

Summary of DOE’s Final Interpretation of “Foreign Entity of Concern” (FEOC)

Agency: Department of Energy

Action: Final interpretive rule

Publication Date: May 6, 2024

Effective Date: May 6, 2024

Federal Register Notice: [Here](#)

Key Links:

- [Proposed DOE rule on FEOC interpretation](#) (December 2023)
 - [ZETA comments to DOE on FEOC interpretation](#) (January 2024)
- [Final Treasury rule on 30D implementation](#) (May 2024)

Introduction

Section 40207 of the Infrastructure Investment and Jobs Act (IIJA), otherwise known as the Bipartisan Infrastructure Law (BIL) (42 U.S.C. 18741), provides the Department of Energy (DOE) \$6 billion to support domestic battery material processing, manufacturing, and recycling. Section 40207(b)(3)(C) directs DOE to prioritize material processing applicants that will not use battery material supplied by or originating from a “foreign entity of concern” (FEOC). Similarly, section 40207(c)(3)(C) directs DOE to prioritize manufacturing applicants who will not use battery material supplied by or originating from a FEOC and prioritize recycling applicants who will not export recovered critical materials to a FEOC. FEOC is defined in BIL section 40207(a)(5).

In December 2023, DOE proposed an interpretive rule to further define the statutory term “foreign entity of concern.” 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 proposed and is now finalizing language to clarify the term FEOC 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 related terms.

The Treasury Department is finalizing 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. A summary of the final Treasury rule will be provided to ZETA members in a separate document.

Definitions

Foreign Entity

DOE's guidance defines a foreign entity as any "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." DOE's interpretation specifically provides that entities organized under U.S. laws but are subject to the ownership, control, or direction of another entity that qualifies as a foreign entity will also qualify as "foreign entities" for the purposes of the BIL.

DOE's interpretation of a foreign entity aligns closely with the definition of "foreign entity" contained in the 2021 National Defense Authorization Act (NDAA). DOE considers a foreign entity:

1. A government of a foreign country;
2. A natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual (as such term is defined in 8 U.S.C. 1324b(a)(3));
3. 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; or
4. An entity organized under the laws of the United States that is owned by, controlled by, or subject to the direction (as interpreted in subsection E) of an entity that qualifies as a foreign entity in paragraphs (i)–(iii).
 - a. The final rule also notes: "If a U.S.-headquartered company has operations in a foreign country but has not been organized under the laws of that country, then the guidance would not consider them to be a foreign entity. However, entities that operate within covered nations are typically required to be organized under the laws of that nation, and if that is the case, then such entities will be considered foreign entities, and thus subject to the jurisdiction of the covered nation's government."

Government of a Foreign Country

1. A national or subnational government of a foreign country;
2. An agency or instrumentality of a national or subnational government of a foreign country;
3. A dominant or ruling political party (e.g., Chinese Communist Party (CCP)) of a foreign country; or
4. A current or former senior foreign political figure.

In order to be considered "senior," an official should be or have been in a position of

substantial authority over policy, operations, or the use of government-owned resources. These include:

- a. a senior official, either in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not),
- b. a senior official of a dominant or ruling foreign political party, and
- c. an immediate family member (spouse, parent, sibling, child, or a spouse's parent and sibling) of any individual described in (a) or (b).

Subject to the Jurisdiction

An entity is considered subject to the jurisdiction of a covered nation government if:

1. The foreign entity is incorporated or domiciled in, or has its principal place of business in, a covered nation; or
2. With respect to the critical minerals, components, or materials of a given battery, the foreign entity engages in the extraction, processing, or recycling of such 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

This occurs if:

1. 25%¹ or more of the entity's board seats, voting rights, or equity interest, with each metric evaluated independently, are cumulatively held by that other entity, whether directly or indirectly via one or more intermediate entities; or
2. 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.

¹ DOE clarifies that each metric is evaluated independently, not in combination. As long as each individual metric is below 25%, the entity is not considered an FEOC. For example: if an entity has 20% of its voting rights, 10% of its equity interests, and 15% of its board seats each held by the government of a covered nation, these percentages would not be combined to equal 45% control, but would each be evaluated independently, resulting in the entity being controlled at the level of the highest metric (i.e., 20%) and thus not considered a FEOC.

Types of Control

Cumulatively Held Control

For the purposes of determining control by a foreign entity (including the government of a foreign country), control is evaluated based on the combined interest in an entity held, directly or indirectly, by all other entities that qualify under the above interpretation of “foreign entity.”

Indirect Control

A foreign entity is considered to be under the indirect control of a covered nation 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. In this case, the parent and subsidiary are treated as equivalent in the evaluation of control, as if the subsidiary were an extension of the parent. As such, any holdings of the subsidiary are fully attributed to the parent.
- A “parent” entity directly holds less than 50% of a “subsidiary” entity’s board seats, voting rights, or equity interest, then indirect ownership is attributed proportionately.

