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U.S. Commerce Department Launches First CHIPS for America Funding Opportunity

Applications For Leading Edge Commercial Fabrication Facilities And For Current-Generation Facilities Accepted Beginning March 31, 2023 And June 26, 2023, Respectively

On August 9, 2022, President Joseph R. Biden signed the CHIPS and Science Act of 2022 (the “CHIPS Plus Act”). The CHIPS Plus Act imposes certain changes 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 \$52.7 billion in federal funding for the U.S. semiconductor industry. This includes \$39 billion in semiconductor incentives, \$13.2 billion in R&D and workforce development, and \$500 million to strengthen global supply chains. The CHIPS Program Office was established at the U.S. Department of Commerce (“Commerce”) National Institute for Standards and Technology (“NIST”) to administer the \$39 billion in incentives.

Commerce has issued a Notice of Funding Opportunity (“NOFO”) establishing the process for private entities, non-profit entities, and public-private consortia to request grants to fund the construction, expansion, or modernization of commercial facilities for the front- and back-end fabrication of leading-edge, current-generation, and mature-node semiconductors. To provide greater clarity to applicants, Commerce also released guidance on the process and the award evaluation criteria it intends to follow for reviewing and granting funding applications, which are outlined in this notice. Applicants should continue to track this process as we expect Commerce will issue further guidance as we approach the beginning of the application periods for funding.



Application Process

The application process for companies seeking funding through the CHIPS Plus Act is broken down into the following five stages:

1. *Statement of Interest (Required)*
 - a. As early as **February 28, 2023**, and at least 21 days prior to submitting a pre-application or full application for a project type covered by the NOFO, companies must submit a statement of interest via the [CHIPS Incentives Application Portal](#) briefly describing the proposed project. The description should include details regarding the construction, expansion, or modernization activities for each proposed facility at a single location, the resulting products that will be manufactured, information on the scale, size, and capacity of production, and any known timelines.
2. *Pre-Application (Optional)*
 - a. Companies may choose to submit a pre-application in order to gauge whether there are any deficiencies in the request prior to submitting a final application. These pre-applications may contain all of the same information required in the final application, but are not required to do so. Companies have an opportunity to submit multiple iterations of the pre-application and will receive a written assessment from Commerce of each submitted pre-application. We recommend that companies take advantage of this step as it can provide greater certainty that the final application will be approved for funding. Furthermore, applicants that are denied funding are prohibited from appealing the denial or resubmitting a revised application for the same project, so a pre-application can help position applicants for success.
 - b. The CHIPS Program Office will begin accepting pre-applications for leading-edge projects on **March 31, 2023**, and will begin accepting pre-applications for current-generation, mature-node, and back-end projects on **May 1, 2023**.
3. *Full Application (Required)*
 - a. Full applications must contain detailed information on the project(s), including their technical and financial feasibility and alignment with economic and national security objectives. The CHIPS Program Office may provide feedback or seek further information or clarification from the applicant as part of the process.
 - b. An Investment Committee will conduct an individual, qualitative assessment of the application and make a written determination that the application should be (1) granted, (2) held for later consideration, or (3) denied.
 - c. The CHIPS Program Office will begin accepting full applications for leading-edge projects at the same time as pre-applications on **March 31, 2023**, and will begin accepting applications for current-generation, mature-node, and back-end projects on **June 26, 2023**.
4. *Due Diligence*
 - a. If the CHIPS Program Office determines that an applicant is reasonably likely to receive an award, it will request that the applicant provide additional information on the proposed project's impact on national security and the environment. Applicants will also be required to submit additional, more detailed financial and commercial information as well. Commerce will engage at the applicant's expense with outside advisors, consultants, and/or attorneys to validate the information provided in the application.
5. *Award Preparation and Issuance*



- a. Ultimately, successful companies will be granted one or more of the of the following forms of assistance:
 - i. Direct funding
 - ii. Loans (*i.e.*, Direct loans from the Federal government to the applicant for eligible costs)
 - iii. Loan guarantees (*i.e.*, Federal guarantees of third-party loans to the applicant for eligible costs)
- b. Most direct funding awards, which include grants, cooperative agreements, or other transactions, are expected to range between 5-15 percent of project capital expenditures. Total awards (including direct funding, loans, and/or loan guarantees) for a single project should not exceed 35 percent of project capital expenditures. Disbursements of an award, whether direct funding or loans, will be made on a project-specific basis to align with project milestones.

