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CHIPS Act Update: U.S. Department of Commerce Provides Guidance for Funding Pre-Applications

Client Alert | April 12, 2023

Since the CHIPS and Science Act ("CHIPS Act") was enacted into law in August 2022, the Biden Administration has been busy implementing its mandate 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] As discussed in our previous client alert, the administration published the first of three expected Notices of Funding Opportunities ("NOFO") on February 28, 2023, and the U.S. Department of Commerce (the "Department") began evaluating pre-applications and applications from leading-edge facilities last month.[2]

In an April 11, 2023 webcast, the CHIPS Program Office ("CPO") discussed the application process for this first funding opportunity and critical elements of a successful pre-application. This alert highlights key details from that webcast that will assist clients preparing funding pre-applications.

I. Who Can Apply, and When?

The CPO emphasized that currently the pre-application guidance in this alert applies only to covered entities applying for funding under the first NOFO, and it is unclear whether future NOFOs will follow a similar pre-application process.[3] The first NOFO encompasses funding for the principle fabrication aspects of semiconductors: fabrication facilities themselves, as well as assembly, testing, and advanced packaging. The first NOFO covers in general the full spectrum of fabrication technology, including: leading-edge, current-generation, and mature-node facilities, as well as back-end production facilities.[4] In its April 11 webinar, however, the CPO indicated that *all* potential applicants for CHIPS funding—even those not eligible for funding under the first NOFO—are encouraged to submit a Statement of Interest at this time.[5] These Statements of Interest, which include applicant information and a brief description of the planned application, allow the Department to gauge interest and prepare for the review of applications and pre-applications.[6] Official instructions for submitting a Statement of Interest have been published online.

After filing the Statement of Interest, applicants must wait a minimum of twenty-one days before submitting an application or pre-application for funding.[7] Once this twenty-one day period has passed, potential applicants eligible for funding may submit a pre-application (or application), according to the following schedule:

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

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

II. Benefits of Submitting a Pre-Application

The Department of Commerce does not require a pre-application to award CHIPS Act funds under the first NOFO.[8] Submitting a pre-application, however, creates an opportunity for dialogue with the CPO. While this dialogue is useful for all applicants, the CPO has indicated that areas other than leading-edge fabrication—specifically, current-generation, mature-node, and back-end production applicants are especially encouraged to submit a pre-application, presumably as the CPO will need to more closely evaluate the merits of funding current or legacy technology as opposed to cutting-edge nodes.[9]

After reviewing a pre-application, the Department will provide potential applicants with a written assessment of the pre-application's strengths and weaknesses, along with recommendations for improvement. This written assessment will include a "recommendation for next steps," ranging from submitting a revised pre-application or full application to not submitting any further application materials.[10] Moreover, the CPO will use the pre-application to assess the project's likely level of review under the National Environmental Policy Act ("NEPA"), allowing applicants to avoid delays down the line.[11]

For current-generation, mature-node, and back-end production applicants, the Department has indicated that the choice to submit a pre-application—or not—will not affect the timeline of the full application's review.[12] The Department will initially screen applications and pre-applications for eligibility in order of receipt. The subsequent comprehensive review order, however, will be determined based on the program priorities discussed in Section IV of this alert. The Department has thus far been reluctant to provide any estimated turnaround time for applications until it has a clearer picture of the volume of potential applications.[13]

III. Elements of the Pre-Application

The pre-application consists of six main sections, including a mix of narrative responses, data uploads, and web form responses. The form of the pre-application largely mirrors that of the final application, to allow the Department to provide as thorough of an assessment of the application's strengths and weaknesses as possible.[14] Guides and templates for these pre-application elements are available on the CHIPS for America website.

a. **Cover Page**: The pre-application's cover page is created by populating a number of required fields in a web-based form on the CHIPS Incentives Program Application Portal. These fields include the applicant's organization and a descriptive name for the project, as well as whether the applicant is part of a consortium.[15]As part of this cover page, applicants must indicate whether they have registered for an account with the federal government's System for Award Management ("SAM.gov"). CPO staff advised that all potential applicants apply for an account on SAM.gov as soon as possible to avoid delays and to receive a Unique Entity Identifier number, which should be included on the cover page when possible.[16]The pre-application cover page should also, if applicable, provide information about any other entities with which the applicant anticipates partnering for purposes of their project. Such partners may include, but are not limited to, customers, suppliers, investors, bankers, or advisors. The Department has emphasized that, so long as these partners are meaningfully involved in the proposed project, applicants should be as inclusive as possible when listing potential partners in their cover page.[17]

b. **Project Plan**

   The Project Plan provides a space for applicants to describe each project expected to be included in the future full application and explain how these projects satisfy the evaluation criteria discussed in Section IV of this alert. The Project Plan should

