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DEPARTMENT OF ENERGY

10 CFR Chapter III

RIN 1901-ZA02

Interpretation of Foreign Entity of Concern

AGENCY: Office of Manufacturing and Energy Supply Chains (MESC), U.S. Department of Energy.

ACTION: Notification of final interpretive rule.

SUMMARY: On December 4, 2023, the U.S. Department of Energy (DOE or the Department) published in the *Federal Register* for public comment a proposed interpretive rule on DOE's interpretation of the statutory definition of "foreign entity of concern" (FEOC) in the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law (BIL), which applies to multiple programs related to the battery supply chain. This 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." In this final interpretive rule, DOE responds to public comments, clarifying the term "foreign entity of concern" by providing interpretations of the following key terms: "government of a foreign country;" "foreign entity;" "subject to the jurisdiction;" and "owned by, controlled by, or subject to the direction."

DATES: This final interpretive rule is effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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I. Background and Purpose

Section 40207 of BIL (42 U.S.C. 18741) provides 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). The relevant paragraph lists five grounds upon which a foreign entity is considered a FEOC, described in subparagraphs (A) through (E). Subparagraphs (A), (B), and (D) address entities designated as foreign terrorist organizations by the Secretary of State, included on the Specially Designated Nationals and Blocked Persons List (SDN List) maintained by the Department of the Treasury's Office of Foreign Assets Control (OFAC), and alleged by the Attorney General to have been involved in various illegal activities, including espionage and arms exports, for which a conviction was obtained, respectively. Subparagraph (C) states that 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 (as defined in [10 U.S.C. 4872(d)(2)])." The "covered nations" are the People's Republic of China (PRC), the Russian Federation, the Democratic People's Republic of North Korea, and the Islamic Republic of Iran (10 U.S.C. 4872(d)(2)). BIL section 40207(a)(5) provides no further definition of the term "foreign entity" or of the terms used in subparagraph (C).

Subparagraph (E) of BIL section 40207(a)(5) provides an additional means by which an entity may be designated to be a FEOC: a foreign entity is a FEOC if it is "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." The Secretary of Energy has not exercised this authority, as of this date.

In addition to affecting which entities DOE will prioritize as part of its BIL section 40207 Battery Materials Processing and Battery Manufacturing and Recycling Grant Programs, the "Foreign Entity of Concern" term is cross-referenced in section 30D of the Internal Revenue Code (IRC) (26 U.S.C. 30D), as amended by the Inflation Reduction Act of 2022 (IRA). Section 30D provides a tax credit for new clean

vehicles, including battery electric vehicles. Section 30D(d)(7) excludes from the definition of "new clean vehicle" "(A) any vehicle placed in service after December 31, 2024, with respect to which any of the applicable critical minerals contained in the battery of such vehicle (as described in [section 30D(e)(1)(A)]) were extracted, processed, or recycled by a [FEOC] (as defined in section 40207(a)(5) [of BIL] (42 U.S.C. 18741(a)(5))), or (B) any vehicle placed in service after December 31, 2023, with respect to which any of the components contained in the battery of such vehicle (as described in section 30D(e)(2)(A)) were manufactured or assembled by a [FEOC] (as so defined)."

On December 4, 2023, DOE published in the Federal Register its notice of proposed interpretive rule and request for comments related to the definition of FEOC contained in section 40207(a)(5) of BIL (88 FR 84082). The comment period closed on January 3, 2024.

After careful consideration of available information related to the battery supply chain and comments received, DOE is now issuing this final guidance regarding which foreign entities qualify as FEOCs, under BIL 40207(a)(5)(C), as a result of being "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation." For the purposes of this document, DOE uses the term "interpretive rule" and "guidance" interchangeably. At a future date, DOE may decide to initiate a separate rulemaking to implement the Secretary's "determination authority" contained in BIL section 40207(a)(5)(E) (42 U.S.C. 18741(a)(5)(E)).

To get the benefit of input from the public and interested stakeholders, the Department specifically requested comments on its proposed interpretation of the terms discussed in its proposed interpretive rule (88 FR 84082). The proposed interpretive rule was intended to solicit public feedback on DOE's interpretation to better understand stakeholder perspectives prior to implementation of finalized guidance. The Department considered all comments received during the public comment period and modified its proposed approach, as appropriate, based on public comment as described in section III of this document.

This final guidance proceeds as follows: Section II of this document provides a discussion of comments received and DOE's response to those comments; section III of this document provides an explanation of final interpretation and changes from the proposed interpretive rule; section IV of this

document provides information on Regulatory Review of this interpretive guidance; section V of this document provides DOE's final interpretive rule on the definition of Foreign Entity of Concern; and section VI of this document provides the approval of the Office of the Secretary.

II. Discussion of Comments

A. Summary of Comments

DOE received 84 comment submissions in response to the proposed interpretive rule. Comments were received from original equipment manufacturers; cell producers; materials suppliers; component suppliers; trade organizations; a nonprofit organization; a consultant; foreign governments; and individuals. Forty-two—half of the total comments received—were from anonymous sources. Several comments included confidential business information, along with a non-confidential version to be uploaded to the docket for public viewing. Additionally, at the request of the governments of the Republic of Korea, Chile, and Australia, DOE met with delegations from each country. Meeting notes of these ex parte communications have been posted to the public docket. Commenters generally expressed support for the issuance of guidance, welcoming additional clarity on the definition of the term "foreign entity of concern." Many comments raised specific concerns about the feasibility of compliance without bright-line administrable standards to govern which entities qualify as FEOCs. Many other submissions raised specific concerns about rules that too narrowly construe the term FEOC, raising concerns about manipulation of the battery supply chain by covered nations. Other submissions were more general in nature and did not provide specific comments on the proposed interpretive rule itself. All submissions were carefully reviewed, and DOE thanks the public for its engagement. DOE's responses to comment within the scope of this interpretive rule have been grouped by the topic area to which they pertain and are summarized as follows.

B. Foreign Entity

Comment: Multiple commenters sought clarity on how the guidance intends to treat a U.S.-headquartered company with its principal place of business in the United States but operating in a covered nation. Specifically, the commenters questioned whether such a U.S. entity's operations within a covered

nation can be considered a FEOC under the guidance even if the U.S. entity does not fall into the definition of "foreign entity."

Response: The guidance includes in the definition of "foreign entity" 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." If a U.S.-headquartered company has operations in a foreign country but has not 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. In this scenario, even though the operations of the U.S. entity located in the covered nation are considered a FEOC, this designation would not flow back to the U.S. entity's operations in the United States or other third-party countries.

