

CHIPS Act Update: Applying for Semiconductor Incentives Funds

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Agenda

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Overview of Notice of Funding Opportunity

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- Stock Buybacks

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Authorization

CHIPS for America (Dec. 2020), [P.L. 116-283](#)

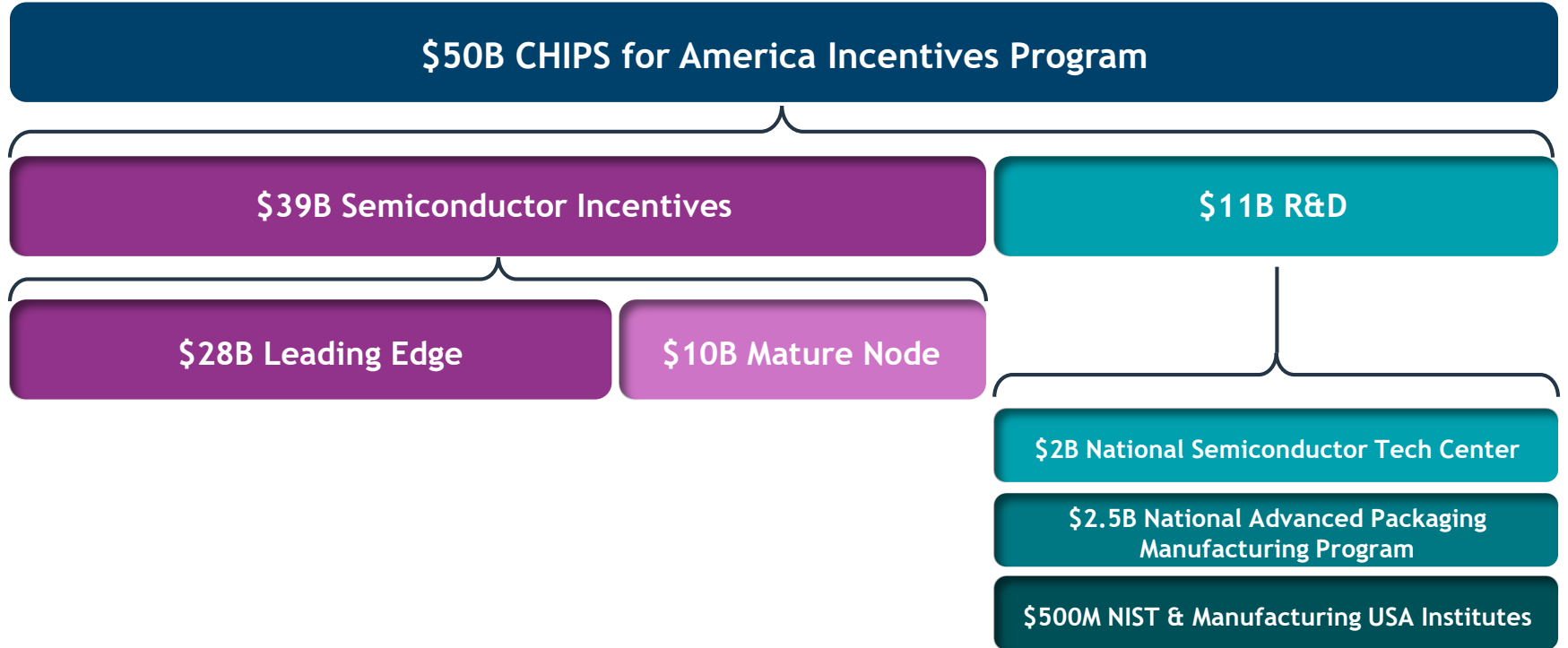
- Semiconductor Incentives, 15 U.S.C. 4652 / §9902, “**Federal Financial Assistance**”.
- National Semiconductor Technology Center, 15 U.S.C. 4656(c) / §9906(c), “The Secretary may make **financial assistance awards**, including construction awards, in support of the national semiconductor technology center.”
- National Advanced Packaging Manufacturing Program, 15 U.S.C. 4656(d) / §9906(d), “The Director may make **financial assistance awards**, including construction awards, in support of the National Advanced Packaging Manufacturing Program.”
- Manufacturing USA Institute for Semiconductors, 15 U.S.C. 4656(f) / §9906(f), “The Secretary of Commerce may award **financial assistance** to any Manufacturing USA Institute for work relating to semiconductor manufacturing.”

