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**New York State Office of the State Comptroller**  
Thomas P. DiNapoli

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Division of State Government Accountability

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# Performance of the Excelsior Jobs Program

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## Empire State Development

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Report 2015-S-15

July 2016

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## Executive Summary

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### Purpose

To determine whether firms that were issued a Certificate of Tax Credit met the eligibility requirements for job growth and investments in their formal agreement before receiving tax credits. The audit covers from July 1, 2010 through September 30, 2015.

### Background

The Excelsior Jobs Program (Program), established in Chapter 59 of the Laws of 2010, provides refundable tax credits to firms in targeted industries. To receive the credits, over a 10-year period, the firms must create and maintain specific numbers of new jobs and/or make significant capital investments. Empire State Development (ESD) administers the Program and is responsible for determining whether businesses meet the eligibility requirements in the Program's Regulations before certifying their eligibility to receive annual tax credits. As of March 31, 2015, the State has committed over \$548 million in Program tax credits to 328 businesses. In return, these businesses have committed to invest nearly \$5.8 billion and create 34,472 jobs in New York State.

### Key Findings

- We sampled 25 companies for which, as of June 2015, ESD had authorized Program tax credits on 39 occasions totaling \$4.84 million. Based on our testing, ESD could not support that the sampled companies met the agreed-upon job growth and investment benchmarks for 5 of the 39 instances (13 percent) where ESD authorized Program tax credits totaling \$214,000. Furthermore, ESD could not support that any of the 25 sampled companies met all the eligibility requirements when initially approved for Program participation.
- In four separate instances, ESD adjusted the annual job creation requirements from the original agreement after the fact to align with the companies' actual lower job creation totals. Had these adjustments not occurred, the three companies involved would have received \$358,329 less in tax credits. For two of the four revisions, ESD could not provide evidence from the company justifying the need for the revision – including one company whose 2012 job commitment was reduced from 600 to 363 for no apparent reason. A company involved in one of the other revisions subsequently closed operations after being authorized to receive \$556,446 in tax credits.
- ESD generally authorizes tax credits based on the job numbers and investment costs that are self-reported by businesses without any additional corroborating support (e.g., invoices, receipts, tax documentation). In addition, ESD does not verify that new jobs meet the Program's 35-hour weekly work requirement and that they have not merely been shifted from existing positions at affiliated companies.

### Key Recommendations

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

## **OSC Response to Agency Comments to Draft Report**

In responding to our draft audit report, ESD officials reiterated many of the positions they put forth during the audit's fieldwork, disagreeing with our conclusions and asserting that our findings were based on misunderstandings of how the Program works and the relevant statutory requirements. We note, however, that ESD's internal auditors reported similar findings more than three years ago, at which time officials pledged to take steps to correct the deficiencies found. Also, as detailed in this report, we found ESD's request for changes to certain audit conclusions to be unwarranted. Its response included inaccuracies and in some cases false statements.

Further, although ESD asserts that it supports programs' transparency and accountability, it continued a pattern we observed in recent audits, in which officials were far less than forthcoming in responding to auditors' requests for meetings, project files, and other necessary information. Officials' attempt to introduce new material as part of their response, ostensibly to address to the same issues and findings presented to them in preliminary observations over eight months ago, further demonstrates the pattern of actions to delay and impede our audit work. Finally, consistent with other recent Comptroller audits, ESD's response avoids directly addressing the report's recommendations. Considering the Program's significance and the millions of public dollars devoted to it, ESD should take prompt steps to address our audit recommendations in a meaningful manner.

## **Other Related Audit/Report of Interest**

[Empire State Development: Marketing Service Performance Monitoring \(2014-S-10\)](#)

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**State of New York  
Office of the New York State Comptroller**

**Division of State Government Accountability**

July 7, 2016

Mr. Howard Zemsky  
President and CEO  
Empire State Development  
633 3rd Ave., 37th Floor  
New York, NY 10017

Dear Mr. Zemsky:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Performance of the Excelsior Jobs Program*. This audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 and Article X, Section 5 of the State Constitution as well as Article II, Section 8 of the State Finance Law and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller  
Division of State Government Accountability*

## Table of Contents

Background	5
Audit Findings and Recommendations	7
Program Tax Credits	7
Incorrect Data Used to Calculate Jobs Credit	11
Recommendations	13
Program Application and Admittance	13
Recommendations	17
Audit Scope and Methodology	18
Authority	19
Reporting Requirements	19
Contributors to This Report	20
Agency Comments and State Comptroller's Comments	21

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This report is also available on our website at: [www.osc.state.ny.us](http://www.osc.state.ny.us)

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## Background

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The Excelsior Jobs Program (Program) was established in Chapter 59 of the Laws of 2010 to support the growth of New York State's traditional economic pillars (e.g., manufacturing and financial industries) and ensure that the State emerges as a leader in the knowledge-, technology-, and innovation-based economies. The Program provides refundable tax credits, which are taken over a 10-year period, to businesses in targeted industries in exchange for creating and maintaining specific numbers of new jobs (Job Growth Track) and/or making significant capital investments (Investment Track). The Program replaced the Empire Zone Program (Empire Zone), and was designed to address prior programs' deficiencies related to companies' accountability to the State for their economic development commitments.

Empire State Development (ESD) administers the Program and is responsible for:

- Ensuring businesses comply with Section 354 of the Economic Development Law (Law) and ESD's Program Regulations – 5 NYCRR Part 191 (Regulations) – which govern the application process;
- Ensuring businesses meet eligibility requirements, as established in the Program Regulations, before authorizing their participation; and
- Determining whether companies meet their Program agreement terms – including achieving their job creation and investment targets – before certifying their eligibility to receive annual tax credits.

To apply for the Program, companies must submit a Consolidated Funding Application (CFA) and concisely describe their planned projects (e.g., current state of projects, project timelines, new construction, anticipated issues, expected outcomes and deliverables) as well as new job development (e.g., job type, such as manufacturing or scientific research; wage information; five-year annual job creation targets; recruitment methods). The lengthy application also contains numerous questions geared toward helping ESD gather additional information relevant to eligibility requirements and regional job development. If the application is approved, ESD offers a written Incentive Proposal to the company specifying the maximum annual tax credits available. Once the offer is accepted, the company submits an initial employment report documenting its current employees at the project location and throughout New York State. Then the company and ESD enter into a formal agreement that clearly states the number and the maximum value of tax credits that will be available, as well as the annual job and/or investment requirements that the company must meet to receive those tax credits.

ESD Regulations require companies to submit an annual Performance Report (Report) to account for their annual job creation and investment totals, as well as other supporting documentation such as tax reports and invoice receipts for qualified investments. If ESD determines a business has achieved 100 percent of its commitment, it will issue a Certificate of Tax Credit (Certificate) specifying the annual tax credit amount. According to the statute and Regulations, if a company achieves a job growth threshold of less than 100 percent – but at least 75 percent – of the agreed-upon commitment, ESD will authorize prorated benefits. However, if a company fails to fulfill at

least 75 percent of its job commitment, there is no prorated benefit, and ESD should not issue a Certificate for that year.

ESD calculates job creation tax credits based on the number of “net new jobs” created after the Program certification date. The Law defines “net new jobs” as jobs that (1) are new to the State; (2) have not been transferred from another business, including a related company, located in the State; (3) are either full-time wage-paying jobs or equivalent to a full-time wage-paying job requiring at least 35 hours per week; and (4) are filled for more than six months.

According to ESD reports, 1,152 businesses have applied to participate in the Program since its inception in September 2010 through March 2015. Of these, 328 (29 percent) have actually been admitted to the Program. The State has committed over \$548 million in tax credits to these 328 businesses, including \$70 million in tax credits which are made available each year through ESD’s Regional Economic Development Councils (REDCs). In return, ESD reports that these businesses have committed to invest nearly \$5.8 billion and create 34,472 new jobs in New York State.

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## Audit Findings and Recommendations

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The Program was created to address deficiencies of past State programs (i.e., Empire Zone) in holding businesses accountable for economic development commitments. According to ESD officials, a major goal of the Program is to ensure State taxpayer dollars are spent effectively and efficiently by providing tax benefits only to businesses that are eligible for the Program, and have created the promised jobs and made the promised investments. However, we found ESD's controls over the application and tax credit certification processes are insufficient to ensure that companies participating in the Program are in compliance with the Regulations and have met their contractual job growth and/or investment requirements. Significant improvements are needed in ESD's exercise of due diligence and oversight to ensure the Program functions as intended.

In October 2012, ESD's Internal Audit Unit reported that ESD lacked sufficient policies to administer the Program effectively and had not performed certain oversight functions. Our current audit resulted in similar findings. We sampled 25 of the 57 companies that ESD had authorized to receive tax credits during tax years 2011 through 2013. We found ESD generally authorizes tax credits based on the job numbers and investment costs that businesses self-report without corroborating support (e.g., invoices, receipts, tax documentation). As a result, ESD could not always provide documentation to support tax credits it authorized. In fact, we found ESD did not obtain sufficient support to ensure that any of the 25 businesses met all Program eligibility requirements when initially approved for Program participation.