C. Government of a Foreign Country

Comment: One commenter requested that DOE provide 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." The commenter argued that determining which officials are considered "senior" and whether their family members hold interests in a company will not always be readily apparent.

Response: While DOE understands the commenter's concern, DOE declines to make this change. Compiling a complete list of current and former senior government officials would prove challenging given that the list would likely be subject to frequent change, difficult to predict, and very likely underinclusive. Furthermore, DOE does not have the resources to do so for every company that may be in the battery supply chain; however, individual participants in the battery supply chain will be in a position to individually analyze their specific upstream suppliers and ask those suppliers to provide information necessary for such an evaluation. 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.

Comment: Several other commenters requested that DOE provide greater clarity for the definition of "senior foreign political figure," particularly regarding whether (a) 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; (b) what level an official must be to be considered "senior;" and (c) for the PRC, whether "senior foreign political figure" is limited to individuals with membership on the CCP entities identified in the guidance.

Response: 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." The concerns that arise from representing the government in a senior role and from membership on the CCP bodies identified in the guidance, for which former membership is considered, do not dissipate over time just because an individual no longer represents that government or political body.

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." In the context of the PRC, the guidance identifies particular CCP entities whose members should be considered to be senior officials of a "dominant or ruling foreign political party." These bodies do not constitute all senior foreign political figures in the PRC, however. 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), or within the military, may also be considered a "senior foreign political figure." DOE declines to specify particular government positions that qualify as "senior," but believes the standard provided (*i.e.*, "a position of substantial authority over policy, operations, or the use of government-owned resources") provides a reasonable standard with which to evaluate companies in the battery supply chain.

Comment: Other commenters argued that a determination of senior political figure ownership and involvement in private companies would be unduly onerous and may not be feasible. Relatedly, one commenter asked for greater clarity on what level of diligence and processes companies are expected to

undertake to determine whether individuals or their family members who control entities within their supply chain qualify as senior foreign political figures.

Response: DOE's guidance has been drafted to provide a reasonable interpretation of the statutory definition of FEOC contained in 42 U.S.C. 18741(a), while taking into account administrability concerns. While outside the scope of this guidance, for the purposes of determining eligibility for the 30D tax credit, the Treasury Department's final regulations on Clean Vehicle Credits under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern published elsewhere in this issue of the *Federal Register* and associated guidance (Rev. Proc. 2023-38) identify due diligence measures, including 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.

Comment: One commenter noted that the proposed interpretive rule suggests that local or subnational government-owned enterprises are considered to be part of the "government of a foreign country" and questioned whether all SOEs should be considered part of the "government of a foreign country" such that an entity controlled by an SOE at a level of 25% or more would also be a FEOC.

Response: DOE agrees that all SOEs, 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.

Comment: One commenter asked for clarity as to whether, with respect to the PRC, a "dominant or ruling political party" in the interpretation of "government of a foreign country" refers only to the central party, or to local party apparatuses as well.

Response: The guidance includes local and subnational government officials in the definition of government of a foreign country, and therefore senior government officials at the local and subnational level should be considered to be part of the government of a foreign country. When it comes to senior officials from a dominant or ruling party, DOE's final interpretive guidance also makes clear that the list

of specific CCP entities that are considered part of the "government of a foreign country," includes current, but not former, members of local or provincial Chinese People's Political Consultative Conferences (CPPCC).

D. Subject to the Jurisdiction

Comment: One commenter urged DOE to clearly define the term "principal place of business" in the guidance.

Response: DOE intends for the term "principal place of business" to be interpreted consistent with standard practice. The guidance is informed 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.'" 559 U.S. 77, 92-93 (2010).

Comment: Multiple commenters argued that all subsidiaries of FEOCs should be considered FEOCs themselves, even when the parent entity is only a FEOC via jurisdiction due to it being headquartered within a covered nation.

Response: DOE declines to make this change. DOE's interpretive guidance is intended to clarify the statutory terms in a way that gives effect to the purpose of the statutory provisions to which it applies. The term FEOC within section 40207, as it applies to both DOE's battery materials processing and battery manufacturing and recycling grant programs and to the 30D tax credit, is intended to both reduce reliance upon covered nations in the battery supply chain and provide a pathway for companies in the United States and third-party countries to increase production of critical minerals, battery components, and battery materials. At this time, DOE concludes that United States or third-party country subsidiaries of entities that are headquartered within a covered nation 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. This is due to: (a) their location within the United States or third-party countries; and (b) the

lack of direct control by the government of a covered nation. In addition, DOE's interpretation serves the intended purpose of the statute by providing a pathway for the onshoring and friend-shoring of critical minerals, battery components, and battery materials. This contrasts with the primary purpose of the CHIPS and Science Act of 2022, and the implementation of the Department of Commerce's substantially similar FEOC provision, which concerns the prevention of transfers of semiconductor technology to covered nation governments.

Comment: More than one of the commenters that urged that all subsidiaries of FEOCs be considered FEOCs themselves, expressed concern that companies headquartered in the PRC, even when privately held with no formal control by the government of the PRC, may receive significant government subsidy, grants, and debt financing to pursue expansion outside of the PRC. One of these commenters urged DOE to aggressively assess whether such companies are actually private or are engaged in activities designed to avoid FEOC designation.

Response: DOE considered whether to expand the definition of "control" under this interpretive rule to incorporate companies that are controlled by the government of a covered nation by virtue of significant investments by that government of the kind identified by the commenters (*e.g.*, subsidies, grants, or debt financing) from 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. Accordingly, DOE declines to make this change to the interpretive guidance at this time. With respect to its evaluation of applications for domestic battery material processing, manufacturing, and recycling grants under section 40207 of BIL, DOE notes that it will conduct a holistic risk evaluation process related to research, technology, and economic security. Such evaluation will include consideration of financial support by countries of concern, including the PRC. In addition, DOE may consider government investment as part of its exercise of the Secretary of Energy's authority under BIL section 40207(a)(5)(E) to designate an entity a FEOC if it is "engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States." Furthermore, 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. Any information that may assist

DOE in monitoring the battery supply chain market may be submitted to the email address identified in the "For Further Information" section of this document.

E. Owned by, Controlled by, or Subject to the Direction

Comment: Several commenters asked whether, when calculating an entity's voting rights, equity interests, or board seats held by the government of a covered nation, the guidance requires that these calculations be made in combination or independently.

