



October 5, 2016

Hon. Andrew M. Cuomo
Governor
NYS Executive Chamber
State Capitol, 2nd Floor
Albany, New York 12224

Senator John J. Flanagan
President Pro Tempore, NYS Senate
State Capitol, Room 330
Albany, New York 12224

Senator John A. DeFrancisco
Chairman, Senate Finance Committee
State Capitol, Room 416
Albany, New York 12224

Assemblyman Joseph D. Morelle
Majority Leader, NYS Assembly
Legislative Office Building, Room 926
Albany, New York 12248

Senator Liz Krueger
Ranking Minority Member
Senate Finance Committee
Legislative Office Building, Room 617
Albany, New York 12247

Hon. Thomas P. DiNapoli
Comptroller
Office of the New York State Comptroller
110 State Street, 15th Floor
Albany, New York 12236

Assemblyman Carl E. Heastie
Speaker, NYS Assembly
Legislative Office Building, Room 932
Albany, New York 12248

Assemblyman Herman D. Farrell
Chairman, Assembly Ways and Means
Committee
Legislative Office Building, Room 923
Albany, New York 12248

Assemblyman Brian Kolb
Assembly Minority Leader
Legislative Office Building, Room 933
Albany, New York 12248

Assemblyman Bob Oaks
Ranking Minority Member
Assembly Ways and Means Committee
NYS Assembly
Capitol Building, Room 444
Albany, New York 12248

Dear Sir/Madam:

In accordance with the provisions of Section 170 of the Executive Law, we are hereby submitting to your Office a copy of Empire State Development's ("ESD") response regarding recommendations for corrective action set forth in the Office of the New York State Comptroller's audit of ESD's Excelsior Jobs Program.

If you have any questions, please do not hesitate to contact me.

RECEIVED
EXECUTIVE CORRESPONDENCE

OCT 18 2016

OFFICE OF THE STATE COMPTROLLER
Enclosure **THOMAS P. DiNAPOLI**
COMPTROLLER

Very truly yours,

Benson V. Martin

Benson V. Martin
Director of Compliance



October 5, 2016

The Honorable Thomas P. DiNapoli
Office of the New York State Comptroller
110 State Street
Albany, New York 12236

RE: 90-Day Response to the New York State Office of Comptroller Audit Report 2015-S-15 Concerning the Performance of the Excelsior Jobs Program

Dear Comptroller DiNapoli:

On July 7, 2016, the Office of the State Comptroller ("OSC") released a final audit report regarding Empire State Development's ("ESD") Excelsior Jobs Program ("Program").¹ OSC stated that the purpose of the audit was to determine whether firms met the eligibility requirements for job growth and investments in their formal agreements prior to being issued a Certificate of Tax Credit by ESD's Program, for the period July 1, 2010, through September 30, 2015.

In its final audit report, OSC recommended that ESD: 1) obtain sufficient corroborating documentation to support that all Program participants met the eligibility requirements for job growth and investments in their formal agreement before receiving tax credits; 2) ensure that all tax credit calculations are correct before issuing a Certificate of Tax Credit; 3) determine and apply reasonable standards for the types of changing circumstances that warrant a shift of financial risk to be borne by the taxpayers rather than by participants and ensure such justifications are documented; 4) ensure project files contain all required documentation to support that companies met eligibility requirements before being accepted into the Program; 5) establish and use specific, objective, and quantifiable criteria for ranking Program CFA applications; and 6) increase Program transparency by including complete and accurate information in Quarterly Reports.

In accordance with Executive Law § 170, within ninety days of the release of the final audit report, by this letter, ESD is advising of our progress to date with respect to OSC's six recommendations.

¹ It must be noted that ESD objects to OSC inserting its rebuttal throughout the body of ESD's Response in the final audit report. We believe that this modification of ESD's Response is inconsistent with Executive Law § 170, which requires that OSC's final audit report contains a "complete copy" of our Response.

I. Background

The New York State Legislature enacted the Excelsior Jobs Program Act (Economic Development Law sections 350-359) on July 1, 2010, to support the growth of New York State's traditional economic pillars, such as the manufacturing and financial industries, and ensure that the State emerges as a leader in the knowledge, technology and innovation-based economy. Pursuant to this statute, ESD's Program creates financial incentives in the form of various tax credits for businesses to create jobs and invest in the new economy, specifically in growth industries such as clean tech, information systems, renewable energy and biotechnology.