To better ensure that the Program attains its primary economic development goals, and resources are used most efficiently and effectively, we believe ESD should take prompt corrective measures to strengthen its procedures and monitoring controls so that it can properly fulfill its oversight responsibilities.

### Program Tax Credits

ESD is responsible for monitoring whether businesses meet their agreed-upon job and investment targets, and for taking prompt remedial action when they fail to do so. ESD officials contend that the Program's project files contain all of the required documentation to support that companies met goals of job attainment and qualified investments prior to receiving tax credits. To make this determination, officials stated Program staff consider documents such as the "Preliminary Schedule of Benefits" (an ESD document that indicates the annual tax credit amount a participant may claim in each of its ten years of eligibility), Reports, quarterly tax forms filed with the Department of Taxation and Finance (Tax and Finance), initial employment reports from participants, and invoices of capital investments. In addition, they consider federal tax return information (Form 6765 regarding credit for increasing research activities) and evidence of local property tax paid for the Real Property Tax Credit. According to officials, the project files also contain documentation of how Program workers derived the maximum potential tax credit.

Starting in 2014, ESD also required companies to submit spreadsheets along with the Report listing each employee's hire and termination dates and total wages. In addition, when submitting



the Report, businesses must provide tax reports that list the names of each employee as well as unemployment compensation, gross wages, and withholding taxes for the year. Also, businesses must submit invoices or receipts for all qualified investments to ESD. ESD requires the Report preparer certify that all information is correct and the Report must be notarized.

### *Documentation Supporting Job Growth and Investment*

We sampled 25 companies that, as of June 2015, ESD authorized on 39 occasions to receive tax credits totaling \$4.84 million. To verify the sampled companies' eligibility for the tax credits, we requested ESD to provide project files for the sampled companies. However, throughout the course of our fieldwork, ESD officials were substantially less than forthcoming in responding to our requests for project files and for other information related to the sampled companies and the Program in general.

To illustrate, on April 29, 2015, we requested the project files for the 25 sampled companies mentioned above. On May 11, 2015, we sent a follow-up request to ESD. On May 15, 2015, ESD provided a project file for each of the 25 companies, all of which were missing many of the critical documents noted above, including tax forms and investment invoices. On May 21, 2015, we provided ESD with a list of the documents that were missing from each of the 25 project files provided to us. After follow-up conversations and phone messages – all with limited response from ESD officials – we issued a preliminary audit report to ESD on July 20, 2015 citing the missing documentation. On August 14, 2015, 3.5 months after our initial request, ESD provided several additional documents related to each project file.

ESD officials assert that they have provided us with all the information they have, yet many of the critical items required under ESD procedures to verify eligibility and performance continue to be absent. Based upon the documentation we received from ESD at the time we issued our first preliminary report, ESD could not (and still cannot) support that the sampled companies met the agreed-upon job growth and investment benchmarks for 5 of the 39 instances (13 percent) where ESD authorized Program tax credits totaling \$214,000. Furthermore, ESD cannot demonstrate that any of the 25 sampled companies met all of the eligibility requirements when initially approved for Program participation.

For 34 of the 39 issued tax credits totaling \$4.6 million, ESD did, however, provide us with Tax Credit Worksheets (Worksheets), which are internal forms that Program staff use to compile data from each Report and to support their tax credit calculations. Using the Worksheets, we were generally able to tie the tax credit calculations into the self-reported new job and investment data contained in companies' Reports. On 31 of the 34 Worksheets provided, ESD workers made notes indicating they had compared Report data with information contained on corroborating State tax forms. Despite this, ESD provided us with corroborating support for only 8 of the 39 tax credits, accounting for just \$417,000 of the \$4.84 million in tax credits ESD authorized to these 25 companies through June 2015. Likewise, 11 of the 31 Worksheets indicated that ESD staff reviewed invoices to support investments made. However, ESD only provided supporting investment invoices to us in eight cases.

We provided ESD officials with our second, and last, preliminary report on November 12, 2015, which summarized the results from our additional work at some of the sampled companies. Overall, if ESD's assertions that they have not withheld any information are correct, then the results of our tests demonstrate that ESD has not exercised the due diligence necessary to ensure either Program eligibility or performance. We found little evidence to show ESD retained, or in many cases even obtained, sufficient documentation to support companies' self-reported job growth and investment data before authorizing annual tax credits. Without such documentation to substantiate self-reported data, ESD lacks adequate assurance that it is properly issuing tax credits only to companies that have actually met eligibility requirements and are entitled to them.

In response to our findings, ESD officials claimed that "despite numerous hours of interviews with ESD staff in which we provided detailed explanations of the Program, its relevant laws, and its process, OSC's auditors still do not fully understand the Program's procedures." Further, ESD officials assert that our findings reflect a lack of understanding of the Program and how it is operated. Also, they indicated our preliminary recommendations demonstrate a misinterpretation of records produced to OSC by ESD and Program participants. As a result, they indicated our findings and recommendations were, in their opinion, fundamentally flawed.

While officials may assert that ESD staff spent hours explaining all aspects of the Program to us, the fact is that we were allowed only very limited access to any ESD Program staff. Throughout the entire audit we were able to arrange just five meetings, which consumed a combined total of only 2.5 hours. During these meetings, ESD staff would only answer specific questions, and only in the presence of an ESD management representative, and would not offer detailed explanations to the auditors. Further, although we made repeated requests for Program eligibility records from the onset of our audit, ESD could not produce the numerous documents we requested, despite ESD officials' assertions that sufficient documentation had been provided. Had these documents been provided to us, we would have used them in developing our findings, as our professional audit standards require.

Furthermore, officials did not respond to many of the critical issues discussed in our preliminary findings. Rather, they chose to address certain specific findings and ignored others. Most importantly, ESD's response avoided addressing our overall conclusions that participants neither met Program eligibility requirements nor attained agreed-upon job growth and investment benchmarks. Even so, to the limited extent that ESD officials responded to our specific findings and provided supporting evidence, we have already acknowledged their responses at length in various sections of this report and, in some cases, have even modified our report accordingly to address any matters of fact that officials pointed out.

ESD has a responsibility to the public to provide access to information and to comply with oversight of its programs as prescribed by law. In addition, ESD must demonstrate accountability for the resources and authority used to carry out their programs. Transparency and accountability are two cornerstones to good government. A lack of commitment to transparency and accountability can result in degradation of the internal control environment, resulting in increased risk that internal controls do not function properly. Insufficient internal controls provide less assurance that Program goals and objectives are being accomplished efficiently and effectively.

### *Post-Agreement Adjustment of Job Growth Commitments*

For 4 of the 34 tax credits for which ESD provided supporting Worksheets, we found that ESD adjusted the original annual job creation commitment numbers after the fact to align with the lower job creation totals that the companies had actually attained. As a result, the three companies involved received a total of \$358,329 in tax credits to which they would otherwise not have been entitled because their job growth did not meet the 75 percent threshold per their original commitment. This circumvents the intent of Program legislation which required that no tax credit be granted unless at least 75 percent of the jobs estimate was achieved. For three of the four adjustments, ESD provided us with the company revision requests – each of which was dated more than three months after the applicable tax year had ended. Two of the requests, which were from the same company, cited construction delays as extenuating circumstances. The third request – which prompted ESD to cut the company’s 2012 job benchmark by 40 percent, from 600 to 363 – contained no justification for the adjustment.

Currently, the Regulations grant ESD the authority to revise participants’ annual job creation commitment requirements. However, the Regulations do not specify circumstances under which revisions are allowable, nor timeframes within which companies must submit revision requests. We recognize that extenuating, unforeseen circumstances may occur, such as construction delays, that could affect annual job creation. Absent valid, documented reasons to reduce the original agreed-upon job targets, however, we question whether ESD should approve job target reductions to better enable companies to receive tax credits. When target reductions are made without such documented justification, ESD lessens businesses’ accountability for their economic development commitments, as the Program otherwise intends. Instead, ESD should determine and apply reasonable standards as to the types of changing circumstances that warrant a shift of financial risk to be borne by the taxpayers (through payments of tax credits despite a Program participant’s failure to meet established goals) rather than by participants.

In responding to our draft report, ESD indicated that there is no law or regulation that prohibits it from retroactively adjusting a company’s annual job goals. Also, in ESD’s opinion, if the total job commitments over the full term of the agreement are not changed, there is no “downside risk” to the taxpayers. However, the tax credit calculation is done annually, and not over the term of the agreement. Further, the legislation clearly intends participating companies to fulfill at least 75 percent of their annual commitments to receive any credit for a given year. Thus, when ESD unilaterally reduces those commitments (especially after the fact) to award credits to firms that would otherwise not qualify for them, ESD circumvents the intent of the law regardless of any lack of statute that expressly prohibits it from doing so.

Further, ESD’s assertion that these actions do not present any risk for the taxpayer is belied by the fourth adjustment that we identified. ESD could not provide a company revision request in this instance; nevertheless, in 2014 it reduced the company’s original job creation commitment for the prior year from 186 to 127 to align with actual job growth. Absent this adjustment, the company would not have met the 75 percent threshold and would have been ineligible for any credit. Instead, by changing the goal, ESD authorized a credit of \$247,082 for 2013, and in 2014, ESD authorized another credit of \$309,364. Nevertheless, by the end of 2015, the company

announced the closing of operations and it left New York State. As a result, the public funded tax credits of more than \$550,000 for a business that no longer employs any New Yorkers. Had ESD held the company to its commitments in 2013, it could have saved taxpayers at least \$247,000 and possibly more for 2014.

