

Congress of the United States

Washington, DC 20515

February 10, 2023

Michael Schmidt
Director
CHIPS Program Office
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Dear Director Schmidt,

As the CHIPS Program Office works to implement the law and finalize its Notice of Funding Opportunity (NOFO), we write to reiterate the importance of Secretary Raimondo's assurance that "CHIPS money is not a subsidy for big companies to make them more profitable or so they have more cash for stock buybacks or to pad their bottom line"¹ and to urge the Department of Commerce (Commerce, or the Department) to use its full authority to prevent CHIPS recipients from misusing taxpayer dollars by directly or indirectly funding buybacks and other shareholder distributions.

We appreciate the Department's continued engagement to ensure strong taxpayer protections on the use of funds provided under the *Creating Helpful Incentives to Produce Semiconductors and Science (CHIPS) Act of 2022*,² and urge you to continue your efforts to ensure that CHIPS funds are spent appropriately and wisely. Section 102(g) of the *CHIPS Act of 2022* explicitly prohibits awardees from using CHIPS funds to repurchase their stock or pay dividends to shareholders.³ These restrictions reflect concerns that the \$52 billion Congress appropriated for strengthening U.S. competitiveness and bolstering our domestic semiconductor manufacturing, research, and design capacity could instead, without appropriate guardrails, be used to enrich corporate executives and shareholders.⁴

As several of us noted in our October 2022 letter to Secretary Raimondo, this is not a hypothetical risk.⁵ America's largest semiconductor companies have spent hundreds of billions

¹ The White House, "Remarks by President Biden in Meeting with CEOs and Labor Leaders on the Importance of Passing the CHIPS Act," July 26, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/26/remarks-by-president-biden-in-meeting-with-ceos-and-labor-leaders-on-the-importance-of-passing-the-chips-act/>.

² CHIPS Act of 2022, Amendment to H. R. 4346, <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>.

³ CHIPS Act of 2022, Amendment to H. R. 4346, <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>.

⁴ Letter from Senators Warren and Sanders and Representative Casten to Conferees to the Conference Committee, June 6, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.06.06%20Letter%20to%20conferees%20re%20Corporate%20Guardrails%20for%20COMPETES.pdf>; Washington Post, "House passes bill to subsidize U.S.-made semiconductor chips in win for Biden," Amy B. Wang and Marianna Sotomayor, July 28, 2022, <https://www.washingtonpost.com/politics/2022/07/28/house-vote-semiconductor-chips-bill/>.

⁵ Letter to Secretary of Commerce Gina Raimondo from Senators Warren and Baldwin and Representatives Casten, Bowman, Jayapal, and Foster, October 4, 2022,

on stock buybacks in recent years.⁶ Five of the largest semiconductor companies (Intel, IBM, Qualcomm, Texas Instruments and Broadcom) spent nearly \$250 billion, or 71% of their net income, on buybacks between 2011 and 2020.⁷ Intel CEO Pat Gelsinger assured the public last year that “We will not be anywhere near as focused on buybacks going forward as we have in the past,”⁸ but then assured investors last month that Intel “remain[s] committed to rewarding our shareholders” with “a very healthy and competitive dividend.”⁹ These comments came even as Intel expects its revenue to fall 40% this quarter relative to the same period last year¹⁰ and has begun laying off workers.¹¹

We appreciate that the CHIPS implementation guidelines released to date have affirmed Commerce’s commitment to protect taxpayer funds and use “every tool within [its] authority to ensure that this money serves [the CHIP Act’s] critical goals.”¹² In furtherance of this commitment, we urge you to consider the following provisions when finalizing the NOFO and implementing the CHIPS program:

Ensure CHIPS fund recipients do not engage in stock buybacks. We support Secretary Raimondo’s view that “CHIPS funds cannot be used for stock buybacks” and “are not intended to replace private capital.”¹³ We also appreciate that the commitment to not allow CHIPS funds to not indirectly “enable” buybacks was reiterated in implementation guidelines that Commerce’s National Institute of Standards and Technology (NIST) released in August 2022.¹⁴

While the Department says that it will “give preference in awards to companies who commit to...not engage in stock buybacks,”¹⁵ the Commerce Secretary has authority from multiple provisions of the law to go even further and prohibit recipients of CHIPS funding from repurchasing their stock for a set time period.

<https://www.warren.senate.gov/imo/media/doc/2022.10.04%20Letter%20to%20Commerce%20re%20CHIPS%20Stock%20Buybacks.pdf>

⁶ *Id.*

⁷ Lenore Palladino, “How To Ensure Industrial Policy Promotes Public Over Private Gain,” ProMarket, University of Chicago Booth School of Business, January 21, 2023, <https://www.promarket.org/2023/01/31/how-to-ensure-industrial-policy-promotes-public-over-private-gain/>.

⁸ Reuters, “Intel will ‘focus’ less on buying back company stock – CEO,” Elizabeth Dilts Marshall, May 2, 2021, <https://www.reuters.com/business/finance/intel-will-focus-less-buying-back-company-stock-ceo-2021-05-02/>.