The Program has separate and distinct statutory provisions and regulations regarding eligibility for admittance, performance monitoring and participation. The Program fully comports with these laws and regulations for each area.

II. Internal Controls

Pursuant to OSC's *Standards for Internal Control in New York State Government* dated March 2016, an internal control is defined as:

...a process, effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance.

OSC recognizes that an "internal control is focused on the mission of the organization, and this mission must be kept in mind when evaluating the appropriateness of specific internal control practices." *See Standards for Internal Control in New York State Government*, Office of the New York State Comptroller (March 2016) p. 1.

For this Program, ESD's mission is to foster an environment that helps companies grow and succeed in New York State. ESD closely evaluates whether companies have made significant investment and created jobs in New York State, and whether they are eligible for a tax credit commensurate with their performance. Specifically, ESD examines whether a company should be admitted into the Program; and if so, audits the underlying documentation prior to issuing any credits; and, where appropriate, addresses requests to modify the projected job numbers for a given year as specifically provided for in the law.

Throughout the entire process, statutorily required controls are firmly in place. In addition, ESD also consistently evaluates its own internal controls, and where appropriate, uses OSC's suggested additional controls as a guide.

III. OSC's Recommendations from the Final Audit Report

OSC's recommendations are delineated below:

Recommendation #1:

Obtain sufficient corroborating documentation to support that all Program participants met the eligibility requirements for job growth and investments in their formal agreement before receiving tax credits.

ESD fully comports with all relevant laws, regulations, and procedures and conducts thorough due diligence before providing tax credits to participants. All participants that received tax credits from ESD met the eligibility requirements of the Program.

Program participants already submit extensive documentation before receiving tax credits. Specifically, participants must submit a performance report detailing their employment and investment information, including when individuals were hired and the hours worked. ESD then cross-checks the reported employment information with a participant's *Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return* filed with the NYS Department of Taxation and Finance. Program participants that knowingly file false NYS-45s are subject to civil and criminal penalties under New York State tax law. These penalties help ensure the accuracy of the wage information that participants provide.

For current Program participants, ESD is increasing its documentation requirements to mandate additional information from related entities to ensure that employees are not being transferred among related entities to meet the net new job goals. Specifically, all current Program participants will be required to provide the name of each related business entity, its federal employment identification number, and the number of employees for each quarter for each reporting year to ESD, starting with the 2016 Performance Report. ESD will use this information to flag potential problems, and where warranted, request additional information from participants.

Recommendation #2:

Ensure that all tax credit calculations are correct before issuing a Certificate of Tax Credit.

ESD already undertakes a series of steps to ensure that tax credit calculations are correct. Participants must provide information that details the number of jobs created and the associated wages. ESD's Program staff then determines the number of net new jobs reported along with the wages associated with those jobs to calculate the jobs tax credit. When doing so, staff checks for discrepancies in the job numbers that companies report by comparing their NYS-45s and ESD performance reports. If a discrepancy is identified, staff must follow up with questions and requests for additional documentation.

OSC's final audit report suggests that a certain Program participant "may" have received an additional \$176,173 in improper credits. However, OSC did not specify the basis for this allegation or provide any supporting documentation. Since ESD cannot determine how OSC reached this conclusion based on our review of this participant's documentation, ESD would like to discuss this matter with OSC to better understand its concerns.

Recommendation #3:

Determine and apply reasonable standards for the types of changing circumstances that warrant a shift of financial risk to be borne by the taxpayers rather than by the participants.

Under Economic Development Law § 352(12), ESD is authorized to amend businesses' job creation requirements. ESD uses this discretion appropriately to help companies succeed and increase private investment and job growth in the State while ensuring compliance with all relevant laws, regulations, and procedures

It is important to note that ESD only authorizes revisions to the interim job goals – that is, ESD has permitted modifications to the pace of job creation. However, ESD has not allowed revisions to the ultimate job commitment projected for the fifth year in a business' schedule of job creation. In its audit, OSC placed significant emphasis on one participant whose tax schedule was amended but two years later, went out of business. At that time, ESD used its statutorily given discretion and amended the company's job requirements after considering that this company had already invested \$208 million dollars in a manufacturing operation in Upstate New York and created 127 jobs, just 12 below its initial threshold for receiving tax credit. Of note, the company subsequently added 32 more jobs the following year.

