

# US Multilateral Trade Policy Developments

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## Trade Policy Developments

### US Court of Appeals for Federal Circuit Vacates US Court of International Trade Decision That Would Have Let Customs Reject Declared Value Based on “First Sale” Rule or “Related-Party” Prices If Non-Market Economy “Influenced” Buyer or Seller

A recent (August 11, 2022) US Court of Appeals for the Federal Circuit (“CAFC”) opinion, *Meyer Corp., US v. United States*,<sup>[1]</sup> has relieved many concerns that a previous decision by the US Court of International Trade (“CIT”)<sup>[2]</sup> had caused for global supply chains. Under the CIT’s previous decision, an importer’s calculation of dutiable value could not lawfully apply the “first sale” rule if “related-party” transactions involved non-market economies (“NME”) such as China or Vietnam. The CAFC has now vacated that CIT decision and remanded it for further consideration, on grounds that the CIT misconstrued an earlier CAFC opinion and improperly required China’s NME status not to affect invoiced prices. According to the CAFC, the applicable statute requires only that the relationship between buyer and seller not affect such prices.

The importer in *Meyer* purchased China-origin cookware sets and Thailand-origin cookware sets including China-origin components. Both sales channels involved a related middleperson in Thailand, although a second middleperson in China also sometimes participated. One of the questions at issue was whether the importer’s calculation of dutiable value could lawfully use the “transaction value” price that a related middleperson paid to a related manufacturer, even if both were located in Thailand (*i.e.*, the “first sale” price).

#### CIT’s Misinterpretation of Statutory Framework

The statutorily preferred means for appraising imported goods’ dutiable value is the “transaction value” method.<sup>[3]</sup> “Transaction value” is defined as “the price actually paid or payable for the merchandise when sold for exportation to the United States,” plus certain enumerated additions and minus certain statutorily required deductions.<sup>[4]</sup> An importer may use the “transaction value” method, however, only in certain circumstances. Specifically, the importer ordinarily must be able show:

1. That the invoiced transaction used to determine the imported goods’ value was a bona fide sale—*i.e.*, that in the transaction, someone actually “sold” the imported goods;
2. If so, that this sale of the imported goods—even when located at the upstream end of a multi-tiered chain of sales and resales—was “for exportation to the United States” (a.k.a. the “first sale” rule);
3. That “sufficient information” supports any statutorily required additions to and deductions from invoiced prices for this sale; and
4. If the imported goods’ buyer and seller are “related” entities, that “the price actually paid or payable” nevertheless reflects arm’s-length principles.<sup>[5]</sup>

<sup>[1]</sup> Fed. Cir. Case No. 2021-1932, decided Aug. 11, 2022) (hereafter “*Meyer CAFC*”).

<sup>[2]</sup> *Meyer Corp., U.S. v. United States*, Slip Op. 21-26, Ct. No. 13-00154 (Ct. Int’l Trade Mar. 1, 2021) (hereafter “*Meyer CIT*”).

<sup>[3]</sup> 19 U.S.C. §§ 1401a(a)(1)(A) and 1401a(b); compare to 19 C.F.R. §§ 152.101(b)(1) and 152.103.

<sup>[4]</sup> 19 U.S.C. § 1401a(b).

<sup>[5]</sup> 19 U.S.C. § 1401a(b); also, 19 C.F.R. §§ 152.103(b)-(g), 152.103(i), 152.103(j)(1)(iv), 152.103(j)(2), and 152.103(l). Generally, the claim that a price will reflect arm’s-length principles means that the relationship between the seller and buyer will not improperly cause one of them to act against its own best interests and the price to be much higher or lower than it would have

Regarding the second and third of the four prerequisites for applying the “transaction value” method, the original CIT *Meyer* decision, which the CAFC has now vacated and remanded, had held that the “first” sales at issue did not have sufficient documentation (a) to *disprove* the existence of any possibly hidden subsidy resulting from China’s NME and (b) to prove that prices reflected arm’s-length principles.

In reaching these conclusions, the CIT’s original decision had generalized that US customs law might prohibit importers from basing reported dutiable value on the “transaction value” of the goods if the sale to a middleperson were between related parties and the goods were either—

- Produced in an NME country like China and Vietnam;
- Produced in a market-economy country like Thailand, but incorporating NME inputs; or
- Bought or sold by an NME entity, regardless of where the goods or the inputs that they incorporated originated.

The CIT opinion’s language had been broad, with potentially widespread implications for global supply chains: “. . . this court has doubts over the extent to which, if any, the ‘first sale’ test . . . was intended to be applied to transactions involving NME participants or inputs.”<sup>[6]</sup>

Much of the reasoning in the CIT’s original *Meyer* decision had relied on an expansive reading of one small phrase in a famous prior CAFC decision commonly known as *Nissho Iwai*.<sup>[7]</sup> In *Nissho Iwai*, the CAFC held that the importer had properly based the transaction value of certain imported subway cars on the “first-sale” price that a foreign purchasing agent had paid to a foreign manufacturer, rather than the higher price that a US importer had paid to a wholly owned US subsidiary of the foreign purchasing agent.<sup>[8]</sup> The facts necessitated this outcome in *Nissho Iwai* because the foreign manufacturer’s production of the cars “for a specific United States purchaser” implied that, when the middleperson placed its order, the cars were “intended ‘for exportation to the United States’ and had no possible alternative destination.”<sup>[9]</sup> The importer’s calculation of dutiable value could use this “first sale,” the *Nissho Iwai* CAFC observed, mostly because the subway cars were clearly destined for the United States—but also because the sale satisfied all other statutory requirements. In explaining the latter detail (what made the sale “statutorily viable”), the *Nissho Iwai* CAFC had written, in pertinent part: “The manufacturer’s price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm’s length, in the *absence of any non-market influences* that affect the legitimacy of the sales price” (emphasis added).<sup>[10]</sup>

The CIT’s original decision in *Meyer* had focused on the one expression from *Nissho Iwai* that we have italicized, “absence of any non-market influences,” and made it into an additional required element, as if both necessary and separate from the four statutory requirements listed above.<sup>[11]</sup> This factor, the CIT wrote, “has generally been

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been were the seller and buyer not related. The statute, regulations, and cases interpreting them, however, set forth specific tests for determining whether arm’s-length principles have governed export prices.

<sup>[6]</sup> *Meyer CIT* at 120.

<sup>[7]</sup> *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992).

<sup>[8]</sup> *Id.*, 982 F.2d at 509.

