does not discuss how specific minerals were identified for inclusion in the definition of “rare earth metals” in the bill. We note that the initial version of the bill does not appear to include a number of critical minerals that were included in a recent draft list of critical minerals for which the Department of Interior (“DoI”) recently requested public comments in a [Federal Register](#) notice. DoI is in the process of considering those comments prior to issuing its final list. Affected companies should consider whether the list of “rare earth metals” in the REEShore Act should be modified as the bill progresses through Congress.

If enacted, the REEShore Act would:

- Require DoD and DoI to report to Congress on the rare earth metal needs of the United States and to establish a strategic reserve of rare earth metals and rare earth metal products by 2025 (the “Strategic Reserve Report”);
- Require contractors that supply DoD with a system that contains a rare earth metal permanent magnet to disclose the magnet’s country of origin;
- Prohibit the use of rare earth metals processed or refined in China from use in certain export-controlled DoD systems, wherever located, by December 31, 2026;
- Require the Comptroller General to audit compliance with the REEShore Act’s contractor disclosure requirement for magnet country of origin and the prohibition on using Chinese rare earth metals for export-controlled DoD systems;
- Require USTR to initiate an investigation of China’s policies and practices related to rare earth metals under Section 301 of the Trade Act of 1974 (“Section 301”); and
- Require DoD to report to Congress on efforts by ally countries to reduce their dependence on rare earth metals from China or other non-allied countries.

RARE EARTH METALS REPORT AND STRATEGIC RESERVE

If enacted as currently drafted, the REEShore Act would require DoD and DoI to submit the Strategic Reserve Report to Congress within 270 days. The report must describe:

- The strategic requirements of the United States regarding stockpiles of rare earth metals and processed and refined rare earth metal products; and
- The requirements for such metals and products to support the United States for one year in the event of a supply disruption.

We note that the bill does not contain a definition of “rare earth metal products” at this time. The legislation also would mandate that DoI “take such actions as are necessary to procure all types of rare earth metals and processed and refined rare earth metal products in appropriate quantities to support the strategic requirements described in the report” within three years of the submission of the Strategic Reserve Report.

The REEShore Act also would require DoD and DoI to reassess the strategic requirements described in the Strategic Reserve Report annually and submit a report to Congress about the reassessment.



RARE EARTH METAL PERMANENT MAGNET DISCLOSURES

Under the REEShore Act, any contractor that provides a system with a rare earth metal permanent magnet to DoD will be required to disclose the origin of the magnet. This disclosure (“Magnet Disclosure”) must identify the country or countries in which:

- The rare earth metals used in the magnet were mined;
- The rare earth metals were refined into oxides;
- The rare earth metals were made into metals and alloys; and
- The magnet was sintered or bonded and magnetized.

If the contractor is unable to make the required Magnet Disclosure, DoD will require the contractor to establish a supply chain tracking system and to make the Magnet Disclosure within 180 days of providing the magnet to DoD.

By December 31, 2022, DoD would be required to submit a report to Congress that includes:

- A summary of the Magnet Disclosures;
- An assessment of the extent of reliance by the United States on foreign countries, and especially countries that are not allies of the United States, for rare earth metals;
- A determination with respect to which systems are of the greatest concern for interruptions of rare earth metal supply chains; and
- Any suggestions for legislation or funding that would mitigate supply chain security gaps.

PROHIBITION ON CHINESE RARE EARTH METALS

The REEShore Act would prohibit the use of rare earth metals processed or refined in China for any DoD contracts entered into or renewed on or after December 31, 2026 that are for the procurement of a defense system controlled under the Arms Export Control Act. The Secretary of Defense may waive this prohibition in limited cases where rare earth metals of sufficient quantity and quality are not available at reasonable prices from sources outside of China and the waiver is in the interests of national security.