Response: DOE responds with the following clarification. The 25% threshold applies to each metric independently, not in combination. For example, and assuming no other relevant circumstances, 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. That said, DOE recognizes that significant levels of government control in all three metrics may still raise concerns. As such, as indicated above in response to a previous comment, DOE may incorporate such considerations into its evaluation of applications for grants under section 40207 of BIL, through utilization of the Secretary's authority under BIL section 40207(a)(5)(E), or through revisions to the interpretive guidance upon evidence of evasive gamesmanship with respect to the 25% threshold.

Comment: One commenter asked for greater clarity on what constitutes voting rights, equity interests, and board seats for the purposes of calculating whether a 25% controlling interest exists. Specifically, the commenter asked (a) whether DOE intended to refer to "traditional voting rights belonging to common stockholders or the voting rights of owners" or to "the voting rights of a board;" (b) how to calculate the value of an individual board seat; and (c) what constitutes equity interests for the purposes of the guidance.

Response: As previously stated, DOE notes that each of these metrics of control is intended to be calculated independently. For "voting rights," DOE intends to refer to the voting rights of owners, as suggested by the commenter. This means that the voting power of owners of different types of stock, to the extent this information is reasonably ascertainable, should be considered in calculating whether a

FEOC controls 25% of the voting rights in an entity. For "board seats," DOE intends for the value of a board seat to equal the value of its voting power on the board. So, if one board seat is held by a representative of the government of a covered nation and that seat holds 25% of the board voting power, then that entity would be considered a controlled FEOC. For "equity interests," DOE intends to refer to percent value of the ownership interest, to include capital or profit interests and contingent equity interests, in the company held by an individual or entity, with the amount of contingent interest that can be reasonably determined included for the purpose of determining FEOC compliance.

Comment: Several commenters raised concerns that the analysis required to evaluate the FEOC compliance of a manufacturer's supply chain, including the voting rights, board seats, and equity interests for privately held companies, will be unduly burdensome and create administrability problems. Other commenters, however, stated that the FEOC guidance is stringent but, for the most part, workable.

Response: DOE's guidance has been drafted to give a reasonable interpretation to the statutory definition of FEOC contained in 42 U.S.C. 18741(a), while taking into account administrability concerns. The due diligence measures required for determining FEOC compliance for purposes of determining eligibility for the 30D tax credit and for DOE's BIL 40207 grant programs are outside the scope of this guidance.

Comment: One commenter stated that the 25% threshold for control is too bright-line and will allow an entity to drop its covered nation government ownership stake to 24.9% to avoid being deemed a controlled FEOC. Several other commenters stated their support for the 25% bright-line threshold and the guidance's alignment with the Department of Commerce's FEOC definition in its Final Rule on Preventing the Improper Use of CHIPS Act Funding (CHIPS Rule) as published in the *Federal Register* on September 25, 2023 (88 FR 65600).

Response: DOE declines to make a change. The guidance attempts, to the greatest degree possible, to establish bright-line rules to allow individual entities seeking to take advantage of BIL section 40207 and IRC section 30D to readily evaluate whether their upstream suppliers should or should not be considered FEOCs. Without that clarity, individual entities would be unable to properly evaluate their supply chains. To the extent that an entity changes its ownership structure to fall below the 25%

threshold, DOE views such restructuring as a desirable dilution of covered nation government control, consistent with the purposes of the FEOC restrictions in BIL section 40207 and IRC section 30D, as DOE understands them.

Comment: Similarly, another commenter stated that DOE's interpretation of indirect control allows for an entity to alter its ownership structure to skirt the FEOC ban, by nesting control and allowing control to defuse through levels of subsidiaries.

Response: DOE declines to make a change. First, not all ownership stakes dilute in a tiered ownership structure. Specifically, DOE notes that the guidance makes clear that the controlling stake of a parent company with 50% or more interest in a subsidiary does not attenuate. Thus, the covered nation government's level of control would not attenuate in a situation where there exist tiers of subsidiaries that are owned at a level of 50% or more. Second, DOE's approach to calculating indirect control recognizes the reality that, in the case of multiple tiers of minority control by a covered nation government, the actual ability of the covered nation government to influence the operations of a subsidiary may become materially attenuated.

Comment: One commenter asked for clarification on why DOE used the parenthetical phrase "(including the government of a foreign country that is a covered nation)" in the interpretation of "control," since the focus of the guidance relates to control by the government of a covered nation.

Response: The interpretation of "control" in the guidance is meant to encompass both situations where the government directly controls an entity and when the government may indirectly control an entity through another entity that is not itself the government of a covered nation. In addition, the "control" definition is also embedded into the interpretation of "foreign entity," to identify situations where a U.S. entity is considered to be "foreign" as a result of control. The parenthetical is intended to make clear that "control" refers to both direct and indirect control by the government, and control within the interpretation of "foreign entity."

Comment: Several commenters asked for clarification on how to evaluate levels of control within a joint venture. Specifically, the commenters questioned whether a joint venture should be evaluated

using the licensing and contracting provision of the guidance or if joint ventures should be evaluated solely under the 25% control prong.

Response: DOE responds by clarifying that whether a FEOC holds a controlling interest in a JV entity (through voting rights, equity interests, or board seats) is determined under the 25% control threshold. Thus, a separate entity that exists as a 50-50 JV, in which one of the members of the JV is a FEOC, would be considered to be 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.

Comment: One commenter asked for clarification as to whether the "effective control" definition only applies when the other entity (licensor/contractor) is a FEOC.

Response: DOE responds that the "effective control" definition in the guidance is only relevant as it relates to licenses and contracts with an entity considered to be a FEOC. The language of the guidance has been edited to clarify.

Comment: Multiple commentors asked for clarification on whether the "effective control" test in the definition of "owned by, controlled by, or subject to the direction" applies only when the licensor or contractor is a FEOC because it is subject to at least 25% control by the government of a covered nation or also when the licensor or contractor is a FEOC due to being "subject to the jurisdiction" of a covered nation.

Response: DOE responds by clarifying that an entity can be subject to effective control through a license or contract with any entity that is deemed a FEOC, whether via the 25% threshold for control or via jurisdiction. The proximity of a FEOC to the government of a covered nation, even when the government does not have a controlling stake in the company, raises similar concerns in the context of a license or contract with a non-FEOC, and the non-FEOC should retain the identified rights to avoid effective control by the FEOC.

