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COMMITTEE ON
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**COMMENTS OF SENATOR JOE MANCHIN III**
**ON THE SECTION 30D NEW CLEAN VEHICLE CREDIT**
**BEFORE THE INTERNAL REVENUE SERVICE, DEPARTMENT OF TREASURY**
**REG-120080-22**

I respectfully submit the following comments on the section 30D new clean vehicle credit pursuant to the notice of proposed rulemaking published by the Department of the Treasury and the Internal Revenue Service ("the Treasury") in the Federal Register on April 17, 2023.[1]

The original credit

Congress added section 30D to the Internal Revenue Code in 2008 to provide taxpayers with a credit against their income taxes for purchasing a new "plug-in" electric vehicle.[2] The purpose of the original credit was to make plug-in electric vehicles more affordable, thereby increasing the sales of such vehicles, encouraging automakers to make more, and ultimately helping to reduce our dependence on foreign oil for our transportation needs.[3] The original section 30D pursued this goal single-mindedly, without regard to where the electric vehicles were made or where the materials used to make them came from.

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1 88 Fed. Reg. 23370 (April 17, 2023).

2 Section 30D was added to the Code by section 205 of the Energy Improvement and Extension Act of 2008, division B of Public Law 110-343, 122 Stat. 3835. Section 1341 of the Energy Policy Act of 2005, which added section 30B to the Code, had previously established a tax credit for "hybrid" electric vehicles, which are powered by both an internal combustion engine and a rechargeable battery, but not for "plug-in" electric vehicles, which are powered by batteries recharged from an external source of electricity.

3 H. Rept. 110-658, p. 82 (2008) (House Ways & Means Committee report on H.R. 6049).

The original goal has largely been met. According to the White House, there are now more than three million electric vehicles on the road in this country. But while the credit has promoted sales of electric vehicles, it has done little to promote the development of the domestic supply chains needed to produce the batteries used to power electric vehicles. The credit helped reduce our dependence on foreign oil, but it replaced that dependence with a new dependence on the foreign supply chains that produce the batteries on which electric vehicles depend.

The new credit

Congress sought to remedy this serious failing with the enactment of section 13401 of the Inflation Reduction Act. Section 13401 rewrote and repurposed the section 30D tax credit to promote domestic production of critical minerals and battery components in this country. Instead of basing the electric vehicle credit on battery capacity, as in the past, the new clean vehicle credit is based on critical minerals and battery component sourcing. The purpose of the tax credit is no longer to promote the purchase and use of electric vehicles without regard to supply chains, but to promote reliable domestic supply chains for the critical minerals and battery components needed to power electric vehicles.

To achieve this new purpose, Congress carefully and deliberately laid down clear and specific requirements for the new credit in subsection (e) of section 30D. The first paragraph of subsection (e) provides that half of the $7,500 credit —$3,750—is available only if a certain percentage of the value of the critical minerals used in a vehicle's battery are "extracted or processed" in the United States or a free trade agreement country or "recycled in North America." Similarly, the second paragraph provides that the other half of the $7,500 credit is available only if a certain percentage of the value of the battery components were "manufactured or assembled in North America." Finally, in the third paragraph, Congress asked the Secretary of the Treasury to "issue such regulations … as … necessary to carry out the purposes of this subsection," namely subsection (e).

The proposed rule

Regrettably, it appears that the Treasury has seriously misconstrued the plain language and clear purpose of the critical minerals and battery component requirements in subsection (e). Either that or the Treasury thinks it has a better approach than the one enacted by Congress and it

is using its subsection (e)(3) rulemaking authority to substitute its approach for the one that Congress enacted into law. But the Treasury has no such power. As the Supreme Court has previously admonished the Treasury, "[t]he power … to prescribe rules and regulations … is not the power to make law … but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."[4]

The proposed rule deviates from the will of Congress in at least three major respects.

1. The "50% of value added test"

First, § 1.30D-3(c)(17) of the proposed rule creates a new "50% of value added test," which the Treasury proposes to use to determine whether the critical minerals requirement in section 30D(e)(1) is met. This new test is not found in section 30D(e) or anywhere else in the law. It is purely of the Treasury's own making. This new, unauthorized, and unlawful test frustrates the purpose of the statutory test. It both bifurcates the unified "extraction or processed" value test that Congress provided in section 30D(e)(1)(A)(i), and it cuts in half the percentage requirements prescribed by Congress in section 30D(e)(1)(B).