Eligibility Criteria

This NOFO conditions funding on several eligibility criteria. For example, funding is only available to private entities or consortia of private and public entities for the purpose of constructing a new facility or expanding or modernizing an existing commercial facility for the front- and back-end fabrication of leading-edge, current-generation, and mature-node semiconductors. Consortia applicants should identify the intended recipient early in the application process. The recipient will ultimately assume legal and financial responsibility for any awards granted under this NOFO.

Additionally, applicants must have been offered a “covered incentive” from a state or local jurisdiction related to attracting the construction, expansion, or modernization of the facility and must make commitments to worker and community investment aimed at expanding employment opportunities in economically disadvantaged areas. To this end, applicants should work with those jurisdictions to identify workforce needs and any training and education benefits that will be required.

Notably, “foreign entities of concern”¹ are not eligible to receive funding under the CHIPS Plus Act. Applicants will be required to submit certain information regarding any affiliation with foreign entities for review by Commerce. Priority will be given to projects that demonstrate they are capable of mitigating risks posed by external influence from foreign entities of concern and dependence on foreign-owned or sources inputs or equipment.

Application Criteria

On March 1, 2023, Commerce published a [checklist](#) covering the information required, and in what form, to be included in a pre-application and final application. Primarily, an application must include:

- Applicant company information, ownership structure, and financials
- Project description, including milestones
- Financial projections for the project

Commerce will also evaluate how a proposed project meets economic and national security objectives, and it is also very interested in broader impacts of a project on the environment and how it will support minority-owned, veteran-owned, women-owned, and small businesses. Companies should be prepared to include a fulsome narrative statement addressing these issues. Additionally, applicants should address how they plan to reinvest in the domestic semiconductor industry beyond the immediate project, use domestically-produced iron, steel, and construction materials,² and minimize potential adverse impacts to the local community, including communities with environmental justice concerns.

Given the importance of these factors, companies should develop detailed plans for addressing the policy concerns identified in the Act and this NOFO that are required in addition to a strong showing of the technical and business merits of the project.



Prohibitions and Penalties: Stock Buybacks, Foreign Investment, and Excess Profits

The CHIPS Plus Act provides several prohibitions on award recipients. For example, Section 102 of the 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.”³ The Act also establishes certain “guardrails” allowing Commerce to request the return of awarded funds if a recipient or its affiliates engage “in any significant transaction...involving the material expansion of semiconductor manufacturing” in China or another “foreign country of concern.”⁴ Congress views these actions as contradicting the underlying objective of the funding, which is to incentivize semiconductor manufacturing in the United States and bolster supply chains.

In addition to the prohibitions set out in the Act, additional contingencies to the funding proceeds are set out in the NOFO and may also be outlined in the terms of the award. For example, the NOFO requires recipients awarded more than \$150 million in direct funding to share a certain percentage of profits in excess of an agreed upon threshold above the recipient’s projections with the U.S. government. Failure to adhere to the terms of the award may result in, among other things, the temporary withholding or suspending of payments, the suspension or termination of the award, the return of funds made available under the award, and/or the initiation of suspension or debarment proceedings.

Commerce is particularly cognizant of the national security implications of the semiconductor industry and semiconductor supply chains. Accordingly, certain activities with foreign entities by a company that receives an award may result in a revocation of the award if such activities implicate national security. This includes a prohibition on engaging in any joint research or technology licensing effort with a foreign entity that raises national security concerns. This is broadly understood to mean research and development activities with Chinese companies. Applicants should ensure in advance that they do not engage in activities that trigger revocation or risk denial of an application for funding. Moreover, any activities which implicate national security concerns may also implicate legal issues separate from the CHIPS Plus Act. Companies should carefully consider how best to navigate these concerns as they prepare any submission to Commerce or respond to queries from Commerce based on information included in their application.

For additional background on the CHIPS Plus Act, please review our [previous client alert](#).



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¹ 15 U.S.C. § 4651(8).

² See Buy American and Supply Chain Policy Roundup, available at <https://www.kslaw.com/pages/buy-american-and-supply-chain-policy-roundup>.

³ CHIPS Plus Act, Section 102(g)(1)(A)(B). Companies will be required to include in their applications an explanation of any intentions with respect to stock buybacks over five years, including whether the company will refrain from or limit them.

⁴ CHIPS Plus Act, Section 103(b)(5).