Effective Control

This refers to the right of the FEOC contractor, whether the entity is a FEOC via 25% control or via jurisdiction, in a contractual relationship, to:

1. determine the quantity or timing of production;
2. determine which entities may purchase or use the output of production;
3. restrict access to the site of production to the contractor’s own personnel;
4. or the exclusive right to maintain, repair, or operate equipment that is critical to production.

The determining factor as to whether the retained rights have prevented “effective control” by a FEOC under the guidance is whether the non-FEOC entity has the right of access and the authority to make decisions. In the case of a contract with a FEOC, a contractual relationship will be deemed to *not* confer effective control to the FEOC if the applicable agreement(s) reserves expressly to one or more non-FEOC entities all of the following rights:

1. To determine the quantity of critical mineral, component, or material produced (subject to any overall maximum or minimum quantities agreed to by the parties prior to execution of the contract);
2. To determine, within the overall contract term, the timing of production, including when and whether to cease production;
3. 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;

4. To access all areas of the production site continuously and observe all stages of the production process; and
5. At its election, 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, for the duration of the contractual relationship.

Summary of Key Provisions & Comparison to ZETA Comments

Foreign Entity

DOE's interpretation ensures that the government of a covered nation cannot evade the FEOC restriction simply by establishing a U.S. subsidiary, while otherwise maintaining ownership or control over that subsidiary. A U.S. headquartered company with operations abroad that has not organized under the laws of that country is not considered a foreign entity. However, even if the company's international arm is organized under the laws of another country (as is typically the case), and that country is a foreign entity of concern, the distinction does not apply to the company's operations in the U.S.

Government of a Foreign Country

DOE's interpretation of the term "government of a foreign country" includes subnational governments, which can have significant ownership or control of firms in the vehicle supply chain. Likewise, the definition also includes current and former senior foreign political figures, government officials, and party leaders and their family members.

In the specific context of the People's Republic of China (PRC), DOE considers "senior foreign political figure" to include:

1. individuals currently or formerly in senior roles within the PRC government, at the central and local levels;
2. individuals currently or formerly in senior roles within the Chinese Communist Party (CCP) and bodies and commissions under the Central Committee;
3. current and former members of the CCP Central Committee, the Politburo Standing Committee, the Politburo, the National People's Congress and Provincial Party Congresses, and the national Chinese People's Political Consultative Conference (CPPCC); and
4. current but not former members of local or provincial CPPCCs.

ZETA Comment: ZETA requested that DOE publish a definitive list of current and former political officials considered senior.

Response (p.6): DOE declined to publish a definitive list of individuals who are considered to be current or former senior government officials and therefore considered part of the “government of a foreign country.” However, DOE’s guidance provides additional clarity for such evaluation by identifying markers of when an individual official should be considered “senior,” and in the case of the People’s Republic of China (PRC), identifying particular Chinese Communist Party (CCP) entities whose current and former members should be considered senior foreign political figures.

ZETA Comment: ZETA requested guidance on the level of diligence required for companies to determine if someone is a family member of a senior official.

Response (p.8): DOE noted that this was outside the scope of this guidance, but directed companies to final regulations on Clean Vehicle Credits under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern and their associated guidance, which identify due diligence measures such as the potential for attestations of compliance from companies within a manufacturer’s supply chain, that can be used to provide reasonable assurance that an entity’s supply chain is free of FEOCs, including control by senior foreign political figures.

ZETA Comment: ZETA requested clarity on the question of whether or not there is a time period that may pass after which a former official can no longer be considered a part of the government of a foreign country.

Response (p.22): DOE stated that there is no designated amount of time for how long an individual may be a former official and avoid being considered a “senior foreign political figure” but noted that the standard for determining whether a particular individual is a “senior” figure under the guidance is whether the individual exercises “substantial authority over policy, operations, or the use of government-owned resources.” Apart from roles within a dominant political party, a senior official who works for the government of a covered nation in an official capacity, whether at a government ministry, for a state-owned enterprise (SOE), within the military, or at a local or subnational level may also be considered a “senior foreign political figure.”

Furthermore, DOE also clarifies that all subnational government-owned enterprises, whether local or national, should be considered to be instrumentalities of a national or subnational government, and thus part of the “government of a foreign country.” As such, a national SOE’s voting rights, equity interests, or board seats in an entity can be combined with a local SOE’s ownership of the same entity to reach the 25% FEOC threshold for control of that entity.

