

Guidance Suggests U.S. Clean Vehicle Subsidies Require Disengagement From China Supply Chains

WRITTEN BY

[Daniel N. Anziska](#) | [Anne C. Loomis](#) | [Adam C. Kobos](#)

On December 1, the U.S. Department of Energy (DOE) released long-awaited proposed guidance defining “foreign entity of concern” (FEOC) under the Infrastructure Investment and Jobs Act (IIJA). Simultaneously, the U.S. Department of the Treasury and Internal Revenue Service (IRS) issued proposed guidance under Section 30D, the Clean Vehicle Tax Credit. The deadline for providing comments to DOE is January 3, 2024, and for providing comments to the IRS is January 18, 2024.

Background

As discussed in our prior alert, [The Clean Vehicle Tax Credit Under Section 30D](#), the Inflation Reduction Act (IRA) modified the existing Section 30D credit for consumers or businesses purchasing clean energy vehicles (EVs), and tied the credit amount to requirements that a certain percentage (by value) of the components of the clean vehicle’s battery be manufactured or assembled in North America (\$3,750 of the credit), and that a certain percentage (by value) of the battery’s critical minerals be extracted or processed in the U.S., or in a country with which the U.S. has a free trade agreement, or recycled in North America (\$3,750 of the credit). In addition, Section 30D excludes from the scope of qualifying new clean vehicles, any vehicle placed in service after: (a) December 31, 2024 with respect to which any of the applicable critical minerals contained in the battery of such vehicle were extracted, processed, or recycled by a FEOC, or (b) December 31, 2023, with respect to which any of the components contained in the battery of such vehicle were manufactured or assembled by a FEOC.

DOE Guidance

The DOE’s FEOC guidance is aimed to help the U.S. de-risk its EV supply chain from China. The DOE’s recently announced \$6 billion Battery Materials Processing and Manufacturing grant program specifically gives priority to applicants that will not use battery material supplied or originated from a FEOC.

The proposed definition of FEOC is an entity that is either: (1) controlled by a covered nation government; or (2) subject to the jurisdiction of a covered nation government, which currently includes China, Russia, and Iran. The DOE proposes a two-part test:

First, determine if there is a foreign entity, defined as:

1. A government of a foreign country (includes local state-owned enterprises, or a utility or public financial institution).

2. A natural person who is not a U.S. citizen or Green Card holder.
3. A partnership, association, corporation, or organization organized under the laws of or having its principal place of business in a foreign country.
4. An entity organized under the laws of the U.S. that is owned, controlled by, or subject to the direction of an entity qualifying as a foreign entity under categories 1-3 above.

Second, determine if the foreign entity is an FEOC:

1. Is the foreign entity incorporated or domiciled in, or has its principal place of business in, a covered nation, or does it engage in the extraction, processing, or recycling of specific battery components, critical minerals, or battery materials in a covered nation?
2. Is the foreign entity owned by, controlled by, or subject to the direction of a government of a foreign country that is a covered nation because: (a) 25% or greater of the foreign entity's board seats, voting rights, or equity interests are cumulatively held by the foreign government, whether directly or indirectly by one or more intermediate entities, or (b) for specific battery components, critical minerals, or battery materials, does the foreign entity have a licensing or other agreement with a contractor that is an FEOC that entitles the FEOC contractor to exercise effective control over the extraction, processing, recycling, manufacturing, or assembly of such items?

Treasury Department and IRS Guidance

The Treasury Department and IRS simultaneously released proposed regulations under Section 30D and Revenue Procedure 2023-38, which provides rules for qualified manufacturers of new EVs to comply with reporting, certification, and attestation requirements regarding FEOC rules under Section 30D. The IRS proposed regulations define “foreign entity of concern” by reference to the DOE’s FEOC guidance.

- For vehicles placed in service after December 31, 2023, the battery must be FEOC-compliant to qualify for Section 30D.
- For vehicles placed in service in 2024 or later, battery components cannot be assembled or manufactured by an FEOC.
- For vehicles placed in service in 2025 or later, critical materials and their constituent materials contained in battery cells cannot be extracted, processed, or recycled by an FEOC.

The qualified manufacturer of the vehicle must perform due diligence and make a determination as to whether battery components and critical minerals are FEOC-compliant, track them to specific battery cells, and track battery components and battery cells into specific batteries.

Finally, there are two temporary rules aimed to address FEOC compliance concerns:

1. **Non-traceable materials:** For vehicles for which a manufacturer provides a periodic written report containing required vehicle information to the IRS before January 1, 2027, certain low-value non-traceable minerals (to be specified by the IRS) may be excluded from consideration by the qualified manufacturer, so long as the manufacturer demonstrates its compliance once this transition rule is no longer in effect.
2. **Allocation of Critical Minerals (and Their Associated Constituent Materials):** For vehicles for which a manufacturer provides a periodic written report providing required vehicle information to the IRS before January 1, 2027, the qualified manufacturer can make a determination that a battery cell is compliant as it relates to critical minerals based on a general allocation of its available mass of applicable critical minerals and associated constituent materials rather than tracking such items to specific battery cells.

Takeaway

We anticipate refinements to the proposed guidance, which we anticipate could become final as early as mid-next year. The key question remains how EVs will comply with the content requirements of the IRA to retain the consumer tax credits, although we note there have been promising announcements related to domestic development and expansion across the battery component chain.

RELATED INDUSTRIES + PRACTICES

- [Energy](#)
- [Energy Tax](#)
- [Inflation Reduction Act of 2022 – Energy Industry Implications](#)
- [Renewable Energy](#)
- [Tax](#)