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The CHIPS Plus Act Promises Support and Incentives for Semiconductor Manufacturing in the United States

On August 9, 2022, President Joseph R. Biden signed the CHIPS and Science Act of 2022 (the “CHIPS Plus Act”). As enacted, the CHIPS Plus Act amends legislation and appropriates funding for semiconductor incentives originally passed in the National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2021, which included the Creating Helpful Incentives to Produce Semiconductors for America Act (“CHIPS for America Act”). This earlier legislation authorized a set of ambitious programs to promote the research, development, and fabrication of semiconductors in the United States.

The CHIPS Plus Act provides substantial opportunities and financial incentives to manufacturers in the semiconductor supply chain. However, applicants should understand the conditions attached to the federal grants in terms of foreign investment and sourcing limitations. The CHIPS Plus Act contains eligibility requirements and prohibitions that companies should take into account as they consider pursuing incentive funding to expand domestic manufacturing in the semiconductor supply chain. Pursuant to the new law, the U.S. Department of Commerce (“Commerce”) will establish a process to review and grant applications for funding. Applicants should carefully and thoughtfully navigate that process from legal and government policy perspectives.

CHIPS Funds

Section 102 of the CHIPS Plus Act makes \$52.7 billion available to private entities, non-profit entities, or public-private consortia to support the implementation of the semiconductor manufacturing provisions included in the FY 2021 NDAA. Funding is allocated among the following programs:



(1) \$50.0 billion for a CHIPS for America Fund: funds will be used to fund domestic production of semiconductors, semiconductor materials, and semiconductor manufacturing equipment, and to support research and development (“R&D”) and workforce development programs authorized by the FY21 NDAA. The following appropriations are available:

- a. *Incentive Program (Grants, Loans, And Loan Guarantees)*: \$39 billion to implement the programs authorized in Section 9902 of the Act, which is the core of the funding available to entities seeking to support expansion of the domestic supply chain for semiconductors. This includes funds for grants as well as the cost of direct loans and loan guarantees. The funding is designed to “incentivize investment in facilities and equipment in the United States for semiconductor fabrications, assembly, testing, advanced packaging, production, or research and development.”¹ Eligible entities may apply for this funding for a variety of purposes, including:
 - Financing construction, expansion, or modernization of a facility for semiconductor manufacturing, semiconductor materials, or semiconductor manufacturing equipment;
 - Supporting workforce development at a facility;
 - Supporting site development for a facility; and
 - Paying operating costs for such a facility, including expenses for specialized workforce, essential materials, and complex equipment maintenance.
- b. Mature technology nodes: \$2 billion of the \$39 billion allocation for Section 9902 will fund legacy chip production technologies/facilities to support critical manufacturing industries.
- c. Industry Survey and Report. Another \$2.3 billion of the \$39 billion for Section 9902 will go to Commerce for funding for to prepare a comprehensive industry-wide survey and report on the global semiconductor supply chain, involvement with Chinese companies, and gaps in U.S. domestic production. This assessment will require companies in the supply chain to provide substantial information to Commerce regarding their technology and global operations.
- d. Commerce research and development (“R&D”) and workforce development programs: \$11 billion to implement programs authorized in Section 9906, including the National Semiconductor Technology Center, the National Advanced Packaging Manufacturing Program, and other R&D and workforce development programs authorized in Section 9906.

(2) \$2 billion for a CHIPS for America Defense Fund: funds allocated to the Department of Defense to establish a national network for microelectronics R&D on new materials and device prototypes, and to accelerate commercial adoption of new technologies.

(3) \$500 million for a CHIPS for America International Technology Security and Innovation Fund: funds will be allocated to the Department of State, the Export-Import Bank, the International Development Finance Corporation, and other U.S. agencies to coordinate with foreign governments to support



cooperation in information and communications technology security and semiconductor supply chain activities.

(4) \$200 million for a CHIPS for America Workforce and Education Fund: funds will be provided to the National Science Foundation to promote growth of the semiconductor workforce source of information for companies that seek to determine their status as a critical infrastructure provider. The Act also specifies that CISA will conduct outreach to “likely covered entities” to inform them of the requirements.

