EXCELSIOR PROGRAM PICKS UP WHERE EMPIRE ZONES LEFT OFF

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The New York State Legislature recently passed, and Gov. David Paterson (D) signed into law, the "Excelsior Jobs Program Act."[1] The Excelsior program was created to replace the Empire Zone program, which expired on June 30. However, for those of you who are used to dealing with Empire Zones, you'll likely recognize several provisions in the Excelsior program. The program was designed to encourage the expansion in and relocation to New York of businesses in growth industries, such as cleantech, broadband, information systems, renewable energy, and biotechnology.[2]

The program essentially contains four components:

- the excelsior jobs tax credit;
- the excelsior investment tax credit;
- the excelsior research and development tax credit; and
- the excelsior real property tax credit.

Below is a brief overview of the program.

Criteria for Eligibility

A business can participate in the program so long as it satisfies one of two eligibility requirements.

Specified Industry/Job Creation Requirement

Under the first requirement, a business must operate in New York state predominantly in one of seven enumerated industries:

- as a financial services data center or a financialservices back office operation,
- in manufacturing,
- in software development and new media,

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- in scientific research and development,
- in agriculture,
- in the creation or expansion of back office operations, or
- in a distribution center.[3]

The statute also contains a catchall provision that would allow a business to participate in the program if it operates "in an industry with significant potential for private-sector economic growth." Those industries will be designated by commissioner of economic development in regulations.[4]

Most of the industries cited above are defined terms under the statute. For example, the term "distribution center" means "a large scale facility involving processing, repackaging and/or movement of finished or semi-finished goods to retail locations across a multi-state area."[5] Similarly, the term "back office operations" means "a business function that may include one or more of the following activities: customer service, information technology and data processing, human resources, accounting, and related administrative functions."[6] Obviously that term can apply to just about any industry or business.

Even if a business is in one of those favored industries, it will not qualify for the program unless it also creates a specific number of "net new jobs" in the state.[7] It is important to note that the program does not allow jobs to be shifted from related entities to inflate employment figures, a defect that plagued the Empire Zone program. The new jobs must be new to the state, must be essentially full-time, wage-paying jobs, and must be filled for more than six months.[8] The job creation threshold varies depending on the participant's industry. For example:

- manufacturing — 25 net new jobs required;
- agriculture — 10 net new jobs;
- financial services data center or financial services back office operation — 100 net new jobs;
- scientific research and development — 10 net new jobs;
- software development — 10 net new jobs;
- back office operations — 150 net new jobs; and
- distribution center — 150 net new jobs.[9]

The Cost Benefit Requirement

The second test for eligibility involves a cost benefit analysis. A potential participant that is operating predominantly in one of the seven industries listed above but does not satisfy the job creation requirement must have at least 50 full-time job equivalents and must demonstrate that its benefitcost ratio is 10 to 1.[10] The term "benefit-cost ratio" refers to the following calculation:

Remuneration projected to be paid for all
new jobs during the period of participation
+
The value of capital investments to

be made by the business during the
period of participation
=
Total tax benefits received under the program

It is important to note that of the total amount of benefits granted by the program, only 25 percent of that total is permitted to go to entities accepted into the program under the cost benefit test.[11] The other 75 percent is reserved for businesses that satisfy the job creation test detailed above.

Regionally Significant Projects

Regionally significant projects are also eligible to participate in the program.[12] To qualify as a regionally significant project, a business must satisfy enhanced job creation requirements and make a "significant capital investment" in the state. For example, the new law generally doubles the job creation requirement on six of the seven designated industries listed above (software development is conspicuously absent).[13] The business would then be required to make a significant capital investment in the state. The commissioner is required to promulgate regulations to determine what qualifies as a significant capital investment. After imposing the higher job creation requirements and the investment requirement on the industries detailed above, the statute provides a safe-harbor for new labor-intensive businesses: "other businesses creating three hundred or more net new jobs in the state and making significant capital investment in the state may be considered eligible as a regionally significant project."[14] Thus, some businesses that do not fit within the targeted industries still may participate in the program if their job creation in the state is large enough.

