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COMMITTEE ON
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December 18, 2023

The Honorable Gene L. Dodaro
The Comptroller General of the United States
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro:

I am writing to request a legal opinion from the Government Accountability Office on whether guidance issued by the Department of the Treasury implementing section 30D of the Internal Revenue Code, as amended by section 13401 of the Inflation Reduction Act, is subject to review under the Congressional Review Act.

BACKGROUND

Section 30D

Section 13401 of the Inflation Reduction Act, Public Law 117-169, 136 Stat. 1954-1962, amended section 30D of the Internal Revenue Code. Congress originally added section 30D to the tax code in 2008 to promote the sale of electric vehicles. H. Rept. 110-658, p. 82 (2008). As originally enacted, the credit was available without regard to where the vehicles or their parts were made or where the materials used to make them came from. Section 13401 of the Inflation Reduction Act changed that. It amended the credit to promote domestic supply chains for the critical minerals and battery components needed for electric vehicles.

As amended, section 30D now provides an income tax credit for "each new clean vehicle placed in service by [a] taxpayer during [a] taxable year." § 30D(a). The credit has two parts. § 30D(b)(1). Under the first part, a taxpayer is allowed a credit of $3,750 for a new clean vehicle so long as a minimum percentage of the "applicable critical minerals" contained in the vehicle's battery either were extracted or processed in the United States or in a country with which the United States has a free trade agreement in effect, or were recycled in North America. § 30D (b)(2); § 30D(e)(1). Under the second part, a taxpayer is allowed a credit of an additional $3,750 for the vehicle so long as a minimum percentage of the value of the components of the battery from which the vehicle's electric motor draws electricity were manufactured or assembled in North America. § 30D(b)(3); § 30D(e)(2).

Congress intended the new credits to take effect by January 1, 2023. To make that possible, it directed the Secretary of the Treasury to issue any "proposed guidance" needed to carry out the new credit program "not later than December 31, 2022." § 30D(e)(3)(B). And it tied the new credits to "the date on which the proposed guidance" was issued, rather than when the rules are made final. § 30D(e)(1)(B)(i); § 30D(e)(2)(B)(i). The Treasury Department missed the December 31, 2022, deadline, but published the "proposed guidance" in the Federal Register on April 17, 2023. 88 Fed. Reg. 23370. By their terms, the "proposed" rules generally apply to tax year 2023 and to new clean vehicles placed in service on or after January 1, 2023. 88 Fed. Reg. at 23380 (April 17, 2023); *id*. at 70322 (Oct. 10, 2023); *id*. at 84107 (Dec. 4, 2023). In other words, though labeled "proposed," they are effectively final.

Congress's focus on promoting domestic supply changes for critical minerals and battery components is further evident in the definition of "new clean vehicle." Congress expressly excluded "any vehicle placed in service after December 31, 2023," from the definition of the term "new clean vehicle," and thus from eligibility for the tax credit, if "any of the components contained in the battery of such vehicle … were manufactured or assembled by a foreign entity of concern…." § 30D(d)(7)(B). Similarly, it excluded "any vehicle placed in service after December 31, 2024," if "any of the applicable critical minerals contained in the battery of such vehicle … were extracted, processed, or recycled by a foreign entity of concern…." § 30D (d)(7)(A).

In drafting section 13401 of the Inflation Reduction Act, Congress left little to the Treasury Department's imagination or its discretion. It defined the "applicable critical minerals" to which the minimum percentage requirements apply with exacting precision, not only as to their specific chemical form, but to their minimum purity level—down to, in some cases, a tenth, a hundredth, or even a thousandth of a percent. § 30D(e)(1)(A) (referencing the definition in section 45X(c)(6) of the tax code (as added by section 13502(a) of the Inflation Reduction Act, 136 Stat. 1978-1981)). It specified the minimum "applicable percentages" for critical minerals and for battery components year by year. § 30D(e)(1)(B) (critical minerals); § 30D(e)(2)(B) (battery components). It defined "foreign entity of concern." § 30D(d)(7)(A) (referencing the definition in section 40207(a)(5) of the Infrastructure Investment and Jobs Act, 42 U.S.C. 18741(a)(5)).

