

## New York Goes All-In on CHIP Manufacturing

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In this installment of The Endres Assessment, Endres and Tantillo review recently approved New York legislation that allows for eligibility of Green Chips projects in the Excelsior jobs tax credit program. The authors also question its speedy passage in relation to similar federal legislation sponsored by U.S. Sen. Charles E. Schumer, D-N.Y.

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On June 2 New York legislators created one of the biggest tax credit programs in the state's history.<sup>1</sup> But shockingly, the Senate approved the bill 61 to 2 with little notice and even less public debate, which certainly caught our attention. Qualifying businesses under the new legislation could be eligible for billions in tax savings. Clearly, state lawmakers believed this bill necessitated an expeditious vote in the Assembly and Senate. And we were eager to investigate the

<sup>1</sup> See S. 9467.

legislative language to find out what could generate this kind of rare political haste.

The bill, A. 10507/S. 9467, allows for eligibility of Green Chips projects in the Excelsior jobs tax credit program, which encourages businesses to relocate to or expand in New York, and strives to maintain strict accountability standards to guarantee that businesses deliver on job and investment commitments. In other words, it's a tax credit program designed to boost the New York state economy and job market. And given the dramatic global shortage in the semiconductor industry, it's understandable that New York would want to significantly expand its semiconductor and microchip manufacturing. The COVID-19 pandemic exacerbated the shortage, which Intel CEO Pat Gelsinger predicts could last into 2024.<sup>2</sup> Consequently, federal and state lawmakers have been seeking new ways to incentivize mass production of chips in the United States. New York has now joined the fray with its Green Chips legislation.

On its face, the legislation provides incentives for computer chip manufacturers to build new factories in New York by creating a subset of tax incentives through the Excelsior business tax credit program that the manufactures can use.

The bill defines a Green Chips project as one that:

- is within the sector of semiconductor manufacturing and related equipment and material suppliers;
- includes sustainability measures to mitigate the project's greenhouse gas emissions impact over the lifetime of the project;
- pays at least federal prevailing wage rates for its construction;

<sup>2</sup> Kevin Stankiewicz, "Intel CEO Now Expects Chip Shortage to Last Into 2024," CNBC, Apr. 29, 2022.

- commits to worker and community investment;
- creates at least 500 new jobs and makes at least \$3 billion in qualified investments; and
- maintains a Green Chips benefit-cost ratio of at least 15 to 1.<sup>3</sup>

Under the legislation, a Green Chips benefit-cost ratio is defined as one in which the numerator is the sum of: (a) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program; (b) the value of all capital investments to be made by the business enterprise during the period of participation in the program; and (c) all research and development expenditures by the participant in New York during the period of participation in the program. The denominator is the amount of total tax benefits under the program that will be used and refunded (more on these benefits later), as well as any state grants provided to the participant.<sup>4</sup>

Projects meeting those criteria may enter into a 10-year benefit term, dubbed phase 1. Eligible projects that remain in good standing will be able to enter phase two of the Green Chips project, and therefore to initiate a new and separate 10-year project benefit schedule if the participant creates 500 new jobs beyond those created in phase 1, and if the participant makes at least an additional \$3 billion investment.<sup>5</sup> Phases 1 and 2 of a project may overlap, but no credits will be awarded to a Green Chips project beyond 2050. That timeline emphasizes the significant potential tax savings for these projects and represents a long-term investment by New York in the semiconductor industry. Both the length of the investment and the value of the tax incentives will be major incentives for manufacturers looking to establish manufacturing and fabrication facilities in New York.

The Green Chips program offers three primary tax benefits: (1) a credit based on employment, (2) a credit based on capital investment, and (3) a credit based on R&D

activities. A participating project is eligible to claim a credit for each net new job it creates in New York. In a Green Chips project, the amount of the credit per job is equal to the product of the gross wages paid and up to 7.5 percent.<sup>6</sup> However, only the first \$200,000 of gross annual wages per job for Green Chips projects will be eligible for the credit, adjusted for inflation annually.<sup>7</sup> Next, participating projects can claim a credit on qualified investments. The investment credit can be up to 5 percent of the costs — or other basis for federal income tax purposes — of the qualified investment in the Green Chips project.<sup>8</sup> Finally, a project is eligible to claim a credit equal to 8 percent of the federal tax credit for R&D expenditures attributable to activities conducted in New York.<sup>9</sup> And the best part is that these tax credits are refundable. In other words, if the credit amount exceeds the participant's tax liability, then the state of New York will cut a check to the participant for the difference. To put it another way, you don't need a tax liability in order to use these credits, as is the case with nonrefundable credit programs.

