ZETA | ZERO EMISSION TRANSPORTATION ASSOCIATION

Treasury's Proposed Implementation of DOE Foreign Entities of Concern Definitions for the 30D Credit*

*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 adds administrative and certification procedures specific to the 30D tax credit.

Agency: Department of the Treasury
Action: Notice of proposed rulemaking
Comment Deadlines: 45 days after *Federal Register* publication (scheduled 12/4)
Public Hearing: Upon request
***Federal Register* Notice:** 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 batteries in any vehicle placed in service after December 31, 2024 must be FEOC compliant. Under the proposed guidance, Treasury asks qualified manufacturers (OEMs) to trace cells using a serial number or similar identification system. The guidance spells out the certification procedure for determining that a battery is FEOC-compliant and the associated reporting requirements. At the same time, Treasury acknowledges that tracing low-value materials and exact masses of critical minerals/associated constituent materials within a cell may not be immediately possible. With this in mind, the guidance provides room for interim exceptions and requests feedback via public comment.

Key Terms

- ***Qualified Manufacturer***
  A manufacturer that meets the requirements described in section 30D(d)(3). For the purposes of this summary, this term is used interchangeably with OEM.

- ***New Clean Vehicle***
    - Any vehicle that meets Section 30D(d) requirements *and* one that the manufacturer noted as meeting the requirements in a correct and timely periodic written report submitted to the IRS.
- ***Applicable Critical Mineral***
    - Any critical mineral listed in Section 45X(c)(6).
- ***Constituent Material***
    - Any component that forms part of a battery and that is manufactured or assembled from one or more components or constituent materials that are combined through industrial, chemical, and physical assembly steps (e.g. powders of cathode active materials, powders of anode active materials, foils, metals for solid electrodes, binders, electrolyte salts, and electrolyte additives)
- ***Battery Component***
    - Any component that forms part of a battery and that is manufactured or assembled from one or more components or constituent materials that are combined through industrial, chemical, and physical assembly steps (e.g. anode, cathode, battery cell, or battery module).
- ***Non-Traceable Battery Materials***
    - Specifically identified low-value battery materials that may originate from multiple sources and are often commingled during refining, processing, or other production processes by suppliers to such a degree that the qualified manufacturer cannot, due to current industry practice, feasibly determine and attest to the origin of such battery materials.
- ***Low-Value Battery Materials***
    - These are determined in comparison to the total value of the battery (e.g. make up a very small percentage of the final product). Historically, these are also materials that manufacturers had no reason to trace and are therefore not immediately traceable.
    - Treasury identifies applicable critical minerals contained in electrolyte salts, electrode binders, and electrolyte additives as exemplar low-value battery materials, as these make up less than 2% of the value of applicable critical minerals in the battery.

FEOC Determinations

Entities

Whether an entity is a FEOC is determined at the time of the entity's performance of the relevant activity.

- For applicable critical minerals, this is the time of extraction, processing, or recycling.
- For battery components, this is the time of manufacturing or assembly.

Critical Minerals

An applicable critical mineral is determined to be FEOC-compliant at the end of its processing or recycling into a constituent material. In general, the determination of FEOC-compliance would account for each step of extraction, processing, or recycling through the step in which such

mineral is processed or recycled into a constituent material. This rule applies even if the mineral is not in a form listed in section 45X(c)(6)), such as nickel sulphate that is used in production of a nickel-manganese-cobalt cathode active powder. Thus, for example, an applicable critical mineral that is not extracted by a FEOC but is processed by a FEOC is not FEOC-compliant.

1. *For constituent materials:*
   A constituent material is associated with an applicable critical mineral if the critical mineral in question has been processed or recycled into a constituent material. This applies even if that processing or recycling transformed the mineral into a form not listed in section 45X(c)(6).

   However, an applicable critical mineral would be disregarded for purposes of the determination *if it is fully consumed in the production of the constituent material or battery component and no longer remains in any form in the battery* (e.g. certain solvents used in electrode production).

2. *For Recycled Elements:*
   Determining if an applicable critical mineral or associated constituent material that is incorporated into a battery via recycling is FEOC-compliant takes into account *only activities that occurred during the recycling process*.

   Applicable critical minerals and associated constituent materials that are recycled would be subject to FEOC-compliance determination if the recyclable material contains an applicable critical mineral, contains material that was transformed from an applicable critical mineral, or if the recyclable material is used to produce an applicable critical mineral at any point during the recycling process. Thus, for example, an applicable critical mineral derived from recyclable material that was recycled by an entity that is not a FEOC would be FEOC-compliant even if such mineral may have been extracted by a FEOC prior to its inclusion in the recyclable material.