The pending regulations

Section 30D(3)(A) directs the Secretary of the Treasury to "issue such regulations or other guidance as the Secretary determines necessary to carry out the purposes of this subsection…." It should go without saying that "the purposes" to be carried out are those of Congress. As the Supreme Court has said, the Secretary of the Treasury's "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 statute." *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The Secretary has published three sets of "proposed regulations" regarding the new clean vehicle credit. The first proposed rules on the critical mineral and battery component requirements and triggered the operation of the new credits. 88 Fed. Reg. 23370 (April 17, 2023). The second provided guidance on the transfer of credits pursuant to section 30D(g). 88 Fed. Reg. 70310 (Oct. 10, 2023). The third focuses on the exclusion vehicles containing critical minerals or battery components sourced from foreign entities of concern under section 30D(d)(7). 88 Fed. Reg. 84098 (Dec. 4, 2023).[1] The latter two proposals supplement and amend the rules proposed by the first. 88 Fed. Reg. at 84099.

Unfortunately, the Secretary's "proposed regulations" do not "carry out the purposes of" section 30D adopted by Congress. They pursue, instead, the Administration's own unenacted policy preferences.

The April 17 proposal rewrites section 30D in three major respects. First, it cuts the critical minerals requirements in section 30D(e)(1) in half. It does this by inventing and applying a new "50 % of value added test," which is not found in the law. Congress very precisely prescribed the "applicable percentage" needed to qualify for the critical minerals component of the tax credit in any given year in section 30D(e)(1)(B). The "50 % of value added test" cuts each of those statutory percentages in half, loosening the limits set by Congress.

Second, it waters down the battery component requirements in section 30D(e)(2). It does this by shifting a substantial part of the value of battery component manufacturing from the battery requirement in section 30D(e)(2) to the critical mineral processing requirement in section 30D(e)(1), by applying a new notion of "constituent materials," which is not found anywhere in section 30D. Congress very precisely and meticulously drew the line between critical mineral processing and battery component manufacturing by specifying precise chemical forms and purification levels for each critical mineral in its definitions of the "applicable critical minerals." It left no gap between critical mineral processing and battery component manufacturing for the Treasury to fill and reallocate with its notion of "constituent materials."

Third, it flouts the requirement in section 30D(e)(1)(A) that critical minerals must be extracted or processed in the United States or a "country with which the United States has a free trade agreement in effect." "Free trade agreement" is a well-established term of art. The United States Trade Representative maintains an authoritative list of the countries with which the United States has a free trade agreement in effect. The Treasury Department's proposal includes Japan, with which the United States does not have a free trade agreement in effect, as a country that does, and it claims the power "to include additional countries" as free trade agreement countries as the Treasury Department chooses—and this treatment of critical minerals extracted or processed in Japan will apply even if this "proposed rule" is never finalized.

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1 Concurrently with the third Treasury proposal, the Department of Energy published a notice of a "proposed interpretive rule" and requested public comment on its interpretation of the statutory definition of "foreign entity of concern" in the Infrastructure Investment and Jobs Act, which is incorporated by reference in section 30D(d)(7). 88 Fed. Reg. 84082 (Dec. 4, 2023).

The December 4 proposal continues in this freewheeling vein. Section 30D prohibits "*any* vehicle placed in service after December 31, 2024," from qualifying for the section 30D tax credit if "*any* of the applicable critical minerals contained in the battery of such vehicle … were extracted, processed, or recycled by a foreign entity of concern…." § 30D(d)(7)(A) (emphasis added). Similarly, section 30D(d)(7)(B) prohibits "*any* vehicle placed in service after December 31, 2023," from qualifying for the section 30D tax credit if "*any* of the components contained in the battery of such vehicle … were manufactured or assembled by a foreign entity of concern…." § 30D(d)(7)(A) (emphasis added).

