



May 22, 2023

Via E-Filing (www.regulations.gov)

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Internal Revenue Service
Department of the Treasury
Washington, DC 20044

Re: IRS REG-120653-22, RIN 1545-BQ54, *Advanced Manufacturing Investment Credit*

The Computer & Communications Industry Association (CCIA) is pleased to respond to the Notice of Proposed Rulemaking (NPRM)¹ regarding implementation of the advanced manufacturing investment credit established by the CHIPS Act of 2022 (here, the “CHIPS Credit”).² CCIA will separately submit comments to the National Institute of Standards and Technology (NIST) in response to its companion Request for Comment regarding the CHIPS Incentives Program.³

INTRODUCTION

These concurrent rulemaking proceedings involve a unique challenge in which two agencies have been charged with the implementation and supervision of two fiscally related, but qualitatively different, programs meant to achieve Congress’ goals of bolstering and securing the nation’s semiconductor supply chain and preserving national security. Adding to the challenge is the slightly different language that Congress employs in the Act when describing the two programs, which have the same purpose and goal, entrusted to each agency. The unavoidable fact that the IRS NPRM and the NIST RFC speak to separate titles of the Code of Federal Regulations, but about many of the same statutory terms, is emblematic of the difficulty faced by the agencies and, in turn, by the companies seeking to digest all of the proposed regulations.

The agencies’ first shared objective in this effort therefore should be to establish regulatory certainty, which is paramount in any industry, like semiconductor manufacturing, that requires significant capital investment and continuous innovation in order to meet the ever-changing needs of their market. Rules should be clear and consistent, compliance should be streamlined, and all mechanisms for review and enforcement should be predictable and routinized.

The agencies’ second objective should be to encourage, foster, and reward innovative investment. The conception, development, and manufacture of semiconductors requires a

¹ *Advanced Manufacturing Investment Credit*, REG-120653-22, RIN 1545-BQ54, published at 88 Fed. Reg. 17451 (Mar. 23, 2023) (the “IRS NPRM”).

² Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (Aug. 9, 2022) (the “CHIPS Act” or “Act”).

³ *Preventing the Improper Use of CHIPS Act Funding*, Docket No. 230313-0074, RIN 0693-AB70, Proposed Rule and Request for Comment, published at 88 Fed. Reg. 17439 (Mar. 23, 2023) (the “NIST RFC”).

long runway – the trip from drawing board to delivery takes several years. Companies that were aware of the need to strengthen the semiconductor supply chain, and that shared Congress’ goals that came to be codified in the CHIPS Act, should participate in the financial incentives and should be recognized for investments made consistent with, though perhaps predating the enactment of, the Act. Making grants and credits available for expenditures made on qualifying facilities prior to enactment would demonstrate the nation’s commitment to even-handed industrial policy.

In support of the aims of regulatory certainty and rewarding innovation, CCIA’s comments focus on the need to ensure that (1) the Department of the Treasury (“Treasury”) and the Department of Commerce (“Commerce”) work in concert to implement the CHIPS Credit and CHIPS Incentives Program, respectively, in a manner that is consistent, clear, and harmonious, and (2) the rules recognize the value of investments made prior to August 9, 2022, that have advanced the goals of the CHIPS Act while comporting with Congress’ objective of preserving national security.

I. THE TREASURY DEPARTMENT AND THE DEPARTMENT OF COMMERCE SHOULD COLLABORATE CLOSELY TO HARMONIZE THE FORTHCOMING RULES.

Both Treasury and Commerce are authorized by the CHIPS Act – Sections 107 and 9999, respectively – to adopt rules implementing Congress’ intent that any CHIPS Credit and any grant of funds may be revoked in the event that a company deals inappropriately with a country of concern. These provisions will impose very similar consequences – significant financial losses – and thus the rules establishing their application must be very similar as well. In addition, the procedure for reviewing and addressing suspect activity should be clear and consistent: CCIA suggests the creation of an interagency (Treasury-Commerce) body tasked with CHIPS Act enforcement. Consistency in the expression, interpretation, and enforcement of rules is a key factor in ensuring the regulatory certainty that industry needs.

A. The Agencies Should Ensure that the Rules Governing Tax-Credit Recapture and Expansion Clawback Are Fully Aligned.

The CHIPS Act gives both Treasury and Commerce authority to redress the inappropriate use of credits and grants. With regard to tax credits, Section 107 establishes “recapture” when a company that claimed a tax credit for property that later is used in a “material expansion” of operations within China or a country of concern (here, “Recapture”). Similarly, as to grants, Section 104 authorizes an “expansion clawback” if a recipient company makes a “material expansion” in China or a country of concern (here, “Expansion Clawback”). It is crucial that these two provisions are defined and implemented consistently by the agencies.

Recapture and Clawback are twin compliance mechanisms: they both import a financial loss, they both regard semiconductor facilities meant to close gaps in the supply chain and preserve national security, and they both apply to improper activities in countries deemed by the federal government to be a threat to the United States. As such, these twin mechanisms must apply consistently. Treasury and Commerce should work together closely to create rules and processes for Recapture and Expansion Clawback that apply the same definitions, criteria, review process, and enforcement protocol. Regulatory alignment in this way would serve the goal of regulatory certainty.