Also, although ESD disagrees that its actions to retroactively adjust company commitments is a problem, in September 2015 (in response to our findings), officials began informing companies that they must now notify ESD before the end of the tax year in question if they will be unable to meet their job performance goals.

## **Incorrect Data Used to Calculate Jobs Credit**

In another instance, for one of the sampled companies, ESD calculated job growth tax credits based on different data than what the company submitted on its Report, resulting in \$187,063 in additional tax credits. The company's 2012 Report showed that it created 556 net new jobs with total wages of \$6,667,551. Of these 556 jobs, only 480 were effective as of June 30, 2012, the cut-off date for meeting the six-month employment criterion for that year. In contrast, ESD's Worksheet, which ESD used as the basis for its tax credit calculation, shows the company had 477 net new employees with wages totaling \$10,299,163 – over \$3.6 million more than the total wages the company reported for its 556 new hires for the year.

A comment on the Worksheet stated that the job component was calculated using wage information from Tax and Finance, and lists the number of jobs and wages for each of the four quarters. It appears from the comment that, in calculating the tax credit, ESD improperly included wages of employees hired in the third and fourth quarters of 2012 – and who, therefore, were not employed for at least 6 months during 2012. For that year, ESD authorized a tax credit totaling \$681,790 (including \$643,790 in job tax credits) to the company. If ESD had used the wage amount reported by the company, the jobs tax credit would have been \$187,063 less (or \$456,727).

In responding to our draft report, ESD went to great lengths to explain that its staff had already noted discrepancies in the company's Report and had used figures from State tax forms to determine the correct figures. They now indicated that total wages for 480 jobs with this company were more than \$9.5 million in 2012, and would normally equate to a credit of \$651,084. Since the company's 2012 credit was limited to a maximum of \$643,970 per its ESD agreement, officials maintain they rightly limited the credit to that amount. However, not only is this analysis inconsistent with that detailed on ESD's Worksheet, but it is also inconsistent with Program requirements and the documentation that ESD purported used. Specifically, we noted that:

- The quarterly tax forms ESD provided included only wages paid, and not the employee names needed to reconcile the payments to eligible new employees. That information is only available on the annual wage reporting form, which ESD did not have in its files.
- Wages reported on the quarterly tax forms total almost \$9.9 million, so it is unclear where ESD's current figure of \$9.5 million comes from, unless ESD is merely backing into the figure to make it equal the credit it actually authorized. In any case, the wage figure originally used in its Worksheet calculation was almost \$10.3 million.

- The quarterly tax forms include wages paid to over 600 employees at all of the company's multiple New York locations, of which only one is enrolled in the Program. Because it did not have the annual wage forms, ESD could not even know who these employees were, let alone where they worked.
- Program Regulations require employees to work at least six months during the year for their wages to be included in the credits calculation. As a result, payments to staff hired in the second two quarters (after June 30) are ineligible. Again, ESD had no information to identify which employees may have worked less than the six-month requirement or which wages would be allocable to them.

When these factors are considered, ESD's response actually illustrates not only its failure to perform the necessary due diligence to verify the performance reported by participating companies, but also the failure of pertinent ESD internal controls to question these errors and inconsistencies. In fact, as our calculations demonstrate, had ESD simply relied on the data reported by the company (\$6.6 million paid for 556 jobs), it would have calculated a credit of only \$456,727. Yet, although ESD agrees now that only 480 of these jobs existed for the required six months, it inexplicably increased the reported eligible wages by at least \$3 million and, as such, the company received another \$187,063 in credits (thus reaching the maximum allowed under its agreement).

As part of our fieldwork, we obtained information from several of the 25 sampled companies, including the one in question. If ESD had taken even the most basic additional steps to verify the company's claims, it would have likely found that the company was eligible for fewer credits. Not only must employees work at least six months of the year for their wages to be counted toward the credit, but they also must be new employees (or individuals hired after the project start date, which in this case was January 25, 2012). However, when we examined personnel data at the company, including hiring and termination dates, we determined that as few as 286 employees may have actually met both criteria. According to company tax reports, wages paid to these employees total only about \$4.1 million. As a result, the actual credit this company may have been due could have been as low as \$280,554 – and potentially another \$176,173 less than the amount authorized by ESD.

Together, these calculations show that ESD may have potentially awarded over \$360,000 of excess tax credits to just this one company in a single year, including: \$187,000 because of its failure to properly vet the performance data reported by the company to the supporting documentation that it purports to require of everyone; and potentially another \$176,000 because of its failure to require companies to provide information related to important Program requirements, like hiring dates and length of service. We are as puzzled and troubled by ESD's lack of recognition of these deficiencies as we are by the ever-changing explanations and justifications ESD provided throughout this audit.

### *Hours Worked*

During our testing, we found that ESD does not require companies to provide evidence that new jobs met the 35-hour criterion, nor does it even collect this data in the Reports. Instead, ESD accepts companies' Report certification that the reported employees worked at least 35 hours a week as sufficient validation.

We visited 3 of the 25 sampled companies and reviewed various records, including human resource department reports. At one company, two of the seven new employees we sampled – specifically the Chief Executive Officer and the Chief Financial Officer – did not work 35 hours per week in 2013 and 2014. In response to our preliminary findings, ESD claimed that they counted these two employees as one full-time equivalent (FTE). However, we noted that for 2013 ESD collected no data from participants on hours worked per week to know that these two employees were part-time.

At the second company, about 33 to 40 employees whom the company listed as new hires actually worked part-time in 2012 and 2013, and did not meet the 35-hour per week work criterion. Otherwise, the data shows all other employees with standard work hours of 35 to 40 hours per week. However, we noted that this did not impact the company's tax credit since the number of new hires who did meet the 35-hour work criterion greatly exceeded the company's job commitments in 2012 and 2013. At the remaining two companies, we determined that all employees listed as new hires worked at least 35 hours per week. In response to our findings, ESD officials stated that they have added "hours per week" to annual Report requirements.

### *New Jobs Data Collection*

During our review of companies' Reports, we noted the way in which ESD collects the data – based on the number of new employees hired (for a minimum of six months) versus new positions created – may penalize companies with a high turnover. ESD should consider collecting data by specific position created, and then provide a breakdown of the length of time employees filled the position during the year. Thus, if a company uses different people to fill a new job, with each working less than six months during the year, the company can still receive credit for creating the job if the combined total time worked is at least six months.

## **Recommendations**

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. Ensure such justifications are documented.

## **Program Application and Admittance**

In order to be admitted to the Program, ESD Regulations require that applicants:

- Comply with all worker protection and environmental laws and regulations.

- Do not owe past due State or local taxes.
- Plan to create new jobs and not merely shift jobs to other company locations within the State or from other affiliated companies.
- Are not eligible for Empire Zone credits at the same time the applicant is approved for Program participation.
- Are not business entities whose primary function is the provision of services; not-for-profit business entities; business entities engaged predominantly in the retail or entertainment industry; or business entities engaged in the generation or distribution of electricity or natural gas.

Further, Section 191.3 of the Regulations states that ESD may consider any of the following factors when determining whether to admit an eligible applicant to the Program:

- Whether the applicant proposes to substantially renovate contaminated, abandoned, or underutilized facilities;
- Whether the applicant will use energy-efficient measures;
- The degree of economic distress in the area where the applicant will locate the proposed project;
- The degree of applicant's financial viability, strength of financials, readiness, and likelihood of completion of the project;
- The degree to which the project supports the State's minority- and women-owned business enterprises;
- The degree to which the project supports the principles of Smart Growth, as defined in Section 190.2 of the Regulations;
- The estimated return on investment that the project will provide to the State;
- The overall economic impact that the project will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be created;
- The degree to which other State or local incentive programs are available to the applicant;
- The likelihood that the project would be located outside of the State or would not occur but for the availability of State or local incentives; and
- The recommendation of the relevant REDC or the ESD President and CEO's determination that the proposed project aligns with the regional strategic priorities of the respective region.

To support their financial viability and eligibility, Section 191.1 of the Regulations requires applicants to submit the prior three years of federal and State income or franchise tax returns, unemployment insurance quarterly returns, real property tax bills, audited financial statements, and environmental assessments. Furthermore, applicants must:

- Agree to allow Tax and Finance to share tax information, and the Department of Labor (Labor) to share tax and employer information, with ESD;
- Agree to allow ESD access to any and all books and records it needs to monitor compliance;
- Provide detailed information about all related companies to assure ESD that jobs are not merely being shifted within the State;
- Agree to disqualify themselves from Empire Zone benefits at any locations that qualify for

- Program benefits before Program admittance; and
- Certify, under penalty of perjury, that they comply with environmental, worker protection, and local, State, and federal tax laws.

