most recently harvested crop at that time.

(4) Only handlers, including duly authorized officers or employees of handlers, who are eligible to serve as handler members of the Board shall participate in the nomination of handler members and alternate handler members of the Board. No handler shall participate in the selection of nominees in more than one district during any nomination cycle. If a handler handles cherries in more than one district, that handler may select in which district he or she wishes to participate in the nominations and election process and shall notify the Secretary or the Board of such selection. A handler may not participate in the nominations process in one district and the elections process in a second district in the same election cycle. If a person is a grower and a grower-handler only because some or all of his or her cherries were custom packed, but he or she does not own or lease and operate a processing facility, such person may vote only as a grower. For the duration of a handler's term on the Board, the sales constituency affiliation for said handler will be the affiliation at the time of nomination.

* * * * *

(7) After the appointment of the initial Board, the Secretary or the Board shall announce at least 180 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in this section. Nominations for such position should be submitted to the Secretary or the Board not less than 60 days prior to the expiration of such term.

(c) * * *

(3) * * *

(i) * * *

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%) of the previous three-year average production handled in the district; Provided, that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(i).

* * * * *

■ 5. Revise § 930.28 to read as follows:

§ 930.28 Alternate members.

(a) An alternate member of the Board, during the absence of the member for whom that member serves as an alternate, shall act in the place and stead of such member and perform such other duties as assigned. However, if a member is in attendance at a meeting of the Board, an alternate member may not act in the place and stead of such member. In the event a member and his or her alternate are absent from a meeting of the Board, such member may designate, in writing and prior to the meeting, another alternate to act in his or her place: *Provided,* that such alternate represents the same group (grower or handler) as the member and is not from the same sales constituency as another acting member or acting alternate member in that district. In the event of the death, removal, resignation or disqualification of a member, the alternate shall act for the member until a successor is appointed and has qualified.

(b) Alternate members may be from the same sales constituency as the member for whom they serve as an alternate. In the event a member and his or her alternate are absent from a meeting of the Board, another alternate may act for the member following the requirements of § 930.28(a), provided this does not create a sales constituency conflict with the other members of that district.

(c) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

■ 6. Amend § 930.52 by revising paragraphs (a) and (d) to read as follows:

§ 930.52 Establishment of districts subject to volume regulations.

(a) The districts in which handlers shall be subject to any volume regulations implemented in accordance with this part shall be those districts in which the average annual production of cherries over the prior 5 years has exceeded 6 million pounds. Handlers shall become subject to volume regulation implemented in accordance with this part in the crop year that follows any 5-year period in which the 6-million-pound average production requirement is exceeded in that district.

* * * * *

(d) Any district producing a crop which is less than 50 percent of the average annual production in that district in the previous 5 years would be exempt from any volume regulation if, in that year, a restricted percentage is established.

* * * * *

■ 7. Amend § 930.62 by revising the introductory text of paragraph (a) to read as follows:

§ 930.62 Exempt uses.

(a) The Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41, 930.44, 930.51, 930.53, or 930.55 through 930.57 cherries for designated uses. Such uses may include, but are not limited to:

* * * * *

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–26396 Filed 12–1–23; 8:45 am]

BILLING CODE P

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 proposed interpretive rule; request for comments.

SUMMARY: The U.S. Department of Energy (DOE or the Department) provides this notification of proposed interpretive rule and request for public comment on its 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). 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 document, DOE proposes to clarify 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 of.''

DATES: DOE invites stakeholders to submit written comments on its interpretation. DOE will accept comments, data, and information regarding this interpretation no later than January 3, 2024. Only comments received through one of the methods described in the **ADDRESSES** section will be accepted.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Follow the instructions for submitting comments for RIN 1901–ZA02.

Alternatively, interested persons may submit comments, including comments containing information for which disclosure is restricted by statute, such as trade secrets and commercial or

financial information (hereinafter referred to as Confidential Business Information (CBI)) and appropriately marked as such, by email to *FEOCguidance@hq.doe.gov.* Please include RIN 1901–ZA02 in the subject line of the message. Please submit comments in Microsoft Word, or PDF file format, and avoid the use of encryption.

FOR FURTHER INFORMATION CONTACT: Mallory Clites, U.S. Department of Energy, Office of Manufacturing and Energy Supply Chains at Email: *FEOCguidance@hq.doe.gov,* Telephone: 202–287–1803.

SUPPLEMENTARY INFORMATION:

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A. 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. 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.''

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 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).''