ESD has already instituted measures that improve the way businesses notify ESD that they will not achieve their jobs and investment commitments prior to the completion of the tax year. ESD requires that businesses admitted to the Program submit requests to revise their performance milestone for a particular year prior to the end of the tax year for that year's goal. ESD will continue to evaluate its reporting requirements to ensure that data is reported in an accurate and timely manner.

Recommendation #4:

Ensure project files contain all required documentation to support that companies met eligibility requirements before being accepted into the Program.

As previously stated in ESD's Response, the only statutorily required documentation is the Program application, which is maintained in every admitted company's project file. The eligibility requirements are based

on projected jobs, investments, and R&D projections. For example, if a company proposes a manufacturing project that will create at least 10 net new jobs, then, by law, it can be deemed eligible for the Program.

As we noted in our Response, Section 191.3 of the Regulations provides that evaluation standards “may be utilized by the Commissioner when determining whether to admit an applicant to the program” (Emphasis added). Likewise, Section 191.1 of the Regulations states that an applicant must, “upon request by the Department” provide financial statements, unemployment insurance returns, etc. ESD determines whether it is necessary to request additional information from an applicant. Consequently, the documentation that OSC alleges is required is actually only supplemental documentation that ESD may request of any applicant as ESD deems necessary.

Nonetheless, ESD conducts a thorough review of the applications to ensure that the proposed activity comports with the definition of a strategic industry. Staff conducts this review by examining the types of jobs and investments companies are proposing for the project locations. ESD will also consult with the companies to better understand the projects before making a final eligibility determination. If a company is deemed eligible, ESD may admit an applicant to the Program [See EDL, § 354(3)].

However, it is important to note that admittance into the Program does not guarantee that a company will receive tax benefits. Rather, credits are awarded based on actual performance. Hence, a company must meet its stated goals in accordance with statutory and regulatory requirements to receive any credits.

To strengthen our controls over this process, ESD is creating an eligibility checklist and formal sign-off on eligibility determination by the Program Director. Also, ESD is now requiring all Program participants to provide the name of each related business entity, its federal employment identification number, and the number of employees for each quarter for each reporting year to ESD, starting with the 2016 Performance Report. ESD will use this information as an additional control to make sure participants in the Program meet eligibility requirements.

Recommendation #5:

Establish and use specific, objective and quantifiable criteria for ranking Program CFA applications.

All Excelsior projects awarded through the Regional Economic Development Council (“REDC”) funding cycles are reviewed and scored in accordance with selection criteria in the REDC Available Resources Guide, the evaluation criteria in the Excelsior Program regulations, and the EDL. All scores are publicly available.

While Excelsior projects awarded outside of the REDC funding cycles are also evaluated based on the evaluation criteria in the regulations, projects are not in competition with one another and, therefore, there is no need for projects to be ranked. Funding decisions are based on merit and available resources.

Recommendation #6:

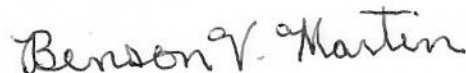
Increase Program transparency by including complete and accurate information in Quarterly Reports.

The Legislature considered the need for Program transparency by enacting EDL § 358. This statute and regulation 5 NYCRR Part 194.2 require ESD to post quarterly reports which include names of Program participants, benefits received per participant, total number of net new jobs created per participant, and new investment per participant. ESD fully comports with this transparency statute and regulation.

IV. Conclusion

As mandated by statute and regulation, ESD runs a fiscally responsible program that helps companies succeed and increases private investment and job growth in the State. Since January 2011, the Program has steadily grown to over 1,338 applications received and 434 businesses admitted to receive \$700 million in tax credits. The 434 businesses project the creation of 44,000 jobs, capital investments of \$4.2 billion, and R&D expenditures of \$2.5 billion. To date, 95 companies have received about \$50 million in tax credits. These 95 companies have retained 41,770 jobs, created 9,930 jobs and invested \$1.3 billion in New York State. By all accounts, the Program has been a success.

Yours truly,

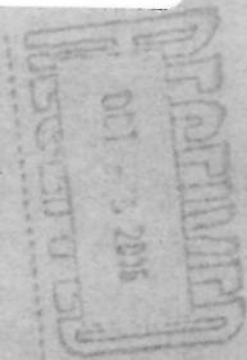
A handwritten signature in cursive script that reads "Benson V. Martin".

Benson V. Martin

Director of Compliance

Empire State Development

Empire State Development
625 Broadway
Albany, NY 12245



Hon. Thomas P. DiNapoli
Comptroller
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110 State Street, 15th Floor
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