Comment: One commenter suggested that DOE modify the fifth right to be reserved within a license or contract with a FEOC, which requires that IP and technology that is the subject of the contract be accessible to the non-FEOC entity "notwithstanding any export control or other limit on the use of intellectual property imposed by a covered nation subsequent to execution." The commenter suggested that the provision could be interpreted to call for the defiance of foreign laws.

Response: To ensure that a license or contract with a FEOC does not result in effective control, a non-FEOC should reserve the listed rights at the time of entering into the license or contract. 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. That said, it is not DOE's intent that this language place a manufacturer in the position of having to violate a foreign law. 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."

Comment: One commenter requested confirmation on their understanding of the first and fifth rights identified by DOE to be retained by a non-FEOC entity entering into a license or contract with a FEOC. Specifically, the commenter stated its understanding that the first right would allow the non-FEOC entity to acquire information from the FEOC related to the quantity of critical minerals or components necessary to manufacture a battery or battery component, and the fifth right would allow the non-FEOC entity to obtain assistance from the FEOC in operating, maintaining, and repairing equipment critical to production.

Response: The commenter is correct that the non-FEOC entity would be able to obtain information and assistance from the FEOC as described above. 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 order to fully exercise those rights, however, it may be necessary for the non-FEOC entity to obtain information and assistance from the FEOC entity.

Comment: In the context of the "effective control" definition and the safe harbor rights identified in the guidance, one commenter requested that DOE provide a limited exception or transition period for licenses and contracts that were signed between enactment of the IRA and the issuance of DOE's proposed interpretive guidance, if the non-FEOC entity can establish that the FEOC entity does not have effective control through alternate means.

Response: DOE's guidance is limited to providing an interpretation of the statutory term "foreign entity of concern," and related terms. Whether to provide an exception or transition period to eligibility for a particular program or incentive is out of scope of this interpretive guidance.

F. Other Comments

i. General Comments Related to Proposed Interpretive Rule

Comment: Several commenters urged DOE to create a definitive list of entities considered to be FEOCs.

Response: DOE declines to make this change. The criteria for "foreign entities of concern" were articulated in the Infrastructure Investment and Jobs Act (IIJA). DOE recognizes that, for some of the criteria, in particular the criteria related to foreign entities that have been alleged by the Attorney General to have been involved in certain activities for which a conviction was obtained, there may not be a consolidated, readily available list. For the criteria that are the subject of this guidance (*i.e.*, a foreign entity that is "owned by, controlled by, or subject to the jurisdiction or direction of the government of a covered nation"), DOE is not in a position to provide a comprehensive list of every entity that qualifies as a FEOC. Providing a definitive list of FEOCs could result in attempts to evade the rule through corporate restructuring that does not change actual control and would be overly burdensome on DOE to create and maintain such a list for the entire battery supply chain. Accordingly, the guidance provides standards to assist companies in determining whether the particular entities in their battery supply chain are FEOCs. These companies are better positioned than DOE to conduct due diligence on and obtain certifications from entities within their supply chain, with whom they maintain a contractual relationship. DOE expects that, given the guidance provided in this final interpretive rule, relevant entities can exercise appropriate diligence to identify entities that fall within the criteria articulated in the IIJA.

Comment: Several commenters urged DOE to establish a voluntary pre-review process to allow manufacturers to submit to DOE potential licenses and contracts with FEOCs to determine whether it would lead to effective control by the FEOC. Several of the commenters also requested that such a pre-review process be structured in a confidential manner.

Response: While DOE requested comment on the desirability of establishing and the potential structure of a pre-review process for licenses and contracts, DOE is declining to establish such process at this time. 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.

Comment: Multiple commenters urged DOE to use the determination authority provided in section 40207(a)(5)(E) of BIL to allow the Secretary of Energy, in consultation with the Secretary of Defense and the Director of National Intelligence, to designate an individual entity as a FEOC "engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States."

Response: DOE responds that it continues to consider whether and how to use the determination authority in BIL section 40207(a)(5)(E).

ii. Comments Related to Treasury's 30D Rule

Comment: One commenter urged DOE to clearly define the terms of "critical minerals," "components," and "materials" in this guidance.

Response: DOE declines to make this change. The definitions identified by the commenter are relevant to DOE's interpretative guidance only insofar as it applies to eligibility for the 30D tax credit. The Treasury Department has defined these terms in the relevant regulations.

Comment: Several commenters suggested that the U.S. Government should consider providing extensions of time for compliance with FEOC sourcing rules or waivers of any penalties involving 'unintentional' transactions with entities later determined to be FEOCs as the industry tries to implement

these new rules. Another commenter expressed strong support for phasing out the Treasury Department's transition rule for non-traceable critical minerals.

Response: DOE's guidance is limited to providing an interpretation of the statutory term "foreign entity of concern," and related terms. As such, comments related to extensions of time to allow for a transition period, waiver of penalties associated with an unintentional interaction with a FEOC, or transition rule phase-outs are outside the scope of this interpretive guidance.

Comment: One commenter expressed concerns that the Federal government has failed to provide a harmonized definition of the term "foreign entity of concern," specifically noting its belief that DOE and the Treasury Department, for the purposes of the 30D tax credit, do not have a common definition of FEOC.

Response: 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.

Comment: One commenter expressed concern that some critical minerals producers would not be able to certify compliance with FEOC rules because they use a mixture of ingredients from FEOC and non-FEOC sources that cannot be separated physically.

Response: DOE's guidance is limited to providing an interpretation of the statutory term "foreign entity of concern," and related terms. This comment is out of scope of this interpretive guidance.

Comment: Several commenters requested clarification from DOE as to what sort of documentation and materials DOE would deem sufficient to certify FEOC compliance with the Internal Revenue Service for the purposes of the 30D tax credit and for the battery ledger identified in the Treasury Department's 30D rule. For instance, one commenter asked whether a guarantee letter from a third-party manufacturer or supplier that confirms it is a non-FEOC is sufficient to substantiate its non-FEOC status to the IRS.

Response: DOE's guidance is limited to providing an interpretation of the statutory term "foreign entity of concern" and related terms, and this comment is outside the scope of this interpretive guidance.

The due diligence measures required for determining FEOC compliance for purposes of determining eligibility for the 30D tax credit and for DOE's BIL 40207 grant programs are outside the scope of this guidance.

iii. Comments Related to the Inflation Reduction Act

Comment: DOE received several comments, both positive and negative, about the relative merits of the Inflation Reduction Act. Some of these commenters stated that the IRA will support energy reliability, clean energy production, and a variety of other goals. Other commenters stated that IRA provisions limiting eligibility for government incentives (*e.g.*, excluding new clean cars from eligibility if they source from FEOCs) is discriminatory, protectionist, and violates basic principles of the World Trade Organization.