<sup>[9]</sup> *Id.*

<sup>[10]</sup> *Id.*

<sup>[11]</sup> See, e.g., *Meyer CIT* at 2-3, 13, 15, and 91-92 (quoting *Nissho Iwai* to require an absence of “non-market influences”).

neglected”<sup>[12]</sup> but mattered in *Meyer*’s facts because China “presumptively”<sup>[13]</sup> remained an NME in customs valuation decisions no less than in US Department of Commerce trade-remedy proceedings. In addition, the *Meyer* CIT assumed that, because the United States does not yet recognize China as a market economy, an importer had an added “burden of demonstrating” that the buyer procured the goods “at undistorted prices.”<sup>[14]</sup>

### CAFC’s Vacating of CIT’s *Meyer* Decision

According to the CAFC’s new decision, the CIT in *Meyer* “misinterpreted *Nissho Iwai* to impose a requirement beyond what the statute and regulations demand.” Specifically:

There is no basis in the statute for Customs or the court to consider the effects of a nonmarket economy on the transaction value. The statute requires only that “the relationship between [the] buyer and seller did not influence the price actually paid or payable.” 19 U.S.C. § 1401a(b)(2)(B). This provision concerns effects of the relationship between the buyer and seller, not effects of government intervention, and especially not with government intervention that affects the industry as a whole.<sup>[15]</sup>

In using the phrase “absence of any non-market influences,” then, the *Nissho Iwai* CAFC was “merely restating the statutory requirements for a transaction value, rather than introducing a new requirement separate from the arm’s-length requirement.”<sup>[16]</sup> In vacating the CIT’s decision, the *Meyer* CAFC accordingly re-affirmed the four pre-requisites that we have summarized above for using “transaction value” to calculate dutiable values and disparaged any imposition of an extra fifth requirement when transactions implicated NMEs. Because the CIT’s decision had relied on a “misreading” of *Nissho Iwai*, the CAFC vacated and remanded to the CIT for reconsideration.<sup>[17]</sup>

### Outlook

If upheld, the CIT’s original *Meyer* decision would have forced many importers to reassess their valuation methodologies or their sourcing patterns, because these often involve not only related-party transactions but also NME inputs, processing, suppliers, and middlepersons. For now, the CAFC’s action has made such reassessments unnecessary. The *Meyer* case still breathes, because the CIT has yet to reconsider whether some other rationale than a presumptively “distortive”<sup>[18]</sup> NME influence prohibits the importer from using the “first sale” price. We will provide further updates if the CIT’s remand redetermination changes the status quo that the CAFC’s new decision has revealed and clarified.

The CAFC’s opinion in *Meyer Corp., U.S. v. United States* is available on-line [here](#).

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<sup>[12]</sup> *Id.* at 3.

<sup>[13]</sup> *Id.* at 16.

<sup>[14]</sup> *Id.*

<sup>[15]</sup> *Meyer* CAFC at 11.

<sup>[16]</sup> *Id.* at 12.

<sup>[17]</sup> *Id.*

<sup>[18]</sup> *Meyer* CIT at 2, 5, 15, 115, and 118.

## Legislative Developments

### New US Climate Bill Seeks to Bolster Domestic Critical Minerals Supply Chain

On July 27, Senate Majority Leader Chuck Schumer (D-NY) unveiled a budget reconciliation bill entitled the *Inflation Reduction Act of 2022* (“IRA”), which would implement core components of President Biden’s agenda on healthcare, tax reform, and climate change.<sup>[1]</sup> The bill includes an estimated \$369 billion in investments related to “climate change and energy security,” including tax and other incentives to promote US production of electric vehicles (EVs), renewable energy technologies, and critical minerals, representing the “single biggest climate investment in U.S. history[.]”<sup>[2]</sup> These provisions are intended to put the United States on a path to roughly 40% emissions reduction by 2030, but they also reflect economic and geopolitical objectives, including a desire to “lessen our reliance on China, ensuring that the transition to a clean economy creates millions of American manufacturing jobs, and is powered by American-made clean technologies.”<sup>[3]</sup>

Consistent with these goals, the IRA includes several provisions aimed at bolstering domestic and regional production of critical minerals. These include (1) substantial revisions to the electric vehicle (EV) tax credit to require regional sourcing of critical minerals used in EV batteries; (2) a new “advanced manufacturing” tax credit for domestic production of critical minerals; (3) a \$500 million appropriation for “enhanced” use of the Defense Production Act, which President Biden recently invoked to support critical minerals production; and (4) new authorization for \$40 billion in loan guarantees under Title XVII of the Energy Policy Act of 2005, which could be used to support critical minerals projects. We provide an overview of these provisions below.

#### Revision of EV tax credit to require regional sourcing of critical minerals

Section 13401 of the IRA would revise the existing US tax credit of \$7,500 for purchases of new electric vehicles, codified at Section 30D of the Internal Revenue Code.<sup>[4]</sup> Eligibility for the revised credit (which would apply to both EVs and fuel cell vehicles (“clean vehicles”)) would be contingent on (1) final assembly of the vehicle occurring in North America; (2) specified percentages of the vehicle battery’s critical minerals originating from a US free trade agreement (FTA) partner, or being recycled in North America; and (3) specified percentages of the battery’s components being manufactured in North America. Moreover, after a short transition period, the IRA would make vehicles ineligible for the credit if the vehicle battery contains “any” critical minerals or components sourced from countries such as China and Russia.

To satisfy the IRA’s critical minerals requirement, at least 40 percent the value of the critical minerals<sup>[5]</sup> contained in the vehicle’s battery must be “extracted or processed in any country with which the United States has a free trade

<sup>[1]</sup> The text of the legislation can be viewed [here](#).

<sup>[2]</sup> “Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022,” Senate Majority Leader Chuck Schumer, July 27, 2022, [https://www.democrats.senate.gov/imo/media/doc/summary\\_of\\_the\\_energy\\_security\\_and\\_climate\\_change\\_investments\\_in\\_the\\_inflation\\_reduction\\_act\\_of\\_2022.pdf](https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf).

<sup>[3]</sup> Id.

<sup>[4]</sup> 26 U.S.C. § 30D.

<sup>[5]</sup> “Critical minerals” subject to this requirement include specified forms of aluminum, antimony, barite, beryllium, cerium, cesium, chromium, cobalt, dysprosium, europium, fluorspar, gadolinium, germanium, graphite, lithium, manganese, neodymium, nickel, niobium, tellurium, tin, tungsten, vanadium, yttrium, and certain other minerals purified to a minimum purity of 99 percent (arsenic, bismuth, erbium, gallium, hafnium, holmium, iridium, lanthanum, lutetium, magnesium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, terbium, thulium, titanium, ytterbium, zinc, zirconium).

agreement in effect”<sup>[6]</sup> or be “recycled in North America.” The required percentage would increase gradually to 80 percent by 2027. Vehicles that satisfy this requirement would receive a tax credit of \$3,750, provided that they otherwise qualify as a “clean vehicle” as defined in the IRA. A similar rule in the IRA would provide an additional tax credit of \$3,750 if at least 50 percent of the battery’s components are manufactured or assembled in North America (increasing to 100 percent by 2029).

The IRA would prohibit the application of the above tax credits where a vehicle’s battery contains “any” critical minerals sourced from countries such as China and Russia. Specifically, a vehicle would be ineligible for the tax credits if any of the critical minerals contained in the battery were “extracted, processed, or recycled” by a “foreign entity of concern” (as defined by the Infrastructure Investment and Jobs Act, (42 U.S.C. § 18741(a)(5)). A foreign entity of concern includes, among other things, any foreign entity that is “owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation” (*i.e.*, China, Russia, Iran, or North Korea). This prohibition would take effect with respect to vehicles placed in service after December 31, 2024. A similar rule would exclude vehicles from eligibility if any components contained in the battery were manufactured or assembled by a foreign entity of concern, effective with respect to vehicles placed in service after December 31, 2023.

#### **Advanced Manufacturing Production Tax Credit available for critical minerals**

Section 13502 of the IRA would establish a new Advanced Manufacturing Production Tax Credit at Section 45X of the Internal Revenue Code. This tax credit would apply with respect to each “eligible component” that is produced by the taxpayer within the United States and sold by the taxpayer to an unrelated person during the taxable year. Critical minerals are among the eligible components to which the tax credit would apply. In the case of critical minerals, the amount of the tax credit would be equivalent to 10 percent of the costs incurred by the taxpayer with respect to production of the critical mineral.