Exclusions

The law prohibits some businesses from participating in the program. For example, the following businesses cannot receive program benefits:

- not-for-profits;
- business entities whose primary function is the provision of services including personal services, business services or the provision of utilities;
- a business entity engaged predominantly in the retail or entertainment industry; and
- a company engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity.[15]

Application and Approval Process

A potential participant must submit a completed application as prescribed by the commissioner. As part of that application process, a potential participant must:

- allow the Department of Labor and the Departmentof Taxation and Finance to share its tax and employer information with the Department of Economic Development (DED);

- allow the DED to access the participant's books and records to monitor compliance;
- agree to be permanently decertified from the Empire Zone program;
- provide clear and detailed presentation of all related persons so that the DED can ensure that jobs are not being shifted within the state;
- certify, under penalty of perjury, that it is in substantial compliance with all environmental, worker protection, and local, state, and federal tax laws; and
- provide the following information on request:

- a plan outlining the schedule for meeting the job and investment requirements (such plan must include details on job titles and expected salaries);
- the prior three years of federal and state income or franchise tax returns, unemployment insurance quarterly returns, real property tax bills, and udited financial
- statements;
- the amount and description of projected qualified investments for which it plans to claim the excelsior investment tax credit;
- an estimate of the portion of any federal research and development tax credits, attributable to R&D activities conducted in New York state, that it anticipates claiming for the years it expects to claim the excelsior research and development credit; and
- the employer identification or Social Security numbers for all related persons to the applicant, including related limited liability companies and partnerships, and their members.[16]

After reviewing the application and determining that the applicant will satisfy the program's eligibility requirements, the DED will admit the applicant to the program and provide it with a certificate of eligibility and a preliminary schedule of benefits by year based on the applicant's projections as set forth in its application. *That preliminary schedule of benefits delineates the maximum possible benefits an applicant may receive*, although the commissioner has the authority to amend the schedule.[17]

To receive benefits from the program, an applicant must also submit evidence demonstrating that it has achieved its job creation and investment requirements. After reviewing that evidence and finding it sufficient, the DED will certify the applicant as a participant and issue a certificate of tax credit for the first tax year. To receive a certificate of tax credit for later years, the participant must submit a performance report to the department. It is important to note that a participant's increase in employment or qualified investment above its projections listed in its application shall not result in an increase in tax benefits. However, if the participant's expenditures and employment are below the projected amounts, the credits can be reduced or the business decertified.[18] Thus, applicants must be careful when making their projections.

A participant in the program can claim tax benefits in the first tax year it receives a certificate of tax credit or for the first year listed in its preliminary schedule of benefits, whichever is later. A participant may then claim those benefits for the next four consecutive years provided that it demonstrates to the DED that it continues to satisfy the eligibility criteria.[19]

The Tax Benefits

The program contains four components designed to alleviate the participant's tax burden. Below is a brief review of each component.

The Excelsior Jobs Tax Credit

This credit is based on the salary paid for each net new job created in the state. The amount of the credit is equal to the sum of a portion of the salaries paid to net new employees as follows: **Percentage Employee Salary** 5% $0-$50,000 4% $50,000.01-$75,000 1.33% $75,000.01 and higher

The amount of the credit is capped for each net new job at $5,000.[20]

The Excelsior Investment Tax Credit

This credit is equal to 2 percent of the cost or other basis for federal income tax purposes of a qualified investment. The term "qualified investment" means that the business has made an investment in and owns tangible property (including a building or structural component of a building) that:

- is depreciable;
- has a useful life of four years or more;
- is acquired by purchase;
- is located in New York state; and
- is placed in service on or after the date the certificate of eligibility is issued to the business enterprise.

