

## DOE's Proposed Definition of Foreign Entities of Concern\*

\*Note: There are two separate Federal Register notices for this action. A notice from the Department of Energy proposes the FEOC interpretation. A notice from the Treasury Department formally adopts the Energy interpretation into the Treasury regulations and proposes administrative and certification procedures specific to the 30D credit.

**Agency:** Department of Energy

**Action:** Notice of proposed interpretive rule

**Comment Deadlines:** 30 days after *Federal Register* publication (scheduled 12/4)

**Public Hearing:** Upon request

**Federal Register Notices:** [Here](#)

### Key Links:

- [Inflation Reduction Act Text Amending 30D Credit](#) (p.366)
- [Foreign Entity of Concern Definition in the Bipartisan Infrastructure Law](#) (p.1)
- [Department of Commerce CHIPS Definitions for "Foreign Entity" and "Foreign Entity of Concern"](#) (p.9) (March 2023)
- [Treasury 30D White Paper](#) (December 2022)
- [Treasury Proposed Rule on Critical Mineral and Battery Component Requirements](#) (March 2023)
  - [ZETA Summary](#)
- [IRS Clean Vehicle Tax Credits FAQ Document](#) (October 2023)
- [Battery Materials Processing & Manufacturing Grants Announcement](#) (November 2023)

### ZETA Written Comments:

- [Comments to Treasury on the Design of 30D](#) (November 2022)
- [Comments to Treasury on the 30D Critical Mineral and Battery Component Requirements](#) (June 2023)

### Overview

The Department of Energy issued a proposed interpretive rule to define the statutory term "foreign entity of concern" (FEOC) in the Infrastructure Investment and Jobs Act. The statutory definition provides that, among other criteria, a foreign entity is a FEOC if it is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation." DOE is proposing language to clarify the term "foreign entity of concern" by providing interpretations of the following key terms: **foreign entity**; **government of a foreign country**; **subject to the jurisdiction**; and **owned by, controlled by, or subject to the direction**, among other key ancillary terms.

The Treasury Department is proposing a concurrent rule to formally incorporate the DOE interpretations into the Treasury regulations and outline the certification procedure for manufacturers to comply with the 30D FEOC requirements. In the interest of maintaining focus on each key element of today's actions, a summary of the proposed Treasury requirements will be provided to ZETA members in a separate document.

## Key Terms

- **Foreign entity**
  - A government of a foreign country;
  - A natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual;
  - A partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country;
  - An entity organized under the laws of the United States that is owned by, controlled by, or subject to the direction of a foreign entity.
- **Government of a foreign country**
  - A national or subnational government of a foreign country;
  - An agency or instrumentality of a national or subnational government of a foreign country;
  - A dominant or ruling political party (e.g., Chinese Communist Party (CCP)) of a foreign country; or
  - A current or former senior foreign political figure.
- **Subject to the jurisdiction**
  - A foreign entity incorporated or domiciled in, or has its principal place of business in a covered nation; or
  - With respect to the critical minerals, components, or materials of a given battery, a foreign entity engaging in the extraction, processing, or recycling of critical minerals, the manufacturing or assembly of such components, or the processing of such materials in a covered nation.
- **Owned by, controlled by, or subject to the direction**
  - 25% or more of an entity's board seats, voting rights, or equity interest are cumulatively held by another entity, whether directly or indirectly via one or more intermediate entities; or
  - With respect to the critical minerals, battery components, or battery materials of a given battery, the entity has entered into a licensing arrangement or other contract with another entity (a contractor) that entitles that other entity to exercise effective control over the extraction, processing, recycling, manufacturing, or assembly (collectively, "production") of the critical minerals, battery components, or battery materials that would be attributed to the entity.
- **Cumulatively held**
  - The combined interest in an entity held, directly or indirectly, by all other entities that qualify as a *foreign entity*.
  - Where an entity that qualifies as a *government of a foreign country* that is a covered nation enters into a formal arrangement to act in concert with another entity or entities that have an interest in the same third-party entity, the cumulative board seats, voting rights, or equity interests of all such entities are combined for the purpose of determining the level of control attributable to each of those entities.
- **Indirect control**