DOE is issuing this proposed guidance regarding which foreign entities qualify as FEOCs 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.'' DOE considers this proposed guidance to be a proposed interpretive rule for purposes of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) and does not consider this guidance to be a legislative rule subject to the procedural requirements of that section. For the purposes of this document, DOE uses the term ''interpretive rule'' and ''guidance'' interchangeably. Subsequent to the issuance of this interpretive rule, DOE intends to promulgate separate regulations implementing the Secretary's ''determination authority'' contained in BIL section 40207(a)(5)(E) (42 U.S.C. 18741(a)(5)(E)).

In accordance with section 553 of the APA, public notice and opportunity for comment is not required for an interpretive rule. Nevertheless, to get the benefit of input from the public and interested stakeholders, the Department specifically requests comments on its proposed interpretation of the terms discussed herein. This document is intended to solicit public feedback on the DOE interpretation to better understand stakeholder perspectives prior to implementation of finalized guidance. The Department will consider all comments received during the public comment period, and modify its proposed approach, as appropriate, based on public comment.

This proposed guidance proceeds as follows: Section B provides DOE's interpretation of the relevant terms related to whether a foreign entity is a FEOC as the 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; Section C provides an explanation of DOE's interpretation, along with citations to analogous provisions in other statutory and regulatory contexts that DOE consulted in making its interpretation; and Section D identifies some specific topics on which DOE requests comment from the public.

B. Proposed FEOC Terminology Interpretations

DOE proposes to clarify 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)): ''government of a foreign country;'' ''foreign entity;'' ''subject to the jurisdiction;'' and ''owned by, controlled by, or subject to the direction of.'' These terms are interpreted separately, recognizing that the terms have unique meaning. DOE also proposes interpretations of additional terms necessary to provide clarity.

For DOE's proposed 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 B.I) and either is ''subject to the

jurisdiction'' of a covered nation government (Section B.III) or is ''owned by, controlled by, or subject to the direction of'' (Section B.IV) the ''government of a foreign country'' (Section B.II) that is a covered nation.

I. Foreign Entity

DOE proposes to interpret ''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 Section IV) of an entity that qualifies as a foreign entity in paragraphs (i)–(iii).

II. Government of a Foreign Country

DOE proposes to interpret ''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), or of a dominant or ruling foreign political party, and (b) an immediate family member (spouse, parent, sibling, child, or a spouse's parent and sibling) of any individual described in (a). ''Senior official'' means an individual with substantial authority over policy, operations, or the use of government-owned resources.

III. Subject to the Jurisdiction

DOE proposes 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.

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

DOE proposes 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 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, 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 C, contains multiple scenarios illustrating how to determine when an entity is indirectly controlled under this interpretive rule.

Effective control means the right of the contractor in the contractual relationship to determine the quantity or timing of production, to determine which entities may purchase or use the output of production, or to restrict access to the site of production to the contractor's own personnel; or the exclusive right to maintain, repair, or operate equipment that is critical to production.

In the case of a contract with a FEOC, a contractual relationship will be deemed to not confer effective control by the FEOC if the applicable agreement(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, notwithstanding any export control or other limit on the use of intellectual property imposed by a covered nation subsequent to execution.

C. Explanation of Proposed Interpretation

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 above are intended to be structured as, to the greatest degree possible, bright-line rules that would allow individual entities to readily evaluate whether their upstream suppliers would or would not be considered FEOCs. In the case of the

Battery Manufacturing and Recycling Grants Program in BIL section 40207, a bright-line rule will afford eligible entities using their grants for battery recycling greater clarity in avoiding the export of recovered critical materials to a FEOC.

I. 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 proposed 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 proposed 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 in this proposed guidance 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 governments of covered nations cannot evade the FEOC restriction simply by establishing a U.S. subsidiary, while otherwise maintaining ownership or control over that subsidiary.

II. Government of a Foreign Country

''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 proposed interpretation of ''foreign entity'' in paragraph (i) of Section B.I.

The proposed 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 state-owned enterprises (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.''

The proposed 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 interests 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. 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.

In the specific context of the CCP in the PRC, DOE considers its interpretation of ''government of a foreign country'' to include current members of Chinese People's Political Consultative Conference and current and former members of the Politburo Standing Committee, the Politburo, the Central Committee, and the National Party Congress because they qualify as ''senior foreign political figures.''

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)).

III. 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 proposed 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'').

Second, DOE's proposal 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* Third Restatement (Foreign Relations) (1986) section 402(1) (stating that a state has ''jurisdiction to prescribe law with respect to [conduct, persons, and interests] 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 proposed guidance, an entity that is not legally incorporated in a covered nation could be nevertheless 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 also be FEOCs solely based on their parent being a covered nation jurisdictional entity. However, a subsidiary entity would be a FEOC itself if it is also either (1) ''subject to the jurisdiction'' of the covered nation, pursuant to Section B.III, or (2) ''controlled by'' a covered nation government, pursuant to Section B.IV.