Appropriation

CHIPS and Science Act (Aug 2022) - \$52.5 billion over five years

- Semiconductor Incentives - \$39 billion over five years.
 - \$19 billion in fiscal year (FY) 22 and \$5 billion each year FY23 through FY26.
 - \$2 billion in FY22 is explicitly provided to focus solely on legacy chip production.
 - Up to \$6 billion over five years may be used for the cost of direct loans and loan guarantees.

CHIPS Act Funding Breakdown



NOTE: remaining \$6B in R&D funding to be distributed from FY23 thru FY26 not allotted to a specific program

Statutory Eligibility

“The Secretary shall establish in the Department of Commerce a program that. . . provides **Federal financial assistance** to **covered entities** to incentivize investment in **facilities and equipment** in the United States for the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment.”

❑ Key Terms:

❑ “Covered Entity”

- 15 USC §4651(2): a non-profit entity, a private sector entity, a consortium of private sector entities, or a consortium of nonprofit, public, and private sector entities with a demonstrated ability to substantially finance, construct, expand, or modernize a facility relating to fabrication, assembly, testing, advanced packaging, or production of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment.”
- NOFO: “In general, the recipient should be the single, private-sector, domestic legal entity that will receive the CHIPS Incentives directly from the Department.”

❑ “Federal Financial Assistance”

❑ “Facilities and equipment”

Direct vs. Indirect Recipient

- Direct awards will be made by Department of Commerce to “Covered Entities”:
 - “The Secretary shall establish in the Department of Commerce a program that. . . **provides Federal financial assistance to covered entities . . .**”
 - Direct award creates “privity of contract” between the Department of Commerce and the “Covered Entity”.
- Subawards (Indirect Recipient): Covered Entities will make “subawards” to other entities to fulfil the performance requirements of the Covered Entity’s direct award from the Department of Commerce.
 - Entities that contract to assist the “Covered Entity” with performance of the direct award from Commerce will have “privity of contract” only with the “Covered Entity”, not the Department of Commerce.
 - Commerce will likely mandate that the Covered Entity include certain terms and conditions in subawards by the Covered Entity to other entities performing work under the direct award.

Notice of Funding Opportunity

Published February 28, 2023

- www.grants.gov
- www.chips.gov

The screenshot displays the Grants.gov interface for a specific grant opportunity. At the top, a navigation bar includes links for HOME, LEARN GRANTS, SEARCH GRANTS, APPLICANTS, GRANTORS, SYSTEM-TO-SYSTEM, FORMS, CONNECT, and SUPPORT. Below this, the page title is 'VIEW GRANT OPPORTUNITY' with a search bar and a 'Back | Link' option. The main content area features the Department of Commerce logo and the following text: '2023-NIST-CHIPS-CFF-01', 'CHIPS Incentives Program – Commercial Fabrication Facilities', 'Department of Commerce', and 'National Institute of Standards and Technology'. There are 'Apply' and 'Subscribe' buttons. Below the title, there are tabs for 'SYNOPSIS', 'VERSION HISTORY', 'RELATED DOCUMENTS', and 'PACKAGE'. The 'SYNOPSIS' tab is active, showing a 'Print Synopsis Details' link. The 'General Information' section contains the following details:

| | |
|--|---|
| Document Type: Grants Notice | Version: Synopsis 14 |
| Funding Opportunity Number: 2023-NIST-CHIPS-CFF-01 | Posted Date: Feb 28, 2023 |
| Funding Opportunity Title: CHIPS Incentives Program – Commercial Fabrication Facilities | Last Updated Date: Feb 28, 2023 |
| Opportunity Category: Discretionary | Original Closing Date for Applications: Rolling NOFO |
| Opportunity Category Explanation: | Current Closing Date for Applications: Rolling NOFO |
| Funding Instrument Type: Other | Archive Date: |

Other Materials

CPO published a variety of supporting background documents as guidance but they are not controlling, including:

- [Vision for Success: Commercial Fabrication Facilities](#)
- [Frequently Asked Questions](#)
- Fact Sheets:
 - [Application Process and Evaluation](#)
 - [Private Investment](#)
 - [Taxpayer Protection](#)
 - [Workforce Development](#)
 - [International Engagement](#)
 - [Economic Opportunity](#)
- Application Resources
 - [Environmental Compliance](#)
 - [Key Dates](#)
 - [Statement of Interest Instructions](#)