ESD is expected to conduct due diligence when assessing applications, including reviewing corroborating documentation such as financial statements and tax forms. According to ESD officials, as part of ESD's eligibility determination, Program staff assess the proposed predominant activity of the business at the project location to ensure that the minimum job or investment thresholds are met and that the type of jobs and investment falls within the activities of a strategic industry. In addition, ESD officials indicated staff conduct a cost-benefit analysis and an analysis of the company's financial health. Next, a Project Review Committee (Committee), consisting of senior-level agency staff, considers the merits of each project. Officials also indicated Program staff rely on information gathered from applicants during the application process regarding projected jobs and investments. When necessary, officials indicated Program staff consult with the company to better understand the project before making a final eligibility determination.

### *Lack of Due Diligence*

Based on our testing of project files, we determined ESD did not exercise due diligence when approving any of the 25 sampled companies for participation in the Program. Despite our repeated requests, ESD failed to provide us with documentation supporting its efforts to verify that the 25 companies met all of the eligibility requirements before being officially admitted into the Program. We concluded that ESD does not follow its own protocol for scrutiny of applications and, therefore, cannot be assured that its applicant selection process is effective and supports the intent of the Program. For example:

- While ESD did provide auditors with cost-benefit analyses for all 25 sampled companies, it could not provide any of the financial health analyses that its protocol requires. Nor did it provide Committee meeting minutes where the merits of the sampled companies were discussed. Therefore, we have no assurance that ESD followed its stated project evaluation and review process or that the most worthy applicants were admitted into the Program;
- None of the project files contained signed tax returns or audited financial statements (which would be needed to evaluate the company's financial health) or environmental assessments;
- Only 6 of the 25 files contained the Eligibility Due Diligence documentation and/or correspondence that ESD procedures require Program staff to complete; and
- One project file did not contain an Initial Employment Report to establish a baseline to measure job growth.

In response to our findings – and, notably, despite the in-depth application form and ESD's access to Tax and Finance as well as Labor information – ESD officials indicated there is very little to verify or check during the application process. For example, if a company proposes a manufacturing project with plans to create at least 10 net new jobs, ESD officials indicated it can be deemed eligible without the aforementioned reviews and analysis.



We also found no evidence that ESD took steps to determine whether companies shifted employees from related companies and counted them as new jobs to the State. A Program employee stated that they rely on the attestations from the participants that the jobs are, in fact, new to the State and not being shifted within the State. Despite having access to data maintained by Tax and Finance and Labor, ESD relies predominantly on companies' CFA and Report certifications that jobs were not shifted.

In our review of the sampled companies, we found one business had a sister company with a manufacturing plant adjoined to the parent company's facility but failed to report these relationships. However, according to the company's CEO, ESD was aware of the relationship. Based on our review, at least two of the new employees which the sampled company claimed in 2013 and 2014 were also employed as the Chief Executive Officer and Chief Financial Officer of the sister company. Another sampled company also had a sister company located in close proximity to its main facility, but we could not determine (and ESD did not verify) whether it shifted any of the 25 reported new jobs between the two companies in 2013 because we did not have access to the sister company's records.

In addition, we found that another of the sampled companies was admitted to the Program and received tax credits totaling \$696,915 through June 2015. This company was also an Empire Zone participant. The company's project location is located on one side of a county road, and the remainder of the manufacturing facility (which is part of Empire Zone and not part of the Program) is on the opposite side of the county road. When we visited the company, we learned employees transferred between the two projects from one year to the next. Regulations prevent firms from being in both the Program and Empire Zone at the same location. Consequently, we question whether these two project locations are truly different project locations.

### *Consolidated Funding Application Rankings*

For projects that originate through the REDCs, the Committee undertakes the same evaluation procedures and makes recommendations as to whether to make an award and the award amount. However, the final projects recommended for funding and the award amounts are determined based on the outcome of the REDC competition and the amount of total funding provided to each region. Projects that originate through the REDCs are formally scored as part of the competitive review process. ESD is responsible for 80 percent of the overall score, and the appropriate REDC is responsible for the remaining 20 percent. However, we found that, despite the significant weight its score carries, ESD has not established specific, objective, and quantifiable criteria or procedures for ranking CFAs. Rather, the rating is based on several judgmental factors decided upon at ESD's discretion.

In response to our findings, officials indicated that the scoring criteria is explicitly stated in the Regulations, Part 191.3 (see Program Application and Admittance section). However, Part 191.3 only lists 11 factors that ESD "may consider" when determining whether to admit an eligible applicant to the Program; it does not assign a rating scale to these factors. Based on our testing, it is not clear that ESD assigns weighting to any of these factors, and the rating score is derived inconsistently. In several cases, ESD admitted companies to the Program despite low REDC scores

– including one company the REDC graded as zero which ESD authorized to receive up to \$1 million of tax credits. In other cases, ESD gave CFAs low scores, but the applicants were still allowed into the Program. We found three companies with an ESD score of 5 or below out of 80 that were authorized to receive up to \$1,265,000 in tax credits. Given these occurrences, and coupled with the fact that ESD often cannot support that participants met all eligibility requirements, there is considerable risk that ESD may not select the most worthy applicants into the Program.

### *Quarterly Program Reports*

Part 194.2 of its Regulations requires ESD to post Quarterly Program Reports (Quarterly Reports) on its website. The Regulations require that Quarterly Reports include, but not be limited to, the number of applicants, number of participants approved, names of participants, total amount of benefits certified, benefits received per participant, total number of net new jobs created, number of net new jobs created per participant, aggregate new investment in the State, and new investment per participant.

We found ESD needs to strengthen controls over the completeness of Quarterly Reports, ensuring all participating firms are reflected in those reports. Specifically, upon comparing data from the 2011, 2012, and 2013 REDC Reports with Quarterly Reports, we identified 72 companies shown on the REDC Reports as receiving \$60.6 million in Program awards that do not appear on the Quarterly Reports during the period. In addition, we identified two companies that had received tax credits that were omitted from the March 31, 2015 Quarterly Report even though they were listed on the previous report.

In response to our findings, ESD officials acknowledged they made an error in omitting the two companies and corrected the Quarterly Report to include them. Regarding the other 72 companies, ESD officials indicated that not all companies that are recommended for Program awards during the REDC rounds are actually admitted into the Program. They further indicated that sometimes these companies do not accept ESD's incentive proposal and, therefore, are not admitted to the Program. However, ESD provided no evidence that any of the 72 companies did not accept the incentive proposal. Unless the public Quarterly Reports include an accounting of all Program participants (or explanation of discrepancies), the Program lacks adequate transparency.

## **Recommendations**

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

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## Audit Scope and Methodology

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Our audit determined whether the agency's oversight and monitoring procedures ensure that all firms that were issued a Certificate of Tax Credit met the eligibility requirements for job growth and investments in their formal agreements before receiving tax credits. The audit covers the period from July 1, 2010 through September 30, 2015.

To accomplish our audit objective, and determine whether associated internal controls over the approval of Program tax credits were adequate, we interviewed agency officials, and reviewed agency policies and procedures, laws, and regulations. We also reviewed agency project files for a judgmental sample of 25 firms that were authorized to receive \$4.8 million in tax credits during tax years 2011, 2012, 2013, and 2014 to include multiple levels of job creation targets with various levels of tax credit per job. For the sampled companies, we reviewed Reports and any corroborating support contained in the project files to verify the job creation and qualified investments reported in the Report. We also reviewed the tax credit approval checklists contained in the project files, which ESD uses to calculate the tax credit earned. Additionally, we reviewed Quarterly Reports prepared by ESD, the CFA Resource Manual, and CFA Assessment & Score Cards.

In addition, we visited select project locations, met with company officials, and reviewed various company financial, human resource, and tax records. We used this information to verify the number of jobs created, the reliability of the reported wages, and whether employees worked at least 35 hours per week as required. Additionally, we requested that ESD provide access to the project files and any related documents so we could determine whether ESD performed appropriate due diligence in approving the projects receiving tax credits. As a result of repeated delays on the part of ESD, and evidence that officials were likely withholding Program eligibility documentation from us, we decided to directly contact and visit some of the sampled companies to obtain Program eligibility documents directly from them. In addition, we conducted meetings with company officials to obtain an understanding of their Program reporting practices.

We conducted our audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our audits to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

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## Authority

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Our audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 and Article X, Section 5 of the State Constitution as well as Article II, Section 8 of the State Finance Law and Section 2803 of the Public Authorities Law.

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## Reporting Requirements

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A draft copy of this report was provided to ESD officials for their review and formal comment. A complete copy of their response is attached at the end of this report, along with our embedded rejoinders to certain statements in their comments. Overall, ESD officials reiterated many of the positions that they put forth during the course of our audit. Most notably, officials assert our findings are based on a fundamental misunderstanding of how the Program works and the relevant laws, rules, regulations, practices, and procedures that govern the Program's implementation. In addition, they contend that ESD was fully transparent during the audit process. They also challenge certain details of our findings and suggest that we make changes to our report.

However, ESD's request has little merit since, in many areas, their response is clearly inaccurate and in some cases includes false statements. It also merits note that, in October 2012, ESD's own internal auditors reported findings similar to many of those we identify in this audit. At that time, ESD management agreed with their auditors' findings and indicated they would take steps to correct the deficiencies. Yet, many of these conditions continue to exist and officials now largely disagree with our conclusions.