Response: DOE notes that all of these comments are directed at the underlying statute, which is outside the scope of this interpretive guidance.

III. Explanation of Final Interpretation and Changes from the Proposed Interpretive Rule

A. Purpose

The term FEOC, as used in both BIL section 40207 and IRC section 30D, is intended to address upstream supply chains of individual entities that may benefit from direct or indirect Federal government financial support. As such, the interpretations proposed here are intended to be structured as, to the greatest degree possible, bright-line rules that allow individual entities to readily evaluate whether their supply chain includes FEOCs. In the case of the Battery Materials Processing and Battery Manufacturing and Recycling Grants programs in BIL section 40207, a bright-line rule will afford eligible entities using their grants for battery materials processing or advanced battery component manufacturing greater clarity in avoiding using battery materials supplied by or originating from a FEOC; similarly, such a rule will afford those eligible entities using their grants for battery recycling greater clarity in avoiding the export of recovered critical materials to a FEOC.

B. Foreign Entity

DOE's final interpretive rule does not make any changes to its interpretation of the term "foreign entity." To be considered a FEOC under BIL section 40207(a)(5) (42 U.S.C. 18741(a)(5)), the statute requires that the entity be a "foreign entity." However, section 40207 does not define "foreign entity."

The interpretation of "foreign entity" in this final guidance aligns closely with the definition of "foreign entity" contained in the 2021 National Defense Authorization Act (NDAA) (15 U.S.C. 4651(6)), which informs certain Department of Commerce programs related to semiconductors. Both the interpretation in this guidance and the 2021 NDAA definitions define foreign entities to include three main categories of entities: (1) a government of a foreign country and a foreign political party; (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) (addressing unfair immigration-related employment practices)); or (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.

DOE's interpretation specifically provides that entities organized under the laws of the United States that 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 BIL section 40207(a)(5)(C). The 2021 NDAA definition of foreign entity allows for U.S. entities to be considered foreign in this way and also provides an additional list of criteria by which such persons may be considered foreign due to their relationship with the three main categories of foreign entities. While these criteria are relevant for the purposes of the Department of Commerce programs at issue, which are primarily concerned with preventing the transfer of semiconductor technology to covered nation governments, DOE assesses that the criteria are not necessary for the purpose of evaluating covered nation-associated risk to the battery supply chains, because the natural persons and corporate entities that are relevant to the battery supply chain are already encompassed in the identified criteria for "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.

C. Government of a Foreign Country

DOE's final interpretive rule makes minor, clarifying changes to its interpretation of the term "government of a foreign country." The term "government of a foreign country" is a term used to determine whether an entity is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country." It is also used in the interpretation of "foreign entity" in paragraph (i) of section V.B of this document.

DOE's interpretation of the term "government of a foreign country" contained within this notice includes subnational governments, which can have significant ownership or control of firms in the vehicle supply chain. In the covered nations at issue here, there exist many subnational and local government-owned entities, that play a large role in their nation's economies, and local SOEs are a large driver of regional economies. This term also includes instrumentalities, which include separate legal entities that are organs of a state but where ownership may be unclear, such as a utility or public financial institution. This interpretation aligns with the definition of "foreign government" promulgated by the Department of the Treasury in its regulations implementing the Committee on Foreign Investment in the United States (CFIUS) program (31 CFR 800.221). That definition includes "national and subnational governments, including their respective departments, agencies, and instrumentalities."

DOE's interpretation of the term "government of a foreign country" also includes senior foreign political figures. This inclusion recognizes the reality of government influence over business entities in covered nations, which is often exercised through individuals representing the government on corporate boards or acting at the direction of the government or to advance governmental interests when serving as an equity owner or through voting rights in an otherwise privately held business. This interpretation aligns with the Defense Department's National Industrial Security Program Operating Manual (NISPOM) regulatory definition of "foreign interest" (32 CFR 117.3) and associated "foreign ownership, control or influence" (FOCI) regulations (32 CFR 117.11), which recognize as FOCI the influence of a representative of a foreign government with the power to direct or decide issues related to a U.S. entity. In addition, in order to deal with the situation in which officials leave their official positions in order to exert the same type of influence on behalf of the government, the interpretation also includes former senior government officials and former senior party leaders. Inclusion of former officials is consistent with regulatory definitions in other contexts. As stated in response to comments above, the guidance does not

limit the "former" designation to a particular period of time, as the concerns arising from membership on the CCP bodies identified below, do not dissipate over time just because an individual no longer serves as a member of that body. For example, the Bank Secrecy Act (BSA) private banking account regulations (relating to due diligence program requirements for private banking accounts established, maintained, administered, or managed in the United States for foreign persons) administered by the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) include both current and former officials in the definition of "senior foreign political figure" (31 CFR 1010.605(p)). Those regulations provide further interpretation of the term "senior official" that DOE has also included to provide additional clarity.

DOE's final interpretive rule clarifies that "senior foreign political figure" includes both individuals who are senior officials in the government and senior officials within a dominant or ruling political party, as well family members of such individuals. In the specific context of the PRC, DOE considers "senior foreign political figure" to include (a) individuals currently or formerly in senior roles within the PRC government, at the central and local levels; (b) individuals currently or formerly in senior roles within the Chinese Communist Party (CCP) and bodies and commissions under the Central Committee; (c) 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 (d) current but not former members of local or provincial CPPCCs.

Finally, the inclusion of immediate family members of senior foreign political figures in the interpretation of "government of a foreign country" aligns with the BSA private banking regulation. Those regulations include the immediate family members of a senior foreign political figure in their definition of "senior foreign political figure" (31 CFR 1010.605(p)(1)(iii)). Immediate family members in those regulations mean spouses, parents, siblings, children, and a spouse's parents and siblings (31 CFR 1010.605(p)(2)(ii)).

D. 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. DOE's interpretation provides an objective standard, consistent with the common understanding of "jurisdiction," rather than a subjective standard that relies upon an individual nation's understanding of its own jurisdictional reach. As such, the interpretation first recognizes that any organization formed under the laws of the government of a covered nation is a national of that nation and therefore subject to its direct legal reach. *Cf.* 28 U.S.C. 1332(c)(1) (noting that, for the purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of every . . . foreign state by which it has been incorporated and of the . . . foreign state where it has its principal place of business"). In addition and as stated above in response to comments, 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.'" 559 U.S. 77, 92-93 (2010).