This credit cannot be combined with other available investment tax credits (see Tax Law sections 210(12), 606(a), 1456 (i)) or the Brownfield credit. Expenses incurred before the date the certificate of eligibility is issued to the participant cannot be included in the calculation of the credit.[21]

The Excelsior Research and Development Tax Credit

This credit is based on a participant's federal research and development tax credit. The component is equal to 10 percent of the portion of the participant's federal credit that relates to the participant's expenditures in New York state during the taxable year.[22]

The Excelsior Real Property Tax Credit

This credit is based on a participant's real property taxes. To claim this credit, a participant must either be designated a regionally significant project or be located in an "investment zone."An investment zone is simply a zone that has been designated as an mpire Zone under sections 858(a)(i) or 858(d) of the General Municipal Law.[23]

This component can be claimed for a period of five years, although the amount of the credit diminishes each year. The credit is equal to a percentage of the eligible real property taxes assessed and paid in the year immediately before the participant's application in the program.24 For the eligible years, the percentages are: Year 1 50% Year 1 40% Year 1 30% Year 1 20% Year 1 10%

Miscellaneous Provisions

The credits authorized by this program are refundable, though no interest will be paid on the refunds.[25] The program also requires its participants to "keep all relevant records" for the duration of the program plus three years.[26] A participant must submit a performance report annually within 30 days of the end of its taxable year.[27]

The statute also places caps on the amount of credits the DED may issue in a given year. If the cap is not reached in a given year, the excess may not be used in later years.[28] Below is a schedule of the caps: **Year Cap** 2011 $50 million 2012 $100 million 2013 $150 million 2014 $200 million 2015 $250 million 2016 $200 million 2017 $150 million 2018 $100 million 2019 $50 million

These caps have caused many to criticize the program because the amounts at issue fall far short of the Empire Zone's average annual payouts totaling approximately $550 million.

Conclusion

The new Excelsior program is similar in many respects to the expired Empire Zones program. However, because of statutorily imposed caps on the amount of benefits that can be paid out in a given year and the limited scope of the industries that may benefit from the program, the Excelsior program will likely provide only a fraction of the incentives available under the Empire Zone program. It will be interesting to see if this supposedly improved program will spur a significant amount of economic development in the state.

[1]Chapter 59, Part MM of the Laws of 2010.
[2]N.Y. Econ. Dev. Law section 351.
[3]N.Y. Econ. Dev. Law section 353.1(a)-(g).
[4]N.Y. Econ. Dev. Law section 353.1(h).
[5]N.Y. Econ. Dev. Law section 351.6.
[6]N.Y. Econ. Dev. Law section 351.2.
[7]N.Y. Econ. Dev. Law section 353.2
[8]N.Y. Econ. Dev. Law section 352.10.
[9]N.Y. Econ. Dev. Law section 353.2.
[10]N.Y. Econ. Dev. Law section 353.3.
[11]N.Y. Econ. Dev. Law section 359.
[12]N.Y. Econ. Dev. Law sections 353.2, 352.14.
[13]N.Y. Econ. Dev. Law section 352.14.
[14]*Id.*

[15]N.Y. Econ. Dev. Law section 353.4.
[16]N.Y. Econ. Dev. Law section 354.
[17]N.Y. Econ. Dev. Law section 354.3.
[18]N.Y. Econ. Dev. Law section 354.4.
[19]N.Y. Econ. Dev. Law section 354.5.
[20]N.Y. Econ. Dev. Law section 355.1
[21]N.Y. Econ. Dev. Law section 353.2
[22]N.Y. Econ. Dev. Law section 353.3
[23]N.Y. Econ. Dev. Law section 353.4.
[24]*Id.*
[25]N.Y. Econ. Dev. Law section 355.5.
[26]N.Y. Econ. Dev. Law section 357.
[27]N.Y. Econ. Dev. Law section 358.1. 28N.Y. Econ. Dev. Law section 359.