The Treasury proposal bifurcates the statutory value test by treating "extraction" and "processing" as separate and independent elements, each with its own value test, either of which may satisfy the Treasury's value test. Consider, for example, a critical mineral that is inexpensive to extract from the ground, but expensive to process. Imagine further that the cost of extracting the mineral accounts for only 10 percent of its value, while processing accounts for the other 90 percent. Imagine, too, that the mineral is extracted in the United States, but processed in a non-free-trade-agreement country. Since 90 percent of the total value of the critical mineral in our example would not come from extraction and processing in a non-free-trade-agreement country, the unified, statutory value test would not be met. Under the Treasury's proposal, on the other hand, extraction and processing are tested separately, and only one of the two tests needs to be met. Since all of the value added by extraction in our example comes from extraction in the United States, the critical mineral would easily qualify under the Treasury's proposed bifurcated test, though it would not qualify under the unified, statutory test.

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4 *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 134 (1936).

The Treasury proposal then proceeds to undermine the statutory test even further by halving the statutory percentages in section 30D(e)(1)(B). It does this by saying that if as little as 50 percent of the value of either extraction or processing is added in the United States or a free-trade-agreement country, that suffices to treat the entire value of extraction or processing as if they occurred in the United States. Thus, under the Treasury proposal, if 20 percent of the value of extraction or processing occurs in the United States during 2023, then the statutory 40 percent requirement for 2023 in section 30D(e)(1)(B)(i) will be deemed met; if 25 percent of the value of extraction or processing occurs in the United States during 2024, then the statutory 50 percent requirement for 2024 in section 30D(e)(1)(B)(ii) will be deemed met; and so forth. This is not what the law says or what Congress intended. "50 percent" means 50 percent, not 25 percent. "The statute means what it says."[5]

2. "Constituent materials"

The second major deviation from the statutory scheme is in the proposed rule's use of the concept of "constituent materials" to count the value added by manufacturing processes as part of the value of the critical minerals rather than part of the value of the battery components. The term "constituent materials" is not found in section 30D(e), though it is used in the definition of battery "processing" in section 40207 of the Infrastructure Investment and Jobs Act.[6] Section 40207 established a "battery material processing grant" program at the Department of Energy, and broadly defined "battery material" to mean both "raw and processed" materials used in battery components. Section 40207 of the Infrastructure Act, unlike section 30D, did not attempt to draw a bright line between the processing of critical minerals used in battery components and the manufacturing processes used to make those components. As used by the Department of Energy, the term straddles the line between critical minerals and battery components.[7]

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5 *Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018). "Courts 'assume that Congress means what it says in a statute....'" *Anderson v. Carter*, 802 F.3d 4 (D.C. Cir. 2015) (quoting *Williams v. Paramo*, 775 F.3d 1182, 1188 (9th Cir. 2015)). So too should the Treasury.

6 Section 40207 of the Infrastructure Act establishes program for battery processing and manufacturing. It defines "processing" to mean "the refining of materials, including ... processes used to convert raw products into *constituent materials* employed directly in advanced battery *manufacturing*." 42 U.S.C. § 18741(a)(7) (emphasis added).

7 Department of Energy, "Critical Minerals & Battery Components" Briefing (May 18, 2023).

The proposed rule borrows the term "constituent material" from the Infrastructure Act and its meaning from the Department of Energy's grant program. The proposed rule defines "constituent materials" to mean "materials that contain applicable critical minerals and are employed directly in the manufacturing of battery components."[8] The Treasury elaborates on this definition in the preamble to the proposed rule, which says that "constituent materials" result from "chemical or thermal processes" used "to create a new product." It describes "constituent materials" as "the final products" of the extraction and processing or recycling operations, beyond which "no further chemical, physical or thermal processes are needed to create the final product that is then used in battery component manufacturing."[9] In other words, the proposed rule moves the value of battery manufacturing processes from the battery component-side to the critical mineral-side of the section 30D(e) equation.