Second, DOE's interpretation accounts for the fact that several critical segments of the battery supply chain today are predominantly processed and manufactured within covered nation boundaries,[1] and recognizes that a covered nation will be able to exercise legal control (potentially forcing an entity to cease production or cease exports) over an entity with respect to any critical minerals that are physically extracted, processed, or recycled, any battery components that are manufactured or assembled, and any battery materials that are processed within those boundaries, even if the entity is not legally formed under the laws of the covered nation. *See* Fourth Restatement (Foreign Relations) (2018) section 408 (stating that "[i]nternational law recognizes a state's jurisdiction to prescribe law with respect to persons, property, and conduct within its territory"). At the same time, DOE's interpretation recognizes that such an entity, which is not legally formed in a covered nation but has production activities *inside* a covered nation, may also have separate production activities that occur *outside* the covered nation. In that case, the covered nation does not have jurisdiction over those outside production activities. Therefore, under the guidance,

[1] 100-day-supply-chain-review-report.pdf (*whitehouse.gov*).

an entity that is not legally incorporated in a covered nation could nevertheless be considered a FEOC under the jurisdiction prong with respect to the particular critical minerals, battery components, or battery materials that are subject to the jurisdiction of a covered nation. But the entity would not be considered a FEOC with respect to its activities related to other critical minerals, battery components, or battery materials that are not subject to the jurisdiction of a covered nation.

Finally, when an entity is a FEOC due to it being "subject to the jurisdiction" of a covered nation, subsidiaries of the FEOC are not automatically considered to be FEOCs themselves based solely on their parent being a covered nation jurisdictional entity. A subsidiary entity would be considered a FEOC itself, however, if it is also either (1) "subject to the jurisdiction" of the covered nation, pursuant to section V.D of this document, or (2) "controlled by" a covered nation government (including via direct or indirect control, such as through joint ventures, or via contracts that confer effective control to a FEOC), pursuant to section V.E of this document.

DOE's interpretation is supported by statutory and regulatory choices made in similar contexts, including: the 2021 NDAA definition of "foreign entity" (15 U.S.C. 4651(6)); and the NISPOM regulatory definition of "foreign interest" (32 CFR 117.3). The interpretation of "subject to the jurisdiction" provides clarity to original equipment manufacturers (OEM) that removing FEOCs from their supply chain will require removal of any critical minerals, battery components, and battery materials that are directly produced within the boundary of a covered nation.

E. Owned by, Controlled by, or Subject to the Direction

DOE's interpretive rule is largely consistent with the proposal but makes some clarifying edits in response to comments. If an entity is "owned by, controlled by, or subject to the direction" of (hereinafter "control") a government of a foreign country that is a covered nation, the entity is a FEOC. The term is also used in paragraph (iv) of DOE's interpretation of foreign entity to account for situations where a U.S. entity is sufficiently controlled to be considered foreign. DOE's 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 on a person that amount to a conferral of control.

As previously stated in response to comments, DOE considered whether to expand the definition of "control" under this interpretive rule to incorporate companies that are controlled by the government of a covered nation by virtue of significant investments by that government of the kind identified by commenters (*e.g.*, subsidies, grants, or debt financing). However, DOE has not yet identified a sufficiently bright-line rule for such investments that would be administrable by vehicle manufacturers in the context of the Treasury Department's 30D tax credit. Accordingly, DOE declines to make a change to the interpretive guidance at this time, but may incorporate consideration of such government investments into its evaluation of applications for domestic battery material processing, manufacturing, and recycling grants under section 40207 of BIL, or through utilization of the Secretary's exercise of her authority under BIL section 40207(a)(5)(E) to designate an entity a FEOC if it is "engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States." Furthermore, 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. Any information that may assist DOE in monitoring the battery supply chain market may be submitted to the email address identified in the "For Further Information" section of this document.

i. Control via 25% Interest

DOE's interpretation of control is informed by careful analysis of corporate structure within the battery supply chain. In the battery industry, the primary methods by which a parent entity, including the government of a foreign country, exercises control over another entity is through voting rights, equity interests, and/or its boards of directors. Parent entities may exercise control via majority equity interest, voting rights, or board seats, and also through minority holdings. Furthermore, parent entities may act in concert with other investors to combine minority holdings in order to exercise control. As a result, an effective measure of control is one that considers multiple permutations of majority and minority holdings of equity interest, voting rights, and board seats that can cumulatively confer control. In response to comments, DOE's final interpretation clarifies that each of these metrics—voting rights, equity interests, and board seats—are evaluated independently. As noted above, and assuming no other relevant circumstances, 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 result in the entity being controlled at the level of the highest metric (*i.e.*, 20%), and thus, not considered a FEOC. That said, DOE recognizes that significant levels of government control in all three metrics may still raise concerns. As such, as indicated above in response to comments, DOE may incorporate such considerations into its evaluation of applications for grants under section 40207 of BIL, through utilization of the Secretary's designation authority under BIL section 40207(a)(5)(E), or through revisions to the interpretive guidance upon evidence of evasive gamesmanship with respect to the 25% threshold.

While there are several prominent companies within the battery supply chain that are majority-owned by covered nation governments, particularly in the upstream mining segment, the predominant form of state ownership and influence in most segments of the battery supply chain is through minority shareholding, voting rights, or board seats. DOE has evaluated a range of supply chain entities for which covered nation governments and officials with cumulative holdings between 25% and 50% have meaningful influence over corporate decision-making, even in cases of subsidiary entities operating in other jurisdictions and in the case of multiple minority shareholders acting in concert. However, DOE's assessment of the battery supply chain strongly suggests that minority control can attenuate with multiple tiers of separation between the state and the firm performing the covered activity.

DOE recognizes that a bright-line metric for control will be necessary to ensure that OEMs can feasibly evaluate the presence of FEOCs within their supply chains. Informed by empirical evidence in the battery supply chain and choices made in other regulatory contexts, as discussed further below, DOE's interpretation establishes a 25% threshold and guidance on calculating the attenuation of control in a tiered ownership structure. In the case of majority control by a covered nation government, that control is not diluted such that outright ownership (50%+) confers full control. This ensures that a covered nation government is still considered to control, indirectly, a majority-owned subsidiary of a government-controlled company. However, multiple layers of minority control by a government may become so attenuated that an entity would no longer be classified as a FEOC. This bright-line threshold and guidance on how to calculate control will enable an evaluation of battery supply chains and facilitate any required reporting or certification of whether that supply chain includes products produced by a FEOC. This same

analysis applies to joint ventures, such that if the government of foreign country that is a covered nation controls, either directly or indirectly, 25% or more of a joint venture, then that joint venture is a FEOC.