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 above 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.

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

If an entity is ''owned by, controlled by, or subject to the direction'' of (hereinafter ''controlled by'') 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 the proposed interpretation of foreign entity to account for situations where a U.S. entity is sufficiently controlled to be considered foreign. DOE's proposed interpretation provides for both (1) control via the holding of 25% or more of an entity's board seats, voting rights, or equity interest, and (2) control via license or contract conferring rights on a person that amount to a conferral of control.

Not all foreign entities are considered FEOCs. However, if an entity is a foreign entity that is ''controlled by'' a covered nation government, that entity is a FEOC. A subsidiary of that FEOC is not automatically considered a FEOC itself unless the subsidiary is either (1) ''subject to the jurisdiction'' of a covered nation government, 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). As such, a FEOC that is controlled by a covered nation government may hold an interest in a subsidiary, even an interest above 25%, and that subsidiary may still not be a FEOC if the covered nation's level of control of the subsidiary falls below 25% (*see* scenario 3 below).

a. 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 a government of a foreign country, exercises control over another entity is through voting interest, equity ownership, and/or boards of directors. Parent entities may exercise control via majority ownership of shares, voting interest, or board seats, and also through minority holdings. Furthermore, parent entities may act in concert with other investors to combine minority holdings to exercise control. As a result, an effective measure of control is one that considers multiple permutations of majority and minority holdings of equity, voting rights, and board seats that can cumulatively confer control.

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, discussed further below, DOE's interpretation establishes a 25% threshold and guidance on calculation of 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 government-controlled company that has majority ownership of a subsidiary passes along control. 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

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

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 and it has devised a method that accounts for the 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, and 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 final rule in Preventing the Improper Use of CHIPS Act Funding, implementing a very similar FEOC provision, uses a 25% threshold with respect to voting interest, board seats, and equity interests (88 FR 65600; Sept. 25, 2023). 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 shares). DOE's interpretation broadens the forms of control that are relevant to the 25%, because doing so accords with statutory concerns related to the corporate structure of the battery industry.

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, 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 interest, equity, 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 so attenuated that the subsidiary would no longer reasonably be deemed ''controlled'' by the government. 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).

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 share, 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 tiered ownership structure:

1. If Entity A cumulatively holds 25% of Entity B's board seats, voting rights, or equity interest, then Entity A directly controls Entity B. If Entity B cumulatively holds 50% of Entity C's board seats, voting rights, or equity interest, 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 board seats, voting rights, or equity interest, 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 board seats, voting rights, or equity interest, 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 board seats, voting rights, or equity interest, then Entity A directly controls Entity B. If Entity B cumulatively holds 40% of Entity C's board seats, voting rights, or equity interest, then Entity B directly controls Entity C. However, because Entity A does not hold 50% of the board seats, voting rights, or equity interest of Entity B, and Entity B does not hold 50% of the board seats, voting rights, or equity interest of Entity C, Entity A's indirect control of Entity C is calculated proportionately (25% × 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.

b. Control via Licensing and Contracting

DOE is concerned that if ''controlled by'' covered only direct and indirect holding of board seats, voting rights, and equity interest by the governments of covered nations, such governments may seek to evade application of the interpretation by instead controlling FEOCs that contract with non-FEOC entities to be the producer of record while the FEOC maintains effective control over production. Because such arrangements would defeat congressional intent, DOE proposes an interpretation of ''controlled by'' that 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.

Many contractual and licensing arrangements do not raise these concerns. Therefore, to provide a reasonably bright-line test for evaluation of upstream battery supply chains that include numerous contracts and licenses, DOE has proposed in Section B.IV 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, 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 proposed 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, ownership of a facility by an entity that does not have 25% voting interest, equity, or board seats held, directly or indirectly, by the government of a covered nation, would not be sufficient if a FEOC licensor or contractor maintains effective control through other mechanisms. Accordingly, DOE has proposed a definition of effective control that 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.

D. Additional Request for Comments

As explained in Section A, DOE requests comment on its proposed interpretations outlined in Section B, as well as the reasoning provided in Section C. Subsequent to the issuance of this interpretive guidance, DOE intends to promulgate separate regulations implementing the Secretary's determination authority contained in BIL section 40207(a)(5)(E). As such, DOE also requests comment on the following.