⁹ Yahoo News, “Intel CEO: ‘We are committed to the dividend,’” Brian Sozzi, January 27, 2023, <https://news.yahoo.com/intel-ceo-we-are-committed-to-the-dividend-200351998.html/>

¹⁰ Financial Times, “Intel’s weak guidance points to more trouble ahead for US chipmaker,” Richard Waters, January 26, 2023, <https://www.ft.com/content/8e1d1867-cf12-43f0-a4c5-763446646dc1>.

¹¹ Marketwatch, “Intel begins layoffs and offers unpaid leave to manufacturing workers,” December 6, 2022, <https://www.marketwatch.com/story/intel-begins-layoffs-and-offers-unpaid-leave-to-manufacturing-workers-11670357128>.

¹² National Institute of Standards and Technology, “Taxpayer Protections,” August 25, 2022, <https://www.nist.gov/semiconductors/taxpayer-protections>.

¹³ The White House, “Press Briefing by Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo,” September 6, 2022, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/09/06/press-briefing-by-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo/>.

¹⁴ National Institute of Standards and Technology, “Taxpayer Protections,” August 25, 2022, <https://www.nist.gov/semiconductors/taxpayer-protections>.

¹⁵ *Id.*

First, Section 9902(a)(3) of the *National Defense Authorization Act of 2021* (NDAA), as amended by the *CHIPS Act of 2022* directs the Commerce Secretary to “determine[s] that the [CHIPS] project to which the application relates is in the economic and national security interests of the United States.”¹⁶ Broadly, given the need for investment in domestic chip production, and the small number of companies currently producing chips domestically, it seems clear that any CHIPS funding that goes to a company that then turns around and uses other excess capital for buybacks rather than research, manufacturing, or other production costs is not in the “economic and national security interests of the United States.”¹⁷

Second, Section 9902(a)(4) of the 2021 NDAA lists four permissible uses of CHIPS funding: financing the construction of a semiconductor facility, supporting workforce development, supporting site development, and paying for facility operating expenses. None of those uses encompass stock buybacks.¹⁸

Third, Section 102(g) of the *CHIPS Act of 2022* explicitly forbids companies from using CHIPS funding to engage in stock buybacks.¹⁹

Absent strict limits, companies would, through accounting mischief, be able to flout the restrictions in Sections 9902(a)(4) of the 2021 NDAA and 102(g) of the CHIPS Act and functionally use CHIPS funding for any purpose.²⁰ For instance, without a blanket prohibition on stock buybacks, companies could accept a \$100 million CHIPS grant from the federal government –and use the funds to construct a semiconductor facility, but immediately turn around and use \$100 million of its own cash for stock buybacks – evading restrictions on CHIPS funding to enrich their stockholders with taxpayer funds. Moreover, as several of us highlighted in an October 2022 letter, Commerce has already recognized the breadth of the Department’s authority to issue additional protections to “develop other guardrails...to maximize the public purposes of federal investments and prevent companies from seeking to evade statutory requirements.”²¹

We urge Commerce to strengthen its plan to “give preference” to companies that commit not to engage in buybacks²² by using its authorities to prohibit CHIPS awardees from buying back their stock for a set period of time. This prohibition should apply equally to foreign companies and domestic companies applying for CHIPS funds. Any attempt to dilute the buyback restriction for

¹⁶ CHIPS Act of 2022, Amendment to H. R. 4346, <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>.

¹⁷ *Id.*

¹⁸ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, <https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf>.

¹⁹ CHIPS Act of 2022, Amendment to H. R. 4346, <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>.

²⁰ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, <https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf>; CHIPS Act of 2022, Amendment to H. R. 4346, <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>.

²¹ Letter to Secretary of Commerce Gina Raimondo from Senators Warren and Baldwin and Representatives Casten, Bowman, Jayapal, and Foster, October 4, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.10.04%20Letter%20to%20Commerce%20re%20CHIPS%20Stock%20Buybacks.pdf>.

²² National Institute of Standards and Technology, “Taxpayer Protections,” August 25, 2022, <https://www.nist.gov/semiconductors/taxpayer-protections>.

foreign companies risks the possibility that American taxpayer funds are used to subsidize buybacks and distributions to shareholders abroad. Finally, this prohibition should apply with respect to *all* repurchases by CHIPS recipients and their parent companies. Any attempt to exempt so-called “good” repurchases from the prohibition would be difficult to define, difficult to implement, and be inconsistent with the federal government’s previous stock buyback restriction implementations.²³

Restrict CHIPS awardees from engaging in stock buybacks for at least 10 years. Commerce “encourage[s] industry and other stakeholders to view CHIPS as a long-term program”²⁴ and “catalyze long-term growth in the domestic semiconductor industry in support of our national and economic security.”²⁵ Consistent with this goal, the Department should set the time period for the ban on buybacks to at least 10 years, or, for longer term projects, the length of the project.