DOE's interpretation is supported by choices made in a variety of statutory and regulatory regimes, while the identified methods of control account for specific circumstances present in the battery industry. DOE takes a broad approach to the interests that count towards the 25% threshold, considering board seats, voting rights, or equity interest. This is consistent with FOCI regulations, which evaluate ownership based on equity ownership interests sufficient to provide "the power to direct or decide issues affecting the entity's management or operations" (32 CFR 117.11(a)(1)). The interpretation that the interests of two entities with an agreement to act in concert may be combined to establish a controlling interest is similar to concepts in Securities and Exchange Commission rules defining beneficial ownership in instances of shareholders acting in concert (17 CFR 240.13d-5) and CFIUS regulations that consider arrangements to act in concert to determine, direct, or decide important matters affecting an entity as one means by which two or more entities may establish control over another entity (31 CFR 800.208(a)). Different thresholds of control are used in different statutory and regulatory contexts (*see, for example*, 26 U.S.C. 6038(e)(2), (3) (defining control with respect to a corporation to mean actual or constructive ownership by a person of stock possessing more than 50% of the total combined voting power of all classes of stock entitled to vote or 50% of the total value of shares of all classes of stock of a corporation, and control with respect to a partnership to generally mean actual or constructive ownership of a more than 50% capital or profit interest in a partnership); and 26 U.S.C. 368(c) (defining control with respect to certain corporate transactions to mean the ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of all other classes of stock of the corporation)). However, there are a number of analogous regulatory contexts in which a 25% threshold for considering an entity controlled is used. For instance, the Department of Commerce's CHIPS Rule, implementing a very similar FEOC provision, uses a 25% threshold with respect to voting interest, board seats, or equity interest. The State Department, in its International Traffic in Arms Regulation (ITAR) regulations, established a presumption of foreign control where foreign persons own 25% or more of the outstanding voting securities of an entity, unless one U.S. person controls an equal or larger percentage (22 CFR 120.65). FinCEN's BSA private banking account

regulations (31 CFR 1010.605(j)(1)(i)) and Beneficial Ownership Reporting Rule (31 CFR 1010.380(d)) also contain 25% ownership thresholds. *See also* 15 CFR 760.1(c) (defining "controlled in fact" using a 25% threshold for cases where no other person controls an equal or larger percentage of voting securities). In some of these other contexts, the 25% calculation is based on a particular form of control (*e.g.*, only voting rights). DOE's interpretation broadens the ways in which an entity can be controlled at a 25% level, because doing so accords with statutory concerns related to the corporate structure of the battery industry.

In response to comments above, DOE also clarified that "equity interests" refers to all ownership interests, including capital or profit interests and contingent equity interests. "Contingent equity interests" is a defined term in the CFIUS regulations (31 CFR 800.207), and DOE intends for the concept of contingent equity interests in the interpretive rule to be understood largely consistent with the CFIUS regulations. For the purpose of determining FEOC compliance, the amount of the contingent interest that can be reasonably determined, as understood in 31 CFR 800.308(a)(3), should be included in the 25% control calculation, without consideration of whether conversion is imminent or within the control of the equity-owning entity as set forth in 31 CFR 800.308(a)(1-2).

DOE's interpretation of indirect control includes guidance on how to calculate the attenuation of control in a tiered ownership structure. In the case of majority control at any level, that control is not attenuated such that outright ownership (50%+) confers full control. The proposed approach recognizes the reality that a parent entity that holds a majority of the voting rights, equity interests, or board seats in a subsidiary has unilateral control over that subsidiary and can direct that subsidiary's ability to exercise influence and control over its own subsidiaries. However, in the case of multiple tiers of minority control by a government, the actual ability of the government to influence the operations of a subsidiary may become materially attenuated. This understanding of how to calculate a parent entity's indirect ownership and control of sub-entities is similar to OFAC's 50% Rule, under which "any entity owned in the aggregate, directly or indirectly, 50% or more by one or more blocked persons is itself considered to be a blocked person." *See* U.S. Dept. of the Treasury, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (Aug. 13, 2014).

As previously stated, when calculating whether an entity is a FEOC based on whether the government of a covered nation directly or indirectly holds 25% or more of its voting rights, equity interest, or board seats, DOE's interpretation would not factor in any voting share, equity interest, or board seats held by an entity that is a FEOC solely by virtue of being subject to the covered nation's jurisdiction.

The following scenarios illustrate indirect control in a multi-tiered ownership structure, which could contain more tiers than illustrated here. For simplicity, these examples only evaluate control via voting rights and assume no other relevant circumstances.

1. If Entity A cumulatively holds 25% of Entity B's voting rights, then Entity A directly controls Entity B. If Entity B cumulatively holds 50% of Entity C's voting rights, then Entities B and C are treated as the same entity, and Entity A also indirectly controls Entity C.
    - ○ If Entity A is the government of a foreign country that is a covered nation, Entities B and C are both FEOCs.
2. If Entity A cumulatively holds 50% of Entity B's voting rights, then Entity A is the direct controlling "parent" of Entity B, and Entities A and B are treated as the same entity. If Entity B cumulatively holds 25% of Entity C's voting rights, then Entity C is understood to be directly controlled by Entity B and indirectly controlled by Entity A.
    - ○ If Entity A is the government of a foreign country that is a covered nation, Entities B and C are both FEOCs.
3. If Entity A cumulatively holds 25% of Entity B's voting rights, then Entity A directly controls Entity B. If Entity B cumulatively holds 40% of Entity C's voting rights, then Entity B directly controls Entity C. However, because Entity A does not hold 50% of the voting rights of Entity B, and Entity B does not hold 50% of the voting rights of Entity C, Entity A's indirect control of Entity C is calculated proportionately (25% x 40% = 10%). Based on that proportionate calculation, Entity A will be considered to hold only a 10% interest in Entity C, which is insufficient to meet the 25% threshold for control contemplated under this proposed guidance.
    - ○ If Entity A is the government of a foreign country that is a covered nation, Entity B is a FEOC. But Entity A holds only a 10% interest in Entity C, which is less than the 25%

threshold requirement to deem Entity C controlled by Entity A. Therefore, Entity C is not a FEOC via the indirect control of Entity A.

ii. Control via Licensing and Contracting

DOE is concerned that if its interpretation of the term "control" covered only direct and indirect holding of board seats, voting rights, and equity interest by the government of a covered nation, then a government may seek to evade application of the rule by instead exercising its control over a FEOC that enters into a license or contract with a non-FEOC entity such that the non-FEOC serves as the producer of record while the FEOC maintains effective control over production. Because such arrangements would defeat congressional intent, DOE's interpretation of "control" includes "effective control" through contracts or licenses with a FEOC that warrant treating the FEOC as if it were the true entity responsible for any production. 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. The proximity of a FEOC to the government of a covered nation, even when the government does not have a controlling stake in the company, raises similar concerns in the context of a license or contract with a non-FEOC, and the non-FEOC should retain the identified rights to avoid effective control by the FEOC.