The definition of “material expansion,” for example, should be identical in each set of rules. This statutory term is the dispositive criterion for determining both whether a credit is recaptured and whether a grant is clawed back.⁴ They both adopt a 5% threshold for quantifying the modifier “material.” It seems not only logical but necessary that the two rules be identical or, in the alternative, that one agency’s definition should consist entirely of a citation to the other’s definition. Any differences in rule language could result in differences of interpretation, which is of no help to the agencies or the companies. Again, the goal of regulatory certainty requires the elimination of as many opportunities for confusion as possible. This principle should apply for any defined term that is duplicated as between the Commerce and Treasury provisions of the Act.

The agencies also should establish consistency as to when the tax-credit Recapture and the Expansion Clawback may be imposed. IRS Draft Rule 1.50-2 states that Recapture may be imposed if an improper transaction (“applicable transaction”) occurs less than 10 years after “the date that an applicable taxpayer **placed in service** property that is eligible for” the tax credit (emphasis added). NIST Draft Rule 231.202, by contrast, states that Clawback may apply to improper transactions occurring less than 10 years after “**the date of the award** of Federal financial assistance” (emphasis added). Again, with Recapture and Clawback being twin mechanisms designed to impose financial loss to redress unlawful conduct, their effective dates should match. CCIA suggests amending the two draft rules to state that Recapture and Clawback may be applied to improper transactions occurring less than 10 years after (a) the eligible property is placed in service, or (b) the date of the award, whichever is later.

Recognizing of course that Sections 104 and 107 are substantively different (credits are backward-looking while grants are forward-looking), CCIA nonetheless encourages the agencies to seek as much homogeneity as possible for their respective forthcoming rules.

B. Treasury and Commerce Should Establish an Interagency Body to Ensure CHIPS Act Compliance.

As needs must, Treasury and Commerce are conducting simultaneous but separate proceedings to implement the CHIPS Credit and Expansion Clawback. Once the rules, which as explained above should be as homogenous as possible, are adopted, the agencies’ oversight and enforcement of those rules would be amenable to a centralized process. Creation of one, jointly staffed, fully empowered interagency tribunal to review and redress potentially improper uses of CHIPS Act benefits would be an extremely efficient and consistent way to ensure compliance.

As stated above, both agencies are authorized to create and oversee CHIPS-related programs. Section 107 requires the Treasury Department to “issue such regulations or other guidance as the Secretary [of Commerce] determines necessary or appropriate to carry out the” Recapture provisions.⁵ Section 9999 authorizes Commerce to “establish such rules, regulations, and procedures as the Secretary [of the Treasury] considers appropriate.”⁶ In addition, Section

⁴ IRS NPRM, 88 Fed. Reg. at 17454 and Draft Rule 1.50-2(b)(7); NIST RFC, 88 Fed. at 17447 and Draft Rule 231.111.

⁵ CHIPS Act Section 107(b), 136 Stat. 1397.

⁶ CHIPS Act Section 9999(a)(7), 136 Stat. 1389.



9999 allows the Secretary of Commerce to “enter into an agreement” with another “Federal agency” for the “use ... with or without reimbursement, [of] any service equipment, personnel, or facility of that Federal agency.”⁷ These provisions enable the agencies to not only coordinate but also to join together in redressing improper use of CHIPS Act benefits.

A consolidated, unitary enforcement body – a Task Force, perhaps – employing the expertise of both agencies would be fast, decisive, and streamlined. This mechanism would conserve the resources of both agencies, would ensure consistency of statutory application, and would provide greater predictability for the affected companies.

II. THE CHIPS CREDIT SHOULD APPLY TO MANUFACTURING FACILITIES CONSTRUCTED PRIOR TO CHIPS’ ENACTMENT IF THEY ARE “QUALIFIED PROPERTIES.”

Congress created the CHIPS Credit “to incentivize the manufacture of semiconductors and semiconductor manufacturing equipment within the United States.”⁸ It covers investment in a “qualified property,” defined as “tangible property” that is “integral” to a semiconductor manufacturing facility and “is constructed, reconstructed, or erected” or “acquired.”⁹ The statute is silent as to when that property is constructed or acquired.

In a word, Congress sought to reward companies that invest in, deploy, and operate facilities that will contribute to closing gaps in the semiconductor supply chain. As such, the CHIPS Credit should be available to companies that embarked, prior to the Act’s signing on August 9, 2022, upon facility investments and expansions intended to achieve that goal.

Rule 1.48D-3 (Qualified property) should thus make clear that “qualified properties” may include facilities deployed prior to the Act’s enactment if all other applicable criteria are satisfied. In an industry requiring years-long lead times to achieve production, adopting a cutoff date to coincide with the last event in a long legislative cycle¹⁰ somewhat arbitrarily excludes from the CHIPS Credit companies that made new facility investments in reliance on the federal programs Congress was actively considering. Nothing in the Act instructs the agencies to create such a cutoff. Rather, it would seem more in keeping with Congress’ commitment to bolstering the supply chain to include otherwise qualified facilities in the tax benefit Congress devised.

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Thank you for commencing this proceeding and for your stewardship of CHIPS Act implementation. CCIA remains available for any additional information that the agency might need.

Sincerely,

⁷ *Id.* 9999(a)(6), 136 Stat. 1389.

⁸ IRS NPRM, 88 Fed. Reg. at 17451.

⁹ CHIPS Act Section 107(a) (IRS Code Sec. 48D(b)(2)), 136 Stat. 1394.

¹⁰ Rep. Ryan introduced H.R. 4346, the CHIPS for America Act, on July 1, 2021.



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