Tax Credits

Section 107 of the CHIPS Plus Act creates an advanced manufacturing investment tax credit for domestic investments in semiconductor manufacturing. The credit is equal to 25 percent of a qualified investment. A qualified investment is an investment in “a facility for which the primary purpose is the manufacturing of semiconductors or semiconductor manufacturing equipment.” Notably, this definition does not expressly include facilities producing materials used to manufacture semiconductors (i.e., input and/or raw material suppliers).

Eligibility and Considerations for Approval

The CHIPS Plus Act and the earlier CHIPS for America Act outline eligibility for grant funds. To be eligible for a grant, an applicant must:

- Demonstrate “a documented interest” in constructing, expanding, or modernizing a facility involved in semiconductor manufacturing;
- Receive an offer for a state or local incentive for the project;
- Make commitments to pay for training and education benefits and participate in programs to expand employment opportunities for economically disadvantaged individuals;
- Secure commitments from educational and training entities to provide workforce training and job placement programming;
- Identify the type of semiconductor technology, equipment, and materials to be produced at the facility (or the R&D to be performed);
- Identify the customers or category of customers the applicant will serve;
- Assess and develop plans to meet workforce needs;
- Develop a plan for economic sustainability for the project absent additional federal financial support;
- Have a plan to identify and mitigate supply chain security risks, including “a lack of geographic diversification” in the applicant’s supply chain; and
- Implement policies to “combat cloning, counterfeiting, and relabeling of semiconductors.”²

Commerce cannot approve a grant application unless it finds the project “is in the economic and national security interests of the United States,” taking into account the type of technology produced by the applicant. Furthermore, Commerce may consider whether the project meets specific needs identified by



the Department of Defense or other defense and intelligence agencies. The CHIPS Plus Act directs Commerce to prioritize grant awards that will address gaps in the domestic supply chain across a diverse range of technologies, including both advanced and mature technology nodes.

Grant recipients will be subject to a variety of other compliance obligations, including prevailing wage requirements. We expect the Biden Administration will also require applicants to provide a plan for equity issues related to economic opportunity, environmental concerns, and labor involvement.

Prohibitions Involving “Foreign Entities of Concern” and “Foreign Countries of Concern”

- With respect to funding, Commerce may not approve a grant application by a “foreign entity of concern.”³ The agency will claw back any grant funds after an award if a recipient “engages in any joint research or technology licensing effort” with such an entity if the activity involves certain technology specified by Commerce.⁴
 - The term “foreign entity of concern” covers a variety of definitions, including an entity that is a designated foreign terrorist organization, a specially designated national for sanctions purposes, or alleged to have violated certain national security laws and regulations related to export controls, sanctions, espionage, *etc.* However, the definition also covers entities “owned by, controlled by, or subject to the jurisdiction or direction of a government” of China, Russia, Iran, or North Korea.⁵
 - It seems apparent that this prohibition covers, at a minimum, government instrumentalities and state-owned entities in China and the other named countries. It also is possible that a broad interpretation of the statute could prohibit, for example, research and development efforts on specified technology with any company that is “subject to the jurisdiction” of China. There is little guidance regarding how the U.S. government will draw the line in determining which entities are foreign entities of concern, especially in identifying whether an entity is “subject to the jurisdiction” of China or another country. There has been some suggestion in other supply-chain focused statutes and executive orders that concepts such as “foreign entities of concern” could extend to private entities with some Chinese ownership, even if located outside China, or even in the United States.⁶
- The Act establishes “guardrails” allowing to Commerce to claw back any grant funds after an award if a recipient or its affiliates engages “in any significant transaction . . . involving the material expansion of semiconductor manufacturing” in China or other “foreign country of concern,” which currently is defined to include Russia, Iran, and North Korea.⁷ This prohibition on expansion in China and certain other countries applies for 10 years from the date of an award and will be memorialized in an agreement between the grant recipient and Commerce.
 - The scope of this prohibition is subject to further definition by Commerce, including as part of the required agreement. In particular, the concepts of “significant transaction,” “material expansion,” and “semiconductor manufacturing” could be read very broadly or narrowly. At a minimum, these restrictions would apply to any new facility in China unless the facility produces “legacy semiconductors” predominantly for servicing that country’s market. The



CHIPS Plus Act provides some guidance on the scope of “legacy semiconductors,” but assigns Commerce wide latitude in defining this term.

