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CHIPS Act Update: Applications Wanted

Client Alert | March 2, 2023

The CHIPS and Science Act ("CHIPS Act") appropriated $50 billion to spur development of a U.S.-based semiconductor industry and supply chains, including $39 billion 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."[1] On February 28, 2023, the Biden administration issued its first Notice of Funding Opportunity ("NOFO") under the CHIPS Act to begin distributing that $39 billion through direct investments, loans, and loan guarantees. The Department of Commerce provided key information for potential applicants through a webcast, Vision for Success paper, and online announcement. This alert highlights key details from those sources that will be of use to clients applying for CHIPS Act funding.

Who Should Apply?

The CHIPS Act limits eligibility to "covered entities," which include non-profit entities, private entities, consortia of private entities, or consortia of non-profit, public, and private entities. They must demonstrate the ability to finance, construct, or expand a facility related to the fabrication, assembly, testing, advanced packaging, or production of semiconductors.[2]

For this first round of funding, the Department is seeking applicants in the following categories:

- Leading-Edge Facilities
- Current-Generation Facilities
- Mature-Node Facilities
- Back-End Production Facilities[3]

In all but extraordinary cases, applicants should be domestic U.S. entities.[4]

Application Schedule

The Department of Commerce announced the following schedule for interested parties to follow in applying for this first round funding:

> **February 28, 2023:** First Notice of Funding Opportunity announced. The Statement of Interest ("SOI") portal is now open. All applicants with proposals "for the construction, expansion, or modernization of commercial facilities for the front- and back-end fabrication of leading-edge, current generation, and mature-node semiconductors" should submit a Statement of Interest as soon as possible. The Statement of Interest must be submitted at least 21 days prior to submitting a pre-application or full application.
>
> **March 31, 2023:** Earliest submission date for applicants for leading-edge project funding to submit an optional pre-application or mandatory full application.
>
> **May 1, 2023:** Earliest date for applicants for current generation, mature node, and

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back-end project funding to submit an optional pre-application.

June 26, 2023: Earliest date for applicants for current generation, mature node, and back-end project funding to submit a mandatory full application.[5]

The Department noted that it will announce another round of funding in the late spring for material suppliers and equipment manufacturers, and a third round of funding in the fall to support construction of semiconductor research and development facilities.[6]

The Department also indicated that projects should start their environmental permitting processes as soon as possible. While questions exist regarding whether the administration will exempt CHIPS Act projects from the National Environmental Policy Act ("NEPA") authorization process, and the Department did not comment on that question directly, it did urge applicants not to wait to start the authorization process.[7]

Application Process Key Points

Statement of Interest: The Department of Commerce encouraged parties to submit a statement of interest to help the CHIPS Program Office gauge interest in the program and understand the types of projects that will be applying. The SOI should include applicant information and basic project information such as the nature of the project and its potential scope.

Pre-Application: Applicants are not required to submit a pre-application, but submitting one creates another opportunity for dialogue between the Program Office and applicants. The CHIPS Program Office is willing to provide feedback on pre-applications that will strengthen the full application. Pre-applications should include a more detailed project description and a summary of financial information. The Department strongly recommends pre-applications for current-generation, mature-node, and back-end production facility applications.

Full Application: Applicants must submit a full application, with substantial detailed information on the proposed project, to be considered for an award.

Due Diligence and Award: If the Program Office determines an applicant is likely to receive an award, it will enter into a preliminary memorandum of terms with the applicant. That memorandum will require validation of national security and financial information. The Program Office will engage outside advisers to assist with the due diligence, which the applicant must fund. The Program Office will disburse funds based on meeting project milestones rather than through lump sum payments.[8]

Issues to Emphasize in Applications

The Department of Commerce has underscored that the CHIPS program should advance U.S. economic and national security objectives; demonstrate commercial viability, financial strength, and technical feasibility, and readiness; promote workforce development and diversity; and encourage broader investment in semiconductors. Successful applicants should explain how they will advance each of those priorities, which the Department details in its online Fact Sheet.

Of particular note, the Department is expected to favor projects that support the Department of Defense, other national security objectives, or other government functions. It also intends to fund projects that demonstrate they can be self-sustaining without future subsidies after the initial government investment, as well as those that can improve the semiconductor supply chain. The Department will give preference to companies that commit to growing the semiconductor industry through research and development and workforce training. In addition, the Department seeks projects that:

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- Promote women-owned and small businesses;
- Include “concrete goals” for outreach plans to underserved communities;
- Commit to enter project labor agreements with building trade unions;
- Develop strategic partnerships with training entities and institutions of higher education to provide workforce training;
- Demonstrate how an accounting for weather and climate risks and include a climate and responsibility plan in their applications;
- Provide childcare “to the greatest extent feasible” (*see further discussion below*); and
- Are sponsored by companies that commit not to engage in stock buybacks for five years after receiving an award.[9]

Unique Program Requirements

The Department webcast speakers flagged several program requirements detailed in the NOFO worth applicants’ early attention. Funds may not be used to construct or modify facilities outside of the United States or to physically relocate an existing U.S. facility to another U.S. jurisdiction unless it is in the interest of the United States as determined by the Department. They also may not be used for stock buybacks or dividend payments (though there is no detail of compliance as money ultimately is fungible), and project budgets may not include indirect costs.[10]

Two special requirements apply to applicants seeking more than $150 million in direct funding:

- Applicants must provide a plan for how they will provide childcare for their workers (the $150 million threshold triggers an actual requirement, rather than the “to the greatest extent feasible” standard); and
- Applicants must share a portion of cash flows exceeding the applicants’ projections with the federal government, which will use the funds for CHIPS Act purposes.[11]

How Gibson Dunn Can Assist

Gibson Dunn has an expert team of industry subject matter experts and public policy professionals tracking implementation of the CHIPS Act closely. We are available to assist eligible clients to secure funds throughout the application process. We also can engage with the Department of Commerce and other federal agencies regarding the structure of future CHIPS Act programs as the agencies develop them.

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[1] Pub. Law No. 117–167 Sec. 102(a) (funding the authorization of the semiconductor incentive program established under the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (15 U.S.C. §§ 4652, 4654, 4656, Pub. Law No. 116-283)).

[2] 15 U.S.C. § 4651(2); U.S. Dep’t of Commerce Nat’l Institute of Standards and Technology Notice of Funding Opportunity, CHIPS Incentives Program—Commercial Fabrication Facilities, here [hereinafter, NOFO].

[3] For an in-depth discussion of the types of facilities, see the NOFO at Sec. 1.

[4] U.S. Dep’t of Commerce Nat’l Institute of Standards and Technology CHIPS Frequently Asked Questions, https://www.nist.gov/chips/frequently-asked-questions.

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[5] CHIPS for America Guide (Feb. 28, 2023), here.

[6] Department of Commerce Webcast (Feb. 28, 2023).

[7] *Id*.

[8] Department of Commerce Webcast (Feb. 28, 2023).

[9] *Id.; see* NOFO.

[10] *Id*.; Department of Commerce Webcast (Feb. 28, 2023).

[11] NOFO Sec. 6.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Public Policy practice group, or the following authors:

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