Eligibility Categories

This NOFO seeks applications for the construction, expansion, or modernization of commercial facilities in the U.S. in the following categories:

- **Leading-Edge Facilities** - utilize the most advanced front-end fabrication processes which achieve the highest transistor and power performance. For logic, facilities that produce semiconductors at high volumes using EUV lithography. For memory, facilities capable of producing 3D NAND flash chips with 200 layers and above, and/or DRAM chips with a half-pitch of 13nm and below.
- **Current-Generation Facilities** - produce semiconductors that are not leading edge, up to 28nm process technologies, and include logic, analog, RF and mixed-signal devices.
- **Mature-Node Facilities** - fabric generations of (a) logic and analog chips that are not based on FinFET, post-FinFET transistor architectures, or any other sub-28nm transistor architectures; (b) discrete semiconductor devices such as diodes and transistors; (c) optoelectronics and optical semiconductors; and (d) sensors.
- **Back-end Production** - assembly, testing, or packaging of semiconductors. DOC particularly interested in projects that ensure competitive operating costs within the U.S. (e.g., through automation).

*A second NOFO for upstream materials and semiconductor equipment manufactures is expected in late spring, and a third for R&D is expected in early fall.

Eligibility - Definition of Semiconductor

In the CHIPS Act (15 U.S.C. §4651(13)) the term “semiconductor” has the meaning given that term by the Secretary.

The [FAQs](#) provide first glimpse on an administrative definition of “semiconductor”:

“A semiconductor is an integrated electronic device or system, most commonly manufactured using materials such as, but not limited to, silicon, silicon carbide, or III-V compounds, and processes such as, but not limited to, lithography, deposition, and etching. Such devices and systems include but are not limited to analog and digital electronics, power electronics, and photonics, for memory, processing, sensing, actuation, and communications applications.”

Funding Amount and Type

- Direct Funding

- Commerce “expects” that direct funding (aka grants) to companies will only constitute **5 to 15%** of total project costs
- This may only be an ‘opening bid’ in Commerce’s award negotiation with grant recipients as the NOFO also states that there “is no fixed amount for how much a project can receive in CHIPS Direct Funding.”
- Direct funding may be higher than 15% of total project costs if a project is not eligible for the investment tax credit.

- Loans/Loan Guarantees

- No fixed limit on the loans or guarantees that a project may receive.
- Only for projects where debt financing is not available on comparable terms on the private market. “CHIPS Loans and CHIPS Loan Guarantees are meant to supplement and not substitute for private funding.”
 - For both CHIPS Loans and Loan Guarantees, an explanation of efforts the applicant has made to attract debt financing from other sources and the rationale for seeking CHIPS Loans or Loan Guarantees beyond financing available from external providers.

Commerce expects that the total amount of a CHIPS Incentives Award (grants + loans + loan guarantees) will not exceed 35% of project capital expenditures.

Relationship with Investment Tax Credit

The CHIPS Act also established the Advanced Manufacturing Investment Tax Credit (ITC), which provides a 25% investment tax credit for investments in both semiconductor manufacturing and semiconductor manufacturing equipment. Unlike the incentives program, investments in semiconductor materials are not eligible for the tax credit.

According to the NOFO, Commerce will take into consideration the applicant's utilization of the Investment Tax Credit in determining the size of its award in several ways:

- The NOFO states that “the Department expects applicants to take advantage of the ITC, if eligible, to the fullest extent possible” and encourages applicants to “maximize the impact of the ITC to reduce the need for CHIPS Incentives.”
- If a project is ineligible for the ITC, then CHIPS Direct Funding awards may be higher than the expected range of 5 to 15% of project capital expenditures.

Evaluation Criteria

Applications will be evaluated based upon six criteria. Judgments will be made qualitatively not quantitatively. **Economic and national security will be given the greatest weight** and the remaining five will be given roughly equal weight.

1. Economic and National Security

- Does an application build sustainable domestic capacity that reduces U.S. reliance on vulnerable or overly concentrated production?
- Does an application address national security considerations, including by securing supply chains for technologies used by government organizations and their contractors?
- The assessment will vary depending on facility type (i.e., leading-edge versus mature-node).

