

CHIPS Act 'Guardrails' Bring Uncertainties For Chipmakers

By Jennifer Doherty

Law360 (August 19, 2022, 8:22 PM EDT) -- The newly passed CHIPS and Science Act of 2022 set aside over \$52 billion to increase domestic semiconductor manufacturing, and its implementation is raising new questions for businesses, which are seeking clarity on the law's novel "guardrail" provisions.

The first-of-their-kind provisions introduce federal limitations on outbound investment with a goal to strengthen U.S. competitiveness, in part by limiting the availability of advanced technology to China and other federally designated "countries of concern."

Computer-chip manufacturers that hope to secure some of the available funding will have to enter into so-called guardrail agreements with the government and promise not to make "significant transactions" that support those countries' semiconductor industries for at least 10 years, or risk seeing the funds clawed back.

However, the new law leaves room for defining what constitutes a "significant transaction," as well as other terms that the U.S. Department of Commerce will need to clarify.

"I always am concerned about gray areas dealing with bureaucracy, because it promotes uncertainty," Dr. Richard L. Thurston, former general counsel for Taiwan Semiconductor Manufacturing Co., told Law360.

Other terms that will need to be defined — either through Commerce Department regulations or within the terms of bilateral guardrail agreements with individual companies — include "existing business" in countries of concern, which the statute allows companies to protect, as well as what it would mean to "materially expand" there.

Thurston also raised the issue of how the act defines "legacy," or less-advanced, chips, which are of less concern to national security than smaller, more advanced models. The bill defines a legacy chip as 28 nanometers or above, a standard that does not quite align with Commerce's current export control policy, which is to refuse export licenses for technology that could help China's semiconductor industry produce 10 nm chips or better.

All in all, the guardrails might present more headaches for semiconductor manufacturers, especially publicly traded companies, than the funds are worth, given the complications they could pose in terms of planning and reporting, according to Thurston.

Covington and Burling partner Jonathan Wakely, however, sees opportunity for flexibility in the guardrails' open-ended parameters, similar to the discretion exercised by the Committee on Foreign Investment in the United States, which vets acquisitions by foreign entities for potential national security concerns and proposes modifications to deals where it foresees trouble.

"The way I read the statute, it would allow the secretary of commerce to undertake that similar analysis, which is to look at the business, look at the risks, and tailor the agreement and potential mitigation measures to the particular facts and circumstances," said Wakely.

An earlier version of the CHIPS Act that passed the U.S. House of Representatives in February sought to establish an outbound corollary to CFIUS, a committee that would have reviewed U.S. entities' proposed investments abroad.

That legislation couldn't be reconciled with the Senate's version of the competition bill, though it reappeared in bipartisan legislation in June. As that bill's future unfolds, the drive to limit U.S. investment in certain unfriendly countries has gained a statutory foothold in the guardrail provisions.

Even absent a CFIUS-like committee, companies that decide to pursue funding opportunities governed by guardrail agreements should be prepared for scrutiny, according to Jonathan H. Becker, a partner in Mayer Brown's policy group and a former chief of staff in the U.S. Senate.

"Whenever Congress appropriates a large amount of money and doles it out quickly, there's often significant oversight of those funds, as there should be," said Becker. "I think it will be broad. Even if you're consistent with the letter of the CHIPS law, I wouldn't hire John Legend for my holiday party this year."

Meanwhile, other governments have also set out to attract chipmakers.

The European Union has put forward its own version of the CHIPS Act, expected to be adopted early next year, which would direct \$43 billion to the semiconductor sector, according to a briefing from the European Parliament.

India, Japan and South Korea have all passed multibillion-dollar incentive packages for chip plants, or "fabs." The Korean "K-Semiconductor Belt" strategy alone is set to provide \$452 billion for semiconductors by 2030, while smaller industry players including Singapore and Vietnam are also looking to increase their share of production.

"The ultimate question is: Is \$52 billion even going to be enough, given how much other countries are willing to spend to lure their own fabs and manufacturing and semiconductor industry to their shores?" said Becker.

Investments from those packages also appear free of the geopolitical baggage — specifically rising concerns on Capitol Hill over China's position in U.S. supply chains — that drove the CHIPS Act's passage after more than a year of congressional wrangling.

For Thurston, the drive to cut out China was a losing proposition for the U.S., primed to provoke retaliation, as the semiconductor industry still relies heavily on inputs sourced from China — which also trains large numbers of semiconductor professionals, who are in short supply in the U.S.

For major players in the semiconductor industry like TSMC, "the question is which side to choose, if any at this time," Thurston said.

"I would be cautious at first, engage in much discussion and get an agreement that would provide clarity in order to minimize risks if they were to take subsidies from the U.S.," he told Law360. "Also related would be an analysis of how China would react."

--Editing by Philip Shea.

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