Proposed Procedure: Determining FEOC Compliance for Batteries

To determine if a battery complies with FEOC guidance, an OEM must *physically track* FEOC-compliant battery subcomponents, including battery cells, to the final product.

1. First, the manufacturer must determine if battery components and critical minerals (and the associated constituent materials) comply by tracking them through the development process.

2. Next, the manufacturer must determine that the cell is FEOC-compliant by tracing compliant subcomponents (components, critical materials, and associated constituent materials) elements to *specific* battery cells.
   a. Cells should be tracked using a serial number or similar identification system.
   b. Individual components must be physically tracked to the specific battery cells into which they are incorporated.

c. The mass of critical minerals must be physically tracked into the specific battery cells into which they are incorporated.

Allocation-Based Exception
Treasury will allow an allocation-based exception for this part of the tracking process. Under this exception, the determination that a cell is FEOC-compliant can be made by **allocating the mass of applicable critical materials and associated constituent materials to specific battery cells** manufactured or assembled in a battery cell production facility *without* physically tracking of the mass of applicable critical minerals and associated constituent materials.

However, this rule comes with several caveats.

- This is a temporary exclusion that sunsets after December 31, 2026.
- This exclusion **does not apply to battery components**, which must be physically tracked.
- To use the rule, OEMs must submit a report during the upfront review process (compliant battery ledger, described below).

The process for allocating critical minerals also follows a specific framework.

- Allocations can only be made within the type of constituent materials (such as powders of cathode active materials, powders of anode active materials, or foils) in which such mineral is contained.
- Masses of an applicable critical mineral may not be aggregated across constituent materials with which such applicable critical mineral is not associated
- An allocation of mass of an applicable critical mineral may not be made from one type of constituent material to another.
- Any allocation with respect to applicable critical minerals and their associated constituent materials must be allocated within one or more specific battery cell product lines of the battery cell production facility, such that a particular mass of constituent material is not treated as fungible across different battery chemistries and designs.

A qualified manufacturer can only choose to use the allocation-based exception on a limited number of cells. This number may not exceed the number of battery cells for which there is enough FEOC-compliant quantity of every applicable critical mineral. That number will necessarily be limited by the applicable critical mineral that has the lowest percentage of FEOC-compliant supply. For example, if a qualified manufacturer allocates all of applicable critical mineral A, that is 20 percent FEOC-compliant, and all of applicable critical mineral B, that is 60 percent FEOC-compliant, to a battery cell product line, no more than 20 percent of the battery cells in that battery cell product line may be FEOC-compliant.

3. Finally, the battery components, including battery cells, are physically tracked to specific batteries, in accordance with the rules for the determination of FEOC-compliant

batteries. A serial number or other identification system must be used to physically track FEOC-compliant batteries to specific new clean vehicles.

Tracing Low-Value Materials (De Minimis)

In General

Where possible, manufacturers must conduct (and attest to conducting) an upfront due-diligence procedure for tracing low-value materials. Essentially, this procedure must comply with currently-available industry tracing standards and must give the OEM reasonable certainty as to the provenance of applicable critical minerals, constituent materials, and battery components. Such tracing standards may include international battery passport certifications and enhanced battery material and component tracking and labeling.

Exceptions

Treasury and IRS acknowledge that that industry has not developed standards or systems for tracing certain low-value materials with precision, and that this is exacerbated by the practice of commingling such materials within the broader materials-processing supply chain. Until this issue is resolved, Treasury is proposing a transition rule through December 31, 2026 that would temporarily exclude a specific list of identified non-traceable battery materials from the due diligence requirements of the qualified manufacturers.

Under the transition rule for non-traceable materials, a qualified manufacturer can determine that a battery cell is FEOC-compliant by excluding non-traceable battery materials, and their associated constituent materials, from the tracking process.

To use this rule, manufacturers must submit a report during an upfront review process. In the report, the OEM must explain how it will comply with the excluded entity restrictions once the transition rule is no longer in effect and all materials must be fully traced.

Who is Responsible for Tracing?

A third-party manufacturer or supplier that operates a battery cell production facility may make the determination that a cell is FEOC-compliant in lieu of the OEM. However, the manufacturer or supplier must follow due diligence procedure and must be contractually-obligated to both provide the OEM sufficient information to establish a basis for the determinations and inform them if any changes to the supply chain occur. If an OEM relies on multiple third-party manufacturers (e.g. if a manufacturer contracts with a battery manufacturer, who then contracts with a manufacturer or supplier who operates a battery cell production facility), the due diligence and information requirements must be satisfied by each such manufacturer or supplier either directly to the OEM or indirectly through contractual relationships.

