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The Emerge Tax Credit Program: New Caps, More Benefit to State and Enhanced Regulatory Oversight

By Anne Babineau and Robert Beckelman

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The Economic Recovery Act of 2020 (the "Act") re-envisions State incentive programs while continuing to offer substantial tax benefits to employers in high-priority industries and targeted locations. The expired Grow NJ Program has been overhauled and replaced under the Act through the newly-established Emerge Program. The successor to Grow NJ in design and intent, Emerge seeks to entice employers to move their business and employees to New Jersey, or retain a business in the State where a substantial number of jobs are at risk of moving elsewhere, in return for tax credits. New components in Emerge include stricter review in confirming that the tax credits are a material factor in an applicant's decision to locate in or remain in the State, more substantial net positive benefit to the State, a cap on total allocable tax credits, restrictions on the time period within which tax credits may be utilized, limitations upon and more transparency concerning transfer of tax credits, additional labor and community benefits requirements and expanded circumstances that could result in the recapture of tax credits.

The Emerge Incentive Program Requires Job Creation and Retention

For those unfamiliar with Grow NJ, Emerge mirrors many of the same components. First and foremost, applicants will be required to demonstrate that the financial incentives are a material factor in their decisions to locate or retain a business in the State. In light of findings in the State Special Taskforce investigation raising doubt as to how at risk jobs were for businesses awarded credits for retained jobs under Grow NJ, Emerge shifts the State's primary focus to generating new jobs, offering tax credits only for a substantial number of retained jobs. Specifically, while a minimum of 25 new jobs for targeted industries and 35 new jobs for all other applicants is required to qualify for Emerge, 500 jobs must be retained in a qualified incentive tract or government-restricted municipality and 1,000 retained jobs in all other locations in order to qualify for tax credits. As was the case under Grow NJ, retained jobs are eligible for tax credits valued only at 50% of the amount of tax credits for which new jobs would be eligible.

Additionally, for both new and retained jobs, it is anticipated that the Economic Development Authority (the "EDA" or the "Authority") will apply stricter scrutiny in verifying that the Emerge incentives are a material factor in a business' decision to move to or remain in New Jersey. Temporary regulations recently adopted by the EDA for the Emerge program (the "Emerge Regulations") provide further detail as to how the EDA will undertake this analysis.

Net Positive State Benefit Increases to at least 200%

The Emerge Program will also require a more substantial quantifiable net positive benefit to the State. Under the Grow NJ program, the State required a net positive benefit equaling at least 110% of the requested tax credits. The net positive benefit required under Emerge has been increased to 400% as a base level, 300% for projects located in a distressed municipality or transit hub municipality and 200% for projects located in government-restricted municipalities (currently Atlantic City, Paterson and Trenton) or "mega projects."

Capital Investment Threshold

Applicants must also make a minimum capital investment of $20 per square foot of gross leasable area for rehabilitation, improvement, fit-out, or retrofit of existing industrial, warehousing, logistics, or research and development portions of premises for the same reuse and $60 per square foot for new construction of these types of facilities. A minimum investment of $40 per square foot of gross leasable area for square foot of rehabilitated, improved, fit-out or retrofit projects and $120 per square foot for gross leasable area for new construction is required for any other uses.

It is noted that the business is required to demonstrate at the time of application that the business will make, acquire *or lease* a capital investment at the qualified business facility equal to or greater than the minimum applicable amount set forth above. In the case of a lease, the Grow NJ statute expressly included a landlord's or seller's costs for purposes of calculating the required minimum capital investment.[1] While the Act makes it clear that the business can satisfy the requirement by either directly making the capital investment into the building and facility improvements or leasing the capital investment, it is unclear how the business is to calculate the required minimum capital investment in the latter case of a lease of a facility improved by a landlord or owner. The definition of capital investment in the Act is limited to expenses incurred directly by the business or an affiliate.[2] This does not answer the question of how those expenses are determined and calculated in the case of a lease.

Eligible Incentive Areas

The eligible incentive areas to which Emerge applies are largely the same as under Grow NJ with a notable exception.[3] Grow NJ applied to all of Planning Area (PA)1 and PA2 on the State Development and Redevelopment Plan (the "State Plan"). While Emerge also includes all of PA1, it is limited to areas of PA2 "located within a one-half mile radius of the mid-point, with bicycle and pedestrian connectivity, of a New Jersey Transit Corporation, Port Authority Transit Corporation, or Port Authority Trans-Hudson Corporation rail, bus, or ferry station, including all light rail stations, or a high frequency bus stop as certified by the New Jersey Transit Corporation."[4] This same limitation applies to PA3 and Designated Centers under Emerge.

Determining the Amount of Tax Credits For Which a Project is Eligible

As with Grow NJ, the amount of tax credits to be awarded under Emerge start with a base amount depending upon the business' location, ranging from a high of $4,000 per job for government-restricted municipalities (Atlantic City, Paterson and Trenton) and mega projects, $3,500 for businesses in "enhanced areas", $3,000 for businesses in "distressed municipalities", $2,500 for businesses in a "qualified opportunity zone" or an "employment and investment corridor", down to $500 per job for other eligible areas. These amounts can be increased based upon various potential bonuses, up to a maximum of $8,000 per job for businesses in government-restricted municipalities or "mega projects".

