

Litigation

January 16, 2019

Law Enforcement Ramps Up Enforcement of EDA Incentives

By **Christopher Porrino** and **Paul B. Matey**

The Big Business of Enticing Businesses

Companies that received incentives through the New Jersey Economic Development Authority (EDA) appear to be in the crosshairs of state law enforcement officials, according to statements over the past several days from the Attorney General of New Jersey, the New Jersey State Comptroller and the Governor himself during his State of the State address. Recipients of such benefits would be well served to immediately check their compliance with the requirements of these incentive programs, given that enforcement efforts are ramping up.

For more than half a century, states have used tax incentives to attract new businesses and grow the economy. In New Jersey, incentive programs are administered by the New Jersey EDA, an independent state agency offering financial assistance to relocating and expanding companies. The EDA relies on a full-time professional staff supervised by a board of directors to implement the New Jersey Economic Opportunity Act of 2013, which created a suite of new incentive programs to strengthen New Jersey's competitive edge in the global economy. A recent review of these programs by the New Jersey State Comptroller suggests fresh regulatory scrutiny in 2019 and the need for program participants to carefully monitor their compliance with the statutory requirements accompanying financial incentives.

New Oversight and Increased Scrutiny

On January 9, 2019, the State Comptroller issued the results of a yearlong performance audit of EDA-administrated tax incentive programs. Generally, these programs promise payments to businesses in exchange for meeting specific

conditions and benchmarks. The EDA oversees these programs and enforces the terms of each grant award. Where appropriate, the EDA is empowered to seek repayment of grants for nonperformance. The Comptroller lauded the benefits of these incentive programs, specifically noting their role in bringing new jobs to the state. Nonetheless, the audit identified numerous deficiencies in the EDA's administration and oversight, and offered 21 areas for improvement.

For example, the audit calls for:

- Policies that verify supporting data on grant performance and that analyze recipient performance to determine continued eligibility
- Assessment tools to document the accomplishments of the programs and to measure the economic benefits realized
- Enhanced monitoring and oversight using data provided to other state departments, including the Department of Labor and Workforce Development and the Department of Treasury, Division of Taxation
- Increased obligations for program participants, including data collections for payroll, tax returns, and time records
- Consideration of legal options to recover incentives from recipients in default

A Strong Message From the Top

The audit recommendations took on new urgency on January 15, 2019, when Governor Phil Murphy used his first State of the State address to declare the state's incentive program "a broken system." Concluding that the existing system "spectacularly failed," the Governor called for a new program that "has clear eligibility criteria and oversight." Similarly, New

Jersey State Attorney General Gurbir Grewal labeled the audit “deeply troubling,” raising the possibility that applicants may have provided “material misrepresentations” to the EDA in their applications. He vowed to investigate the matters raised in the audit and to use “the full powers of my office,” including civil actions and criminal prosecutions, to “ensure that the proper parties are held accountable.” Local officials have joined the chorus of disapproval, leading to widespread media coverage and editorializing on the need for reforms.

EDA Program Participants Should Carefully Review Their Obligations and Proactively Assess Risks

The Comptroller’s audit is likely to have a significant impact on enforcement actions. Existing program participants should review the terms of their grant agreements, their

compliance with all obligations, and any deficiencies in their performance. Future applicants must expect heightened expectations and significantly more rigorous monitoring, requiring a clear understanding of the duties and obligations imposed by each grant. Since incentive recipients can assume that New Jersey will vigorously scrutinize all loan files and pursue civil and criminal remedies where warranted, the recipients are advised to proactively check their own compliance with program requirements before receiving a law enforcement inquiry.

Chris Porrino was the 60th Attorney General of New Jersey and a former Chief Counsel to the Governor of New Jersey. Paul Matey was a federal prosecutor and Deputy Chief Counsel to the Governor. Both Chris and Paul currently represent businesses working under EDA programs and are available to assist other EDA program participants.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

CHRISTOPHER PORRINO

Partner & Chair, Litigation

T: 212.419.5880 (NY)

T: 973.597.6314 (NJ)

cporrino@lowenstein.com

PAUL B. MATEY

Partner

T: 973.597.2512

pmatey@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.