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consist of:[18]

- **Description of Projects**: Applicants must provide a detailed description of the proposed project(s) for each facility included in the application.This description should include, among other things: the products that each facility produces or will produce, these products' end market application, the top ten customers for each major product, and key suppliers.
- **Estimated Project Timeline**: This timeline should include an estimated schedule for capital expenditures, key construction and operations milestones, and an estimate of when the applicant may be ready to submit the full application.
- **Applicant Profile**: Applicants should identify their headquarters, primary officers, ownership, main business lines, countries of operation, and, if applicable, the identity of any corporate parent.
- **Consortium Description (if applicable)**: If applying as one participating entity in a larger consortium, an applicant must identify all individual entities that are members of the consortium, along with the role of each entity and the governance structure of the consortium.
- **Cluster Profile**: Applicants should describe how their project(s) will attract supplier, workforce, and other related investments.
- **CHIPS Incentive Justification**: A narrative summary should describe how CHIPS Act funding will incentive investments in facilities and equipment in the U.S. that would not occur in the absence of this funding.
- **Summary Narrative Addressing the Evaluation Criteria**: This narrative response should address each evaluation criteria discussed in Section IV and indicate how the proposed project would support these program priorities.

c. **Financial Information**

The Financial Information section of the pre-application aims to ascertain the financial strength of the applicant (including any parent entities) and the project, as well as the existence of any third-party investments and the reasonableness of the CHIPS Act funding request.

The Financial Information submission should include:

- **Summary Financials for Each Project**: For each project described in the pre-application, applicants must submit the expected revenues, costs, and cashflows for the project, including key income statements, cash flow statements, and balance sheet information.[19]

  The Department has created an example financial model that can guide applicants' submissions for these summary financials.[20]

- **Company Financials**: Applicants must provide audited financial statements, key performance metrics, and details on leverage and related debt coverage for both the applicant and, if relevant, its corporate parent.
- **Facility Ownership Structure**: Though not relevant in all cases, the Department has indicated that a detailed ownership map will generally be helpful for their review.[21]
- **Sources and Uses of Funds**: Working from a template, applicants must describe the proposed project's costs—including capital investment,

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operating losses and cash outflows, and workforce development costs—as well as a detailed description of project capital sources. When calculating project capital sources, applicants should factor in the estimated value the benefit is expected to be eligible to receive from the Investment Tax Credit, if applicable, and other state and local tax incentives.[22]

- **CHIPS Incentives Request**: Applicants must submit a summary of requested dollar amounts for CHIPS Direct Funding.

d. **Environmental Questionnaire**

Companies may not have complete information regarding potential environmental impacts of their proposals at the pre-application stage. However, applicants should provide as thorough responses as possible to the environmental questionnaire in order to prevent delays at later stages.

In particular, the CPO has emphasized that comprehensive pre-application questionnaires enable its Environmental Division to more effectively assess an applicant's likely level of NEPA review. The CPO Office has indicated that it plans to work with applicants and their third-party contractors to facilitate the environmental review under NEPA, including working with applicants at the pre-application stage to ensure that all required environmental information is collected as early as possible.[23] Specifically, they noted they will provide resources such as webinars, templates, and consultation in preparing for environmental reviews.[24]

e. **Workforce Development Information**

As a key program priority of the CHIPS Act, applicants must provide detailed information about their planned efforts to recruit, train, and retain a "diverse and skilled" set of workers.[25] In addition to forward-looking goals, the CPO stressed its interest in understanding any early actions applicants have already taken to support workforce development efforts.[26]

This workforce development section must provide an estimated number of jobs that an applicant's projects will create, proposed strategy to meet these workforce needs, proposed training and education strategies, and an applicant's strategy to comply with the Good Jobs Principles published by the Departments of Commerce and Labor.

In its April 11 webcast, the CPO repeatedly stressed its focus on creating "opportunities to reflect America's diversity."[27] Therefore, all submissions should include proposed equity strategies to promote the hiring and retention of employees from historically underserved communities.