Throughout the audit, ESD was far less than forthcoming in responding to our requests for meetings, project files, and other necessary Program information. ESD's attempts to withhold information from the auditors during the audit, to limit their access to Program staff, and to avoid addressing the specific audit recommendations all clearly demonstrate an intentional lack of transparency and accountability by ESD's Program administration. Further, ESD's desire to introduce new material as part of its response, ostensibly to address the same findings that we presented to them in preliminary observations over eight months ago, further demonstrates a continued effort to delay and impede the completion of this audit.

Considering the Program's importance to the State and the millions of public dollars that are devoted to it, ESD should take prompt steps to address our audit recommendations in a meaningful manner. We therefore remind officials that Section 170 of the Executive Law requires that, within 90 days of the final release of this report, the President and Chief Executive Officer of ESD must report to the Governor, the State Comptroller, and the leaders of the Legislature and its fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where the recommendations were not implemented, the reasons why. Our expectation is that ESD will comply with this requirement and, in doing so, be more responsive to the core issues at hand.

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## Contributors to This Report

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### Vision

A team of accountability experts respected for providing information that decision makers value.

### Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

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## Agency Comments and State Comptroller's Comments

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March 17, 2016

Mr. John Buyce  
Office of the State Comptroller  
Division of State Government Accountability  
110 State Street, 11<sup>th</sup> Floor  
Albany, New York 12236

RE: Response to OSC's Final Draft Audit Report for ESD's Excelsior Jobs Program

Dear Mr. Buyce:

We have received your February 17, 2016 e-mail and Final Draft Audit Report entitled *Performance of the Excelsior Jobs Program* ("Final Draft Report"). Empire State Development ("ESD") strongly objects to the Office of the New York State Comptroller's ("OSC") findings regarding ESD's Excelsior Jobs Program ("Excelsior" or "the Program"). OSC's findings are based on a fundamental misunderstanding of how the Program works, and the relevant laws, regulations, practices and procedures that govern the Program's implementation. Moreover, ESD strongly rejects any implication that it was not fully transparent during the audit process. ESD complied with OSC's requests for information, and made staff available to answer any questions or provide additional explanation.

**State Comptroller's Comment** – ESD's comments are misleading and inaccurate. Contrary to ESD's claims, we were well aware of the Program's Regulations and considered the requirements and procedures noted by ESD in preparing our draft report's conclusions and recommendations. In fact, to the extent ESD's Program explanation pertained to our findings, we incorporated it verbatim into the report narrative. Further, our report clearly details how our findings tie directly to the same requirements and procedures that ESD cites in its response. ESD's own internal auditors had similar findings in October 2012 when they reviewed the supporting documents that Program participants maintain for tax credits.

Below is a summary of ESD's Final Draft Audit Report Response ("Response"). First, ESD provides a comprehensive overview of the Program's law, policies, and procedures. This is necessary because many of OSC's specific findings are based on incomplete or inaccurate assumptions about the Program's design and implementation. Second, ESD addresses each of OSC's six findings regarding the Program and provides specific point-by-point rebuttals. This is also necessary to ensure that OSC recognizes that ESD has implemented numerous statutory and programmatic safeguards to ensure that state taxpayer dollars are spent appropriately.

In light of the foregoing information, ESD therefore requests that OSC corrects its findings and recommendations before issuing its final report.

**State Comptroller's Comment** – ESD's request for changes in our report is unwarranted. ESD's response is largely inaccurate and contains false statements. Moreover, ESD's attempt to withhold information from the auditors during the audit, to limit their access to Program staff, and to avoid addressing the audit recommendations demonstrates its lack of transparency and accountability in operating the Program. Considering the Program's importance to the State and the millions of public dollars devoted to it, ESD should take prompt steps to address our audit recommendations in a meaningful manner.

#### **I. Background of the Program**

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. The 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 ensures that state taxpayer dollars are spent effectively and efficiently by providing tax benefits only to businesses that have created the promised jobs and made the promised investments. The regulations governing the Program are 5 NYCRR Parts 190-196.

To provide a better understanding of the Program's procedures, ESD will explain our process with the following breakdown: a) program tax credits, b) project origination, c) eligibility, d) applications, e) project evaluation and admission, and f) performance monitoring and participation.

#### **A. Program Tax Credits**

Tax credits for the Program are capped each year according to a statutory schedule. See Economic Development Law § 359. The Program caps represent the maximum dollar amount of credits that can be issued in a particular year to businesses meeting Program requirements. Per statute, 50% of any credits not allocated in a year are carried over for use in future years. The annual Program caps were \$50 million in 2011, and increased by \$50 million each subsequent year to \$250 million in 2015. The annual cap is now \$200 million for 2016 through 2021, and then is reduced to \$150 million in 2022, \$100 million in 2023 and \$50 million in 2024, at which point authorization for Program funding expires. \$70 million in Excelsior tax credits are made available each year to the REDC competition.

## **B. Project Origination**

Projects originate in two ways. The first way is within ESD Regional Offices and ESD's Strategic Business Division. There, ESD staff works directly with companies throughout the State, or outside the State looking to expand into the State, and educates them about available economic incentives. The ESD staff at ESD's Regional Offices and the Strategic Business Division obtains project information and provides it to Program staff to determine eligibility. ESD staff at the Regional Offices and the Strategic Business Division also advocates for the project during the Project Review Committee review (See section on Project Evaluation and Admission).

The second way that projects originate is through the REDC funding process. Generally, REDC accepts applications from spring through the end of July. In addition to being actively involved in the origination of projects, REDCs also prioritize projects viewed as most important to the implementation of their respective regional plans.

## **C. Eligibility**

Eligibility criteria for entry into the Program are explicitly stated in the statute and regulations. See EDL § 353. These criteria are published on the ESD website and in the Regional Council Guidebook. See <http://esd.ny.gov/BusinessPrograms/Data/Excelsior/ExcelsiorJobsProgramOverview.pdf>; [https://www.ny.gov/sites/ny.gov/files/atoms/files/RESOURCES\\_AVAILABLE\\_GUIDE\\_FINAL\\_V3.pdf](https://www.ny.gov/sites/ny.gov/files/atoms/files/RESOURCES_AVAILABLE_GUIDE_FINAL_V3.pdf)

EDL § 353 provides that:

To be a participant in the Excelsior Jobs Program, a business entity shall operate in New York State predominantly:

- (a) as a financial services data center or a financial services back office operation;
- (b) in manufacturing;
- (c) in software development and new media;
- (d) in scientific research and development;
- (e) in agriculture;
- (f) in the creation or expansion of back office operation in the state;
- (g) in a distribution center;
- (h) in an industry with significant potential for private-sector economic growth and development in this State....
- (i) as an entertainment company; or
- (j) in music production.

This statute also provides the minimum job requirements per industry and the factors that the Commissioner should consider when determining whether an applicant is operating predominantly in one of the prescribed industries, i.e., the nature of the business activity at the location for the



proposed project.

ESD staff within Regional Offices and the Strategic Business Division educates potential applicants about these criteria. However, the ultimate decision as to whether a company is eligible rests with the Excelsior Program Director on behalf of the Commissioner. This structure ensures consistency in the application of the criteria.

Further, eligibility is based on company jobs, investments, and research and development ("R&D") projections. Program Managers review applications to ensure that the proposed activity comports with the definition of a strategic industry. They examine the types of jobs and investments companies propose for the project locations. Staff with Program expertise conducts this review. When necessary, they consult with the ESD staff in the Regional Offices and the Strategic Business Division and the company to better understand the project before making a final eligibility determination. If a company is deemed eligible, the Department of Economic Development may admit an applicant to the Program (See EDL, § 354(3)). Again, the ultimate decision as to whether a company is eligible rests with the Excelsior Program Director on behalf of the Commissioner.

Importantly, admission into the Program does not guarantee that a company will receive tax benefits. Rather, ESD awards credits based on actual performance. Hence, a company must meet its stated goals in accordance with statutory and regulatory requirements to receive any credits.

#### **D. Applications**

Economic Development Law § 354 and 5 NYCRR Part 191 govern the Program's application practices. The application must be in a form and manner as prescribed by the Commissioner. Applicants to the Program must complete a Consolidated Funding Application ("CFA"). For projects that originate through the REDCs, the CFA is the primary source of project information. For projects originated directly through ESD, companies complete a project information worksheet ("PIW") which is the primary source of project information used in preparing the incentive proposal. If a company accepts an offer of ESD assistance this way, it still must complete a CFA before it is officially admitted to the Program to ensure that the company agrees to the statutorily prescribed terms referenced in the application. Program applicants have to complete attestations of accuracy and certify under penalty of perjury that all information provided in the CFA and incentive proposals is accurate.

ESD staff uses the information in the CFA or PIW to determine the maximum amount of tax credits a company may be eligible for under the statute. Staff determines the amount using the Excelsior Maximum Potential Calculator – a pre-programmed calculator that uses formulas in the statute to determine the maximum credits available to a company. The company's information may change between the time it is submitted and ESD issues an incentive proposal. An Excelsior Final Calculator is generated based on the recommended offer to the company and may be based on revised job, investment and R&D commitments as indicated in the preliminary schedule of benefits that accompanies the incentive proposal.