The new tax credit would apply to several downstream products as well, including solar energy components, wind energy components, power inverters, and battery components. For these downstream products, the tax credit would begin to phase out in 2030 and would phase out completely by 2033. However, the tax credit for production of critical minerals would not be subject a phase out. The sponsors of the IRA estimate that this tax credit will result in tax expenditures of approximately \$30 billion.

#### **\$500 million for “enhanced use” of Defense Production Act**

Section 30001 of the IRA would appropriate \$500 million for “enhanced use” of the Defense Production Act (DPA), on top of the funds made available for the DPA through the normal appropriations process.<sup>[7]</sup> The DPA gives the President broad authority to use economic incentives to create, maintain, protect, expand, or restore domestic sources for critical components, critical technology items, and industrial resources.<sup>[8]</sup>

The IRA would not limit the use of the \$500 million appropriation to any particular DPA initiative. However, the sponsors of the bill have indicated that this appropriation is intended in part to support President Biden’s recent DPA

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<sup>[6]</sup> The United States currently has free trade agreements in effect with Israel, Canada, Mexico, Jordan, Singapore, Chile, Australia, Morocco, Bahrain, Oman, Peru, Panama, South Korea, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

<sup>[7]</sup> In Fiscal Year 2022, the US Department of Defense (DOD) received appropriations of \$988 million to implement the DPA, plus a balance of approximately \$158 million carried forward from the previous year.

<sup>[8]</sup> 50 U.S.C. §§ 4501-4568.

action concerning critical minerals.<sup>[9]</sup> On March 31, 2022, President Biden invoked Section 303 of the DPA to increase federal support for “domestic mining, beneficiation, and value-added processing of strategic and critical materials for the production of large-capacity batteries,” including materials “such as lithium, nickel, cobalt, graphite, and manganese.”<sup>[10]</sup> This action enabled the Department of Defense (DOD) to use DPA funds to encourage domestic mining and processing of such materials. President Biden’s Memorandum specifically directed DOD to use its DPA authorities to support: (1) feasibility studies for mature mining, beneficiation, and value-added processing projects; (2) by-product and co-product production at existing mining, mine waste reclamation, and other industrial facilities; and (3) mining, beneficiation, and value-added processing modernization to increase productivity, environmental sustainability, and workforce safety.

### **\$40 billion commitment authority for Innovative Technology Loan Guarantee Program (Title XVII)**

Section 50141 of the IRA authorizes the Department of Energy (DOE) to make commitments for an additional \$40 billion in loan guarantees under Title XVII of the Energy Policy Act of 2005, on top of DOE’s existing commitment authority of approximately \$24 billion. Title XVII (also known as the Innovative Technologies Loan Guarantee Program) authorizes the Secretary of Energy to make loan guarantees for projects that (1) “avoid, reduce, utilize, or sequester” air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ “new or significantly improved technologies” as compared to commercial technologies in service in the United States at the time the guarantee is issued.<sup>[11]</sup> The \$40 billion authorization under the IRA could bolster recent efforts to leverage the Title XVII program to support domestic production of critical minerals.

Successive administrations have shown interest in using the Title XVII program to support domestic production of critical minerals, and Congress has recently taken steps to support those efforts. During the Trump Administration, DOE issued guidance interpreting Title XVII “broadly” to authorize loan guarantees for critical minerals projects, and “encourage[d] applications from potential projects involving the production, manufacture, recycling, processing, recovery, or reuse of Critical Minerals and other minerals.”<sup>[12]</sup> Subsequently, in the Infrastructure Investment and Jobs Act of 2021, Congress amended Title XVII to expressly authorize the provision of loan guarantees for “[p]rojects that increase the domestically produced supply of critical minerals . . . including through the production, processing, manufacturing, recycling, or fabrication of mineral alternatives.”<sup>[13]</sup> The Biden Administration is currently considering how regulations implementing Title XVII could be improved to facilitate applications for loan guarantees for critical minerals projects, among other changes.<sup>[14]</sup>

### **Outlook**

The IRA’s passage is not yet assured, but the bill enjoys strong support from President Biden and Congressional Democrats, and there is a strong chance that Congress will approve the bill in the coming weeks. If enacted in its

<sup>[9]</sup> “Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022,” Senate Majority Leader Chuck Schumer, July 27, 2022, [https://www.democrats.senate.gov/imo/media/doc/summary\\_of\\_the\\_energy\\_security\\_and\\_climate\\_change\\_investments\\_in\\_the\\_inflation\\_reduction\\_act\\_of\\_2022.pdf](https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf), at p.2.

<sup>[10]</sup> “Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended,” Presidential Determination No. 2022-11, March 31, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/31/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended/>.

<sup>[11]</sup> 42 U.S.C. § 16513.

<sup>[12]</sup> “Notice of Guidance for Potential Applicants Involving Critical Minerals and Related Activity,” US Department of Energy, December 1, 2020, 85 Fed. Reg. 77202.

<sup>[13]</sup> 42 U.S.C. § 16513(b)(13), as added by Public Law 117-58, sec. 40401(a)(2)(A) (2021).

<sup>[14]</sup> “Innovative Technologies Loan Guarantee Program,” US Department of Energy, June 1, 2022, 87 Fed. Reg. 33141.

current form, the IRA would represent a major expansion of tax and other financial incentives for domestic production of critical minerals. However, the IRA would not address impediments arising from the complex system of US federal and state environmental laws, regulations, and permitting processes applicable to mining operations.<sup>[15]</sup> Some experts consider these permitting obstacles to be the single largest impediment to expanding domestic production of critical minerals at a scale needed to support the energy transition.<sup>[16]</sup> Such obstacles, if left unaddressed, could limit the effectiveness of the policies envisioned in the IRA.

As part of their political agreement on the IRA, Majority Leader Schumer and Senator Joe Manchin (D-WV) announced that they have reached agreement with President Biden and Speaker Pelosi to separately “pass comprehensive permitting reform legislation before the end of this fiscal year.”<sup>[17]</sup> While the details of the forthcoming bill are not yet available, this effort could complement the IRA by streamlining regulatory processes that impede critical minerals production in the United States.

### **New US Climate Bill Seeks to Promote Domestic Content in Clean Energy Projects**

On July 27, Senate Majority Leader Chuck Schumer (D-NY) unveiled a budget reconciliation bill entitled the *Inflation Reduction Act of 2022* (“IRA”), which would implement core components of President Biden’s agenda on healthcare, tax reform, and climate change.<sup>[1]</sup> The bill includes an estimated \$369 billion in spending related to “climate change and energy security,” including tax and other incentives to promote US production of electric vehicles (EVs), renewable energy technologies, and critical minerals, representing the “single biggest climate investment in U.S. history[.]”<sup>[2]</sup> These provisions are intended to put the United States on a path to roughly 40% emissions reduction by 2030, but they also reflect economic and geopolitical objectives, including a desire to “lessen our reliance on China, ensuring that the transition to a clean economy creates millions of American manufacturing jobs, and is powered by American-made clean technologies.”<sup>[3]</sup>

Consistent with these goals, the IRA would significantly expand US tax credits for renewable energy projects such as solar, wind, geothermal, and hydropower facilities. Among other changes, the IRA would revise and extend existing tax credits for investments in renewable energy property and production of electricity from renewable resources. The IRA would also establish new, “technology neutral” production and investment tax credits for facilities that generate electricity with zero carbon emissions. In an effort to bolster domestic production of inputs used in renewable energy

<sup>[15]</sup> The Biden Administration acknowledged this challenge in its June 2021 review of the large-capacity battery supply chain. In that review, DOE “identified permitting issues, which arise in part from the lack of modern mining laws and regulations, as one of the hindrances to increasing domestic mineral production.” DOE acknowledged that independent analyses “consistently give[] the U.S. very low marks related to permitting risk, citing approximately seven to ten years to obtain the relevant permits for full-scale operations.” See “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth,” The White House, June 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

<sup>[16]</sup> See, e.g., “Biden mining order won’t change biggest hurdle: Permits,” E&E News, April 8, 2022, <https://www.eenews.net/articles/biden-mining-order-wont-change-biggest-hurdle-permits/>.

