

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

LILA HELMS, MAJORITY STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

March 22, 2023

The Honorable Gina Raimondo
Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

Dear Secretary Raimondo:

We write to express concern regarding the Department of Commerce's implementation of \$39 billion in funding for the construction, expansion, and modernization of commercial semiconductor fabrication facilities under the CHIPS and Science Act of 2022 ("CHIPS Act").¹ Many of the grant criteria detailed in your Department's recent Notice of Funding Opportunity ("NOFO") will have the opposite effect of Congress's intent with enactment of the CHIPS Act and instead make domestic chip production more expensive, less competitive, and reliant on taxpayer subsidies over private investment.

Furthermore, your Department has included in the NOFO extraneous environmental-social-governance (ESG) requirements that seek to enact progressive policies that had been previously rejected by Congress. These policies include liberal wish list items, many of which were removed from the White House's "Build Back Better" major spending package, H.R. 5376 (P.L. 117-169), because they did not have the votes to pass at even a simple majority in the Senate. To claim that these provisions are integral to the "national security mission" of the CHIPS Act and will "[result] in lower costs" defies reason.²

The Commerce Department should amend the NOFO by striking all application requirements that are ancillary to accomplishing Congress's stated goals or otherwise squander taxpayer dollars on social policy objectives. Specifically, those provisions are:

1. Mandates for cradle-to-grave "wraparound" services. The NOFO requires that applicants requesting more than \$150 million provide on- or near-site child care that creates "a safe and healthy environment that families can trust." Finding workers to run child care facilities, especially in rural areas, will prove challenging and increase costs for all parents living nearby. Applicants must also describe their plans to provide "adult care," transportation assistance, housing assistance, and "emergency cash assistance" to workers. Further, the Good Jobs Principles Fact Sheet provides that full-time and part-

¹ See 15 U.S.C. 4652(d) (expressing the sense of Congress with respect to the allocation of funds).

² "U.S. Sec. of Commerce's Gina Raimondo on CHIPS Act: This isn't a blank check," CNBC Live, March 6, 2023, <https://www.cnbc.com/video/2023/03/06/u-s-secretary-of-commerces-gina-raimondo-on-the-chip-sector.html>.

time workers should receive health insurance, a retirement plan, workers' compensation benefits, and work-family benefits such as paid leave and caregiving support.³ These top-down mandates assume that companies do not know how to attract and retain a skilled workforce.

2. Discrimination against non-union labor. The CHIPS Act requires chipmakers to pay “prevailing wages” consistent with the Davis-Bacon Act, increasing overall project costs and preferencing union firms. However, in an additional preference for union labor not found in the text of the law, the NOFO strongly encourages the use of project labor agreements (PLAs). If an applicant does not wish to use a PLA, they must furnish a “project workforce continuity plan” that describes in detail many of the provisions commonly found in PLAs. Regardless of the merits of PLAs, at least 24 states have enacted policies restricting government-mandated PLAs,⁴ which could put projects in nearly half of the country at an immediate disadvantage. Further, preferencing PLAs may limit employment opportunities to the 87 percent⁵ of American construction workers who are not members of a union.
3. Encouragement of racial discrimination in hiring. An applicant’s workforce plan must detail how they will hire “economically disadvantaged individuals,” which prioritizes affirmative action over hiring on merit. “Economically disadvantaged individuals” are defined by the NOFO as “individuals whose ability or opportunity to compete in the economy has been impaired due to [...] *membership in a group that has been subjected to racial or ethnic prejudice or cultural bias* within American society” (emphasis added). Discriminating on the basis of race is illegal, which is why a federal judge recently blocked the implementation of nearly identical language for a program meant to forgive the debt of minority farmers only.⁶ Despite this ruling, the Department has chosen to include provisions that could violate Americans’ right to equal protection under the law.
4. Subsidized housing and transportation. The CHIPS Act requires successful applicants to make “commitments to worker and community investment,” which can include training and education benefits.⁷ However, the NOFO dramatically embellishes the term “community investment” to include an array of social programs not contemplated in the text of the law, including policies that “reduce” transit costs and “financing or building affordable housing or providing housing vouchers.” Notably, a stunning \$330 billion in duplicative housing subsidies was struck from H.R. 5376 (P.L. 117-169) because it could not muster 50 Senate votes.

³ “Good Jobs Summit Principles Fact Sheet,” U.S. Department of Commerce and U.S. Department of Labor, <https://www.dol.gov/sites/dolgov/files/goodjobs/Good-Jobs-Summit-Principles-Factsheet.pdf>.