Congress legislates with knowledge of its prior laws,[10] and the distinction between mineral refining and manufacturing processes may best be understood in light of history of the mineral depletion allowance.[11] The tax code has long recognized that most minerals are not marketable in the form in which they are extracted from the ground. They ordinarily require a certain amount of "processing" to separate the valuable mineral from worthless residual materials. Beyond that, they also ordinarily require still further "processing" to fabricate the refined mineral into a usable products. The courts have drawn a distinction between refining processes and manufacturing processes. They have described the various treatment processes used by the mining industry as lying "on a continuum," with the extraction of ore from the ground at one end and manufacturing a finished product at the other.[12]

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8 Proposed § 1.30D-3(6), 88 Fed. Reg. at 23384.

9 88 Fed. Reg. at 23375-23376.

10 *Garcia v. Department of Homeland Security,* 437 F.3d 1322, 1336 (Fed. Cir. 2006) ("Congress is presumed to enact legislation with knowledge of the law"), citing *Cannnon v. University of Chicago,* 441 U.S. 677, 696-697 (1979).

11 26 U.S.C. § 613.

12 *Ranchers Exploration & Development Corp. v. United States,* 634 F.2d 487, 492 (10th Cir. 1980); *Ideal Basic Industries, Inc. v. Commissioner,* 82 T.C. 352, 370 (1984).

"At some point along the continuum mining stops and manufacturing starts."[13] Congress was first called upon to mark the cutoff point 80 years ago in the context of the mineral depletion allowance. It did so by defining "mining" to include "the ordinary treatment processes normally applied by mine owners or operators in order to obtain [a] commercially marketable mineral product…."[14]

The problem with the "commercially marketable" test was that lower courts often counted most processing, including manufacturing processes, as "mining."[15] In 1960, both the Supreme Court and Congress rejected that interpretation. The Supreme Court held that the definition of "mining" placed "the cutoff point" between mining and manufacturing "where the mineral first became 'ready for industrial use or consumption.'"[16] The Court said that mining did not include processes that changed "the physical or chemical identity of the minerals or … transformed [them] into new products."[17]

At the same time, Congress amended the definition of "mining" in the depletion allowance statute to eliminate the "commercially marketable" test.[18] It replaced the test with "a specific designation of those processes that would be considered as mining,"[19] and those that

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13 *Ranchers Exploration & Development Corp.*, 634 F.2d at 492.

14 Internal Revenue Code of 1939, § 114(b)(4)(B), quoted in *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76, 84 n.8 (1960) .

15 *Cannelton Sewer Pipe Co. v. United States,* 268 F.2d 334 (7th Cir. 1959) , *rev'd,* 364 U.S. 76 (1960); *Dragon Cement Co. v. United States*, 244 F.2d 513 (1st Cir.), *cert. denied*, 355 U.S. 833 (1957); *United States v. Cherokee Brick & Tile Co.*, 218 F.2d 424 (5th Cir. 1955).

16 *Ideal Basic Industries, Inc.* 82 T.C. at 363, quoting *Cannelton Sewer Pipe Co.*, 364 U.S. at 86. *See also Riddell v. Monolith Portland Cement Co.,* 371 U.S. 537, 538 (1963).

17 *Cannelton Sewer Pipe Co.,* at 86.

18 *Barton Mines Corp. v. Commissioner*, 446 F.2d 981, 995 (2d Cir. 1971) (stating that "The primary purpose of the amendment was to eliminate the 'commercially marketable test' … and thereby overturn the judicial extension of depletion to manufactured products.").

19 *Id.* at 996. 26 U.S.C. § 613(c)(2) now defines "mining" to include both extraction and "the treatment processes considered as mining described in paragraph (4) (and the treatment processes necessary or incidental thereto)." Paragraph (4) lists those "treatment processes … considered as mining…."

would not.[20] In other words, Congress redrew the "line between mining and manufacturing by listing those processes it considered part of normal mining operations" and those it did not.[21] In general, "a process constitutes mining if its function and purpose is to separate valuable [mineral] products from otherwise valueless ore."[22] Chemical or thermal processes involved in refining are manufacturing processes, not mining processes.[23]

Congress chose to take a somewhat different approach in section 30D. Rather than listing the various treatment processes that it considered part of "mining" and those considered part of "manufacturing," it specified the final chemical form and the purification level for each of the 50 critical minerals covered by section 30D(e)(1). It did this by defining the term "critical minerals" in section 30D(e)(1)(A) by cross-reference to the definitions in section 45X(c)(6) of the Internal Revenue Code. Section 45X(c)(6) very precisely and meticulously defines each critical mineral covered by section 30D(e)(1) in terms of a specific chemical form and a minimum purity level—down to, in some cases, a tenth, a hundredth, or even a thousandths of a percent.

