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Re: NIST–2023–0001, RIN 0693–AB70, *Preventing the Improper Use of CHIPS Act Funding*

The Computer & Communications Industry Association (CCIA) is pleased to respond to the Request for Comment¹ regarding implementation of the CHIPS Incentive Program established by the CHIPS Act of 2022.² CCIA will separately submit comments to the Internal Revenue Service in response to its companion Notice of Proposed Rulemaking (NPRM) on implementing the advanced manufacturing investment credit provisions of the Act.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 NIST RFC and the IRS NPRM 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.

¹ *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").

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 *Advanced Manufacturing Investment Credit*, REG–120653–22, RIN 1545-BQ54, published at 88 Fed. Reg. 17451 (Mar. 23, 2023).

The agencies' second objective should be to encourage, foster, and reward innovative investment. The conception, development, and manufacture of semiconductors requires a 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 Commerce ("Commerce") and the Department of the Treasury ("Treasury") work in concert to implement the CHIPS Credit and CHIPS Incentives Program, respectively, in a manner that is consistent, clear, and harmonious, and (2) companies are not, in the "predominantly serves the market" exception, unreasonably charged with knowledge of or control of the entire stream of commerce that the vast majority of its products take.

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

Both Commerce and Treasury 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 (Commerce-Treasury) 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 Expansion Clawback and Tax-Credit Recapture Are Fully Aligned.

The CHIPS Act gives both Commerce and Treasury authority to redress the inappropriate use of credits and grants. With regard 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"). Similarly, as 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"). It is crucial that these two provisions⁴ are defined and implemented consistently by the agencies.

Clawback and Recapture are twin enforcement mechanisms: they both import a financial loss, they both regard semiconductor facilities meant to close gaps in the supply chain and preserve

⁴ Implementation of the Technology Clawback should likewise be consistent with the Recapture rule, but CCIA does not discuss that aspect of the CHIPS Credit in these comments.

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. Commerce and Treasury should work together closely to create rules and processes for Expansion Clawback and Recapture 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.⁵ 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 (grants are forward-looking while credits are backward-looking), CCIA nonetheless encourages the agencies to seek as much homogeneity as possible for their respective forthcoming rules.

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

As needs must, Commerce and Treasury 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.

⁵ 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.

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.⁶ Section 9999 authorizes Commerce to “establish such rules, regulations, and procedures as the Secretary [of the Treasury] considers appropriate.”⁷ In addition, Section 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.”⁸ 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 “PREDOMINANTLY SERVE THE MARKET” EXCEPTION TO THE EXPANSION CLAWBACK SHOULD CONTEMPLATE MANUFACTURERS’ DIFFICULTY OF CONTROLLING THE STREAM OF COMMERCE FOR SEMICONDUCTORS.

CCIA appreciates that Congress’s prevailing concern in establishing the CHIPS Incentive Program was preventing semiconductors that were manufactured using Program funds from ending up in a facility located in China or another foreign country of concern.⁹ Certainly it is appropriate that a company which deliberately “engage[s] in any significant transaction” in these countries within ten years of a grant award¹⁰ should not enjoy the benefits of the Act, because such activity is rightly prohibited in the Act. To that end, Congress created an exception to this prohibition for existing facilities that manufacture legacy semiconductors and any facility undergoing significant renovations if it “predominantly serves the market of a foreign country of concern.”¹¹ Satisfaction of that exception will obviate an Expansion Clawback.

The parameters defining the “predominantly serves the market” exception should not be so stiff as to exclude a company that experiences having a portion of its material leave China due to downstream transactions occurring far down the stream of commerce. That is, unless a large proportion – more than half – of a company’s distribution is “used or consumed”¹² in a foreign country of concern, the Department should conclude that the company used reasonable efforts to prevent its material ending up in the wrong hands.

Draft Rule 231.114 suggests an 85% threshold: if 85% of the company’s output never is part of a product “used or consumed” in a foreign country of concern, that company would fall within the “predominantly serves the market” exception. That number seems to create an impossible

⁶ CHIPS Act Section 107(b), 136 Stat. 1397.

⁷ *Id.* Section 9999(a)(7), 136 Stat. 1389.

⁸ *Id.* Section 9999(a)(6), 136 Stat. 1389.

⁹ *Id.* Section 103(b)(5), 136 Stat. 1383.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*



standard. No company can be charged with monitoring, or with constructive knowledge of, the entire stream of commerce for 85% of its product. The Department should adopt a much lower threshold for this exception.

Similarly, the “used or consumed” language in Draft Rule 231.114 would impose a monitoring or constructive-knowledge standard for the “predominantly serves the market” exception. But a company cannot reasonably be expected to know where its product is ultimately used or consumed. A company does know, however, who **ordered** the product. CCIA suggests amending this 231.114 language to refer to a portion of product being **ordered** for use in a foreign country of concern rather than simply being “used” in such a place.

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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,

Stephanie Joyce
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CCIA