<sup>[17]</sup> “Joint Statement From Leader Schumer And Senator Manchin Announcing Agreement To Add The Inflation Reduction Act Of 2022 To The FY2022 Budget Reconciliation Bill And Vote In Senate Next Week,” Senate Majority Leader Chuck Schumer, July 27, 2022, <https://www.democrats.senate.gov/newsroom/press-releases/senate-majority-leader-chuck-schumer-d-ny-and-sen-joe-manchin-d-wv-on-wednesday-announced-that-they-have-struck-a-long-awaited-deal-on-legislation-that-aims-to-reform-the-tax-code-fight-climate-change-and-cut-health-care-costs>.

<sup>[1]</sup> The text of the legislation can be viewed [here](#).

<sup>[2]</sup> “Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022,” Senate Majority Leader Chuck Schumer, July 27, 2022, [https://www.democrats.senate.gov/imo/media/doc/summary\\_of\\_the\\_energy\\_security\\_and\\_climate\\_change\\_investments\\_in\\_the\\_inflation\\_reduction\\_act\\_of\\_2022.pdf](https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf).

<sup>[3]</sup> Id.

projects, each of these new and revised tax credits would provide “bonus” credits for facilities that satisfy domestic content requirements for iron, steel, and manufactured goods. Given the globalized nature of supply chains for clean energy technologies, these requirements would have significant trade implications, and may draw complaints from US trading partners on the grounds that they discriminate against imports in favor of domestic goods. We provide an overview of the tax incentives subject to domestic content requirements below.

## Overview

The IRA would impose domestic content requirements in connection with four types of clean energy tax credits: (1) the existing tax credit for electricity produced from renewable resources, codified at Section 45 of the Internal Revenue Code (IRC); (2) the existing tax credit for investment in energy property, codified at Section 48 of the IRC; (3) a new tax credit for electricity produced from zero-emissions facilities; and (4) a new tax credit for investment in facilities that generate electricity with zero emissions.

Under the IRA, each of these tax credits would consist of a base credit amount (available to all qualifying facilities), and an elevated credit amount equal to five times the base rate for projects that meet prevailing wage and apprenticeship requirements.<sup>[4]</sup> The IRA would make these tax credits refundable for certain eligible taxpayers (*i.e.*, it would allow taxpayers to elect to be treated as having made a tax payment equal to the value of the credit for which they are eligible).<sup>[5]</sup> This “elective payment” option is intended to allow entities with little or no tax liability to accelerate utilization of the credits, rather than carrying them forward to years when their credits can offset their tax liability.

Under the IRA, each of the tax credits described above would include additional “bonus” credits for projects that satisfy domestic content requirements. The domestic content requirements generally consist of (1) a requirement that all iron and steel products that are part of the project at the time of completion are produced in the United States; and (2) a requirement that manufactured products that are part of the project satisfy a domestic content threshold. In addition to being ineligible for bonus credits, projects that do not satisfy domestic content requirements would be partly disqualified (and in some cases completely disqualified) from the elective payment benefit established by the IRA. The bill would permit the Secretary of the Treasury to provide exceptions from the domestic content requirements in certain circumstances where domestic products are unavailable or excessively costly.

The specific domestic content requirements and associated incentives for each provision are summarized below. Other key details of the new and revised tax credits (including the effective dates of the IRA’s modifications, the time periods for which the credits would be available, and the schedules for phase-out of certain credits) can vary significantly depending on the credit and type of energy project at issue, and are not addressed here.

### **Production tax credit for electricity produced from certain renewable resources (“Section 45 PTC”)**

The IRA would revise and extend the electricity production tax credit codified at Section 45 of the IRC, which allows energy producers to claim a credit for electricity produced from certain renewable resources.<sup>[6]</sup> The revised Section 45 PTC would provide a base credit of 0.3 cents per kilowatt hour (KWh) of electricity produced and sold by a qualifying facility to an unrelated party. For facilities that satisfy the applicable wage and apprenticeship

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<sup>[4]</sup> The wage requirements generally require that the taxpayer ensure laborers and mechanics are paid prevailing wages during the construction of a qualifying project, and, in some cases, for the alteration and repair of the project for a defined period after the project is placed into service. The apprenticeship requirements generally require that the taxpayer ensure that qualified apprentices perform no less than a specified percentage of total labor hours of the project.

<sup>[5]</sup> Taxpayers eligible for the elective payment option are tax-exempt entities, state and local governments (and subdivisions thereof), tribal governments, and the Tennessee Valley Authority.

<sup>[6]</sup> 26 U.S.C. § 45.

requirements, the credit rate would be 1.5 cents per KWh. The types of facilities eligible for the revised credit would include wind, solar, biomass, hydropower, and geothermal energy facilities, among others.

Facilities that satisfy domestic content requirements would be eligible for a “bonus credit” equivalent to 10 percent of the value of the Section 45 PTC. The bonus credit would be available only if “any steel, iron, or manufactured product which is a component of such facility (upon completion of construction) was produced in the United States[.]”<sup>[7]</sup> For purposes of this requirement, iron and steel products would be treated as domestic only where “[a]ll steel and iron manufacturing processes . . . take place in the United States, except metallurgical processes involving refinement of steel additives.”<sup>[8]</sup> The manufactured products that are components of the facility would be considered domestic if they satisfy a domestic content threshold of 40 percent (or 20 percent in the case of offshore wind facilities). Domestic content would be measured by calculating the total cost of the manufactured products that are “mined, produced, or manufactured in the United States” as a percentage of the total costs across all manufactured products in the facility.

In addition to being ineligible for the 10 percent bonus credit, facilities that fail to satisfy the domestic content requirements would face limitations on the use of the “elective payment” option with respect to the Section 45 PTC. If a facility does not satisfy the domestic content requirements, the amount of the credit that would be eligible for direct payment would decrease by 10 percent, effective with respect to facilities for which construction begins after January 1, 2024.

The IRA would require the Secretary of the Treasury to provide “exceptions” to the domestic content requirements where (1) the inclusion of domestic products increases the overall costs of construction by more than 25 percent; or (2) relevant products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

**Investment tax credit for energy property (“Section 48 ITC”)**

The IRA would revise and extend the investment tax credit codified at Section 48 of the Internal Revenue Code, which allows taxpayers to claim a credit for the cost of certain energy property.<sup>[9]</sup> The revised provision would provide base credits ranging from 2 to 6 percent, depending on the type of energy property at issue, and bonus rates of 6 to 30 percent for properties that meet wage and apprenticeship requirements, as shown below.

Property Type	Base Credit Rate	Bonus Credit Rate
Solar energy, geothermal, fiber-optic solar, fuel cell, microturbine, small wind, offshore wind, combined heat and power, and waste energy recovery	6%	30%
Geothermal heat pump <sup>[10]</sup>	6%	30%

<sup>[7]</sup> The legislation indicates that domestic content would be determined in a manner consistent with the US regulations governing the application of “Buy America” requirements to transportation infrastructure (49 C.F.R. § 661).