In other words, processing is already built into the statutory definition of each of the critical mineral covered by section 30D(e)(1). By specifying the chemical forms and purification levels for each critical mineral as it has, Congress has already drawn the line between mining and manufacturing on the processing "continuum" for purposes of the section 30D credit. It has not left it up to the Treasury to define or redefine that point. Section 30D(e)(1) left no "gap" for the Treasury to fill with its notion of "constituent materials."

Rather than filling a gap that does not exist, the Treasury appears to be using the term "constituent materials" to shift the value of manufacturing processes from the calculation of value of battery components "manufactured or assembled in North America" under subsection

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20 26 U.S.C. § 613(c)(5) (listing the treatment processes that are "not considered as mining").

21 *Ideal Basic Industries, Inc.* 82 T.C. at 363.

22 *Ranchers Exploration & Development Corp.* 634 F.2d at 493.

23 26 U.S.C. § 613(c)(5) (stating that "smelting, refining, … blending with other materials, treatment effecting a chemical change, [and] thermal action" are not "considered as 'mining'").

(e)(2) to the calculation of the value of the critical minerals under subsection (e)(1). It places "constituent materials" on the "processing" side, rather than the "manufacturing" side, of the continuum. The preamble of the proposed rule states that "[c]onstituent materials would be the final products relevant for calculating the value of the applicable critical minerals in the battery."[24]

Once again, this is not what the statute says or what Congress intended. It ignores the definition of critical minerals in section 45X(c)(6), which is cross-referenced in section 30D(e)(1)(A). It ignores, too, the companion definition of "qualifying battery components" in section 45X(c)(5), which defines "electrode active materials," under "battery components" rather than under "critical minerals."[25] Although section 30D does not expressly cross-reference the definition of "battery component" in section 45X, it should go without saying that materials defined as battery components under section 45X should be treated "battery components" under 30D(e)(2), not as "critical minerals" under section 30D(e)(1).[26]

Moreover, the constituent materials definition ignores the very purpose of section 30D as it has been amended by the Inflation Reduction Act. As the Treasury acknowledges in the preamble to its proposed rule, the purposes of the Act's amendments to section 30D are not only "to promote the purchase and use of new clean vehicles … and to achieve significant carbon emissions reductions," but "to promote resilient supply chains and domestic manufacturing … [and] to protect against improper credit claims…."[27] The proposed rule defeats the latter purposes by discouraging investment in domestic battery component production capacity,

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[24] 88 Fed. Reg. at 23375-23376.

[25] Section 45X(c)(5) defines "electrode active material" to mean "cathode materials, anode materials, anode foils, and electrochemically active materials, including solvents, additives, and electrolyte salts that contribute to the electrochemical processes necessary for energy storage."

[26] "The substantial relation between the two programs presents a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc., v. United States*, 286 U.S. 427, 433 (1932)). Section 45X was added to the Internal Revenue Code by section 13502 of the Inflation Reduction Act.

[27] 88 Fed. Reg. 23370 (April 17, 2023).

perpetuating our dependence on foreign supply chains, and awarding costly tax credits to subsidize production of electric vehicle battery components outside of North America.[28]

3. Free trade agreement countries

The third major deviation from the statute is in the definition of the term "country with which the United States has a free trade agreement in effect." The Treasury proposes a two-part definition. The first part, in §1.30D-3(c)(7)(ii), mostly reflects the list of countries with which the United States does, in fact, currently have a free trade agreement in effect. To this list, however, the Treasury has added Japan, with which the United States does not have a "free trade agreement" within the meaning of the statute.