- The CHIPS Plus Act requires grant recipients to notify Commerce of planned significant transactions for material expansion of semiconductor manufacturing capacity in foreign countries of concern. If Commerce determines that the planned transaction would violate the agreement, it is possible for the recipient to work with the U.S. government to mitigate the potential violation, presumably through controlling investor rights or access to sensitive goods, software, or technology. If a recipient proceeds with the prohibited transactions without notification and mitigation, Commerce would be able to claw back the financial assistance provided. Notably, Commerce is the agency that also reviews export license applications for the export or reexport of dual-use controlled goods, software, and technology, which includes certain items used in semiconductor design and manufacturing. Thus, companies should presume that Commerce will have a method of reviewing export license applications to monitor compliance with funding agreement commitments. Commerce is required to report to Congress potential violations and mitigations.
- Further, a foreign entity of concern does not qualify for tax credits under the legislation. If a recipient claims tax credits for its investment, but then engages in a significant transaction involving the material expansion of semiconductor manufacturing in China or other foreign country of concern, it must repay the claimed tax credits.

Prohibitions on Stock Buybacks

Section 102 of the CHIPS Plus Act prohibits using the funds for stock buybacks. Specifically, grant recipients “may not use [the funds] to purchase an equity security that is listed on a national securities exchange of such person or any parent company of such person” or “to pay dividends or make other capital distributions with respect to the common stock (or equivalent interest) of the person.”⁸

Implementation and Industry Advocacy

The full scope of program eligibility and prohibitions is not fully defined in the CHIPS Plus Act or CHIPS for America Act. As a result, companies that intend to pursue grants or tax credits should carefully assess the corporate structure and ownership of entities seeking to benefit. Affected stakeholders also should take steps now to formulate advocacy positions in any forthcoming rulemaking process regarding the implementation of the CHIPS Plus Act, and particularly how agencies will further define “foreign entity of concern” and “new manufacturing capacity.”

We expect that Commerce will issue implementing regulations with further guidance on these and other points. Agency funding announcements may also provide additional insight into agency interpretations and expectations. Industry will very likely have formal and informal opportunities to comment on proposed regulations to implement CHIPS Plus Act funding. In fact, this is one of the best avenues for companies to help shape the policy environment for the CHIPS Act programs and similar future supply chain initiatives. Affected companies should engage with policymakers as the implementation process unfolds.

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Semiconductor manufacturers, upstream materials suppliers, and equipment manufacturers can greatly benefit from the grants and investment tax credits provided by the CHIPS Act to expand their U.S. production capacity. Companies should prepare for the grant process now by assessing the value of these incentives for a company’s long-term business and developing an appropriate application and advocacy strategy. As part of this, companies should monitor and develop advocacy on issues of importance to them during the comment process for implementing regulations to maximize this opportunity. Developing a plan and engaging with policymakers now will help companies lay the groundwork for successfully obtaining funding in a compliant manner.

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¹ CHIPS for America Act, Section 9902(a); CHIPS Plus Act, Section 103(a)(1)(B). Citations to the CHIPS for America Act refer to the legislation as passed in January 2021 and do not reflect revised enumeration resulting from the CHIPS Plus Act amendments.

² CHIPS for America Act, Section 9902(a)(2)(B); CHIPS Plus Act, Section 103(b)(2).

³ CHIPS for America Act, Section 9902(a)(2)(C)(iii).

⁴ CHIPS for America Act, Section 9902(a)(5)(C).

⁵ CHIPS for America Act, Section 9901(6).

⁶ See, e.g., “Securing the Information and Communications Technology and Services Supply Chain,” 86 Fed. Reg. 4909, 4911-12 (Jan. 19, 2021), available at <https://www.federalregister.gov/documents/2021/01/19/2021-01234/securing-the-information-and-communications-technology-and-services-supply-chain> (defining a “person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary” to include numerous criteria dependent on locations of entities and corporate relationships).

⁷ CHIPS Plus Act, Section 103(b)(5).

⁸ Sec.102(g)(1)(A)(B)