COMPTROLLER GENERAL AUDITS

The REEShore Act would require the Comptroller General to audit compliance with the Magnet Disclosure requirements and the prohibition on the use of Chinese rare earth metals. The Comptroller General also would be required to audit compliance with an existing provision of U.S. law that was enacted in the National Defense Authorization Act for Fiscal Year 2019 (“2019 NDAA”). The existing provision prohibits DoD from procuring samarium-cobalt magnets, neodymium-iron-boron magnets, tungsten metal powder, tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy, tantalum metals and alloys, or any end item that contains the foregoing from North Korea, China, Russia, or Iran.¹ The first audit would need to be completed by September 30, 2022, with future audits to be completed every two years thereafter.

As currently drafted, the REEShore Act also requires the Comptroller General to report to Congress (within 30 days after submitting its audit report) on:

- The inclusion by DoD of necessary contracting clauses in relevant contracts; and
- Compliance by DoD contractors with the Magnet Disclosure requirement, the prohibition on Chinese rare earth metals, and the 2019 NDAA prohibition.



The REEShore Act directs the Comptroller General to “provide the Department of Justice [“DoJ”] with the resources and authorities needed for any enforcement actions against entities that have failed to comply with the [REEShore Act’s] requirements.”

SECTION 301 INVESTIGATION

Within 90 days of its enactment, the REEShore Act would require USTR (in coordination with the Department of Commerce), to initiate an investigation under Section 301 into whether China’s acts, policies, and practices “related to technology transfer, intellectual property, or innovation with respect to rare earth metal mining, separation, metallization, alloying, or magnet manufacturing, or related processes” are in violation of Section 301. Not later than 180 days after initiating the Section 301 investigation, USTR would submit a report to Congress (“Section 301 Report”) “assessing the necessity of trade enforcement actions to deter the Government of the People’s Republic of China from further interference in the rare earth metals market.”

The Section 301 Report must include:

- A summary of actions taken by China to disrupt supply chains for rare earth metals;
- A summary of the world market for rare earth metals at each stage of the supply chain, including the ability of producers in the United States and countries that are allies of the United States to meet the national security and commercial needs of the United States;
- Determinations with respect to whether further action under title III of the Trade Act of 1974 (19 U.S.C. 2411 et seq.), section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 14 1862), or any other provision of law is necessary to deter China from further interference in the rare earth metals market; and
- Recommendations for such other authorities as the Secretary considers necessary to deter China from further interference in the rare earth metals market.

ALLIES AND RARE EARTH METALS

The REEShore Act states that it “shall be the policy of the United States to encourage countries that are allies of the United States to eliminate their dependence on non-allied countries for rare earth metals to the maximum extent practicable.” To support this policy, the REEShore Act requires DoD (in coordination with the Department of State (“DoS”)), to submit a report not later than December 31, 2022, and annually thereafter, that:

- Describes in detail the discussions of DoD and DoS with countries that are allies of the United States concerning supply chain security for rare earth metals;
- Assesses the likelihood of those countries discontinuing the use of rare earth metals from China or other countries that DoD and DoS deem to be of concern; and
- Assesses initiatives in other countries to increase rare earth metals production capabilities.

TAKEAWAYS

DoD contractors and other companies that are involved in the mining, processing, or production of rare earth metals and rare earth metals products should carefully review the REEShore Act. While the bill’s ultimate prospects for passage are unclear at this time, the proposed legislation portends what should be a series of significant developments with respect to this industry in the near future. DoD is required to issue an intensive report on the critical supply chain for the defense industrial base by February 24, 2022, and it is likely that the report will contain additional comprehensive policy and enforcement proposals that are designed to address shortcomings and vulnerabilities in the supply chain for rare earth



metals and downstream products. Affected companies should take steps now to assess the potential implications of the bill (and potentially to participate in the legislative process as the bill is considered by Congress).

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

| | | | | | |
|-----------|-----------|-------------|-------------------|----------------|------------------|
| ABU DHABI | CHARLOTTE | GENEVA | MIAMI | PARIS | SINGAPORE |
| ATLANTA | CHICAGO | HOUSTON | MOSCOW | RIYADH | TOKYO |
| AUSTIN | DUBAI | LONDON | NEW YORK | SAN FRANCISCO | WASHINGTON, D.C. |
| BRUSSELS | FRANKFURT | LOS ANGELES | NORTHERN VIRGINIA | SILICON VALLEY | |

¹ See 10 U.S.C. § 2533c.