Foreign Entity of Concern (FEOC)

DOE and the Treasury Department have harmonized their FEOC definitions for the purposes of implementing the 30D tax credit, as Treasury has incorporated DOE's FEOC guidance into its 30D rule.

DOE notes that subsidiaries of FEOC are not considered FEOCs themselves. This is particularly true of U.S. or third-party country subsidiaries of entities that are headquartered within a covered nation, which do not necessarily pose the same risk to the battery supply chain as subsidiaries that are FEOCs by virtue of the government of a covered nation holding, directly or indirectly, 25% or more of the equity interests, board seats, or voting rights of the subsidiary.

ZETA Comment: ZETA asked DOE to clarify if a company can rely on supplier attestations to confirm the ownership and control of entities in its supply chain. Likewise, ZETA encouraged DOE to provide entities with the opportunity to voluntarily request a pre-review of contracts and licensing arrangements by DOE in order to provide additional certainty regarding whether effective control by a FEOC is present.

Response (p.17): DOE declined to publish a definitive list of FEOCs, citing the fact that the criteria for FEOC determination is identified clearly in the IJJA. The guidance provides standards to assist companies in determining whether the particular entities in their battery supply chain are FEOCs; as such, DOE expects the burden of identifying FEOCs to fall on the companies themselves and declined to create a pre-review process. Instead, as established in the Treasury Department's 30D rule and associated guidance, DOE will play a pivotal role in reviewing all of the documentation that is provided to the IRS for the purpose of determining eligibility for the 30D tax credit. DOE's review of licenses and contracts for effective control will take place through that process.

Subject to the Jurisdiction

DOE's final interpretive rule does not make any changes to its interpretation of the term "subject to the jurisdiction." 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.

However, the interpretation of "subject to the jurisdiction" provides clarity to original equipment manufacturers (OEMs) that removing FEOCs from their supply chain will require removing any critical minerals, battery components, and battery materials that are directly produced within the boundary of a covered nation.

Determining an entity's principal place of business under the guidance should be guided by the United States Supreme Court's formulation in *Hertz Corp. v. Friend*, in which a principal place of business is considered to be the "place where a corporation's officers direct, control, and

coordinate the corporation's activities [and] in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center.'”

Owned by, Controlled by, or Subject to the Direction

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, the entity is a FEOC. DOE's interpretation provides for two types of control:

1. control via the holding of 25% or more of an entity's board seats, voting rights, or equity interest, where the 25% threshold applies to each metric independently, not in combination; and
2. control via license or contract conferring rights on a person that amount to a conferral of control.

In the case of control via the 25% threshold:

- “Control” refers to both direct and indirect control by the government, and control within the interpretation of “foreign entity.”
- DOE considered whether to expand the definition of “control” to incorporate companies that are controlled by the government of a covered nation by virtue of significant investments (e.g., subsidies, grants, or debt financing) by the government of a covered nation. However, DOE has not yet identified a sufficiently bright-line rule for such investments that would be administrable by entities in the battery supply chain or by vehicle manufacturers.
- The 25% threshold also applies to joint ventures (JV). In situations where a JV is 50-50, and one of the members of the JV is a FEOC, the JV is considered a FEOC. In a situation where a FEOC maintains less than 25% control of a JV, the JV agreement would not confer “effective control” of the JV entity unless, by its terms, it gives a FEOC the right to determine the quantity or timing of production; to determine which entities may purchase or use the output of production; 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.
- DOE will continue to monitor the battery supply chain market and may consider revisiting this issue in the future through updated interpretive guidance defining control by the government of a covered nation based on significant investments from that government.
- In the case of equity interest, DOE clarifies that this refers to all ownership interests, including capital or profit interests and contingent equity interests (the latter being consistent with the definition in Committee on Foreign Investment in the United States regulations).

In the case of control via licensing or contracting:

- DOE’s interpretive rule clarifies that “effective control” through a license or contract can be exercised by any entity designated as a FEOC, whether through 25% control by the government of a covered nation or through jurisdiction.
- A non-FEOC entity that can demonstrate that it has reserved certain rights to itself or another non-FEOC through contract would not be deemed to be a FEOC solely based on its contractual relationships.
- Under the guidance, an entity could be considered a FEOC with respect to the particular critical minerals, battery components, or battery materials that are effectively produced by the FEOC under a contract or license but not with respect to other critical minerals, battery components, or battery materials that are produced by the entity outside the terms of the contract or license with a FEOC.

In the case of intellectual property:

- DOE’s view is that new export controls would not be applicable to IP that has already been transferred, i.e., IP licenses with an effective date prior to implementation of a new export control. Therefore, DOE has edited the fifth right to state that the parties to the given license or contract commit that the non-FEOC party will retain access to and use of any intellectual property, information, and data critical to production “for the duration of the contractual relationship.”