**E. Project Evaluation and Admission**

ESD staff reviews the CFA or PIW based on evaluation criteria outlined in the regulations after a project is originated and an eligibility determination is made. (See EJP regulations, Part 191.3). This internal evaluation can include a benefit-cost analysis using a nationally recognized economic input- output model (REMI), an analysis of a company's financial health, and review by a Project Review Committee consisting of senior level agency staff that considers the merits of a project.

**(i) ESD Project Review Process**

The Project Review Committee reviews projects originated directly through ESD staff within Regional Offices and the Strategic Business Division. This committee recommends whether to extend an offer of assistance to the company and in what dollar amount to the Commissioner. If a determination is made by the Commissioner to extend an offer, Program staff sends an incentive proposal to the company that includes a schedule of benefits (tax credits). If the company accepts the offer, ESD officially admits it to the Program once a CFA is completed. The estimated amount of tax credits in the schedule of benefits is based on the company's own projections and represents the maximum amount of credit that ESD can issue if the company performs as promised. Projects originated through ESD are not officially scored because projects are not reviewed against one another via a competitive process. ESD receives and reviews Program applications on a rolling basis.

**(ii) REDC Project Review Process**

For projects that originate through the REDCs, the Project Review Committee undertakes the same evaluation procedures and recommends whether to extend an award and the award amount to the Commissioner. However, the final projects recommended for funding and the award amounts are determined based on the outcome of the REDC competition and the amount of total funding provided to each region.

Projects originated through the REDCs are formally scored as part of the competitive review process. An Excelsior award recommended to an applicant through the REDC process is not the final decision for admittance to the Program. Indeed, some businesses recommended for an Excelsior award through the REDC process ultimately are not admitted into the Program. If a company accepts an REDC award, it must still provide additional information to ESD for the preparation of an incentive proposal and preliminary schedule of benefits. If the company accepts the incentive proposal and completes a CFA, the company is officially admitted to the Program.

**F. Performance Monitoring and Participation**

After admittance to the Program, a company must commence its project and reach its first interim milestone of actual job creation, investments or R&D expenditures in its preliminary schedule

of benefits before applying to ESD for a certificate of tax credit. For projects admitted based on job creation, a company has to meet its minimum statutory job thresholds to qualify for a certificate of tax credit. If a project is admitted as a regionally significant project, a company must meet both the minimum statutory job and investment thresholds. Although R&D commitments are not threshold eligibility requirements, these commitments can impact the amount of credit a company receives. Finally, job retention and investment projects must demonstrate that the minimum job retention thresholds have been maintained and that the wages paid for the net new jobs coupled with any qualified capital investments are at least ten times greater than the tax credits the company is requesting (10:1 benefit-cost ratio) before it can be issued a certificate of tax credit.

A company must submit a performance report to ESD. Program staff evaluates performance and determines whether the company qualifies for the estimated amount of tax credits in its schedule of benefits. If a business meets its performance objectives, Program staff calculates the amount of tax credit using the actual results (jobs or investments) and issues a tax credit in that amount, provided it does not exceed the estimated amount indicated in the schedule of benefits.

Once a company submits its first performance report and ESD issues the company a certificate of tax credit, the company is officially a participant in the Program. Each subsequent year, the company must demonstrate performance prior to being issued a certificate of tax credit.

## **II. Rebuttal of Findings and Recommendations**

In its Final Draft Report, OSC made six findings. All of them are factually incorrect. As set forth below ESD: (a) obtained sufficient corroborating documentation to support that all Program participants met the eligibility requirements for job growth and investments in their formal agreements; (b) ensured that all tax credits calculations were correct before issuing certificates of tax credit; (c) applied reasonable standards for determining whether to adjust companies' annual job creation requirements; (d) ensured that project files contain all required documentation to support that companies met eligibility requirements before being accepted into the Program; (e) established and used specific, objective and quantifiable criteria for ranking Program CFA applications; and (f) has already increased Program transparency by including complete and accurate information in quarterly reports.

ESD addresses all of these findings below:

### **A. ESD Obtains Sufficient Corroborating Documentation Before Providing Tax Credits**

OSC alleged that based on its sample 25 Program participants, ESD failed to obtain sufficient corroborating documentation to support that all Program participants met eligibility requirements for job growth and investments in their formal agreement before receiving tax credits. This finding is incorrect.

ESD fully comports with all relevant laws, regulations, and procedures and conducts due diligence before providing tax credits to participants. Program participants must submit extensive documentation and ESD conducts a thorough review before providing 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 cross-checks the employment information a company reports 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.

OSC's recommendation appears to result from a misunderstanding of ESD procedures. This misunderstanding is evidenced by OSC's allegation that ESD only provided *"supporting investment invoices to us in eight cases."* In fact, ESD provided OSC with the NYS-45 and NYS-45 ATT returns for all 25 participants in OSC's sample along with supporting investment invoices for the eight participants that were claiming the investment tax credit.

**State Comptroller's Comment** – ESD's assertion that it obtains sufficient corroborating documentation is not supported by our findings. As noted in the body of the report, ESD produced corroborating tax forms for only 8 of the 39 tax credits that it authorized for the 25 sampled companies, which accounted for only \$417,000 of the \$4.84 million awarded. ESD's inability to provide supporting documents leads us to question the extent to which ESD actually verified companies' self-reported job growth information to corroborating tax forms.

ESD only required participants that were claiming investment credits to provide ESD with investment invoices. Program staff did not obtain investment invoices from the other 17 participants because those companies did not claim the investment credit; therefore, there was no need to review invoices. If ESD offered a participant an investment tax credit component and the company claimed it, ESD would follow a procedure for obtaining invoices. Specifically, if there are 100 qualified investments or less listed in the performance report, all invoices must be submitted and are compared with the items listed in the performance report. ESD staff corrects the performance report for any discrepancies. For projects listing more than 100 qualified investments, ESD uses a sampling procedure for obtaining invoices to compare with qualified investments listed in the performance report. When ESD finds a discrepancy, staff adjusts the performance report accordingly. In short, OSC's finding that ESD lacked due diligence by not obtaining investment invoices from participants that did not claim the investment tax credit is incorrect and should be amended.

**State Comptroller's Comment** – Our report refers only to companies that actually claimed the investment portion of the Program tax credits. As detailed in the report, ESD provided

invoices for only 8 of the 11 cases where Program participants received investment tax credits and staff indicated they had reviewed supporting investment invoices.

OSC also alleged that some of the jobs ESD reports as net new jobs are, in fact, just jobs shifted from related entities in the State. OSC made this determination because it incorrectly found that one business shifted two jobs from a related entity and therefore failed to create those two new jobs pursuant to EDL § 352(10). This statute provides:

"Net new jobs" means jobs created in this state that:

- (i) are new to the state;
- (ii) have not been transferred from employment with another business located in this state including from a related person in this state;
- (iii) are either full-time wage-paying jobs or equivalent to a full-time wage-paying job requiring at least thirty-five hours per week; and
- (iv) are filled for more than six months.

OSC alleged that for one of the sampled companies, ESD improperly combined the work hours of the chief executive officer and chief financial officer as one full-time equivalent. In fact, ESD properly combined those hours as one full-time equivalent. ESD staff cross-checked the net new job information the company reported with its NYS-45s before providing any tax credits. After OSC issued a similar finding in its second preliminary audit report, ESD contacted the company and reconfirmed that the hours worked by those two employees were at least 35 hours per week. In short, ESD provided the correct amount of tax credit to the company.

**State Comptroller's Comment** – ESD was aware that the company had an existing affiliate. Since the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) already held similar positions with the sister company, these two employees would not be considered "new jobs" under the Program Regulations, regardless of the number of hours they worked.

Moreover, OSC alleged that the way in which ESD collects the data – based on the number of new employees hired (for more than six months) versus new positions created – may penalize companies with high turnover when, in fact, it would not. Attachment A requires the company to list job titles. ESD combines employees within the same position with turn-overs, as long as the documentation shows the position is filled for more than six months.

Finally, ESD is further enhancing its review process regarding related persons and the transfer of employees. Performance reports will now require businesses to report job numbers for all related entities and ESD will be able to cross-check this information with Forms NYS-45 for each of the related companies. Also, since 2015, all Program participants have been required to report hours per week

worked toward net new jobs.

**State Comptroller's Comment** – Because ESD has changed the reporting formats on Performance Reports since the Program started, confusion among companies exists regarding how to report new job growth. During our site visits, company officials informed us they were not sure whether to report employees hired or positions created for new job growth. Therefore, we suggest that ESD provide clearer direction and training to companies for reporting new job growth.

**B. ESD Ensures That All Tax Credit Calculations Are Correct**

OSC incorrectly alleged that ESD failed to ensure that all tax credit calculations are correct before issuing certificates of tax credit. ESD undertakes a series of steps to ensure that tax credit calculations are correct. Program staff carefully determines the number of net new jobs along with the wages associated with those jobs to calculate the jobs tax credit. Participants provide sufficient information to ESD to determine an accurate job count. Staff checks for discrepancies in the job numbers that companies report on NYS-45-ATTs and ESD performance reports. When Program staff identifies discrepancies, staff follows up with questions and requests for additional documentation. Companies' reporting and ESD review of reported information fully comport with all relevant laws, regulations, and procedures.