2. Commercial Viability - is there reasonable demand for the project's output?

3. Financial Strength - can the project withstand stress in a market downturn?

4. Technical Feasibility and Readiness - what is likelihood of technical and manufacturing execution success, including environmental risk?

5. Workforce Development - are plans coherent, achievable and equitable to address talent needs and generate the workforce needed to execute on the applicant's project goals including affordable, accessible, reliable and high-quality child care?

Evaluation Criteria, cont.

Applications will be qualitatively evaluated based upon six criteria:

6. Broader Impacts - to what degree will the proposed project provide broader public impacts:
 - Stock Buybacks - what is the strength of the commitment to limit or refrain from stock buybacks over the next five years?
 - Research and Development - commitment to build and participate in process innovation occurring in the U.S.
 - Diverse and Underserved Suppliers - commitment to engaging with small, minority-owned, veteran-owned and women-owned businesses as suppliers, contractors or subcontractors.
 - Climate and Environmental Responsibility - quality of applicant's plan including renewable energy use, water conservation and climate resilience.
 - Local Community Investments - quality and comprehensiveness of the applicant's plans to drive regional equity, inclusion and broad-based growth.
 - Buy America - strength of intent to use domestically produced iron, steel, and construction materials.

Mandatory Requirements

In addition to the evaluation criteria, the NOFO also lays out several important restrictions and considerations:

- CHIPS Incentive Role - Applicants must demonstrate how the CHIPS award will incentivize the applicant to make investments in the US that they otherwise would not have engaged in but for the CHIPS award.
- Covered Incentive Role - Applicants must provide a letter from a state or local government to demonstrate that they have been offered a qualifying covered incentive.
- Child Care - Applicants requesting more than \$150 million in grant funding must provide a plan for access to child care for facility and construction workers that may include on-site or near-site child care, agreements with existing child care providers, child care subsidies or other measures.
- Profit Sharing - Recipients receiving more than \$150 million in CHIPS grant funding will be required to share with the U.S. a portion of any cash flows or returns that exceed the applicant's projections.

CHIPS Incentive Role

- NOFO: CHIPS Incentives Justification: A summary narrative explaining how the CHIPS Incentives requested will incentivize the applicant to make investments in facilities and equipment in the United States *that would not occur in the absence of the incentives*.

May an applicant apply for CHIPS funding for a project that has already been announced or begun construction?

The CHIPS Act provides that funding is available to covered entities “to incentivize investment in facilities and equipment in the United States” for the fabrication, assembly, testing, advanced packaging, or production of semiconductors. Applicants must therefore demonstrate how the CHIPS funding requested will incentivize the applicant to make investments in facilities and equipment in the United States that would not occur in the absence of CHIPS Incentives.

For applications containing projects that have already been announced or begun construction, this standard could be met by demonstrating that the CHIPS Incentives requested will enable the applicant to meaningfully enhance the size, scope, speed, or technical ambition of the overall application. If the applicant cannot make this type of showing, it will have to demonstrate that the project would not occur without CHIPS funding.

Covered Incentive

Statutory Requirement: applicants obtain a state or local government incentive to be eligible for CHIPS Incentives.

Definition of Covered Incentive:

- **Tax incentive** for the purposes of constructing, expanding or modernizing a facility within that jurisdiction; **OR**
- **Workforce-related incentive**, including a grant agreement relating to workforce training or vocational education.

The Department encourages projects that include state and local incentive packages capable of creating **spillover benefits** that improve regional economic resilience and support a robust semiconductor ecosystem, beyond assisting a single company. Such incentives might include investments in workforce, education, site preparation or infrastructure (including transit or utilities) that are not limited to the applicant, but designed to benefit both the applicant and the broader community. Likewise, the Department will place less weight on incentives (such as direct tax abatements) with less potential for spillover benefits.

- **Letter Required.** Each applicant must provide a letter from a state or local government entity to demonstrate that they have been offered a qualifying covered incentive.
- **Contingent Commitment Allowed.** The offer may be contingent; if so, any contingencies must be clearly specified in the letter.

Prior Covered Incentive


Will the CHIPS Program Office accept workforce or community investments and covered incentives committed prior to the release of the funding opportunity?

Yes, the CHIPS Program Office will take such investments and/or incentives into account. The quality and depth of such commitments will be evaluated per the criteria in Section V.A (“Evaluation Criteria”) of the [CHIPS Incentives Program – Commercial Fabrication Facilities Notice of Funding Opportunity](#).