The Treasury's proposal rewrites these clear statutory requirements by suspending the statutory prohibition in section 30D(d)(7)(A) from January 1, 2025, to January 1, 2027 and suspending the statutory prohibition in section 30D(d)(7)(B) from January 1, 2024, to January 1, 2027. This enables electric vehicles that contain critical minerals or battery components sourced from foreign entities of concern placed in service over the next 3 years to qualify for the tax credit in spite of the statutory prohibitions—and this allowance is effective in a matter of weeks regardless of whether Treasury ever issues a "final" version of the proposal at some later date.

Specifically, the Treasury proposal seeks to suspend the Inflation Reduction Act's foreign entity of concern deadlines in two ways. First, it creates a new "transition rule" for a new class of "non-traceable battery materials." §1.30D-6(c)(3)(iii). The new transition rule allows vehicle makers to exclude a yet-to-be-identified class of "low-value" (compared to the total value of the battery) and hard-to-trace battery materials from the statutory prohibition on "any" battery components. The Treasury Department says this "transition rule" will apply until 2027.

Second, the proposals waters down the statutory prohibition on "*any* vehicle" containing "*any*" applicable critical minerals or "constituent materials" sourced from an excluded entity by enabling some vehicles containing some critical minerals and "constituent materials" sourced from excluded entities to qualify for the tax credit. It does this by allowing battery makers to "allocate" critical minerals and associated materials from prohibited sources to specific batteries without physically tracking them. The Treasury Department says this "exception" to the specific tracking requirement will be "temporary" and "phase out … after December 31, 2026."

Suffice it to say, the Treasury Department's proposals breach the guardrails that Congress erected in section 30D to promote the production of critical minerals and battery components in this country. It translates "*any*" vehicle into only a percentage of vehicles, and "*any* applicable critical minerals" and "*any* battery components" into only those critical minerals and battery components selected by the Department.[2] It waives deadlines. It reduces minimum percentages. It treats battery manufacturing processes as critical minerals mining and processing.

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[2] "Read naturally, the word 'any' has an expansive meaning…." *Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)). "In case after case," courts "have given effect to this expansive sense of 'any.'" *Home Depot U.S.A., Inc. v. Jackson,* 139 S. Ct. 1743, 1756 (2019) (Alito, J., dissenting) (citing *Small v. United States*, 544 U.S. 385, 396 (2005) (Thomas, J., dissenting)

The Congressional Review Act

The Congressional Review Act provides an important mechanism by which Congress can review and disapprove federal agency rules. GAO, B-325553, at 2 (May 29, 2014). Its purpose is to enable Congress to block not just agency rules it finds burdensome, excessive, or objectionable, S. Rept. 104-89, at 53-54 (1995) (Senate Governmental Affairs Committee report on the CRA), but also "*rules that do not accurately reflect the intent of Congress in enacting the underlying statutory scheme*." S. Rept. 104-90, at 123 (1995) (Senate Judiciary Committee report on the CRA) (emphasis added).

As a general rule, the Congressional Review Act only applies to final rules, not to proposed rules. GAO, B-325553 (May 20, 2014). There are sound reasons for drawing this distinction. As GAO has previously noted, most proposed rules are simply proposals, which may change in light of public comment. Proposed rules normally "do not have a binding effect on the obligations of any party." *Id*. at 8. Deferring congressional review until rules are final gives "the agency an opportunity to correct its own mistakes," and avoids wasting time on proposals that may change or never be adopted. But those reasons carry little to no weight when, as here, the "proposed" rules have already taken effect.

Although an agency's characterization of its action should be considered in deciding whether its action is a rule, the courts have said that "an agency's own label … is not dispositive," for purposes of determining finality under the Administrative Procedure Act. GAO, B-329272, at 3 (Oct. 19, 2017) (quoting *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980). "Similarly, an agency's characterization is not determinative of whether it is a rule under" the Congressional Review Act. *Id.* Thus, while the Treasury Department has labeled its actions as "proposed regulations," its label is not dispositive.

DISCUSSION

GAO has previously stated that "The common thread in our prior decisions in which GAO found that an agency action constituted a rule for CRA purposes was that the action imposed requirements that were both certain and final" and had a "binding effect." GAO, B-32553, at 8-9 (2014). GAO's test mirrors that of the courts.[3] As the Supreme Court has said, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted).