Reporting Requirements

Periodic Written Reports

Manufacturers must submit periodic written reports to the IRS. These reports certify that specific vehicles (identified by VIN number in the report) comply with 30D prior to being placed in service.

Establishing a Compliant-Battery Ledger
At the beginning of each calendar year, the OEM must establish a compliant-battery ledger for any new vehicles placed in service after 12/31/24. One compliant-battery ledger may be established for all vehicles for a calendar year, or there may be separate ledgers for specific models or classes of vehicles. This information must be provided to IRS.

To establish this ledger, the OEM must make *an upfront determination of the number of FEOC-compliant batteries it knows or reasonably anticipates providing a periodic written report on during the calendar year*. The determination would be based on the battery components and applicable critical minerals (and associated constituent materials) that are procured or contracted for the calendar year and that are known or reasonably anticipated to be FEOC-compliant components or applicable critical minerals.

All this information must be backed up in the form of attestations, certifications and documentation that demonstrates compliance with the requirements. IRS would review all the information and approve or reject the determined number of FEOC-compliant batteries, in whole or in part. The approved number will be reported back to the OEM in the initial balance in the compliant-battery ledger.

Revising a Compliant-Battery Ledger
For any given calendar year, the number in the ledger balance can be amended after IRS determines it. Once the compliant-battery ledger is established, the OEM must determine and take into account any decrease in the number of FEOC-compliant batteries for such calendar year, and any of the prior three calendar years for which the OEM had a compliant-battery ledger, within 30 days of discovery. In addition, the qualified manufacturer may determine and take into account any increase in the number of FEOC-compliant batteries. All this information and supporting documentation must be reported on a periodic basis in the manner provided in the Internal Revenue Bulletin.

Similarly, the OEM must track the number of available FEOC-compliant batteries of the qualified manufacturer by reducing the balance of the ledger as it submits periodic written reports. The reports must include the VINs of new clean vehicles as eligible for the credit under section 30D.

Transferring the Ledger Balance
A negative balance is possible following a revision process. Whether positive or negative, the remaining balance at the end of the calendar year will be included in the compliant-battery ledger for the subsequent calendar year.

If an OEM has multiple compliant-battery ledgers with negative balances, any negative balance would first be included in the compliant-battery ledger for the same model or class of vehicles for the subsequent calendar year. The IRS can also account for such negative balance in the ledger of different models or classes of vehicles if the OEM does not have ledger for the same model or class in the subsequent calendar year.

Corrective Action

IRS may require a qualified manufacturer to provide attestations, certifications, and documentation to support the accuracy of the number of FEOC-compliant batteries of the qualified manufacturer at the end of a given calendar year. If an OEM provides inaccurate information, IRS may take action against the OEM. Such actions would affect new clean vehicles and qualified manufacturers on a prospective basis.

If an OEM provides erroneous information inadvertently, the OEM may correct the information in the ledger.

- If the error is not corrected and corresponds to a vehicle that the OEM has reported as 30D-compliant but has not yet placed in service, IRS will no longer consider the vehicle new and eligible for the credit.
- If the error is not corrected and corresponds to a vehicle that the OEM has not submitted a report for nor placed in service, the OEM cannot file a report certifying that the vehicle is 30D compliant.
- If no errors are corrected, IRS may require decreasing the number in the OEM's ledger.

If the OEM provides inaccurate information deliberately (as in the case of intentional disregard or fraud),

- IRS may determine that all vehicles of the qualified manufacturer that have not been placed in service are no longer considered new clean vehicles eligible for the section 30D credit.
- IRS may terminate the written agreement between the IRS and the manufacturer, thereby terminating the manufacturer's status as a qualified manufacturer. The manufacturer would then have to reapply for this status anew.

Additional Comment Requested

- Traceability/feasibility, specifically information that explains alternative approaches and:
    - If/why certain materials are prohibitively difficult to trace given current supply chains and current broadly available tools and practices for supply-chain tracing in the battery sector, and that explain how the supply chain may be limited by any such difficulty.
    - how the state of supply chains and tools/practices for supply-chain tracing are expected to evolve for battery materials that are prohibitively difficult to trace
    - current industry recordkeeping to trace supply chains, what kind of recordkeeping requirements would facilitate better tracing of supply chains,
    - how to encourage manufacturers to adopt appropriate tracing systems ASAP, and how these rules incentivize further shifting of supply chains to strengthen energy security, national security, and domestic manufacturing.
    - whether the listed materials are appropriately characterized as non-traceable
- Reporting:
    - If it would be feasible and helpful for tax administration if qualified manufacturers were to encode eligibility for section 30D through a particular calendar year into the VIN using an alphanumeric combination.