OSC found that for one of its sampled companies, ESD calculated job growth tax credits based on different data than the company submitted on its performance report, resulting in \$187,063 in additional tax credits, when, in fact, ESD provided the correct amount of tax credits. This company completed the net new jobs section of its 2012 Performance Report incorrectly. ESD staff discovered this company's mistake by using the company's related NYS-45 documentation to verify net new jobs and wage information to ensure the job component of the tax credit was justified. Using actual wage information from the NYS-45s, the wages for 480 jobs for this company in 2012 totaled \$9,504,833, resulting in a calculated credit of \$651,084. The company's maximum job component credit for 2012 for this company was \$643,970, the amount of the job credit issued. As a result of ESD staff's due diligence, ESD was able to identify the company's mistake and ensure that the proper amount of tax credits was issued.

OSC further noted that in calculating the company's tax credit, ESD improperly included wages of employees hired in the third and fourth quarters of 2012, and that those employees should not have been used for calculating tax credits. Even if true, this error would be immaterial because the calculated credit exceeded the maximum job component. As a result, ESD issued the same amount of job credit component credit that it would have issued even without the alleged error.

**State Comptroller's Comment** – ESD's comments concerning the \$187,063 tax credit miscalculation are incorrect. In fact, as discussed in the body of our report, not only is this analysis inconsistent with ESD's Worksheet, but it is not in line with Program requirements or the documentation that ESD purports to have used. Further, our review of personnel data at

the company found as few as 286 employees may have been eligible for consideration toward the credit in the first year. As a result, the actual credit the company may have been due could be as low as \$280,554 (and potentially represents another \$176,173 of improper credits).

**C. ESD Applies Reasonable Standards For Determining Whether to Adjust Companies Annual Job Creation Requirements**

OSC incorrectly alleged that ESD does not apply reasonable standards for determining whether to adjust companies' annual job creation requirements. OSC's recommendation suggests that a financial risk is borne by taxpayers when interim annual job creation requirements are adjusted when, in fact, there is not. ESD is allowed to amend businesses' job creation requirements pursuant to EDL § 352(12). No statute or regulation requires companies to request modifications prior to the end of the tax year.

OSC notes that in four separate instances, ESD adjusted annual job creation requirements from the original agreements and, had these adjustments not occurred, these companies would have received \$358,329 less in tax credits. This finding, however, is incorrect and mischaracterizes Program procedures. ESD has only authorized amendments to these interim milestones, not the ultimate job target. For example, if Company A has agreed to provide 100 new jobs over a five-year period (20 jobs per year) and Company A's interim goals are amended, Company A would still be responsible for providing 100 new jobs by the end of the 5<sup>th</sup> year. The revised schedule might be amended so Company A is required to provide 10 new jobs per year for Years 1-4 but 60 new jobs in year 5 for a total of 100 new jobs. The original five-year job creation commitment has not been changed for any applicant reviewed as part of the audit. Therefore, amending companies' goals for interim milestones does not increase tax payer financial risk.

Further, a participant must always demonstrate that it has met its interim goal before ESD issues any tax credits and the participant can never receive more in tax credits in any year than allowed in the agreement for that year. If the company creates more jobs than the performance schedule indicates, the result is good for taxpayers; the amount of tax benefits provided remains the same while more jobs are created. A Long Island Excelsior participant had a job commitment of 60 net new jobs in 2012, but created 423 net new jobs. If this participant was allowed to receive credits for the additional job creation, the credit would have been \$534,743. The actual credit given was \$22,725, a savings of \$512,018. In 2013, the company's job commitment was 85 net new jobs but the company created 532. If this participant was allowed to receive credits for the additional job creation, the credit would have been \$835,215. The actual credit given was \$32,194; a savings of \$803,021. In 2014, the company's job commitment was 110 net new jobs but the company created 631. If this participant was allowed to receive credits for the additional job creation, the credit would have been \$970,918. The actual credit given was \$41,663, a savings of \$929,255. Here, ESD staff's discretion saved New York State taxpayers \$2,244,294.

If fewer jobs are created than the performance schedule indicates, the credits authorized are pro-rated provided at least 75% of the goal is reached. If less than 75% of the goal is reached, then no tax credit is issued. Accordingly, the taxpayer is protected from any downside risk.

Nonetheless, even though ESD has no statutory or regulatory obligation to do so, ESD has already instituted measures to improve the way Program staff identifies businesses that will not achieve their jobs and investment commitments prior to the completion of the tax year. Clear direction has been provided to businesses admitted to the Program that they must 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 make efforts that further enhance its record-keeping of the requests.

**State Comptroller's Comment** – We disagree that there is no risk involved when ESD amends companies' interim milestones. As discussed at length in our report, ESD adjusted one company's goals in 2013 to allow it to receive over \$247,000 in credits. ESD authorized another \$309,000 in credits in 2014. By the end of 2015, the company announced that it was ceasing operations in New York. Had ESD held the company to its commitments in 2013, it would have saved taxpayers at least \$247,000 – and possibly as much as \$309,000 more for 2014.

**D. ESD Obtains All Required Documentation Before Admitting Companies Into the Program**

OSC alleged that ESD did not exercise due diligence when approving any of the 25 sampled companies for participation in the Program. This finding is incorrect. The only statutorily required documentation is in the Program application, which is included in every admitted company's project file.

The eligibility requirements are based on projected jobs, investments, and R&D projections. There is very little to verify or check at this stage of the process. For example, if a company proposes a manufacturing project that will create at least 10 net new jobs, then it can be deemed eligible. ESD reviews applications to ensure that the proposed activity comports with the definition of a strategic industry. Staff conducts this review by examining the type of jobs and type of investments companies are proposing for the project locations. When necessary, ESD consults with the company to better understand the project before making a final eligibility determination. If a company is deemed eligible, ESD may admit an applicant to the Program [See EDL, § 354(3)]. 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.

**State Comptroller's Comment** – ESD's comments seem to imply ESD workers are only responsible during the initial eligibility review for assessing the proposed primary activity of applicants at the project location to ensure that the minimum job or investment



thresholds are met, and that the type of jobs and investment falls within the activities of a strategic industry. However, ESD's response indicates at great length (see audit report pages 23-35) – as does our report (see *Program Application and Admittance* section) – the additional steps that Program staff must take when reviewing applications, evaluating projects, and deciding to admit companies into the Program. During our testing, we found that these steps were not properly followed for any of the 25 sampled companies.

OSC also found that ESD does not follow its own protocol for scrutiny of applications and, therefore, cannot be assured that its applicant selection process is effective. This is also incorrect. In fact, ESD does follow protocols but OSC misunderstands the process and appears to suggest a strict formulaic approach to administering the Program would be a better approach. ESD has evaluation criteria that it may consider when evaluating a project for admittance into the Program. Not all projects are equal and ESD's professional economic development staff reviews projects in relation to the evaluation criteria, including a benefit-cost benchmarking approach when making funding decisions. It is not formulaic, but rather is based on sound decision-making that has saved taxpayers millions of dollars.

For example, the best way for ESD to meet OSC's expectations and act without discretion in selecting projects and funding amounts would be simply to provide businesses the maximum award allowed per the formulas in the statute. This method would insulate ESD from any charges of using standards that are "not reasonable" when admitting businesses to the Program. However, if ESD used this approach, the 25 companies sampled by OSC would have been awarded \$81 million. Instead, ESD was able to secure deals with these companies for a cost of \$39 million. Overall, since the Program's inception, ESD has offered \$828 million to 530 companies for the creation of 54,195 jobs (\$15,000 per job). If ESD used the more formulaic standard suggested by OSC, \$2.3 billion would have been offered at a cost of \$42,000 per job.

**State Comptroller's Comment** – According to ESD reports, the amount of the proposed tax credit is based on several judgmental factors, with one being the amount of a credit necessary to move a given project forward and/or to lure the project to New York from other competing states. Because proposed Program tax credits can reduce the remaining amount of aggregate statutory credit available (under an annual cap) to other businesses, it is important that ESD use a sound basis to develop tax credit proposals. Without one, there is a risk that Program resources may not be used in the most efficient or effective manner and all companies might not receive equal Program opportunities.

OSC further found that none of the project files contained proper financial health analyses and that OSC therefore has no assurance that ESD followed its stated project evaluation and review process. Again, this is based on a lack of understanding of ESD's evaluation criteria. ESD's evaluation process is not formulaic. It is not necessary to conduct financial analyses on all

companies prior to admitting them to the Program. The purpose of having financial analysis as an evaluation criterion is to assess the likelihood of the project's success; however, the Program is performance-based and tax credits are only provided if a project is financed and successful. There is no financial risk to New York State taxpayers if the business cannot secure funding for a project. The other reason for conducting financial analysis is to guard against committing a large allocation of the annual Program cap to highly speculative projects because doing so could reduce the allocation available for other more worthy projects. To date, that potential problem has not been realized because the number of approved projects and credits allocated remains far below the credit caps authorized by law.

OSC suggests that financial analysis must be done in every instance. This suggestion is flawed because it would turn the criteria, now discretionary, into mandatory requirements without adding value to the process. Again, the Program is performance-based. If a Program participant is unable to meet its goals due to the financial health of the company, ESD will not provide the company tax credits. When ESD commitments start to approach the credit caps in the law, financial analysis will become a more important part of the process.