<sup>[8]</sup> The bill stipulates that the domestic content standard for iron and steel products would be applied in a manner consistent 49 C.F.R. § 661.5(b), under which iron and steel products are treated as domestic only if “[a]ll steel and iron manufacturing processes . . . take place in the United States, except metallurgical processes involving refinement of steel additives[.]”

<sup>[9]</sup> 26 U.S.C. § 48.

<sup>[10]</sup> The base credit rate for geothermal heat pump property phases down to 5.2 percent for property that begins construction in 2033 and 4.4 percent for property that begins construction in 2034. The bonus credit rate phases down to 26 percent in 2033 and 22 percent in 2034. No credit is allowed for property that begins construction after December 31, 2034.

Microturbine	2%	10%
Energy storage technology, biogas property, microgrid controllers, dynamic glass, linear generators <sup>[11]</sup>	6%	30%

Properties eligible for the Section 48 ITC would be eligible for an additional bonus credit if they satisfy domestic content requirements similar to those that apply to the Section 45 PTC (described above). The additional credit for domestic content would be 2 percentage points if the property is subject to the base credit rate, or 10 percentage points if the property also satisfies the wage and apprenticeship requirements, and is therefore eligible for the bonus credit rate. For properties that do not satisfy the domestic content requirement, the amount of the credit that is eligible for elective payment would decrease in a manner similar to the Section 45 PTC (*i.e.*, the amount eligible would decrease by 10 percent).

**New tax credits for clean electricity production (“clean electricity PTC”) and investment (“clean electricity ITC”)**

The IRA would create new “emissions-based” tax incentives for electricity-generating facilities. These provisions would allow taxpayers to choose between a production tax credit (codified at new Section 45Y) or an investment tax credit (new Section 48D), both of which would be contingent on the carbon emissions of the electricity generated. Power facilities would qualify for the credits regardless of the technology they use, provided that their “greenhouse gas emissions rate” is not greater than zero.<sup>[12]</sup>

Clean electricity PTC

The new production tax credit would have a base rate of 0.5 cents per KWh of electricity produced and sold in the 10-year period after a qualifying facility is placed in service. For facilities that meet the wage and apprenticeship requirements, the credit would be 2.5 cents per KWh. Facilities that comply with the following domestic content requirements would be eligible for an additional bonus credit equivalent to 10 percent of the value of the credit:

- All iron and steel products that are components of the facility upon completion of construction must be produced in the United States; and
- The manufactured products that are components of the facility upon completion of construction must satisfy the following domestic content thresholds:

Year in Which Construction of the Facility Begins	Facility Type	
	Offshore wind	All others
2025	27.5 percent	45 percent
2026	35 percent	50 percent
2027	45 percent	55 percent
After December 31, 2027	55 percent	55 percent

<sup>[11]</sup> These types of properties would newly be eligible for the Section 48 ITC as a result of the IRA.

<sup>[12]</sup> The bill defines the greenhouse gas emissions rate as “the amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity, expressed as grams of CO<sub>2e</sub> per KWh.” For facilities that produce electricity through fuel combustion or gasification, the greenhouse gas emissions rate would be “the net rate of greenhouse gases emitted into the atmosphere by such facility (taking into account lifecycle greenhouse gas emissions) . . . expressed as grams of CO<sub>2e</sub> per KWh.”

If a facility does not satisfy the domestic content requirements, the amount of the PTC that would be eligible for elective payment would decrease by 15 percent, for facilities that begin construction in 2025. Facilities that begin construction after December 31, 2025 would be ineligible for elective payment of the new PTC, unless they satisfy the domestic content requirements.

### Clean electricity ITC

The new investment tax credit would have a base rate equivalent to 6 percent of the qualified investment for the taxable year. For facilities that meet the wage and apprenticeship requirements, the credit would be 30 percent. Facilities that satisfy domestic content requirements would be eligible for an additional bonus credit of 2 percentage points (if the facility is subject to the 6 percent base rate), or 10 percentage points if the facility also satisfies the wage and apprenticeship requirements. The applicable domestic content requirements are similar to those that apply to the Section 48 ITC and the Section 45 PTC: all iron and steel products must be produced in the United States, and manufactured products must satisfy a domestic content threshold of 40 percent (or 20 percent in the case of offshore wind facilities). For properties that do not satisfy the domestic content requirements, the amount of the credit that is eligible for elective payment would decrease in a manner similar to the Section 48 ITC and the Section 45 PTC (*i.e.*, the amount eligible would decrease by 10 percent).

### **Outlook**

The IRA's passage is not yet assured, but the bill enjoys strong support from President Biden and Congressional Democrats, and there is a strong chance that Congress will approve the bill in the coming weeks. The above-mentioned provisions of the IRA are partly intended to reduce greenhouse gas emissions, but proponents of the bill acknowledge that they reflect other objectives, including to "on-shore clean energy manufacturing."<sup>[13]</sup> The bill's domestic content requirements would encourage US firms to give preference to US suppliers of raw materials and manufactured goods for clean energy projects, potentially placing foreign suppliers at a significant disadvantage in the US market. Unlike the IRA's tax credit for electric vehicles, which would allow vehicles to qualify based on North American content, the abovementioned "bonus" credits for clean energy projects are contingent upon US content only – potentially leading to trade tensions with Canada and Mexico, among other trading partners. If these provisions are enacted in their current form, foreign governments may challenge them through WTO dispute settlement or similar mechanisms provided in US free trade agreements, such as the US-Mexico-Canada Agreement.

### **President Biden Signs CHIPS and Science Act into Law**

On August 9, 2022, President Biden signed the CHIPS and Science Act (H.R.4346), which seeks to bolster the US semiconductor supply chain and promote research and development of advanced technologies in the United States.<sup>[1]</sup> The Act is comprised largely of provisions extracted from the US Innovation and Competition Act (USICA) and its House alternative, the America COMPETES Act, which Congress failed to reconcile in conference negotiations this summer. The CHIPS and Science Act encompasses the most popular provisions of the USICA and COMPETES bills, but modifies and adds to those provisions in important ways. Key provisions and updates in the CHIPS and Science Act are as follows:

<sup>[13]</sup> "Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022," Senate Majority Leader Chuck Schumer, July 27, 2022, [https://www.democrats.senate.gov/imo/media/doc/summary\\_of\\_the\\_energy\\_security\\_and\\_climate\\_change\\_investments\\_in\\_the\\_inflation\\_reduction\\_act\\_of\\_2022.pdf](https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf).

<sup>[1]</sup> The text of the CHIPS and Science Act can be viewed [here](#).

- **\$52.7 billion appropriation for semiconductor incentives.** The bill appropriates \$52.7 billion over five years to fund grants, loans, loan guarantees, and other programs to incentivize semiconductor manufacturing in the United States (as proposed in the USICA and the COMPETES Act).
- **“FABS Act” investment tax credit.** The bill establishes a new 25 percent tax credit for investments in semiconductor manufacturing facilities in the United States (not envisioned in the USICA or the COMPETES Act).
- **Limits on expansion of manufacturing capacity in China.** The bill includes new “clawback” provisions that generally prohibit beneficiaries of the CHIPS funding and investment tax credit from expanding semiconductor manufacturing in China for a period of ten years (except for manufacturing of legacy chips). For recipients of CHIPS funding, these provisions establish a process of mandatory notification of planned relevant transactions in China, agency review of such transactions, and mitigation authorities, resembling the CFIUS process and recent legislative proposals for outbound investment screening.
- **\$170 billion authorization for R&D programs.** The bill authorizes nearly \$170 billion in funding over five years for research and development initiatives across multiple federal agencies, roughly in line with the USICA and the COMPETES Act. This includes a \$20 billion authorization for a new technology directorate within the National Science Foundation, which will award grants to fund research and development in areas such as artificial intelligence, advanced energy, data storage, and robotics.