Restrictions

- **Stock Buybacks** - The CHIPS Act prohibits incentives recipients from using CHIPS Act funds for stock buybacks or other dividend payment programs. The NOFO goes beyond this restriction to establish a preference for applicants that commit to limit or refrain from engaging in stock buybacks over the next five years, though this falls short of some members of Congress who sought a complete prohibition on award recipients from engaging in stock buybacks regardless of the source of funding.
- **Davis-Bacon Act** - All laborers and mechanics employed by the applicants, sub-recipients, contractors or sub-contractors in the performance of construction, alteration or repair work funded in whole or in part under the NOFO shall be paid prevailing wages in compliance with Davis-Bacon Act.
- **Clawback/Guardrails** - The NOFO notes that it specifically does not include further information the ‘technology clawback’ or the ‘manufacturing clawback’, which will both be the subject of a future rulemaking. These two guardrails prohibit incentive recipients from sharing certain technology with foreign entities of concern or expanding leading-edge semiconductor manufacturing capacity in countries of concern.

Clawbacks/Guardrails

 An official website of the United States government



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Pending EO 12866 Regulatory Review

RIN: [0693-AB70](#)

[View EO 12866 Meetings](#)

Title: Preventing the Improper Use of CHIPS Act Funding

Agency/Subagency: DOC / NIST

Legal Deadline: None

International Impacts: No

Pandemic Response: No

Received Date: 01/31/2023

Stage: Proposed Rule

Economically Significant: No

Affordable Care Act [Pub. L. 111-148 & 111-152]: No

Dodd-Frank Wall Street Reform and Consumer Protection Act, [Pub. L. 111-203]:
No

Restrictions - Foreign Control/Access

- Foreign Control - Each applicant must identify any foreign entity that exercises control over the applicant or a proposed project or has *access to confidential information about the proposed project*. The applicant should also identify any potential transactions occurring during the application process that could result in such control by a foreign entity or sharing of confidential information with a foreign entity
- SF-328 Requirements - Foreign Control Ownership and Influence:

2. Foreign Entities of Concern and Foreign Capital

Foreign entities of concern³⁴ are not eligible to receive CHIPS Incentives. In addition, the Department will review applications for involvement of foreign entities of concern and will not approve any applications where a foreign entity of concern—through control,³⁵ access to information, or other mechanisms—poses an undue risk to a project or U.S. national security interests. Applicants are required to provide information via the SF-328 form at the time of full application to enable an initial assessment of these issues. Additional information, beyond the scope of the SF-328 form, may be required in due diligence, to further identify and, if necessary, mitigate potential risks to national security.

Application Timing

Key Application Dates

- Statements of Interest - may be submitted now on chips.gov SOI portal.
- March 31, 2023 - Pre-applications (optional) and full applications for *leading-edge* facilities will be accepted on a rolling basis.
- May 1, 2023 - pre-applications for *current generation*, *mature-node* and *back-end* production facilities will be accepted on a rolling basis.
- June 26, 2023 - full applications for *current generation*, *mature-node* and *back-end* production facilities will be accepted on a rolling basis.

Application Process Phases

1. Statement of Interest
2. Pre-Application
3. Full Application
4. Preliminary Memorandum of Terms
5. Due Diligence
6. Award Negotiation
7. Award Issuance

Statement of Interest (SOI) Questions

- **Purpose** - to help Commerce gauge the level of interest and demand for each type of incentive; the SOI will not be used for the purpose of evaluating applications.
- **When** - *all* (not just commercial fab facilities subject to this NOFO) potential applicants may submit an SOI as of two days ago, Feb 28, 2023, on the SOI portal and must be submitted at least 21 days prior to submission of a pre- or full application ([SOI Instructions](#)).
- **Who** - an SOI is required from all potential applicants (contra the pre-app which is optional but recommended).
- **What** - an SOI must include the following important info:
 - Brief project description, including activities for each proposed facility at a single location, the resulting products that will be made, known timelines, etc.
 - End markets that will be served.
 - Site location (may be marked as “not determined at this time”).
 - Project type (i.e., is it a new build or expansion or modernization of an existing facility).
 - Facility types (i.e., leading-edge, current-gen, mature-node, back-end, materials or equipment facilities, R&D or other).
 - Expected total capital expenditure.

