MEMORANDUM

TO: US Department of Energy (DOE)
FROM: The Battery Materials and Technology Coalition (BMTC)
RE: DOE Proposed Guidance on Foreign Entity of Concern (FEOC)

Introduction

The Battery Materials and Technology Coalition (BMTC) would like to thank the US Department of Energy (DOE) for its efforts to define Foreign Entity of Concern (FEOC). This definition is important as it will be applied to the Department of Energy (DOE) Battery Materials Processing and Battery Manufacturing Grants under 42 U.S.C. 18741, as well as the 30D Clean Vehicle Tax Credit under Public Law 117–169, 136 Stat. 1818 to be administered by the Internal Revenue Service (IRS), both of which are of great interest to members of the BMTC.

BMTC is a coalition of companies that mine, extract, process, manufacture, and recycle battery materials, as well as develop cathode, anode, cell, pack, and battery technologies in North America. The coalition is comprised of 18 member companies across Canada and the US, including facilities and operations in 28 states and current employment numbers of over 8,700 individuals, with projections for over 23,500 individuals to be employed by 2030. Our coalition is united behind a shared interest in growing a resilient and sustainable North American battery supply chain that ensures industry and government work together to seize the opportunity to secure the supply chains that power our way of life.

BMTC appreciates DOE's detailed approach in defining FEOC to address national and economic security threats. That said, as written, we believe the definitions still allow for Chinese and Russian-backed entities to benefit from US taxpayer subsidies, contrary to the intent of the law. We ask that DOE amend language to close loopholes that exist in the draft guidance.

Background Information

The US, and North America more broadly, is heavily reliant on foreign countries and industries for the sourcing, processing, and manufacturing of the materials and components needed for the lithium-ion battery supply chain. Most notably, Chinese entities control most of the global battery mineral processing and refining including 44% of lithium chemical processing, 69% of nickel processing, 69% of synthetic graphite processing, 95% of manganese processing, and 100% of natural graphite processing.[1] As of 2022, Chinese companies have over 10 times the battery cell manufacturing capacity than companies in the US, and Chinese entities also have ownership stake in mining operations worldwide, including in Indonesia, Australia, the Democratic Republic of Congo, Chile, and beyond, where they wield outsized power and influence. Russian entities are also

[1] Benchmark Minerals Intelligence, "China's Battery Supply Chain Dominance," October 2022.

dominant players in this space, as the nation is the top global producer of Class 1 nickel.[2] With geopolitical tensions on the rise, the US and other nations have committed to shifting dependence away from Russia for a variety of critical goods, including battery materials such as nickel, posing a significant supply concern moving forward.

This stranglehold on battery supply chains is exacerbated by the policies implemented by the governments of China and Russia that allow for bad-faith business practices in and outside their countries, including restricting market access, implementing trade barriers, utilizing discriminatory procurement policies, and undercutting competitors on pricing. This dominance in the marketplace and these unfair business practices have made it difficult for companies to build a battery supply chain in the United States.

The Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA) provide much-needed investments to level the playing field in helping the US build a sustainable domestic battery supply chain. Domestic production is critical to sustainably powering electric vehicles, renewable energy sources, and industrial decarbonization. Importantly, the FEOC provision in the IRA 30D tax credit is intended to add an additional layer of security on top of the sourcing requirements for critical minerals and battery components. These legal protections are meant to ensure that adversarial materials do not qualify for US taxpayer subsidies.

Below, BMTC asks DOE for clarifications and provides recommended changes to the proposed guidance. These changes are to guarantee that the Congressional intent of the law is upheld, and that the focus remains on investments in the US and with our close trading partners that share high-level economic, environmental, and labor practices across the battery supply chain.