- If a parent entity (including the government of a foreign country) directly holds 50% or more of a subsidiary entity's board seats, voting rights, or equity interest, then the parent and subsidiary are treated as equivalent in the evaluation of control, as if the subsidiary were an extension of the parent and any holdings of the subsidiary are fully attributed to the parent.
- If a parent entity directly holds less than 50% of a subsidiary entity's board seats, voting rights, or equity interest, then indirect control is attributed proportionately.
- **Effective control**
  - The right of the contractor in the contractual relationship to determine the quantity or timing of production, to determine which entities may purchase or use the output of production, or to restrict access to the site of production to the contractor's own personnel; or the exclusive right to maintain, repair, or operate equipment that is critical to production.
  - In the case of a contract with a FEOC, a contractual relationship will be deemed to not confer effective control by the FEOC if the applicable agreement reserves expressly to one or more non-FEOC entities all of the following rights:
    - To determine the quantity of critical mineral, component, or material produced;
    - To determine the timing of production, including when and whether to cease production;
    - To use the critical mineral, component, or material for its own purposes or, if the agreement contemplates sales, to sell the critical mineral, component, or material to entities of its choosing;
    - To access all areas of the production site continuously and observe all stages of the production process; and
    - To independently operate, maintain, and repair all equipment critical to production and to access and use any intellectual property, information, and data critical to production, notwithstanding any export control or other limit on the use of intellectual property imposed by a covered nation subsequent to execution.

### **Owned, Controlled, or Subject to the Jurisdiction or Direction of a Foreign Government**

The guidance takes a two-pronged approach to determining whether a **foreign entity** is a FEOC:

1. If an entity is **subject to the jurisdiction** of a government of a foreign country that is a covered nation, the entity is a FEOC.
2. If an entity is **owned by, controlled by, or subject to the direction** of a government of a foreign country that is a covered nation in a cumulative amount greater than 25%, the entity is a FEOC.

The guidance hinges the owned by, controlled by, and subject to the direction terms (collectively referred to as "control") on whether an entity cumulatively holds more than 25% of board seats, voting rights, or equity interest in another entity. Control is evaluated based on the **cumulatively held** interest in an entity held, directly or indirectly, by all other **foreign entities**. If the

**government of a foreign country** is a covered nation and it directly or **indirectly controls** more than 25% of an entity, then that entity is a FEOC.

DOE's proposed interpretation provides for both (1) control via the holding of 25% or more of an entity's board seats, voting rights, or equity interest, and (2) control via license or contract conferring rights that amount to **effective control**.

### **Subsidiaries**

The guidance addresses parent-subsidary relationships through the **indirect control** definition. For purposes of determining how much control is **cumulatively held** by a **foreign entity**, a parent entity (including the **government of a foreign country**) that controls more than 50% of the subsidiary is deemed to be in 100% control, as if the subsidiary is an extension of the parent. If the parent controls less than 50% of the subsidiary, then indirect control is attributed proportionally.

### **Intellectual Property**

Intellectual property is addressed via the **owned by, controlled by, or subject to the direction** definitions. An entity would be considered a FEOC if it has entered into a licensing arrangement or other contract with another entity that entitles that other entity to exercise **effective control** over the production<sup>1</sup> of the critical minerals, battery components, or battery materials.

Based on this, licensing of IP from a FEOC licensor does not seem to automatically make the licensee a FEOC, provided the licensee maintains **effective control** over the operations. If the licensor retains control, then FEOC could be triggered.

### **Additional Comment Requested**

DOE requests comment on whether use of its determination authority<sup>2</sup> could provide a tool for limiting attempts to evade restrictions and what DOE may deem "unauthorized conduct." DOE requests specific comment on whether, in addition to or instead of defining "owned by, controlled by, or subject to the direction of" to include effective control via contractual arrangement, DOE should consider whether a given contractual or licensing arrangement, or operational practice with a contractor or licensor, is a means of evading restrictions on production by a FEOC that would warrant use of its determination authority.

DOE is also considering whether to provide entities with the opportunity to voluntarily request a review of contracts and licensing arrangements by DOE in order to provide additional certainty regarding whether effective control by a FEOC is present. DOE requests comment on whether such a voluntary pre-review process would be beneficial and administrable, including input on what process steps would be reasonable and the types of documents that should be submitted for review.

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<sup>1</sup> Defined collectively as extraction, processing, recycling, manufacturing, or assembly.

<sup>2</sup> Section 40207(a)(5)(E) of BIL includes as FEOCs those foreign entities "determined by the Secretary [of Energy], in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States."