The CHIPS and Science Act creates significant new funding opportunities and potential tax benefits for companies exploring investments in the semiconductor supply chain and other critical technologies – albeit with significant conditions and restrictions that recipient companies will need to navigate. The legislation received substantial bipartisan support, passing the Senate by a margin of 64 to 33, but this was achieved in part by limiting the scope of the legislation to the core issues of semiconductor incentives and R&D funding. Other issues addressed in the USICA and the COMPETES Act were omitted, including trade provisions pertaining to Section 301 tariff exclusions, antidumping and countervailing duties, trade preference programs, and *de minimis* tariff treatment of China-origin goods. Members were unable to reach consensus on these trade provisions in conference, and the passage of the CHIPS and Science Act leaves them without a clear path to become law this year.

This alert provides an overview of key provisions the CHIPS and Science Act and their implications.

### **Financial Assistance Program for Semiconductors (\$39 billion)**

The CHIPS and Science Act appropriates \$52.7 billion to fund semiconductor incentive programs authorized by the CHIPS for America Act of 2021.<sup>[2]</sup> The majority of this appropriation (\$39 billion) will fund a “Financial Assistance Program” for the semiconductor industry.<sup>[3]</sup> This program, which the US Department of Commerce will administer, will provide Federal financial assistance to “covered entities”<sup>[4]</sup> to incentivize “investment in facilities and equipment in the United States for the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing

<sup>[2]</sup> Congress enacted the CHIPS for America Act in January 2021 as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2021.<sup>[2]</sup> The CHIPS for America Act is codified at 15 U.S.C. § 4651 et seq.

<sup>[3]</sup> 15 U.S.C. § 4652.

<sup>[4]</sup> The law defines a covered entity is defined as “a nonprofit entity, a private entity, a consortium of private entities, or a consortium of nonprofit, public, and private entities with a demonstrated ability to substantially finance, construct, expand, or modernize a facility relating to fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment.” 15 U.S.C. § 4651(2).

equipment.” The CHIPS and Science Act appropriates \$19 billion for this program in FY 2022, and \$5 billion annually thereafter through FY 2026. The bill also makes important changes to the terms of the Financial Assistance Program by way of amendments to the CHIPS for America Act (discussed below).

### Program overview

Under the Financial Assistance Program, covered entities may submit applications to the Secretary of Commerce seeking financial assistance for the construction, expansion, or modernization of qualifying facilities and equipment. The Secretary may grant financial assistance if the applicant satisfies certain eligibility criteria.<sup>[5]</sup> Covered entities may use financial assistance awards to finance the construction, expansion, or modernization of facilities or equipment; to support workforce and site development; and to pay “reasonable costs related to the operating expenses” for a facility. Federal investment in any particular project may not exceed \$3 billion, unless the Executive Branch certifies to Congress that a larger investment is necessary to: (1) “significantly increase the proportion of reliable domestic supply of semiconductors relevant for national security and economic competitiveness that can be met through domestic production;” and (2) “meet the needs of national security.”<sup>[6]</sup> No assistance may be granted under the program to a “foreign entity of concern,” and a “technology clawback” provision requires the Secretary to “recover the full amount of an award” if the covered entity “knowingly engages in any joint research or technology licensing effort” with a foreign entity of concern and the technology or product at issue raises national security concerns.<sup>[7]</sup> The law defines a “foreign entity of concern” to include any foreign entity that is “owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is listed in [10 U.S.C. § 2533c],” which includes China, Russia, Iran, and North Korea.

### New “clawback” requirement related to expansion of manufacturing capacity in China

The CHIPS and Science Act makes several noteworthy changes to the terms of the Financial Assistance Program. The most significant is a new requirement that covered entities must refrain from expanding semiconductor manufacturing capacity in China for 10 years after receiving an award, or else they must forfeit the “full amount” of the award.<sup>[8]</sup> Specifically, covered entities must enter into an agreement with the Secretary of Commerce specifying that, during the 10-year period beginning on the date of the award, the covered entity “may not engage in any

<sup>[5]</sup> For example, the covered entity must have “an executable plan to sustain the facility,” “an executable plan to identify and mitigate relevant semiconductor supply chain security risks,” and must have made “commitments to worker and community investment,” among other criteria. 15 U.S.C. § 4652(a)(2)(B).

<sup>[6]</sup> 15 U.S.C. § 4652(a)(3)(B).

<sup>[7]</sup> 15 U.S.C. § 4652(a)(2)(C)(iv) and (a)(5)(C). The law defines a “foreign entity of concern” as any foreign entity that is:

(A) designated as a foreign terrorist organization by the Secretary of State under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);

(B) included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of the Treasury;

(C) owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is listed in section 2533c of title 10, United States Code; or

(D) alleged by the Attorney General to have been involved in activities for which a conviction was obtained under (i) chapter 37 of title 18, United States Code (commonly known as the “Espionage Act”) (18 U.S.C. 792 et seq.); (ii) section 951 or 1030 of title 18, United States Code; (iii) chapter 90 of title 18, United States Code (commonly known as the “Economic Espionage Act of 1996”); (iv) the Arms Export Control Act (22 U.S.C. 2751 et seq.); (v) sections 224, 225, 226, 227, or 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2274–2278; 2284); (vi) the Export Control Reform Act of 2018 (50 U.S.C. 4801 et seq.); or (vii) the International Economic Emergency Powers Act (50 U.S.C. 1701 et seq.); or

(E) determined by the Secretary, in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States under this Act.

<sup>[8]</sup> 15 U.S.C. § 4652(a)(6), as amended.

significant transaction, as defined in the agreement, involving the material expansion of semiconductor manufacturing capacity in the People's Republic of China or any other foreign country of concern.”<sup>[9]</sup>

The 10-year prohibition does not apply to existing facilities or equipment for manufacturing legacy semiconductors, or to “significant transactions” involving the material expansion of manufacturing capacity that produces legacy semiconductors and “predominantly” serves the market of a foreign country of concern. The bill defines legacy semiconductors to include semiconductor technology that is of the 28 nanometer (nm) generation or older for logic, as well as “memory technology, analog technology, packaging technology, and any other relevant technology. . .relative to [the 28nm and older generation],” as determined by the Secretary of Commerce. Any semiconductor technology that the Secretary determines to be “critical to national security” would not qualify as “legacy” technology. The bill authorizes the Secretary to expand the definition of legacy technology periodically through a public notice and comment process.

To enforce the 10-year prohibition, the bill establishes a process of mandatory notification, agency review, and mitigation that resembles the CFIUS process and recent legislative proposals for outbound investment screening. This process is as follows:

- **Notification requirement.** During the 10-year period after receiving an award, covered entities must notify the Secretary of Commerce of any planned significant transactions involving the material expansion of semiconductor manufacturing capacity in China or any other foreign country of concern.
- **DOC determination.** Within 90 days after receiving a notification from a covered entity, the Secretary of Commerce must determine whether the transaction would violate the covered entity’s 10-year agreement, and must notify the covered entity of the determination.
- **Opportunity to remedy.** If the Secretary of Commerce determines that the planned transaction violates the covered entity’s agreement, the covered entity will have 45 days to provide “tangible proof” that the transaction has been abandoned. If the covered entity does not do so, the Secretary “shall recover” the full amount of the financial assistance provided to the covered entity, unless the parties can reach agreement on mitigation measures.
- **Mitigation.** If the Secretary determines that a covered entity could take measures to mitigate any national security risk stemming from the planned transaction, the Secretary may negotiate, enter into, and enforce an agreement or condition for mitigation, and may waive the statutory requirement to recover the financial assistance award.

