CHIPS Act Strategy: Department of Commerce Releases Additional Information on Applications for $50 Billion in Funding

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On September 6, 2022, the U.S. Department of Commerce (“Department”) released a 20-page document providing key details on the administration and application process for the award of $50 Billion through the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Fund.

The “Strategy for the CHIPS for America Fund” included important information about the breakdown of the funding it will disburse, the priorities it will set for awarding grants, the intended timeline for the first awards and how the agencies will staff the programs, among other items. Here are the key takeaways:

Program Administration

The program will be administered through two new offices at the Department of Commerce’s National Institute of Standards and Technology (NIST). The CHIPS Program Office (CPO) will implement the Section 9902 semiconductor incentives program and provide policy and stakeholder engagement support across CHIPS programs. The CHIPS research and development (R&D) office will “incubate” the National Semiconductor Technology Center (NSTC), and manage the Industrial Advisory Committee, Advanced Packaging, Manufacturing USA and R&D activities. Staff have not yet been publicly named to lead the CPO or CHIPS R&D office.

Key Initiatives

The CHIPS Act of 2022, which we previously analyzed in a July 27, 2022 client alert here, directly appropriates $39 billion in funding to incentivize domestic chip manufacturing and $11 billion for semiconductor research and development, provides some guidance on how to disburse that money but gives significant discretion to the Secretary. For example, the statute says that up to $6 billion may be used for the cost of direct loans and loan guarantees and $2 billion is explicitly provided solely to focus on legacy chip production. However, the Department’s newly released strategy offers the first window into how the Secretary will use her discretion to award funding under the CHIPS programs. It identifies three key initiatives:

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- Leading Edge Logic and Manufacture Clusters. The Department will dedicate $28 billion through grants, cooperate agreements or loans/loan guarantees for proposals involving the construction or expansion of manufacturing facilities to fabricate, package, assemble and test these critical components, particularly focusing on projects that involve multiple high-cost production lines and associated supplier ecosystems. The Department expects this initiative to account for roughly three-quarters of the CHIPS incentives and drive “large-scale” change.
- Mature Chips, New and Specialty Technologies, and Suppliers. The Department will allocate $10 billion through grants, cooperate agreements or loans/loan guarantees for proposals that involve but are not limited to:
  - Construction or expansion of facilities for fabrication, packaging, assembly and testing of mature semiconductors, including all types of logic, memory, discrete, analog and optoelectronic chips.
  - Facilities to produce new or specialty technologies like advanced analog chips, radiation hardened chips, compound semiconductors or emerging technologies.
  - Facilities that manufacture equipment and materials for semiconductor manufacturing.
  - Equipment upgrades for near-term efficiency improvements in fabrication facilities.

The Department encourages “industry participants to craft creative proposals” and expects this pot of funding to support potentially dozens of grants with the total financial assistance varying considerably “depending on the specifics of each project.”

- Research and Development. The CHIPS Act already details how much funding each of the new research and development initiatives—the National Semiconductor Technology Center (NSTC), the National Advanced Packaging Manufacturing Program (NAPMP) and the three new Manufacturing USA Institutes—will receive over the next five fiscal years. Instead, the new strategy document shares new details about the mission for each of these centers.
  - National Semiconductor Technology Center – the strategy imagines the NSTC as a long-term “force for advancing innovation in semiconductors and microelectronics, with substantial financial and programmatic support from companies, universities, investors and other government agencies.” The NSTC will seek to ensure broad participation from startups, small firms and fabless companies “rather than being tuned to the needs of specific companies” or technologies as well as the ability to attract leaders who understand the entire semiconductor ecosystem and can manage large public-private partnerships.
  - National Advanced Packaging Manufacturing Program – the strategy notes that the Department “envisions forming a network of entities to create a robust domestic advanced packaging capacity.”
  - Manufacturing Institutes – the statute requires the Department to establish up to three new institutes related to semiconductors and the strategy explains that the Department now expects these institutes “to emphasize virtualization and automation, among other topics.”

Timeline

The strategy notes that the Department intends to solicit funding applications before February 2023 for the semiconductor incentives programs (i.e., key initiatives 1 and 2 above). In addition, CPO will establish "a preliminary application stage that will enable applicants to get feedback" from the Department before final applications are due.

