

## CLIENT ALERT

### New Executive Order Supports Domestic Sources of Critical Minerals

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Pointing to perceived risks posed by the lack of domestic sources of certain critical minerals needed for military applications, infrastructure, and the modern economy, President Donald J. Trump issued an [Executive Order on September 30, 2020](#), that declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) and the National Emergencies Act (50 U.S.C. § 1601 et seq.) to address the country's reliance on foreign sources for these minerals.

The Executive Order notes that the United States is dependent on China as the source for many kinds of minerals used in a range of industrial and military applications, and that China has taken various actions, including flooding international markets, to make it uneconomical for the United States and other countries to develop domestic sources of these minerals.

The Executive Order directs the Department of the Interior to investigate the country's reliance on foreign sources of critical minerals and to report to the President within 60 days any recommended actions, including the imposition of tariffs, quotas, or other import restrictions, that may be taken against China and other countries whose economic practices threaten to undermine the health and growth of the United States. The Secretary of the Interior is also directed to consider whether it can provide grants "to procure or install production equipment for the production and processing of critical minerals in the United States" pursuant to the Defense Production Act and authority previously delegated under Executive Order 13603 (National Defense Resources Preparedness).

With the declaration of a national emergency, the President would have broad authority under the International Emergency Economic Powers Act to investigate and prohibit financial transfers involving any banking institution, "to the extent such transfers or payments involve an interest of a foreign country or national thereof" and to regulate, block or prevent financial transactions including acquisitions, holding, transporting, importing or exporting involving "any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States."

While the Department of Defense regularly uses the Defense Production Act to assist with the procurement of materials and services, the Trump Administration also utilized the Korean War era law multiple times to direct the Secretary of Health and Human Services to prioritize and allocate medical resources, to prevent hoarding of medical supplies, and to prevent the export of personal protective equipment in response to the Covid-19 pandemic. It was also used in 2000-2001 to respond to the California energy crisis by directing natural gas providers to deliver natural gas to a utility. The United States has also used the International Emergency Economic Powers Act multiple times to prohibit financial transactions and block property transfers for those involved in illicit drug trafficking, terrorism, human rights violations, or other activities but, according to the Congressional Research Service, it has not been used to place tariffs on imported goods or implement domestic policy.

The Executive Order also directs the Secretary of Energy to publish within 30 days guidance clarifying whether projects to support the domestic supply chains for minerals are eligible for loan guarantees pursuant to Title XVII of the Energy Policy Act of

2005, as amended, and funding pursuant to section 136 of the Energy Independence and Security Act of 2007, as amended (the Advanced Technology Vehicles Manufacturing incentive program).

The Executive Order also states that the United States needs to improve its domestic mining and processing capacity for other minerals and reduce its reliance on minerals sourced from countries that lack adequate human rights, child labor, and environmental protections, directing relevant agency heads to accelerate the issuance of permits and the completion of projects to expand and protect the domestic mining supply.

Finally, the Executive Order directs the Secretary of the Interior, the Secretary of Energy and the Administrator of the Environmental Protection Agency to consider whether their existing authorities could be used “to accelerate and encourage the development and reuse of historic coal waste areas, material on historic mining sites, and abandoned mining sites for the recovery of critical minerals.” The Government Accountability Office issued [a report in March 2020](#) estimating there are at least 140,000 abandoned hardrock mining features located on land administered by the federal government and that lack of funding and concerns about legal liability have prevented widespread cleanup efforts or activities to reprocess tailings at these sites.

This Executive Order builds upon [Executive Order 13817](#) issued on December 20, 2017 (A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals), which directed the Secretary of the Interior to identify which minerals are critical to the national defense and economy and declared that it is the policy of the federal government to identify new sources of critical minerals, to increase activity at all levels of the supply chain, and to streamline leasing and permitting processes. After a public notice and comment process, the Department of the Interior published on May 18, 2018, [a final list](#) that identified 35 minerals as critical, including aluminum (bauxite), cesium, chromium, cobalt, graphite (natural), helium, indium, lithium, magnesium, manganese, platinum group metals, potash, the rare earth elements group, strontium, tantalum, tin, titanium, tungsten, uranium, vanadium, and zirconium.

While the mining industry may see long-term benefits from the United States government’s policy and financial support to develop domestic sources of critical minerals and the facilities used to process and refine the materials for use in consumer goods, batteries, and products, in the short term, the Executive Order and an any resulting escalation of the trade war with China could pose a risk to existing supply chains. Industries that utilize critical minerals should closely monitor how the Department of the Interior, the Department of Energy, and the Environmental Agency respond to the directives in this Executive Order.

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