The second part, in §1.30D-3(c)(7)(iii), adds an elastic clause that gives the Treasury the flexibility to revise and update the established list still further. Plainly, the Treasury will need to add additional countries to the list in clause (ii) as new free trade agreements enter into force. But the preamble reveals that the Treasury has a larger purpose in mind. It shows that the Treasury plans "to include additional countries that the Secretary" decides to treat as having free trade agreements in effect, even though they do not have free trade agreements in effect, as it has already done with Japan in clause (ii). The preamble goes on to cite Japan as an example of a country that the Treasury proposes to include under the proposed elastic clause, based on a recent critical minerals supply chain agreement between our two countries.[29]

The problem here is that not every foreign trade agreement is a "free trade agreement" as that that term is generally understood and as Congress used it in section 30D(e)(1)(A)(i)(II). Although the term "free trade agreement" is not defined in the statute, it has a well-established meaning.[30] A "free trade agreement" is an agreement between two or more countries in which

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28 Letter from Thomas Conway, International President of the United Steelworkers, to Secretary Yellen (March 7, 2023) (warning that Treasury's proposal "could damage the ability of the United States to create thousands of jobs in the supply chain for batteries"); Letter from J.B. Straubel, CEO of Redwood Materials, to Secretary Yellen (March 9, 2023) (warning that Treasury's proposal could put domestic batter component manufacturers at a "competitive disadvantage" and discourage investment in domestic production capacity).

29 88 Fed. Reg. at 23376.

30 Congress added the term to section 3 of the Natural Gas Act, 15 U.S.C. § 717b, in 1992, without defining it. The Department of Energy has had no trouble understanding its meaning in the Gas Act.

each removes tariff and other restrictions on "substantially all" trade between the parties, not just a mineral here or a mineral there.[31]

The requirement that a "free trade agreement" apply to "substantially all" trade between the parties is found in article XXIV of the General Agreement on Tariff and Trade, which provides that parties to the Agreement, of which the United States is one, may form "free-trade areas" with other parties, and that the term "shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce … are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories."

The agreement between the United States and Japan is a "trade agreement," but not a "free trade agreement," as that term is generally understood and used in section 30D(e)(1). The United States Trade Representative, in whom Congress has vested principal responsibility for administering the trade agreement program,[32] does not characterize it as a "free trade agreement." The agreement covers about five percent of our trade with Japan, not "substantially all." Here again, the Treasury is crossing lines drawn by Congress in the statute.

Conclusion

Congress rewrote section 30D to promote reliable critical mineral and battery manufacturing supply chains needed to supply the growing demand for electric vehicles. It prescribed carefully tailored requirements in subsection (e) to serve this purpose. It then asked the Treasury to issue regulations "to carry out the purposes of this subsection."

The proposed regulations do not carry out Congress's purposes. They alter and weaken the requirements that Congress prescribed by adding a "50% of value added test," treating manufacturing processes as mining processes, and treating non-free-trade-agreement countries as

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31 S. Rept. 103-189 at 5 (1993) (Report of the Finance Committee in the Joint Report on S. 1627, the North American Free Trade Agreement Implementation Act). The Treasury terms these "free trade agreements" as "comprehensive free trade agreements." 88 Fed. Reg. at 23376.

32 19 U.S.C. § 2171(c).

if they were free-trade-agreement countries. Each of these is "an attempted addition to the statute of something which is not there."[33]

The Treasury may not "rewrite the statute simply because [it] may feel that the scheme [that Congress] create[d] could be improved upon."[34] Where, as here, "Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[35] This rule of law applies to the Treasury as to any other federal agency.[36] The Treasury may not add by regulation "something which is not" in the statute.[37]

The notice of proposed rulemaking asks for comments on the proposed regulations. My comment is simple: Follow the law. Eliminate the 50% value added test, treat manufacturing processes as manufacturing processes, not mining processes, and respect the established meaning of the term "free trade agreement."

Sincerely,

Joe Manchin III
Chairman, Committee on Energy and
Natural Resources

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33 *United States v. Calamaro*, 354 U.S. 351, 359 (1957). *See also Arkansas-Oklahoma Gas Co. v. Commissioner,* 201 F.2d 98, 102 (8th Cir. 1953) ("The Commissioner has no more power to add to the Act what he thinks Congress may have overlooked than he has to supply what Congress has deliberately omitted."); *Commissioner v. Commodore, Inc.*, 135 F.2d 89, 92 (6th Cir. 1943) ("what Congress did not do by positive enactment [the Treasury] cannot do by regulations").

34 *United States v. Calamaro*, 354 U.S. at 357.

35 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

36 *Mayo Foundation for Medical Education and Research v. United States,* 562 U.S. 44, 55 (2011) ("The principles underlying … *Chevron* apply with full force in the tax context.").

37 *United States v. Calamaro*, 354 U.S. at 359.