Many contractual and licensing arrangements do not raise these concerns. Therefore, to provide a reasonably bright-line test for evaluation of battery supply chains that may include numerous contracts and licenses, DOE's interpretation in section V.E of this document contains a safe harbor for evaluation of "effective control." 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.

DOE also recognizes that even if an entity's contractual relationship with a FEOC confers effective control over the production of particular critical minerals, battery components, or battery materials, for purposes of determining eligibility for the 30D tax credit and for and DOE's BIL 40207 grant program, the contracting entity would not necessarily be controlled by the government of a covered nation for critical minerals, battery components, or battery materials that were not produced pursuant to

that contract or license. Therefore, 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.

The concept that an entity can be controlled via contract is supported by choices made in various regulatory contexts, including CFIUS regulations that include an understanding that control can be established via contractual arrangements to determine, direct, or decide important matters affecting an entity (31 CFR 800.208(a)). Further, intellectual property can be licensed restrictively, or even misused, to give the intellectual property owner rights beyond the typical ability to exclude others from making, using, selling, and/or copying the intellectual property for a limited time. In this scenario, even if a non-FEOC entity owns a facility, which is not separately 25% controlled by the government of a covered nation, the facility and/or its operations could still be effectively controlled by a FEOC licensor or contractor through other mechanisms. Accordingly, DOE's definition of effective control identifies criteria that would indicate that a license or contract provides the licensor or contractor with the ability to make business or operational choices that otherwise would rest with the licensee or principal. The criteria selected reflect various known mechanisms in restrictive or overreaching licenses, such as lack of access by the licensee or principal to information and data (*e.g.*, control parameters or specification and quantities of material input for equipment) that are necessary to operate equipment critical to production at necessary quality and throughput levels. This lack of access could be tantamount to the licensor or contractor having effective control over the licensee or principal.

IV. Regulatory Review

DOE considers this guidance to be a final interpretive rule under the Department's authority to interpret section 40207(a)(5) of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)). As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(A)). Because no notice of proposed rulemaking is

required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis (5 U.S.C. 603(a), 604(b)).

This interpretive rule is significant guidance under Executive Order 12866 because of the substantial public interest and policy importance with respect to the interpretation of the definition of a FEOC. It also affects a variety of entities and other Federal agencies. This interpretive rule has, thus, been reviewed by the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA).

The Department has determined that this final interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on the public that would be considered information collections requiring approval by the OMB in accordance with the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Finally, as required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this interpretive rule prior to its effective date. The report will state that OIRA has determined that the rule does not meet the criteria set forth in 5 U.S.C. 804(2).

V. Final Interpretive Rule on the Definition of Foreign Entity of Concern

A. Overview

DOE clarifies the term "foreign entity of concern" by providing interpretations for the following terms within BIL section 40207(a)(5)(C) (42 U.S.C. 18741(a)(5)(C)): "foreign entity;" "government of a foreign country;" "subject to the jurisdiction;" and "owned by, controlled by, or subject to the direction." These terms are interpreted separately, recognizing that the terms have unique meaning. DOE also interprets additional terms as necessary to provide clarity.

For DOE's final guidance, an entity is determined to be a FEOC under BIL section 40207(a)(5)(C) if it meets the definition of a "foreign entity," (section V.B of this document) and either is "subject to the jurisdiction" of a covered nation government (section V.D of this document) or is "owned by, controlled by, or subject to the direction" (section V.E of this document) of the "government of a foreign country" (section V.C of this document) that is a covered nation.

B. Foreign Entity

DOE interprets "foreign entity" to mean:

(i) A government of a foreign country;

(ii) 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));

(iii) 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

(iv) 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).

C. Government of a Foreign Country

DOE interprets "government of a foreign country" to mean:

(i) A national or subnational government of a foreign country;

(ii) An agency or instrumentality of a national or subnational government of a foreign country;

(iii) A dominant or ruling political party (*e.g.*, Chinese Communist Party (CCP)) of a foreign country; or

(iv) A current or former senior foreign political figure.

Senior foreign political figure means (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). 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.

D. Subject to the Jurisdiction

DOE interprets that a foreign entity is "subject to the jurisdiction" of a covered nation government if:

(i) The foreign entity is incorporated or domiciled in, or has its principal place of business in, a covered nation; or

(ii) 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.

E. Owned by, Controlled by, or Subject to the Direction

DOE interprets that an entity is "owned by, controlled by, or subject to the direction" of another entity (including the government of a foreign country that is a covered nation) if:

(i) 25% 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

(ii) 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. 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." Additionally, if 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. For purposes of determining whether an entity indirectly holds board seats, voting rights, or equity interest in a tiered ownership structure:

- 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. As such, 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 ownership is attributed proportionately.

Section III.E.i of this document, contains multiple examples illustrating how to determine when an entity is indirectly controlled under this interpretive rule.

Effective control means the right of the FEOC contractor, whether the entity is a FEOC via 25% control or via jurisdiction, in a contractual relationship 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.

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:

(i) 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);

(ii) To determine, within the overall contract term, the timing of production, including when and whether to cease production;

(iii) 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;

(iv) To access all areas of the production site continuously and observe all stages of the production process; and

(v) 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.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of final interpretive rule.

Signing Authority

This document of the Department of Energy was signed on April 18, 2024, by Giulia Siccardo, Director, Office of Manufacturing and Energy Supply Chains, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on April 18, 2024.

GIULIA SICCARDO

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Date: 2024.04.18 13:50:55 -04'00'

Giulia Siccardo,

Director,

Office of Manufacturing and Energy Supply Chains