Application Prioritization:

1. Cost Share/Private Capital. A significant project cost share by the applicant will either be required or result in a significant *prioritization* for funding. In addition, the Department is encouraging proposals that leverage private capital, both investments from the fab companies themselves as well as outside sources of capital. In addition to committing their own significant resources, semiconductor companies are encouraged to explore creative financing structures to tap a variety of sources of capital at different places on the risk-reward spectrum to reduce the overall cost of capital.
2. Expanded Covered Incentives. The Department expects to *prioritize* applications "that include state and local incentive packages with the potential for large spill-over benefits, are based on performance, and maximize regional and local competitiveness as well as economic gains, including supporting a robust semiconductor ecosystem rather than a single company." Encouraged expanded incentives include, but are not limited to: (1) support for broader development of a supplier ecosystem such as shared utility, logistics and production capacity, (2) workforce investment and (3) long term tax credits.
3. Quick Delivery/Low Project Risk. The Department will *prioritize* funding for proposals that can "move quickly, reduce project risk, demonstrate ample local support and/or regional cooperation, and provide broad-based benefits."
4. Security and Resiliency. The Department expects to prioritize projects that "adhere to standards and guidelines on information security, data tracking and verification, and that collaborate on further development and adoption of such standards."
5. Workforce. The Department expects to *prioritize* investments in projects that connect workforce training dollars to quality jobs that exceed the local prevailing wage for an industry in the region, including basic benefits (e.g., paid leave, health insurance, retirement/savings plan) and/or are unionized.
6. Diversity and Underserved Populations. The Department will *prioritize* "applicants with well-developed proposals designed to increase participation of and outreach to economically disadvantaged individuals, minority-owned businesses, veteran-owned businesses, women-owned businesses, and rural businesses in the geographic area of each project."

Encouraged to Include in Application

1. Collaboration. The Department is *encouraging* applications that evidence collaboration between industry stakeholders, investors, customers, designers and suppliers; and international firms. This can include (1) purchase commitments, (2) enabling fabless design firms and/or (3) "consortium-like proposals, by semiconductor fabricators and their upstream suppliers (e.g., of substrates or specialty chemicals), equipment providers, and downstream partners (e.g., of assembly, test, and packaging)."

2. State/Local Commitment. The Department notes the benefit and potential prioritization of applications that demonstrate significant state and localities commitment beyond the required covered incentive. This could include:

- Expedited processes for environmental, health and safety reviews and permits.
- Liaisons to assist with site selection, supplier discovery and compliance with local laws.
- A systems integrator that works with ecosystem companies to address shared issues like navigating permits, building infrastructure, finding workers and coordinating incentive applications.
- Planning and support for other ancillary investments such as housing and community development.
- Partnership with other states and localities to develop regional ecosystems and corridors that encompass multiple jurisdictions.

3. Workforce. The Department is *encouraging* projects that include effective and creative workforce development solutions at the scale required to meet demand.

Project Details Required

The Department has stated that each application will require the submission of the following details:

1. An executable plan to sustain the facility without further Section 9902 funding that covers the expected useful life of the facility receiving support.
2. Provisions for necessary investments and upgrades to ensure that the facility remains competitive and commercially viable for its useful life.
3. Commercially reasonable assumptions for revenue, operating costs, cash flows and other drivers of financial sustainability.
4. An analysis of how the Incentive Tax Credit will impact the financial results of the project.

Unanswered Questions

While the Commerce's strategic plan is extraordinarily helpful as entities develop proposals, many critical questions remain unanswered, including the following:

- Accountability Regime. While the Department's strategy and other documents include much discussion about the focus on transparency and accountability for the expenditure of federal dollars, the Department has yet to announce whether the Department will follow the standard grant and cooperative agreement regulations found at 2 C.F.R. § 200 or develop a new system.
- Foreign Manufacturing Guardrail. A direct recipient of Section 9902 funds must execute an agreement with the Department agreeing to "not engage in any significant transaction, as defined in the agreement, involving the material expansion of semiconductor manufacturing capacity in the People's Republic of China or any other foreign entity of concern." The agreement will be operative for 10 years following date of award. The strategy does not define critical terms including "significant transaction" or "material expansion." It also does not address whether these agreements will be negotiated on an individual awardee basis.

- Technology Guardrail. The full amount of an award provided to a direct recipient of Section 9902 funds shall be recovered by the Department of Commerce, if during the specified award term, the recipient knowingly engages in *any* joint research or technology licensing effort with a foreign entity of concern (China, North Korea, Russia, Iran and others identified by the U.S. government "engaged in conduct detrimental to U.S. national security or foreign policy") that relates to a technology or product that raises national security concerns and is communicated to the recipient before engaging in the joint research or technology licensing. The strategy does not provide further information on how this provision will be implemented.
- Buy America Act. Under the Infrastructure Investment and Jobs Act (IIJA) passed last December, federal agencies must ensure that no funds made available for a federal financial assistance program for infrastructure is obligated for a project unless all of the iron, steel, manufactured products and construction materials used in the project are produced in the U.S. The Department's strategy does not provide any information on whether Section 9902 funding will be considered an infrastructure project subject to the Buy America Act requirements.
- Intellectual Property. A significant open question is the intellectual property rights that Commerce will require as a condition of funding. The new strategy does not provide any guidance.

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