Implement additional restrictions on buybacks. As stated above, we urge Commerce to use its authorities to implement a broad prohibition on stock buybacks to ensure that CHIPS funds are not used to indirectly subsidize buybacks and pad companies’ and their executives’ bottom lines. If the Department instead provides a preference for applicants that commit not to engage in buybacks for a period of time after receiving CHIPS funds, we strongly advise the Department to impose additional conditions around buyback activity to limit gaming and disincentivize repurchases. These conditions, which should be applied regardless of whether a company committed not to conduct repurchases, could include:

- Disclosure requirements regarding buyback plans and execution;²⁶
- Rigorous audits of any CHIPS recipient that engages in buybacks or dividends to ensure that they are not paid for – either directly or indirectly – with CHIPS funds;
- Restrictions against company insiders selling shares during or following a buyback;²⁷
- Bright-line limits on the amount of shares firms are allowed to repurchase (such as in terms of the dollar value or percent of outstanding shares);²⁸
- Requirements that companies issue warrants or proceeds from a stock buyback to the federal government.

Require CHIPS awardees to certify that they will not conduct stock buybacks by checking a box on the application form. CHIPS applicants should have the opportunity to simply check a box on the application form to affirm their commitment not to conduct stock buybacks for a specified time period. Future violations of this requirement would expose recipients to liability, strengthening the Department’s ability to enforce taxpayer protections on CHIPS funds.

²³ Department of the Treasury, Payroll Support Program Agreement, <https://home.treasury.gov/system/files/136/Form-of-PSP-Agreement.pdf#page=5>.

²⁴ National Institute of Standards and Technology, “A Strategy for the CHIPS for America Fund,” September 6, 2022, <https://www.nist.gov/document/chips-america-strategy>.

²⁵ *Id.*

²⁶ Lenore Palladino, “The \$1 Trillion Question: New Approaches to Regulating Stock Buybacks,” *Yale Journal on Regulation*, November 8, 2019, <https://www.yalejreg.com/bulletin/the-1-trillion-question-new-approaches-to-regulating-stock-buybacks-2/>.

²⁷ *Id.*

²⁸ *Id.*

Ensure Commerce uses all its tools against firms that misuse taxpayer dollars. As we said in our October 2022 letter²⁹, we applaud the Department’s pledge to “require companies to provide capital investment plans as part of the application process” and to “go over [them] with a fine-tooth comb and make sure that companies are not padding their models to ask for outsized incentives.”³⁰ We are also encouraged that the Department will pursue criminal enforcement actions when CHIPS applicants provide false information to the government and that it “will not hesitate to claw back funds or pursue other remedies if companies misuse taxpayer dollars.”³¹ We once again encourage Commerce to provide additional details on the enforcement actions it intends to pursue when companies violate taxpayer protections and lay out clear guidelines for the public around when and how these measures will be pursued.

Secretary Raimondo assured the public that the “Department of Commerce intends to be vigilant and aggressive in protecting taxpayers” and that it would “look after every nickel of taxpayer money.”³² Meeting this commitment and realizing the economic and national security objectives of the CHIPS Act will require the Department to use its authority to ensure that CHIPS funds are not used to subsidize stock buybacks and shareholder distributions, whether directly or indirectly. Prohibiting buybacks among CHIPS recipients would also be consistent with President Biden’s call in his State of the Union address to quadruple the tax on corporate stock buybacks to disincentivize buybacks and instead “encourage long-term investments.”³³

We look forward to continuing to work with your office to strengthen and enforce these critical protections and ensure that CHIPS funds are not misdirected toward enriching executives and shareholders at taxpayers’ expense.

Sincerely,

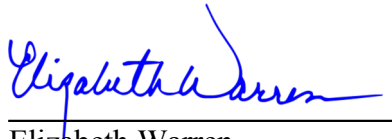
²⁹ Letter to Secretary of Commerce Gina Raimondo from Senators Warren and Baldwin and Representatives Casten, Bowman, Jayapal, and Foster, October 4, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.10.04%20Letter%20to%20Commerce%20re%20CHIPS%20Stock%20Buybacks.pdf>.

³⁰ National Institute of Standards and Technology, “Taxpayer Protections,” August 25, 2022, <https://www.nist.gov/semiconductors/taxpayer-protections>.

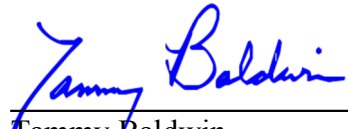
³¹ *Id.*

³² The White House, “Press Briefing by Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo,” September 6, 2022, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/09/06/press-briefing-by-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo/>.

³³ Remarks of President Joe Biden, State of the Union Address as Prepared for Delivery, February 7, 2023, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.



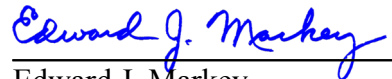
Elizabeth Warren
United States Senator



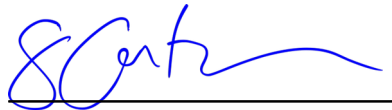
Tammy Baldwin
United States Senator



Bernard Sanders
United States Senator



Edward J. Markey
United States Senator



Sean Casten
Member of Congress



Bill Foster
Member of Congress



Pramila Jayapal
Member of Congress



Jamaal Bowman, Ed.D.
Member of Congress

cc:

The Honorable Gina M. Raimondo, Secretary, U.S. Department of Commerce