Pre-Application

- **Purpose** – to create an opportunity for dialogue between the Department and the potential applicant to ensure the proposed application would meet program requirements and address program priorities.
- **When** – leading-edge facility applications may submit pre-applications as of March 31, while current-gen, mature-node and back-end applications may submit pre-applications as of May 1.
- **Who** – Commerce “strongly encourages” pre-apps for current-gen, mature-node and back-end facilities.
- **Outcome** – the pre-app review will conclude with a written assessment of the pre-app and will include a recommendation for next steps: (1) to submit a full application, (2) to submit a revised pre-app or (3) not to submit a further pre- or full application. Applicants cannot submit their full application until receiving comments from Commerce on their pre-app.
- **What** – the project plan and workforce development information should not exceed 20 pages, excluding attachments. Topics of discussion during the pre-app phase may include: relevance to economic and national security goals; the scope of the proposed project; capital structure; long-term economic viability, CHIPS Incentives request; CHIPS Incentives justification; workforce development plans; a more detailed project description than the SOI; and an Environmental Questionnaire.
- **NEPA** – the Environmental Questionnaire is intended to allow Commerce to assess the likely level of review under the National Environmental Policy Act.

Full Application

The full application will include 12 sections:

1. Cover Page
2. Covered Incentive - each applicant must provide a letter from a state or local government to demonstrate offer of incentive.
3. Description of Project(s) - separate narrative on the overarching vision for all projects (no more than 15 pages) and, if multiple projects in a single application, a narrative for each project (no more than 15 pages); cluster profile; project timeline; summary narrative addressing evaluation criteria; CHIPS incentive justification.
4. Applicant Profile - descriptive information about the applicant; company financials; equity capital structure; outstanding debt.
5. Alignment with Economic and National Security Objectives - in no more than 30 pages how will the project(s) enhance U.S. economic competitiveness, increase global supply chain resilience, address USG need for access to domestically produced chips; cybersecurity plans; supply chain mapping.

Full Application, cont.

The full application will include 12 sections:

6. Commercial Strategy - review (no more than 15 pages) end-market demand; market position and competitor landscape; stability of supplies and materials.
7. Financial Information - describe (no more than 20 pages) project costs; capital sources; project cash flow, income statement, balance sheet projections; income statement projections; internal revenue rate; scenario analysis; CHIPS Incentives request and justification.
8. Project Technical Feasibility - describe (no more than 20 pages) the viability and security of the underlying technology and manufacturing processes; ability to execute required construction; and effective management of the environmental review process.
9. Organization Formation - describe the applicant's ownership, legal entity, and organizational structure; managerial capability; consortium applications; past project history; intellectual property security; litigation and/or conflicts; advisors and key partners.
10. Workforce Development Plan - each applicant (in no more than 30 pages) must document expected workforce needs and develop a strategy for meeting those needs for each facility and their construction workforce. Workforce development plans have 5 components: workforce needs assessment; worker recruitment and retention; Good Jobs Principles approach; workforce training and wraparound services; metrics and milestones. Applicants requesting more than \$150 million in direct funding will also describe here how they plan to meet the new child care requirement.

Full Application, cont.

The full application will include 12 sections:

11. Broader Impacts - applicants will describe here (in no more than 30 pages) their plan to:
 - Reinvest in the U.S. semiconductor industry.
 - Engage, limit or refrain from participating in stock buybacks and other dividend programs over the next 5 years.
 - Support semiconductor research and development.
 - Create inclusive opportunities for businesses through a supplier diversity plan.
 - Advance climate and environmental responsibility goals.
 - Make community investments to drive regional economic resilience and broad-based growth.
 - Utilize domestically produced iron, steel, and other construction materials, if they have such domestic content plans.
12. Standard Forms - all applicants should submit:
 - SF-328, Certificate pertaining to Foreign Interests
 - CD-511, Certification Regarding Lobbying
 - SF-LLL, Disclosure of Lobbying Activities

Due Diligence

- **Investment Committee Process**: When applications are determined to be eligible, complete and responsive, the Department will convene an Investment Committee to conduct a merit review and consider whether to advance or deny applications through the process.
- **Investment Committee Decision**: The Investment Committee may make one of three determinations: (1) the application should be denied, which is non-appealable; (2) the application should be held for later consideration pending review of other applications; or (3) the application is eligible for an award and should **advance to the due diligence phase**.
- **Due Diligence**: In the due diligence phase, the Department will require the applicant to provide additional information on national security, financial, environmental and other issues as well as initiate its environmental review.
- **Due Diligence Fees**: The Department will engage outside advisors, consultants and/or attorneys in this stage and **the applicant will be responsible for their fees and costs**.
- **Transaction Review Committee**: Recommendation on application will be sent from Investment Review Committee to Transaction Review Committee, which will be made up of senior department leadership.