Interestingly, the bill exempts the Green Chips projects from the statutory cap on the total amount of tax credits laid out in the Excelsior job program statute. It sets an alternative cap of \$500 million per year on the total amount of tax credits from 2022 to 2041. And 100 percent of credits not awarded for a particular tax year are permitted to be used in another tax year.<sup>10</sup> Therefore, the bill could provide large private businesses up to \$10 billion in state tax credits over 20 years to promote the growth of new green semiconductor manufacturing projects. This allocation of funds makes it one of the largest tax credit programs ever created by the New York State Legislature.

The legislation is timely, considering that U.S. Sen. Charles E. Schumer, D-N.Y., has pressed Congress to dramatically expand semiconductor production across the country.

<sup>3</sup> S. 9467, section 1, subdivision 24 (May 31, 2022).

<sup>4</sup> S. 9467, section 1, subdivision 3-a.

<sup>5</sup> S. 9467, section 1, subdivision 24.

<sup>6</sup> S. 9467, section 3, subdivision 1.

<sup>7</sup> *Id.*

<sup>8</sup> S. 9467, section 3, subdivision 2.

<sup>9</sup> S. 9467, section 3, subdivision 3.

<sup>10</sup> S. 9467, section 4, subdivision 359(4).

Schumer's proposal (S. 1260) would provide \$52 billion for domestic semiconductor production.<sup>11</sup> The U.S. House of Representatives and U.S. Senate are still reconciling their differences on this plan; however, lawmakers in both parties support combating China's growing influence in the global chip sector. The administration of Gov. Kathy Hochul (D) said that New York will have to offer "some form of state support" to chip manufacturers if it wants to land manufacturing projects.<sup>12</sup> An Empire State Development Corp. spokeswoman described the bill as a way to capitalize on the anticipated passage of Schumer's bill, which would put New York "in the best position to stand apart from the other states and countries who are trying to attract the semiconductor industry."<sup>13</sup>

One of the two no votes against the Green Chips bill was by Senate Finance Committee Chair Liz Krueger (D). Estimating that the legislation would cost the state upwards of \$20 billion, Krueger voiced concerns about the speed and lack of transparency related to its passage.

Other lawmakers supported it, including Rep. Carrie Woerner (D), who believes tax credits are needed for what she describes as a "transformative industry." She said that "there's a reason Saratoga County is the only county outside of New York City that grew over the past 10 years. And it is because we have semiconductor manufacturing in the midst of our county."<sup>14</sup> Saratoga County is home to GlobalFoundries, a large semiconductor manufacturer.

Tax benefits to manufacturers notwithstanding, there are questions worth asking regarding the speedy passage of the legislation. As tax professionals, the creation of programs like the Green CHIPS credits are a welcome sight. Indeed, this should provide a significant shot in the arm to the state's somewhat

lackluster Excelsior jobs program. Consider that according to the state's special reports regarding its various tax credit programs,<sup>15</sup> in 2020 participants in the Excelsior program claimed over \$47 million in tax credits. By comparison, participants in the state's Brownfield tax credit program claimed over \$394 million in tax credits for that year. And though the state stopped providing those statistics for its film production credits, those credits have historically also dwarfed the amounts paid in accordance with the Excelsior program. So this is a significant financial allocation to critical industry that seems to have broad support. But the measure's rapid passage and the general lack of notice is surprising. As noted, there is context for this expediency related to Schumer's congressional efforts. However, we understand the skepticism that should accompany any tax bill of this size that passes in only three days.

Political underpinnings aside, the bill represents a monumental amount of potential tax savings for private manufacturers looking to begin Green Chips production in New York. And New York positioned itself well if Congress approves the \$52 billion in funding for semiconductor manufacturing. When weighing options for the location of their facilities, manufacturers will be hard-pressed to ignore the obvious tax benefits of basing their projects in New York. ■

<sup>11</sup> Schumer release announcing Senate passage of U.S. Innovation and Competition Act (June 9, 2021).

<sup>12</sup> Chris Bragg, "With Little Notice, Legislature Passes \$10B Tax Break," *Times Union*, June 5, 2022.

<sup>13</sup> *Id.*

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

<sup>15</sup> See New York State Department of Taxation and Finance, "Special Interest Reports" (updated Feb. 9, 2022).