⁴ “24 States Ensure Fair and Open Competition, Restrict Government-Mandated Project Labor Agreements,” July 2, 2018, <https://thetruthaboutplas.com/2018/07/02/24-states-ensure-fair-open-competition-restrict-government-mandated-project-labor-agreements/>.

⁵ “Project Labor Agreements – Associated Builders and Contractors,” <https://www.abc.org/Politics-Policy/Issues/Project-Labor-Agreements>.

⁶ Josh Gerstein and Ximena Bustillo. “DOJ forgoes appeal of order blocking money for minority farmers.” *Politico*. August 24, 2021. <https://www.politico.com/news/2021/08/24/doj-appeal-minority-farmers-506820>.

⁷ 15 U.S.C. 4652(a)(2)(B)(ii)(II) (commitments to worker and community investment for eligible covered entities).

5. New disclosure requirements and commitments on stock buybacks and dividends. The CHIPS Act prohibits recipients from using *award funding* for dividend payments or stock buybacks. But the NOFO goes significantly further by requiring applicants to “detail” plans for any stock buybacks (including whether they intend to refrain from or limit them) and dividends (including dividend payment increases and special dividends) over five years. The NOFO further expresses a preference for applicants that pledge to prohibit buybacks for five years. Troublingly, the inclusion of a total buyback ban flies in the face of congressional intent. During the debate on the CHIPS Act, the Senate roundly rejected by 87-6 a motion to instruct that would require recipients “to be banned from purchasing the stock of the beneficiary.”⁸ The Department has no authority to overturn the Senate’s clearly-expressed policy decision simply because it wishes to.
6. Government seizure of “excess” profits. The NOFO includes a policy, not explicitly contemplated in the text of the law, stating that applicants receiving more than \$150 million share with the government “a portion of any cash flows or returns that exceed the applicant’s projections.” The NOFO states that these funds will go back to the CHIPS Office but does not mention for what purpose such funds will be used. This policy will encourage applicants to over-inflate projected outcomes to the Commerce Department so that they can avoid returning future funds.
7. Green New Deal mandates. The NOFO contains extensive requirements, not found in the text of the law, for applicants to detail climate-related practices and commitments. For example, the CHIPS Office will favor applicants who commit to pursuing “environmental justice” and use 100% renewable energy for facility operations. The CHIPS Office will also require applicants to submit an “Environmental Questionnaire,” which has yet to be made available to the public or Congress, as part of their application packages. A recent Federal Register Notice states that required information will cover topics including tribal and cultural resources, vegetation, endangered species, waste management, “environmental justice and socioeconomics,” transportation, and noise, among others.⁹ Further, these wholly new climate requirements are on top of environmental requirements already in current law. As senators from both sides of the aisle have warned,¹⁰ most CHIPS-funded projects will likely trigger review under the National Environmental Policy Act (NEPA). Compliance with NEPA, absent efforts by the administration to streamline permitting, is expensive, burdensome, and will delay project timetables.

The CHIPS Act was passed by Congress for the purpose of reversing the decline of the domestic semiconductor industry. It is apparent from the NOFO’s enumerated priorities that the Commerce Department intends to repurpose the CHIPS program and circumvent Congress. We urge the Department to reverse these superfluous and partisan provisions in the NOFO immediately.

⁸ Congressional Record Vol. 168, No. 74, May 4, 2022, <https://www.congress.gov/congressional-record/volume-168/issue-74/senate-section/article/S2312-1>.

⁹ 88 FR 13436, March 3, 2023, <https://www.federalregister.gov/documents/2023/03/03/2023-04442/agency-information-collection-activities-submission-for-office-of-management-and-budget-omb-review>.

¹⁰ Letter from Sens. Kelly and Wicker, February 24, 2023, <https://www.kelly.senate.gov/wp-content/uploads/2023/02/Sec.-Raimondo-Letter-RE-CHIPS-Implementation-FINAL.pdf>.

We look forward to your response as we conduct thorough oversight of CHIPS Act implementation and spending.

Sincerely,



Ted Cruz
United States Senator



Eric Schmitt
United States Senator



Ted Budd
United States Senator



Marsha Blackburn
United States Senator



Deb Fischer
United States Senator



Joni Ernst
United States Senator



John Barrasso, M.D.
United States Senator



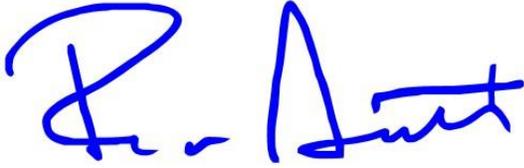
Kevin Cramer
United States Senator



Mike Lee
United States Senator



Tom Cotton
United States Senator



Rick Scott
United States Senator



Mike Braun
United States Senator



Tommy Tuberville
United States Senator



Cynthia M. Lummis
United States Senator