

# United States Senate

WASHINGTON, DC 20510

February 24, 2023

The Honorable Gina M. Raimondo  
Secretary of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230

Dear Secretary Raimondo:

Congress passed historic and bipartisan legislation, the CHIPS and Science Act of 2022,<sup>1</sup> to invigorate the domestic semiconductor manufacturing and innovation ecosystems to grow the economy, protect our national security, boost supply chain resilience, and advance U.S. technology leadership and competitiveness. As Members of the Senate actively involved in this historic legislation, we seek an update on the Department of Commerce's progress and approach in implementing the semiconductor manufacturing incentives in the CHIPS and Science Act to ensure they align with Congressional intent.

With the Notice of Funding Opportunity (NOFO) for manufacturing expected to be published by the CHIPS Program Office (CPO) in late February,<sup>2</sup> we look forward to working with you to ensure effective implementation of this critical legislation. In the meantime, we request responses on several key areas essential to the effective implementation of the CHIPS Act prior to publication of the NOFO.

## **1. The Advanced Manufacturing Investment Tax Credit should be supplemental to and distinct from the CHIPS grant program**

The CHIPS Act incentives consist of two distinct but supplementary programs: (1) a program of direct grants for manufacturing under the authority of the Department of Commerce, and (2) an "Advanced Manufacturing Investment Credit" codified under section 48D of the Internal Revenue Code on investments in qualified facilities for semiconductor manufacturing and the manufacturing of semiconductor manufacturing equipment. Both the \$39 billion grant program and the 25 percent investment tax credit (ITC) are critical to making semiconductor manufacturing in the U.S. much more competitive with overseas locations that have attracted semiconductor investment.<sup>3</sup>

The CPO's CHIPS Strategy Document published in September 2022 indicates the ITC will "reduce the required share of federal CHIPS incentive funding allocated" for leading-edge projects<sup>4</sup> and for mature/current generation technologies the CPO "is still assessing the ITC impact on allocations between programs."<sup>5</sup> We are concerned that if CPO reduces grant incentives for a specific project due to an applicant's estimate of the ITC value for that same project investment, the result would be a narrowed cost gap and an overall non-competitive incentive package. This would mean that these tools would fail to achieve the goals of the CHIPS Act.

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<sup>1</sup> Public Law No. 117-167.

<sup>2</sup> Department of Commerce, [Biden Administration Releases Implementation Strategy for \\$50 Billion CHIPS for America Program](#), Sept. 2022

<sup>3</sup> SIA/BCG, [Government Incentives and U.S. Competitiveness in Semiconductor Manufacturing](#), Sept. 2020, at 10.

<sup>4</sup> Department of Commerce, [A Strategy for the CHIPS for America Fund](#), Sept. 2022, at 9.

<sup>5</sup> *Ibid.*, at 10.

These proposed assessments are neither required by the CHIPS and Science Act, nor were they contemplated by Congress. As originally introduced in 2020 in S. 3933, the CHIPS for America Act, the investment tax credit and grant program were independent investment incentive policies. Had Congress intended these programs to offset each other, such restriction would have been made explicit. Further, as the ITC was introduced in 2021 in S. 2107, the FABS Act, there was no restrictive language linking that tax credit to the grant program and indicating that one should offset the other. In fact, the 2021 FABS Act was introduced after the enactment of the semiconductor grant program in December 2020 (Section 9902, P.L. 116-283). Similarly, the clear language of Public Law 117-167, the CHIPS and Science Act of 2022, contains no language that directly links the tax credit and grant program, and Congress did not convey implementing authority to create such an offset.

From a practical standpoint, companies will face great difficulties in estimating the value of the ITC prior to the release of regulations from the Treasury Department. In addition, the investment tax credit is based on actualized investments and can only be claimed after the fact. Moreover, as with all tax credits, it will be subject to audit and review by the IRS. While both grants and tax credits are designed to stimulate investments, the grant is designed to help with the initial investment costs and the tax credit is meant to encourage sustained investment and its long term competitiveness. Congress envisioned these two incentive tools working in tandem, not in lieu of one another, to increase critical semiconductor-related investments in the U.S. significantly.

Please confirm your understanding of Congressional intent that the ITC is intended to be both distinct from and a *supplement* to the grant program rather than a partial *substitute* of those funds.