The Department has also emphasized the importance of strategic partnerships to help attract talent, increase awareness of employment opportunities within a community, provide wraparound support for employees, and retain and grow a company's workforce.[28] These partners may include community-based organizations, labor unions, educational institutions, and local housing organizations. Applicants cannot merely gesture to these community groups: the CPO indicated that applicants must

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secure commitments from these strategic partners and are expected to engage with them on an ongoing basis.[29]

Applicants seeking more than $150 million in direct funding will be required at the final application stage to provide a plan for how they will provide childcare for their workers. Although it is encouraged if possible, applicants are not required to submit this childcare plan at the pre-application stage.[30]

f. **Attestation and Submission**

After a pre-application is submitted through the CHIPS Incentives Program Application Portal, the CPO will send an email confirming receipt of the application. Once the pre-application has been screened for eligibility, the Department will begin a comprehensive review of the application and may reach out to the applicant for additional information or for clarification before providing its written assessment and next steps.

IV. Confidentiality

Some elements of the pre-application may require applicants to reveal trade secrets or other confidential business information. The CHIPS Act expressly provides that "any information derived from records or necessary information disclosed by a covered entity to the Secretary" with respect to CHIPS funding is exempt from disclosure under the Freedom of Information Act ("FOIA") and "shall not be made public."[31] Applicants' trade secrets and privileged commercial or financial information is also protected from disclosure by FOIA.[32] Additionally, CPO staff emphasized that the Office is in the process of "instituting robust protocols, technology solutions, and organizational practices" to keep applicants' data safe. They noted that application materials will only be available to federal officials and contractors on a need-to-know basis.[33]

To ensure that all confidential business information is properly protected from disclosure, the Department provides detailed instructions for marking this information in Section III(C)(2) of the NOFO.[34]

V. Project Evaluation Criteria

All applications and pre-applications for funding under the first NOFO are evaluated based on their ability to satisfy six main criteria, based on CHIPS program priorities. These criteria are:

a. **Economic & National Security Objectives**

Because "[a]dvancing U.S. economic and national security is the principal objective of the CHIPS Incentives Program,"[35] the Department has indicated that projects' ability to support these goals will receive the greatest weight in its review.[36] Strong applications must therefore explain how their projects will support U.S. economic and national security by, for example, mitigating against supply chain shocks associated with the current geographic concentration of semiconductor manufacturers or meeting the government's need for safe and secure chips for modern defense systems.

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Moreover, because the CHIPS Act aims to support the "next wave of U.S.-based production" of semiconductors, the Department will consider "the extent to which the applicant makes credible commitments of ongoing private investment" in the United States as part of its economic security analysis.[37]

Projects that remain vulnerable to cybersecurity risks or supply chain disruption may pose risks to U.S. national security. Therefore, applicants should address their risk management strategies designed to avoid supply chain exploitation, loss of intellectual property, and data security.[38]

b. **Commercial Viability**

The Department of Commerce has indicated that projects funded under the CHIPS Act should eventually be capable of "providing reliable cash flows that are sufficient to maintain continuity of operations and continued investment as necessary in the facility."[39] Applications and pre-applications should therefore demonstrate a reasonable market environment and demand—including an assessment of the size and diversity of the expected customer base—for the types of semiconductor technology the projects will produce.

In its April 11 webcast, CPO staff indicated that evidence of *existing* customer demand can be particularly persuasive.[40] However, applications should address the commercial viability for the "entire estimated useful life" of the project, including by addressing any technology obsolescence risk.[41]

c. **Financial Strength**

As discussed in Section III, the Department will assess any application on the financial strength not just of the applicant, but also of its corporate parent and key intermediate entities.

When assessing the financial strength of any given project, the Department will consider all alternative sources of financing that an applicant has pursued, including through private equity and external debt financing. CPO staff indicated that applicants that have minimized the size of their CHIPS funding request by pursuing alternative funding sources will generally be preferred.[42]

d. **Technical Feasibility & Readiness**

The CHIPS Act's success depends, in part, on the timely and effective construction and operation of funded facilities. Therefore, applicants must demonstrate not only that their projects are technically feasible, but also that the applicant has a clear project execution plan including construction and operational deadlines. Applicants who can demonstrate, for example, existing infrastructure and contractual arrangements for their projects may be more successful in securing funding.

e. **Workforce Development**

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As discussed in Section III, a key priority of the CHIPS Act is the development of a highly skilled and diverse workforce, including both the construction workforce necessary to complete funded projects and the semiconductor workforce that will ultimately operate these facilities. Applicants must detail their plans to recruit, train, and retain these construction and facility workers on an equitable basis and in line with the Good Jobs Principles.