The law authorizes the Secretary of Commerce to promulgate regulations implementing these requirements.

#### Other notable changes to the Financial Assistance Program

The CHIPS and Science Act makes several other noteworthy changes to the Financial Assistance Program, including:

- Expanding the scope of the program to include upstream suppliers of semiconductor manufacturing equipment and materials used to manufacture semiconductors;

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<sup>[9]</sup> The term “foreign country of concern” is defined as a country that is a “covered nation” for purposes of 10 U.S.C. 4872(d) (i.e., China, Russia, Iran, and North Korea,” as well as “any country that the Secretary, in consultation with the Secretary of Defense, the Secretary of State, and the Director of National Intelligence, determines to be engaged in conduct that is detrimental to the national security or foreign policy of the United States.” 15 U.S.C. § 4651(7).

- Providing express authority for the Secretary of Commerce to provide financial assistance in the form of loans or loan guarantees (which may account for up to \$6 billion of the \$39 billion appropriation);
- Establishing additional eligibility criteria, including requirements that covered entities must have plans in place to identify and mitigate supply chain security risks; and
- Establishing a dedicated sub-program to provide financial assistance for assembly, testing, or packaging of semiconductors at “mature technology nodes,” and setting aside \$2 billion of the total appropriation to implement this sub-program.

#### **Other CHIPS for America Act Programs (\$13.7 billion)**

The bill appropriates \$13.7 billion for other programs authorized by the CHIPS for America Act, including:

- \$11 billion for workforce and research and development programs administered by the Department of Commerce (including the National Semiconductor Technology Center and the National Advanced Packaging Manufacturing Program);
- \$2 billion for a CHIPS for America Defense Fund, which will be used to establish a national network for microelectronics research and development;
- \$500 million for a CHIPS for America International Technology Security and Innovation Fund, which will be used to coordinate with foreign government partners on semiconductor supply chain issues; and
- \$200 million for a CHIPS for America Workforce and Education Fund, which will seek to promote growth of the US semiconductor workforce.

#### **New Investment Tax Credit for Semiconductor Manufacturing**

The CHIPS and Science Act establishes a new tax credit for investments in semiconductor manufacturing facilities in the United States, based on the Facilitating American-Built Semiconductors (FABS) Act introduced by Senators Ron Wyden (D-OR) and Mike Crapo (R-ID).<sup>[10]</sup> The credit is equal to 25 percent of the value of a qualified investment in a facility for which the primary purpose is the manufacturing of semiconductors or semiconductor manufacturing equipment. The credit is available with respect to facilities for which construction begins on or before December 31, 2026. The Congressional Budget Office estimates that this credit will result in tax expenditures of approximately \$24 billion.

Much like the CHIPS funding, the new investment tax credit includes provisions designed to discourage recipients from expanding semiconductor manufacturing capacity in China:

- Taxpayers are ineligible to claim the credit if, during the taxable year, they engage in an “applicable transaction,” defined as a “significant transaction . . . involving the material expansion of semiconductor manufacturing capacity” in China or a foreign country of concern (except for transactions that primarily involve manufacturing capacity for legacy semiconductors).<sup>[11]</sup>

<sup>[10]</sup> This tax credit is codified at new 26 U.S.C. § 48D.

<sup>[11]</sup> 26 U.S.C. § 48D(c).

- If a taxpayer receives the credit and subsequently engages in an “applicable transaction” during the 10-year period after the facility is placed in service, the taxpayer would forfeit the credit in its entirety.<sup>[12]</sup>

### **Research and Development, Competition, and Innovation Act**

Division B of the CHIPS and Science Act, entitled the Research and Development, Competition, and Innovation Act, authorizes nearly \$170 billion in funding over five years for research and development initiatives across multiple federal agencies, including the National Science Foundation, the Department of Commerce, the Department of Energy, and the National Institute of Standards and Technology. This amounts to an \$82.5 billion increase over the baseline of authorized funding, representing “the largest five-year investment in public R&D in the nation’s history,” according to the bill’s proponents.<sup>[13]</sup> The legislation covers a broad array of programs, including initiatives to fund research and development of advanced technologies, promote research security, develop standards in areas such as cybersecurity and advanced communications, and promote energy security.

Among other notable provisions in Division B, and particularly relevant to the bill’s theme of technological competition with China, the bill authorizes a \$20 billion appropriation for a new “Directorate for Technology, Innovation, and Partnerships” within the National Science Foundation.<sup>[14]</sup> The Directorate is authorized to make financial awards to private entities and other institutions (excluding “entities of concern”) for research and technology development within “key technology focus areas.” The bill specifies ten “key technology focus areas” that are eligible for such awards:

- Artificial intelligence, machine learning, autonomy, and related advances;
- High performance computing, semiconductors, and advanced computer hardware and software;
- Quantum information science and technology;
- Robotics, automation, and advanced manufacturing;
- Natural and anthropogenic disaster prevention or mitigation;
- Advanced communications technology and immersive technology;
- Biotechnology, medical technology, genomics, and synthetic biology;
- Data storage, data management, distributed ledger technologies, and cybersecurity, including biometrics;
- Advanced energy and industrial efficiency technologies; and
- Advanced materials science.

Also notable is the inclusion of the Steel Upgrading Partnerships and Emissions Reduction (SUPER) Act, which establishes a program within the Department of Energy that aims to reduce carbon emissions associated with the production of iron, steel, and steel mill products.<sup>[15]</sup> This program will focus on several key technologies for reducing emissions from steelmaking, including heat generation, carbon capture, smart manufacturing, resource efficiency,

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<sup>[12]</sup> 26 U.S.C. § 50(a)(3), as amended.

<sup>[13]</sup> CHIPS and Science Act House Leadership Fact Sheet, available at <https://science.house.gov/the-chips-and-science-act>.

<sup>[14]</sup> Division B, Title III, Subtitle G.

<sup>[15]</sup> Division B, Title VI, Subtitle M.

alternative materials, and high-performance computing. As part of the program, DOE will support an initiative for the demonstration of low-emissions steel manufacturing in collaboration with industry partners.

## Outlook

The CHIPS and Science Act creates significant new funding opportunities and potential tax benefits for companies exploring investments in the semiconductor supply chain and other critical technologies in the United States. At the same time, the law imposes stringent conditions on companies seeking to benefit from these incentives, reflecting the sensitive geopolitical and national security considerations that informed the law's design. Given these sensitivities and the amount of funding involved, Congress is likely to exercise careful oversight regarding the allocation of the new incentives, and recipient companies will face scrutiny regarding their compliance with the law's requirements concerning overseas investments. Over time, the novel "clawback" provisions included in the CHIPS and Science Act could inspire similar legislation targeting other sectors, given the growing congressional interest in outbound investment screening in sectors deemed critical to national security.