Government vs. Industry Control

DOE makes clear in the proposed guidance that to be qualified as a FEOC, an entity must be 1) a foreign entity, AND, either be a) subject to the jurisdiction of the government of a covered nation, OR b) owned by, controlled by, or subject to the direction of the government of a covered nation. BMTC would like clarity on why, for b) above, this is limited to *government* entities. Specifically, BMTC would like to see added: "b) owned by, controlled by, or subject to the direction of the government of a covered nation, **OR, owned by, controlled by, or subject to the direction of a foreign entity that is itself subject to the jurisdiction of a covered nation (a FEOC)."**

Page 16 of the guidance states: "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." As written, this clarification allows for foreign companies – that are themselves a FEOC based on the jurisdiction clause – to control up to 50% of a subsidiary, and that subsidiary would still NOT be considered a FEOC if government entities don't explicitly hold at least 25% of the subsidiary's parent company (as depicted in Scenario 3 of the guidance).

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[2] International Energy Agency, "Global Supply Chains of EV Batteries," July 2022.

It is widely documented that the governments of China and Russia are directly involved with industries incorporated under their jurisdictions, with their influence reaching deep into subsidiary companies in other countries as well. The sole fact that government officials, ex-officials, their families, instrumentalities, or state-owned enterprises (SOEs) don't *explicitly* hold 25% of board seats, voting rights, equity share, and the like of a company, does not mean that that company is not "under the direction of" that government. Because of the covert nature of the Chinese and Russian governments, limiting the FEOC 25% control classification to explicit government entities creates a loophole for Chinese and Russian influence to benefit from the 30D tax credit. To close this loophole, DOE should change the definition to account for direct government AND FEOC influence when determining control.

For example, say Company A, a Russian nickel mining and refining company, is clearly a FEOC due to being domiciled in Russia, and Company A's largest shareholder is Holdings B, a private company which is owned by a former Russian government official and close associate of Vladimir Putin, at 35% stake. Hypothetically, if Company A sets up a JV in Singapore which in turn opens a refinery in Indonesia, the JV itself and any subsidiaries could avoid an FEOC classification simply by being structured in a certain way. These entities could still allow for government influence and control without the existence of explicit board seats and the like for government entities as defined. No government entities, as defined, have explicit control over Company A, but it is evident that the Russian government maintains influence in the company, which would inevitably trickle down through subsidiaries, joint ventures (JVs), and investments in other countries. This example showcases how Russian government influence is exerted through subsidiaries while avoiding FEOC classification. Clarifying the FEOC definition to also include FEOC *company* influence would close this loophole and effectively solve this problem.

BMTC urges DOE to consider the Department of Commerce (DOC) definition of FEOC in its final guidance under the CHIPS and Science Act. Under DOC's rule, industry control is considered when looking at subsidiaries, regardless of explicit government ties.

Administration of FEOC Guidance Concerns

BMTC is concerned about the administrability of the 30D tax credit FEOC provision as defined in the draft guidance. As written, the proposed rule requires automobile manufacturers to conduct difficult calculations about whether they are or are not FEOC compliant based on company ownership. These calculations will likely involve engagement between private industry and government to assess FEOC compliance, thus making the process extremely difficult for IRS to administer. BMTC would like further clarification on how the battery ledger will be implemented, audited, and subsequently enforced, to ensure proper allocation of eligibility.

Definition of "Foreign Entity" for US Companies

Clarification is needed on the definition of a "foreign entity" as it relates to US companies. For instance, it is unclear whether a US-headquartered company, with its principal place of business located in the US, would be considered a FEOC if it opens a processing operation in China for battery materials. Since the company is operating in a covered nation, it is therefore "subject to the jurisdiction" of that nation, but the company itself is not a "foreign entity" as defined in the guidance. This allows for an area of obscurity regarding where eligible operations can and cannot

occur, and by whom, when determining FEOC compliance. BMTC would like clarity on how this distinction will be handled for US companies operating in covered nations.

Conclusion

BMTC sincerely appreciates DOE's efforts in implementing the various programs as passed in the IIJA and IRA. This includes the FEOC exclusion, which is vital for effectively administering the DOE battery grants and the IRS 30D tax credit. These incentives are meant to be just that – incentives. The US government should not be incentivizing Chinese and Russian government influence, including influence imposed through covert means. We hope that our comments are helpful in finalizing the FEOC definition and ensuring it is one that thoroughly accounts for adversarial government influence in the marketplace.