Preliminary Memorandum of Terms and Negotiation

- **Preliminary Terms.** Prior to advancing from the full application phase to the due diligence phase, the Department will also prepare a non-binding Preliminary Memorandum of Terms that will include recommendations for the amount and form of any CHIPS Incentives. The Department will provide these terms to the applicant for review and negotiation.
- **Negotiation.** Clear the Department expects “negotiation” of terms.
- Nature and extent of Terms and Conditions not disclosed in NOFO.
- Unclear if any terms will mirror any current grant requirements:
 - ❖ Office of Management and Budget Uniform Guidance
 - ❖ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 200
 - ❖ Department of Commerce Grants and Cooperative Agreements Manual (April 2021)
 - ❖ Department of Commerce Financial Assistance Standard Terms and Conditions (November 2020).

Unanswered Questions

- Terms and Conditions
- Applicability of 2 C.F.R. § 200
 - Real Property Trust - 2 C.F.R. § 200.316
 - Accounting/Financial Management Systems
- Budgeting/Tracking Requirements
- Required Audits
- Mitigation of potential impacts of Bayh-Dole

Bayh-Dole Act - Research and Development

- ❖ **Title to Subject Inventions:** The Department of Commerce has the right to take title to any invention conceived or first actually reduced to practice in the performance of work under a financial assistance award for research and development made to a for-profit large business.
- ❖ Business will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the government obtains title.
- ❖ **Manufacturing in U.S.:** An awardee (large or small/for-profit or non-profit) of a financial assistance agreement for research and development must agree that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention **will be manufactured substantially in the United States.**
- ❖ The requirement may be waived by a federal agency upon a showing by the *awardee* or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

Laws Applicable to Financial Assistance

- ❖ **Byrd Amendment and Lobbying Disclosure**, 31 U.S.C. § 1352.
 - ❖ “No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.”
- ❖ **Whistleblower Protections**, 41 U.S.C. § 4712
 - ❖ An employee of a grant recipient or sub-recipient may not be discharged, demoted or otherwise discriminated against as a reprisal for providing information to the federal government information that the employee reasonably believes is evidence of gross mismanagement of a federal grant, a gross waste of federal funds, an abuse of authority relating to a federal grant, a substantial and specific danger to public health or safety or a violation of law, rule or regulation related to a federal grant.

Criminal/Civil Penalties for Noncompliance

- ❖ **Civil False Claims Act** - Any person who **“knowingly”** (1) **presents**, or causes to be presented to the United States, a false or fraudulent claim for payment or approval; (2) **makes, uses, or causes to be made** or used **a false record or statement** to get a false or fraudulent claim paid or approved or conspires to defraud the government by getting a false or fraudulent claim allowed or paid; or (3) makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the United States is subject to a **civil penalty for each claim** adjusted for inflation, plus **three times the amount of damages** which the government sustains because of the act of that person.
 - ❖ **“Knowing”** means:
 - ❖ Actual knowledge
 - ❖ Deliberate ignorance
 - ❖ Reckless disregard.
- ❖ **Recouping Grant Amount**
- ❖ **Suspension or Debarment**

Key Takeaways

- **More Sticks and Fewer Carrots** - By adding more restrictions like child care and profit-sharing requirements and stock buyback preferences while also lowering expectations that the federal share of a project will be in the range of just 5 to 15% for grants, the Department is making a risky bet that companies will jump through more hoops for a smaller reward.
- **Proposed Rule on Certain Guardrails** - There is still more important information to come from the Department in a forthcoming proposed rule with notice and public comment regarding the ‘manufacturing clawback’ prohibiting expansions of leading-edge capacity in countries of concern and the ‘technology clawback’ prohibiting technology sharing with countries of concern

CLE CODE: 228CHIPS

Email the non-traditional format form with the code word to FirmCLE@akingump.com.

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Questions?