The CHIPS and Science Act also represents an important evolution of the United States' longstanding posture regarding industrial subsidies. The United States has long expressed concern about the market-distorting effects of industrial subsidies maintained by other countries, and has sought to address them primarily through trade enforcement and dispute settlement, new FTA disciplines, and proposed reforms to WTO rules (the latter being a focus of trilateral discussions with the EU and Japan in recent years). More recently, the Biden Administration and Members of Congress of both parties have argued that the United States must respond to foreign subsidization of the semiconductor industry by offering commensurate subsidies of its own, as envisioned in the CHIPS and Science Act (which is expressly intended to "erase[] the difference with foreign subsidy regimes[.]"<sup>[16]</sup> Following the passage of the CHIPS and Science Act, US Trade Representative Katherine Tai stated that the United States should "keep replicating this for other industries," especially those that face "stiff competition from economies that are not structured like ours," calling this approach "the key to American competitiveness going forward."<sup>[17]</sup> This shift in the United States' posture may further complicate efforts to advance new trade disciplines regarding industrial subsidies, and there are indications that the United States has already begun to pull back from some of those efforts.<sup>[18]</sup>

Though the CHIPS and Science Act is derived largely from the USICA and the COMPETES Act, it omits the trade provisions proposed in those two bills. Key trade provisions in the USICA would reinstate exclusions from the Section 301 tariffs on China-origin goods, require USTR to accept new exclusion requests, and reauthorize expired trade programs such as the Miscellaneous Tariff Bill and the Generalized System of Preferences.<sup>[19]</sup> Key trade provisions of the COMPETES Act include amendments to US trade remedy law (designed to favor domestic petitioners), reauthorization of trade adjustment assistance for displaced workers, and a prohibition on "*de minimis*" tariff treatment for China-origin goods.<sup>[20]</sup> In conference negotiations for the USICA and the COMPETES Act,

<sup>[16]</sup> CHIPS and Science Act House Leadership Fact Sheet, available at <https://science.house.gov/the-chips-and-science-act>. See also "With Funding Stalled, Chip Makers Warn Congress the U.S. Is Lagging," New York Times, June 17, 2022, <https://www.nytimes.com/2022/06/17/us/politics/semiconductors-congress-chips.html>.

<sup>[17]</sup> "Tai: U.S. must 'keep replicating' CHIPS Act efforts for other industries," Inside US Trade, August 8, 2022, <https://insidetrade.com/daily-news/tai-us-must-%E2%80%98keep-replicating%E2%80%99-chips-act-efforts-other-industries>.

<sup>[18]</sup> In July 2022, Ms. Sabine Weyand, EU Director-General for Trade, indicated that the Biden Administration has sought to shift the focus of the trilateral discussions on industrial subsidies away from the development of new trade disciplines. See "U.S. puts trilateral Chinese subsidies work on a new course," Politico Pro, July 14, 2022, <https://subscriber.politicopro.com/newsletter/2022/07/u-s-puts-trilateral-chinese-subsidies-work-on-a-new-course-00045763>.

<sup>[19]</sup> For an overview of these provisions, please refer to the W&C US Trade Alert dated June 18, 2021.

<sup>[20]</sup> For an overview of these provisions, please refer to the W&C US Trade Alert dated February 4, 2022.

Members of Congress struggled to reconcile the trade titles of the two bills, owing not only to partisan differences over trade policy, but also to fissures within the parties on sensitive issues such as Section 301 tariff relief. Following these and other disagreements, the conference negotiations were put on hold in July, and Members agreed to proceed separately with the elements of the two bills that had broad consensus (i.e., those reflected in the CHIPS and Science Act).

Democratic leaders have expressed hope that conference negotiations on the remaining elements of USICA and the COMPETES Act will resume after Congress returns from its August recess, providing another opportunity to reach a compromise on trade legislation. For the time being, however, there is no indication that this will occur, and any effort to salvage a conference bill will face significant obstacles. By the time Congress returns from its August recess, just two months will remain before the mid-term elections, and electoral politics will complicate any effort at legislative compromise. Moreover, even after the mid-term elections, it is unclear whether there will be sufficient political will to reach agreement on a conference bill, especially now that the most popular elements of the USICA and COMPETES Act have passed separately through the CHIPS and Science Act. Recognizing these difficulties, some Members have expressed hope that outstanding trade provisions could be attached to other “must-pass” legislation during the lame duck session (e.g., a year-end spending bill), but the prospects for this are highly uncertain.

## Petitions and Investigations

### US Department of Commerce Issues Final Determinations in Countervailing Duty Investigations of Steel Nails from India, Oman, Sri Lanka, Thailand, and Turkey

On August 16, 2022, the US Department of Commerce (DOC) announced its affirmative final determinations in the countervailing duty (CVD) investigations of steel nails from India, Oman, Sri Lanka, and Turkey; and its negative final determination in the CVD investigation of steel nails from Thailand. In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at the following subsidy rates:

Country	Subsidy Rate
India	2.73 to 2.93 percent
Oman	2.49 percent
Sri Lanka	4.12 percent
Thailand	0.05 to 0.10 percent ( <i>de minimis</i> )
Turkey	1.52 to 1.86 percent

The merchandise covered by this investigation is certain steel nails having a nominal shaft or shank length not exceeding 12 inches. Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel or long-rolled flat steel bars. Certain steel nails may be of one piece construction or constructed of two or more pieces. Examples of nails constructed of two or more pieces include, but are not limited to, anchors comprised of an anchor body made of zinc or nylon and a steel pin or a steel nail; crimp drive anchors; split-drive anchors, and strike pin anchors. Also included in the scope are anchors of one piece construction. A full description of the scope can be found in DOC's Federal Register notices.

Certain steel nails subject to this investigation are currently classified under HTSUS subheadings 7317.00.5501, 7317.00.5502, 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5508, 7317.00.5511, 7317.00.5518, 7317.00.5519, 7317.00.5520, 7317.00.5530, 7317.00.5540, 7317.00.5550, 7317.00.5560, 7317.00.5570, 7317.00.5580, 7317.00.5590, 7317.00.6530, 7317.00.6560 and 7317.00.7500. Certain steel nails subject to these investigations also may be classified under HTSUS subheadings 7318.15.5090, 7907.00.6000, 8206.00.0000 or other HTSUS subheadings.

The US International Trade Commission (ITC) is scheduled to issue its final injury determinations in the CVD investigations of certain steel nails from India, Oman, Sri Lanka, and Turkey by September 29, 2022. If the ITC reaches affirmative final determinations of injury, DOC will issue CVD orders. If the ITC reaches negative final determinations of injury, the investigations will be terminated.

According to DOC, imports under the above HTSUS subheadings in 2021 were valued at approximately \$44 million (for India); \$120 million (for Oman); \$34 million (for Sri Lanka); \$67 million (for Thailand); and \$56 million (for Turkey).

### US Department of Commerce Issues Affirmative Preliminary Determination in the Antidumping Duty Investigation of Sodium Nitrite from India

On August 12, 2022, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of sodium nitrite from India. In its investigation, DOC preliminarily determined that imports of the subject merchandise from India were sold in the United States at a dumping margin of 57.24 percent.

The petitioner in this investigation is Chemtrade Chemicals US LLC (Parsippany, NJ). The product covered by this investigation is sodium nitrite in any form, at any purity level. In addition, the sodium nitrite covered by this investigation may or may not contain an anticaking agent. Examples of names commonly used to reference sodium nitrite are nitrous acid, sodium salt, anti-rust, diazotizing salts, erinitrit, and filmerine. Sodium nitrite's chemical composition is  $\text{NaNO}_2$ , and it is generally classified under subheading 2834.10.1000 of the Harmonized Tariff Schedule of the United States (HTSUS). The American Chemical Society Chemical Abstract Service (CAS) has assigned the name "sodium nitrite" to sodium nitrite. The CAS registry number is 7632-00-0.

DOC is scheduled to issue its final determination in this investigation by December 30, 2022. If DOC reaches an affirmative final determination, the US International Trade Commission (ITC) will then be scheduled to issue its final determination of injury by February 13, 2023. If both agencies reach affirmative final determinations, DOC will issue an AD order on imports of this product from India.