## **2. Risk of harmful delay due to overly lengthy environmental review**

The CHIPS Act was intended to strengthen the domestic semiconductor supply chain and address urgent risks to national security and the economy from a small and constantly eroding U.S. share of chip manufacturing. Given that the timeline for standing up a new fab (semiconductor manufacturing facility) from greenfield to full production is approximately two to four years, it is imperative CHIPS projects are initiated and funded without unnecessary delay. As you said in July of last year, “There's a real time urgency there, because these chip companies are making their decisions right now about where to expand.”<sup>6</sup> Many projects awarded funds under the CHIPS grant program, however, likely will be subject to review under the National Environmental Policy Act (NEPA).

Multi-year delays from a full NEPA review<sup>7</sup> undoubtedly will negatively affect the decisions of some CHIP manufacturers that have other locations to choose from that provide expedited permitting processes.<sup>8</sup> Given the dynamic nature of the semiconductor industry, companies cannot afford to wait to bring new capacity online. Thus, lengthy delays resulting from a NEPA review will undermine the intent of the CHIPS Act.

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<sup>6</sup> Axios, “Scoop: Raimondo wants to ‘cleave off’ CHIPS Act and pass standalone bill,” July 13, 2022

<sup>7</sup> The average time for completion of an Environmental Impact Statement (EIS) under NEPA is 4.5 years, with a median time of 3.5 years. EOP Council on Environmental Quality, [Environmental Impact Statement Timelines \(2010-2018\)](#), June 2020, at 1

<sup>8</sup> For example, the European Commission is asking member states to implement fast-track permitting process for environmental and other assessments to enable investment in first-of-a-kind semiconductor facilities as part of the recently published EU Chips Act. *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Chips Act for Europe, at 17, COM (2022) 45 Final (Brussels 8.2.2022); Proposal for a Regulation of the European Parliament and of the Council, European Commission 2022/0032, establishing a framework of measures for strengthening Europe’s semiconductor ecosystem (Chips Act), at 7-8 (Brussels 8.2.2022).

While we recognize the importance of considering the environmental impacts of these facilities, we note that projects funded under CHIPS will already be subject to other applicable environmental laws, regulations, and permit requirements at the Federal, state, and local level that will accomplish this objective. Semiconductor fabs have been constructed and operated in the U.S. since the industry's inception, and it is only because of the new federal financial assistance in the CHIPS program that potential NEPA reviews would be triggered.

At the same time, a strong domestic supply of semiconductors will be critical to advancing other environmental priorities, including building the next generation of clean energy and ensuring the strength of the chip supply chain for the Energy Sector Industrial Base.<sup>9</sup> The CHIPS Act reflects the sense of Congress that in carrying out its incentives program the Secretary should seek to strengthen the security and resilience of the semiconductor supply chain, strengthen U.S. semiconductor leadership, grow the economy, support job creation, and bolster the semiconductor and skilled technical workforce.<sup>10</sup> For these goals to be upheld, projects incentivized by the CHIPS Act must not face undue delay.

Please confirm that the Department of Commerce will leverage the flexibility inherent in the NEPA statute and all available authorities, personnel, and resources to ensure projects supported by CHIPS grants are not unduly delayed by NEPA reviews.

### **3. Effective enforcement regarding stock buyback restriction**

Section 102(g) of the CHIPS and Science Act appropriately protects taxpayer funding by prohibiting recipients of CHIPS funds from using such funds for stock buybacks or dividend payments. Yet, the CPO Request for Information on Implementation of the CHIPS Incentives Program<sup>11</sup> and the CHIPS Strategy Document<sup>12</sup> indicate that Commerce may intend to go beyond federal requirements. The Senate specifically rejected, by a margin of 87-6,<sup>13</sup> a Motion to Instruct the conferees to include provisions that, among other prohibitions, would ban grantees from re-purchasing stock even with non-grant funds. Commerce's intention to go far beyond the requirements of the CHIPS Act may result in some projects critical to our economy and national security declining to pursue CHIPS funding and potentially failing to locate in the U.S.

### **4. Commerce should provide immediate guidance on the expansion clawback ("guardrails")**

The CHIPS Act requires entities receiving financial assistance to be subject to a 10-year restriction<sup>14</sup> on certain transactions or expansions in China and other countries of concern (with certain exceptions), which are to be captured in an agreement with Commerce.<sup>15</sup> Aside from language provided in the statute, the CPO thus far has provided no further guidance to prospective applicants as to what they can expect this required agreement to include. CPO has also provided limited guidance in defining other statutory terms. It is critical that companies know the ground rules for what foreign investments are permissible or not permissible to be awarded CHIPS incentives.