**State Comptroller's Comment** – ESD implies that because the number of approved projects and tax credits is below the annual capped amounts, it is acceptable to admit companies in poor financial health into the Program. However, there is a greater risk that such companies will be unable to meet their long-term commitments. As such, this practice seems contrary to the Program's goal of promoting long-term job growth. Section 191.3 of the Regulations states that ESD considers the degree of applicant's financial viability, strength of financial statements, readiness, and likelihood of completion of the project in making award decisions. The Regulations suggest that ESD should have conducted not only cost-benefit analyses, but financial health analyses as well for all 25 sampled companies – which it did not. Moreover, a number of applicants that were not accepted into the Program may have been in better financial condition and also met the requirements.

OSC also criticized ESD's assertion that there is very little to verify or check during the application process. This criticism is based on a misunderstanding of relevant laws. The eligibility criteria are clearly defined in statute and are based on projections. Per statute, the application includes an agreement with the applicant authorizing the Departments of Taxation and Finance and Labor to share information. The purpose of this provision is to allow information sharing so ESD can verify performance and compliance with labor and environmental laws. ESD conducts this verification when a business applies for a tax credit based on actual performance, not at the time of application based on projections.

Simply put, there is nothing to verify with either the Tax or Labor Departments at the eligibility stage before admitting a business into the Program. As ESD has repeatedly emphasized to OSC throughout the audit, a company only needs to promise jobs or investments to be eligible

to be admitted to the Program. However, a business must actually create jobs or investments in order to receive any tax benefits. It is at this second stage of the process that ESD reviews performance reports, consults with the Tax Department, and undertakes other due diligence to ensure compliance with labor, environmental and tax laws.

OSC also noted that one project file did not contain an Initial Employment Report to establish a baseline to measure job growth. ESD has this report and provided it to OSC.

**State Comptroller's Comment** – To be admitted to the Program, the Regulations require that applicants not owe past due State or local taxes. Also, the Regulations require applicants to create new jobs and not merely shift jobs to other company locations within the State or from other affiliated companies. While we found ESD did at times verify whether the sampled companies owed past due State and local taxes, we found no evidence that it took any steps to verify whether the firms shifted employees from related companies, despite having access to both Tax and Finance and Labor reports. Instead, ESD simply relies on company certifications that jobs were not shifted. As detailed in the report, the CEO and CFO of one Program participant held the same titles with another affiliated company; thus, the positions in question were primarily shifted, as opposed to newly created.

**E. ESD Used Specific Criteria For Ranking Program CFA Applications**

OSC also alleged that ESD failed to establish and use specific, objective, and quantifiable criteria for ranking Program CFA applications. This finding is incorrect. In fact, 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 and the evaluation criteria in the Excelsior Program regulations. 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 there is no need for projects to be ranked. Funding decisions are based on merit and available resources.

OSC alleged that based on its testing, it is not clear that ESD assigns weighting to any of these factors, and the rating score is derived inconsistently. Specifically, OSC found that ESD admitted four companies to the Program despite low REDC scores. First, OSC suggests that ESD should not have funded Program participant Contract Packaging Services, Inc. because of low REDC scores. In Regional Council Round 1, Excelsior resources for the Mid-Hudson region were available to fund seven projects. As previously stated, REDC funding and the award amounts are determined based on the outcome of the REDC competition and the amount of total funding provided to each region. After allocating funds to six projects that received REDC scores higher than Contract Packing Services, Inc. there were still enough funds left over to fund Contract Packing Services, Inc. There were no projects that received a higher score than Contract Packing

Services, Inc. in this REDC round that were not funded in this round.

**State Comptroller's Comment** – We do not suggest that ESD should not have funded any particular company. Instead, we repeatedly requested that ESD provide us with explanations about the weights assigned to each criterion used. In addition, Regional Councils appear to take into account the degree to which the application helps implement their regional strategic plan and aligns with their regional priorities. Therefore, we question why ESD would provide funding to companies that, based on the REDC's score, did not appear to align with regional priorities.

Second, OSC suggests that ESD should not have funded Program participant International Imaging Materials, Inc. because the REDC gave it a score of zero. However, the REDC scorecards indicate a zero and Not-Awarded because the company was not a Regional Council project; it was incentivized outside the Regional Council round. International Imaging Materials, Inc. entered into an incentive proposal on March 7, 2013. As indicated earlier, companies are required to complete a CFA to be admitted into the Program. The company completed its CFA on July 30, 2013, which happened to fall during the 2013 Regional Council award process but was not advanced through the Regional Council process and therefore was not scored by the Regional Council.

**State Comptroller's Comment** – Nowhere in our report do we recommend that ESD should not have funded any of the Program participants.

Similarly, Ryzac, Inc. dba Codecademy was incentivized outside the Regional Council round. This company entered into an incentive proposal with ESD in December 2012. Since companies have to complete a CFA to be admitted into the Program, Ryzac, Inc. subsequently completed its CFA in July 2013, which coincidentally fell during the 2013 Regional Council award process. In short, the company's 2013 scorecards indicate a zero and Not-Awarded because it was not a Regional Council project. A score of zero out of one hundred, while not impossible, is so extreme and unlikely that it should have raised a red flag and OSC should have inquired further during this year-long audit.

Program participant Menu Solutions, Inc. predates the CFA. Specifically, the company completed an application for the Program in November 2010, and entered into the incentive proposal in January 2011. After receiving funding, the company subsequently applied for additional funding during the 2011 Regional Council process and was not funded for that application, receiving a score of 13.41. OSC mistakenly believed that Menu Solutions, Inc. was funded based on a CFA score of 13.41. Although OSC did not request the project files for these Program participants, ESD remains willing and able to provide them.

**State Comptroller's Comment** – Although we cited the same company example in our July 20, 2015 preliminary finding to ESD, its written response did not address the matter, nor did ESD provide any additional information specific to this company. Providing this information at this late stage and offering to supply the relevant project files is indicative of ESD's continuously changing responses to the issues raised throughout the course of the audit.

**F. ESD Currently Provides Program Transparency as is Required Under the Statute and Regulations**

OSC recommended that ESD increase Program transparency by including complete and accurate information in quarterly reports. This modification, however, is unnecessary. Section 358 of the Economic Development Law and 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 statute and regulation and provides sufficient transparency.

OSC incorrectly found that: (a) ESD provided no evidence that 72 companies did not accept incentive proposals and (b) unless the public quarterly reports include an accounting of all Program participants, the Program lacks adequate transparency. This finding reflects a misunderstanding of the Regional Council awards process and is improper for several reasons. Not all companies that are recommended for Excelsior awards during the REDC Rounds are admitted into the Program. Companies that are recommended during the REDC Rounds sometime do not accept incentive proposals and therefore, are not admitted to the Program. Other companies that are recommended during the REDC rounds withdraw their projects prior to accepting the terms of the incentive proposal for various business reasons. If companies do not accept an incentive proposal, they are not Excelsior program participants and are not covered by the Program's reporting requirements. Indeed, since the 72 companies never entered the Program there is no relevant information to report.

OSC also found that two companies that had received tax credits had been omitted from the March 31, 2015 quarterly report even though they were listed on the previous report. Although ESD staff inadvertently left these companies off the March 31, 2015 quarterly report, ESD staff corrected and reposted this report within a week of the original posting. Here, OSC took a minor data entry error, that ESD promptly corrected, and characterized it as a systemic problem with no basis.

Further, OSC's finding is based on a comparison of 72 companies recommended for Excelsior Jobs Program credits through the REDC reports for 2011, 2012 and 2013 that did not appear on the quarterly reports during the period. The acceptance process for admittance into the Program is for a company to enter into an incentive proposal with ESD and complete a CFA. There is no official rejection document. If a company enters into an incentive proposal and completes a CFA, it is admitted. If a company does not enter into an incentive proposal or complete a CFA, then it is not admitted. The fact that no signed incentive proposal exists is evidence that those 72 companies did not enter into incentive proposals and were not admitted into the Program; and therefore, ESD is not

required to post quarterly reports for these companies.

As previously stated, quarterly reports contain confidential information such as a company's net new jobs and aggregate new investment in the State. This information can be used by a company's competitors to determine the company's financial health and develop competitive strategies. Program participants are hesitant about posting this confidential business information but do so because it is required by statute and regulations to receive tax credits. If ESD had mandated that those 72 companies post confidential business information without an agreement with ESD to receive anything, the companies' businesses might have been negatively affected. Those companies would have assumed the risk of disseminating their confidential business information without the promise of financial gain.

**State Comptroller's Comment** – We recognized that some of the 72 firms identified in our data match may not have been admitted to the Program. Accordingly, we requested ESD to provide support, including read-only access to its project tracking system, so that we could verify whether or not the firms were admitted to the Program. However, ESD denied our request.

### III. Conclusion

This Response provides clarifications to OSC's Final Draft Report findings. ESD welcomes the opportunity to work with OSC to better understand the Program and to reach findings and make recommendations that comport with the documentation, statute and regulations, and ESD's process.

Thank you again for this opportunity to respond to your Final Draft Report. Please do not hesitate to contact me if further information is needed.

Yours truly,



Benson V. Martin

Director of Compliance