The Department of Commerce has published a detailed Workforce Development Planning Guide to assist applicants in developing these strategies.

f. **Broader Impacts of the Project**

The Department of Commerce has emphasized its interest in funding projects that will contribute to "community vitality" by supporting small businesses, engaging in appropriate environmental stewardship, and more.[43] Applicants should demonstrate that they will maximize benefits to taxpayers by supporting a wide variety of tangential impacts, such as:

- Commitments to future investment in the U.S. semiconductor industry;
- Support for CHIPS research and development programs;
- Creating inclusive opportunities for businesses, including small businesses and minority-owned, women-owned, and veteran-owned businesses;
- Demonstrated climate and environmental responsibility;
- Community investments, including affordable housing, education, and transportation opportunities; *and*
- Use of domestic manufacturing and raw materials in construction and operation of projects.

VI. How Gibson Dunn Can Assist

Gibson Dunn has an expert team tracking implementation of the CHIPS Act closely, including semiconductor industry subject matter experts and public policy professionals. Our team is available to assist eligible clients to secure funds throughout the CHIPS Act application process, including the pre-application process. We also can engage with our extensive political-appointee and career officials contacts at the Department of Commerce and other federal agencies to facilitate dialogue with our clients and discuss the structure of future CHIPS Act programs being developed.

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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] 5 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, https://www.nist.gov

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/system/files/documents/2023/02/28/CHIPS-Commercial_Fabrication_Facilities_NOFO_0.pdf [hereinafter, NOFO].

[3] Department of Commerce Webcast (Apr. 11, 2023). During this webcast, the CPO reiterated that two additional NOFOs are expected to be published in the coming months: one focused on material suppliers and equipment manufactures in late spring 2023 and one for the construction of semiconductor research and development facilities in fall 2023. *Id.*

[4] NOFO at 5.

[5] *Id.*

[6] NOFO at 11.

[7] *Id.* at 1.

[8] NOFO at 11.

[9] Department of Commerce Webcast (Apr. 11, 2023).

[10] *Id.*

[11] NOFO at 11.

[12] Department of Commerce Webcast (Apr. 11, 2023).

[13] *Id.*

[14] *See* NOFO at 38–39. The full application submission is made up of the following components, which include information captured in large part in the pre-application: Cover Page, Covered Incentive, Description of Project(s), Applicant Profile, Alignment with Economic and National Security Objectives, Commercial Strategy, Financial Information, Project Technical Feasibility, Organization Information, Workforce Development Plan, Broader Impacts, and Standard Forms.

[15] CHIPS for America Guide: Instruction for Pre-Application Forms and Templates (Mar. 27, 2023), https://www.nist.gov/system/files/documents/2023/03/27/Pre-App-Instruction-Guide.pdf.

[16] Department of Commerce Webcast (Apr. 11, 2023).

[17] *Id.*

[18] NOFO at 34–35.

[19] NOFO at 36.

[20] CHIPS for America Guides and Templates (last accessed Apr. 11, 2023), https://www.nist.gov/document/chips-nofo-commercial-fabrication-facilities-pre-application-sources-and-uses-template. The Department of Commerce published a white paper explaining the financial models contained within this example, available at: https://www.nist.gov/system/files/documents/2023/03/31/Pre-App-Financial-Model-White-Paper.pdf.

[21] Department of Commerce Webcast (Apr. 11, 2023).

[22] NOFO at 36.

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[23] *Id.*

[24] Department of Commerce Webcast (Apr. 11, 2023).

[25] NOFO at 37.

[26] Department of Commerce Webcast (Apr. 11, 2023).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* 15 U.S.C. § 4652(a)(6)(G).

[32] *See* 15 U.S.C. § 4652(a)(6)(G).

[33] Department of Commerce Webcast (Apr. 11, 2023).

[34] NOFO at 30–31.

[35] NOFO at 13.

[36] Department of Commerce Webcast (Apr. 11, 2023).

[37] NOFO at 14.

[38] *Id.* at 15.

[39] *Id.* at 16.

[40] Department of Commerce Webcast (Apr. 11, 2023).

[41] NOFO at 17.

[42] Department of Commerce Webcast (Apr. 11, 2023).

[43] *Id.*

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