(collecting cases)). "Congress' use of 'any' … is most naturally read to mean … of whatever kind," and not as limited to certain kinds. *Ali*, 552 U.S. at 220.

[3] "GAO [has] recognize[d] that federal cases on [what constitutes a "rule" for purposes of the Administrative Procedure Act] can be informative for [Congressional Review Act] decisions." GAO must, of course, "make its own determinations under" the Congressional Review Act. GAO, B-334032.2 (April 5, 2023).

The Treasury Department's regulations are already "certain and final," at least for purposes of the current tax year. Congress itself gave them "certain and final" effect for 2023 when it tied the new tax credit to "the proposed guidance," rather than delaying the operation of the tax credit until the regulations are made final. § 30D(e)(1)(B)(i); § 30D(e)(2)(B)(i). Simply put, issuance of the Department's "proposed" guidance "marks the consummation of the agency's decisionmaking … unless and until it is superseded." *NRDC v. Wheeler*, 955 F.3d 68, 80 (D.C. Cir. 2020).

The possibility that the Treasury Department may modify its regulations at some point in the future does not detract from the certainty and finality of the "proposed guidance." As the courts have said, "*any* agency action is *always* subject to displacement by a future rulemaking. If the mere possibility of displacement rendered a governing agency rule non-final for purposes of judicial review, no rule would ever count as final." 955 F.3d at 80 (emphasis in original). The "proposed" rules are certain and final already and are likely to remain so for the foreseeable future.[4]

Moreover, the Treasury Department's "proposed guidance" already has a "binding effect." By their terms, the "proposed" rules already "apply to new clean vehicles placed in service on or after January 1, 2023, for taxable years ending after April 17, 2023." 88 Fed. Reg. at 84107 (Dec. 4, 2023).[5] The Treasury Department has said its proposals are binding. The regulations plainly state that "*Taxpayers may rely on these proposed regulations for vehicles placed in service prior to the date final regulations are published* in the Federal Register, provided the taxpayer follows the proposed regulations in their entirety, and in a consistent manner"—at least well into next year, and potentially well beyond that. 88 Fed. Reg. at 23380 (April 17, 2023); 88 Fed. Reg. at 84107 (Dec. 4, 2023) (emphasis added).

Simply put, the Treasury Department's "proposed" rules have "created a norm with 'present-day binding effect'" on the right of taxpayers to claim the section 30D tax credit. *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (quoting *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 n.4 (D.C. Cir. 1987). They are not merely "musings about what the [Treasury Department] might do in the future." 818 F.2d at 948. They "establish[] a standard of conduct which has the force of law." *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

Again, "[t]he particular label placed upon [the rule] by the [Treasury Department] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942). "If an agency acts as if a document … is controlling …, if it treats the document in

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[4] The Fall 2023 Unified Agenda indicates that the Treasury Department does not expect to issue a final rule before June 2024.

[5] "The amendments made to section 30D by the [Inflation Reduction Act] generally apply to vehicles placed in service after December 31, 2022, with certain exceptions." 88 Fed. Reg. at 23380 (April 17, 2023).

the same manner as it treats a legislative rule, if it bases enforcement action on the policies or interpretations formulated in the document, if it leads private parties" to act in reliance on the document, "then the agency's document is for all practical purposes 'binding.'" *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

Looking past the "proposed rule" label and treating the Treasury regulations as a final rule in view of the binding legal effect it already has on the operation of the section 30D tax credit will further the purpose of the Congressional Review Act. It will enable Congress to review and disapprove a rule that plainly does "not accurately reflect the intent of Congress in enacting the underlying statutory scheme." S. Rept. 104-88, at 123. It will enable Congress to reclaim its lawmaking power and its power of the purse.

REQUEST

I respectfully request that you provide a legal opinion on whether the Treasury Department's April 17 and December 4, 2023 guidance on the section 30D tax credit are "rules" subject to the Congressional Review Act, in view of the binding effect they have on the availability of the section 30D tax credit in the current and coming tax years, and whether they should have been submitted to you and to Congress for review.

Sincerely,

Joe Manchin III
Chairman