Overview

On September 30, President Trump issued Executive Order (EO) 13953 on “Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries and Supporting the Domestic Mining and Processing Industries.” In the EO, the President declared a national emergency under the International Emergency Economic Powers Act (IEEPA), in order to “deal with the threat posed by our Nation’s undue reliance on critical minerals, in processed or unprocessed form, from foreign adversaries.” The President also directed a group of federal agencies to recommend possible executive actions to ensure an uninterrupted supply of critical minerals for the US economy.

The EO defines “critical minerals” by reference to EO 13817 on “A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,” under which the Department of the Interior (DOI) defined “critical minerals” to include: aluminum (bauxite), antimony, arsenic, barite, beryllium, bismuth, cesium, chromium, cobalt, fluorspar, gallium, germanium, graphite (natural), hafnium, helium, indium, lithium, magnesium, manganese, niobium, platinum group metals, potash, the rare earth elements group, rhenium, rubidium, scandium, strontium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium, and zirconium. The new EO does not change the DOI list, but emphasizes that the list will be periodically updated “to reflect current data on supply, demand and concentration of production as well as current policy priorities.” We expect the next update to occur in spring 2021.

Under EO 13953, the Departments of Defense, Treasury, Commerce (DOC), Energy (DOE), and Agriculture, DOI, USTR, and other relevant agencies will issue both independent and joint-agency reports to the president within the next 30-60 days, depending on the report, that contain recommendations for executive actions to limit US imports of critical minerals (click here for chart). The EO suggests that such executive actions could include tariffs, quotas, or other import restrictions. The reports will also recommend potential incentives that will promote a domestic mining and processing industry for critical minerals. Specifically, DOI is instructed to explore possibilities of expanding domestic mining operations via the Defense Production Act and using EO 13603 on “National Defense Resources Preparedness” to “provide grants to procure or install production equipment for the processing of critical minerals.” In addition, DOE and DOI are tasked with exploring possible loan guarantee programs under the Energy Policy Act of 2005 for mining operations that adhere to clean environmental practices.
The EO specifically identifies China as a country that the US heavily depends on for the steady flow of critical minerals. It notes that 80% of US rare earth elements are supplied by China and that, for 31 of the 35 critical minerals contained on the DOI critical minerals list, the US imports more than half of its annual consumption and has no domestic production capacity for 14. Several US industries (e.g., hydraulic fracturing, semiconductors, batteries, 5G) are highlighted as being dependent on these critical minerals in their respective supply chains. The EO notes that given the vital nature of these minerals and these industries, non-market foreign adversaries, such as China, cannot be principal suppliers to the United States. The order justifies this by stating that the United States must "guard against the possibility of supply chain disruptions and future attempts by our adversaries or strategic competitors to harm our economy and military readiness." The order does not suggest that the critical mineral supply chain must be onshored to the United States entirely, however. It specifies that supply chains should include trusted partners as a viable alternative supplier for US imports, provided that these partners meet responsible mining, business and labor standards.

Addressing a perceived over-reliance on critical mineral imports has been a priority for this administration. In addition to requiring publication of a critical minerals list, EO 13817 required several federal agencies to investigate a "dependency of the United States on foreign sources [that] creates a strategic vulnerability for both its economy and military to adverse foreign government action, natural disaster, and other events that can disrupt supply of these key minerals," and DOC issued an interagency report containing a government action plan on critical minerals.

Congress has also taken steps to address the issue. In particular, the 2021 Fiscal Year National Defense Authorization Act (NDAA) includes provisions that direct DOD to issue a report on "critical minerals and metals and vulnerabilities in the supply chain." It also includes a "Statement of Policy with Respect to Critical Minerals" in which DOD is charged with ensuring that by 2030 the US will "fully meet the demands of the domestic defense industrial base, [and] eliminate the dependence of the US on unsecure sources of supply of strategic minerals and metals." The statement also suggests that to achieve these goals requires providing "incentives for the defense industrial base to develop robust processing and manufacturing capabilities in the United States to refine strategic minerals and metals for the Department of Defense."

While the order does represent potential opportunities for domestic producers, the potential for import restrictions being imposed also looms. A variety of legal and policy responses to the order are likely under development or will be rolled out soon, and a potential change in administration is unlikely to radically alter US policy direction, if at all.

It is worth noting that the European Commission is also taking steps to increase the security of the European Union's mineral supply chain, announcing an Action Plan on Critical Raw Materials in early September. The Commission's Action Plan also contains a list of critical raw materials, as well as a description of the challenges for building resilience, sustainability, and open strategic autonomy with regard to the supply of those materials, and a set of related action items. On September 29, the Commission further announced the creation of the European Raw Materials Alliance. The purpose of the Alliance will be to connect industrial actors, EU Member States authorities, and civil society in order to diversify the sources of supply and achieve open strategic autonomy for the rare earths and magnets value chains in Europe.

Interested stakeholders should be thinking proactively about how to engage with the relevant authorities in both the European Union and the United States on these issues.

Practices

Economic Sanctions

Export Controls