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<sup>9</sup> U.S. Department of Energy, Semiconductor Supply Chain Deep Dive Assessment: U.S. Department of Energy Response to Executive Order 14017, 'America's Supply Chains', Feb. 2022

<sup>10</sup> 15 U.S.C. 4652 (d).

<sup>11</sup> National Institute of Standards and Technology, Implementation of the CHIPS Incentives Program Request for Information, Question 19

<sup>12</sup> *Supra*, at 13

<sup>13</sup> U.S. Senate Roll Call Vote 153, Question: On the Motion (Sanders Motion to Instruct Re: H.R. 4521), May 2022

<sup>14</sup> 15 USC 4652(a)(6)(C)(i)

<sup>15</sup> 15 USC 4652(a)(6)(C)(ii)

Please provide additional information on the process and your timeline for making information on this topic available to interested stakeholders, including a process for seeking input from the stakeholders in trade organizations, research bodies, and industry.

## **5. Definition of a “project”**

A key goal of the CHIPS Act is to make the U.S. competitive for semiconductor industry investment and incentivize projects to be built in the U.S. However, it remains unclear how the Department of Commerce will define eligible “projects” for which applicants can seek financial assistance.<sup>16</sup> Under the CHIPS Act, both eligibility for a grant and the use of such funds are tied to the construction, expansion, or modernization of a semiconductor facility rather than the development of a cluster of facilities.<sup>17</sup> As set forth in the CHIPS Act, a project is defined as “constructing, expanding, or modernizing *a* facility”<sup>18</sup> “for the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment.”<sup>19</sup>

Chipmakers will often co-locate multiple fab facilities at the same site for economic efficiency and flexibility in planning. Commerce should recognize the large scale and long-term time horizon of some projects. Commerce should also ensure that each individual facility at a given site is also eligible for grant consideration to compete effectively with facilities overseas that are incentivized on an individual basis.

## **6. Increased clarity on the funding allocation among different types of projects**

Congress provided Commerce with discretion in allocating the CHIPS funding among various types of projects. The CHIPS Strategy Document states the CPO intends to devote about \$28 billion toward advanced technologies<sup>20</sup> and about \$10 billion to mature and current-generation technologies, new and specialty technologies, equipment, and materials.<sup>21</sup>

Please provide more clarity about how the split will be distributed among different categories of projects and the associated pools of funding.

## **7. Uphold confidential business information throughout the application process**

We appreciate the importance of transparency throughout the implementation of the CHIPS incentives program, but we are concerned about the potential treatment of applicants’ need for confidentiality of competitive information, such as investment plans. The CHIPS Act authorizes the Secretary to “request records and information from the applicant to review the status of a covered entity” and that “the applicant shall provide the records and information requested by the Secretary.”<sup>22</sup> To ensure that applicants for projects that will meet the goals of the CHIPS Act are fully incentivized to apply and provide information to Commerce throughout the phases of the application process (statement of interest, pre-application, final application), Commerce should disclose information only on an aggregated basis and in a manner which ensures the security of confidential business information. It would be a mistake to discourage participation in the CHIPS program.

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<sup>16</sup> 15 USC 4652(a)(2)(A).

<sup>17</sup> 15 USC 4652(a)(2)(B) and 4652(a)(4)(A).

<sup>18</sup> 15 USC 4652(a)(2)(B)(i-ii)(emphasis added).

<sup>19</sup> 15 USC 4652(a)(1)

<sup>20</sup> CHIPS Strategy Document, at 9

<sup>21</sup> *Ibid*, at 10

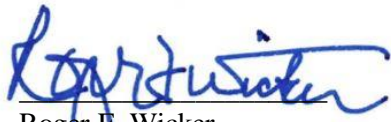
<sup>22</sup> 15 USC 4652(a)(2)(E)

Please provide more information about the confidentiality rules and treatment of company information provided pursuant to the CHIPS Act<sup>23</sup> for applications prior to the start of the application process.

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We look forward to continuing to work with the Department and the CPO to ensure the CHIPS incentives program is successful in its mission of incentivizing economic growth, supply chain resilience, national security, and U.S. technology leadership.

Sincerely,



Roger F. Wicker  
United States Senate



Mark Kelly  
United States Senate

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<sup>23</sup> Ibid.