DOE recognizes that entities could attempt to evade ownership and control restrictions in various ways without materially changing the extent to which they are, in fact, subject to the ownership, control, or direction of a covered nation as defined in this guidance. Section 40207(a)(5)(E) of BIL includes as FEOCs those foreign entities ''determined by the Secretary [of Energy], in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.'' Accordingly, DOE requests comment on whether use of this determination authority could provide a tool for limiting attempts to evade such restrictions and what DOE may deem ''unauthorized conduct.'' DOE requests specific comment on whether, in addition to or instead of defining ''owned by, controlled by, or subject to the direction of'' to include effective control via contractual arrangement, DOE should consider whether a given contractual or licensing arrangement, or operational practice with a contractor or licensor, is a means of evading restrictions on production by a FEOC that would warrant use of its determination authority in BIL section 40207(a)(5)(E). For example, DOE recognizes that even if certain rights are reserved by a non-FEOC licensee in its contractual arrangement with a FEOC, a FEOC licensor may nevertheless compel the licensee through leverage or coercion to not exercise the licensee's contractual rights. DOE could construe any such overt compulsion by a FEOC licensor as unauthorized conduct, potentially subject to the determination authority. DOE requests comment on whether there are any other circumstances related to contractual arrangements between entities and FEOCs that could constitute unauthorized conduct, potentially subject to the determination authority.

In addition, in recognition of the fact that it may be particularly difficult to definitively evaluate the contractual relationships of upstream suppliers, DOE is also considering whether to provide entities with the opportunity to voluntarily request a review of contracts and licensing arrangements by DOE in order to provide additional certainty regarding whether effective control by a FEOC is present. DOE requests comment on whether such a voluntary pre-review process would be beneficial and administrable, including input on what process steps would be reasonable and the types of documents that should be submitted for review.

E. Public Comment Process

Comments submitted can be public or confidential.

Do not submit to *www.regulations.gov* information claimed as CBI. Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, *see* the Confidential Business Information section.

F. Confidential Business Information

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the

document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email at *FEOCnotice@hq.doe.gov.* DOE will make its own determination about the confidential status of the information and treat it according to its determination.

G. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this Notification of proposed interpretive rule; request for comments.

Signing Authority

This document of the Department of Energy was signed on November 28, 2023, 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 November 28, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 364

RIN 3064–AF94

Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More; Extension of Comment Period

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking and issuance of guidelines; extension of comment period.

SUMMARY: On October 11, 2023, the Federal Deposit Insurance Corporation (FDIC) published in the **Federal Register** a proposal to issue Guidelines to FDIC's standards for safety and soundness regulations and make conforming amendments to its regulations. These Guidelines would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to Section 39 of the Federal Deposit Insurance Act (FDI Act), with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines. The FDIC has determined that an extension of the comment period until February 9, 2024, is appropriate.

DATES: Comments must be received by February 9, 2024.

ADDRESSES: The FDIC encourages interested parties to submit written comments. Please include your name, affiliation, address, email address, and telephone number(s) in your comment. You may submit comments to the FDIC, identified by RIN 3064–AF94, by any of the following methods:

Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications. Follow instructions for submitting comments on the FDIC's website.

Mail: James P. Sheesley, Assistant Executive Secretary, Attention: Comments/Legal OES (RIN 3064–AF94), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

Hand Delivered/Courier: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

Email: comments@FDIC.gov. Include RIN 3064–AF94 in the subject line of the message.

Public Inspection: Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-registerpublications/*. Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this notice will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision: Judy E. Gross, Senior Policy Analyst, (202) 898–7047, *JuGross@FDIC.gov*; Legal Division: Jennifer M. Jones, Counsel, (202) 898–6768; Catherine Topping, Counsel, (202) 898–3975; Nicholas A. Simons, Senior Attorney, (202) 898–6785; Kimberly Yeh, Senior Attorney, (202) 898–6514.

SUPPLEMENTARY INFORMATION: On October 11, 2023, the FDIC published in the **Federal Register** a proposal to issue Guidelines as Appendix C to FDIC's standards for safety and soundness regulations in part 364 and make conforming amendments to parts 308 and 364 of its regulations.[1] These Guidelines would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to section 39 of the FDI Act with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines. The Guidelines are intended to set the FDIC's expectations for covered institutions regarding corporate governance, risk management, and oversight by the board of directors. The notice of proposed rulemaking stated that the comment period would close on December 11, 2023. The FDIC has received requests to extend the comment period. An extension of the comment period will provide additional opportunity for the public to consider the proposal and prepare comments, including to address the questions posed by the FDIC. Therefore, the FDIC is extending the end of the comment period for the proposal from December 11, 2023, to February 9, 2024.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on November 28, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–26510 Filed 12–1–23; 8:45 am]

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[1] 88 FR 70391 (Oct. 11, 2023).