The bonuses available comprise a substantial list of other enhancing factors designed to further various policy objectives in levels ranging generally from $500 to $2,000 per job. These include bonuses promoting businesses in targeted industries, bonuses for businesses exceeding the Emerge minimum qualification requirements, such as for capital investment, the numbers of jobs or exceeding environmental sustainability standards, the nature or types of jobs (such as technology or manufacturing), the salaries of such jobs, providing employee services and training (such as child care or prisoner re-entry programs) and promoting diversity. It is important to note, however, that regardless of what amount of base and bonus tax credits for which a business may qualify, the total annual award "shall not exceed an amount determined by the [A]uthority to be necessary to induce the project to be sited in New Jersey as determined by the board."[5]

Tax Credit Under Emerge and Aspire Not to Exceed $1.1B

While caps on the total tax credits remain in place for individual projects, as was the case under Grow NJ, Emerge institutes a new overall cap on the total amount of tax credits available to all applicants. Specifically, the total annual value of tax credits for both Emerge and the Aspire program shall not exceed $1.1 billion, with up $715 million for projects in the northern counties and $385 million for projects located the southern counties of the State. Placing a cap upon these awards was part of the State Task Force recommendation, noting that placing a cap upon the maximum amount of tax credits that the EDA may issue "would require the EDA to make tough choices as to how to allocate scarce resources, and as such, promote greater discipline in the EDA's evaluation of applications."[6]

Tax Credit Transfer Restrictions and Limitations

Restrictions have also been put in place on the transfer of tax credits, in response the State Task Force recommendation that to "facilitate State efforts to forecast the budget and anticipate the use of unapplied tax credits, there should be more reasonable limitations on the transfer of tax credits and the use of transferred credits."[7] While Grow NJ did require New Jersey Department of Treasury approval for a tax credit transfer and set a minimum sale price at 75% of the tax credit face value, it did not limit the number of tax credit transfers nor the time or tax period within which the tax credit must be applied. Emerge now increases the minimum sale price for transfer of tax credits to 85% of the face value of the tax credits and limits a recipient to only one transfer of their tax credits. Furthermore, in an effort to ensure that the State has the ability to adequately track and budget its tax credits, each tax certificate will be allocated a set timeline in which it must be utilized. Finally, under Emerge the EDA is required to publish the details of any tax credit transfers (the parties to the transaction, the tax credit value, the consideration paid and the tax liabilities applied to) on its website.

Additional Requirements for Qualified Business Applicants

An award of tax credits under Emerge will result in some additional requirements for qualified businesses.

Payment of Prevailing Wages

A business receiving tax credits under the Emerge program, as with all EDA incentive programs, will be required to pay prevailing wages for construction work in development of the project but in addition, "during the eligibility period, each worker employed to perform … building services work at the qualified business facility shall be paid not less than the prevailing wage rate …".[8] "Building services" are defined as "cleaning or routine building maintenance work, including but not limited to sweeping, vacuuming, floor cleaning, cleaning of rest rooms, collecting refuse or trash, window cleaning, securing, patrolling, or other work in connection with the care or securing of an existing building, including services typically provided by a door-attendant or concierge."[9]

Community Benefits Agreement

The Emerge program will also require businesses to enter a community benefits agreement ("CBA") with the EDA and the municipality or county in which the project is located for projects exceeding $10 million in total project costs and which are not subject to a redevelopment agreement with the municipality. These agreements may include provisions for employment, training, youth and community services and provide for an advisory board comprised of a diverse group of local stakeholders to oversee the implementation and success of the agreement. Projects will be exempt from the CBA requirement if the business submits to the EDA a copy of a redevelopment agreement that is certified by the municipality in which the project is located.

Potential Recapture of Tax Credits For Failure to Comply with On-Going Program Requirements

Finally, Emerge has enhanced certain remedies and provides for more circumstances under which applicants may face rescission or recapture of tax credits awarded than those provided under Grow NJ. While both programs require supporting certifications of information submitted with applications by businesses and annual reporting, and provide for potential recapture of tax credits for submission of false statements, failure to maintain compliance with program requirements and failure to timely provide required reports, Emerge includes additional bases for recapture or rescission of tax credits. For example, under Emerge if the EDA finds a material misrepresentation has been made at any time during the eligibility period the business "shall forfeit all tax credits awarded …, which shall be in addition to any other criminal or civil penalties to which the business and the officer may be subject."[10] The EDA may rescind the tax credit award if it learns that the business obtained site control of the facility prior to the execution of the letter of intent, if the business fails to provide the information required under the program within the time periods or if the project fails to advance in accordance with the project agreement. A business is also subject to recapture of the tax credits if it fails to comply with the terms of a CBA.

The EDA is currently accepting applications under the Emerge program. The EDA is encouraging potential applicants to review all of the information about the program on its website and submit an expression of interest form before proceeding with filing an application. Additionally, the EDA has established a two-step process by which applicants first file a pre-application, designed to allow the EDA "to conduct a preliminary analysis of the proposed project and ensures that interested businesses are aware of all the program requirements before investing additional time to complete the full application and paying the non-refundable application fee."[11]

Note that while applicants that have obtained site plan approval, site control or ownership of the New Jersey location prior to applying are ineligible under Emerge (with some exceptions), if approved, an applicant will be required to "demonstrate that it has obtained site plan approval and has committed financing for, and site control of, the qualified business facility" within six months of executing a project agreement.[12]

This is a summary of a complex law, the regulations for which have not been adopted. You should consult an attorney and tax adviser for the law's particular application to your circumstances.

About the Authors

Anne Babineau and Robert Beckelman are shareholders in the Redevelopment and Real Estate practice groups at Wilentz, Goldman & Spitzer, P.A.

Footnotes

[1] N.J.S.A. 34:1B-244(a)(1).

[2] N.J.S.A. 34:1B-337 definition of "capital investment."

[3] The "incentive areas" under both Grow NJ and Emerge include aviation districts, port districts, distressed municipalities, transit hub municipalities, New Jersey Meadowlands planning areas, Hackensack Meadowlands District, New Jersey Sports and Exposition Authority property, land approved for closure under any federal Commission on Base Realignment and Closure action, regional growth areas subject to jurisdiction of the Pinelands Commission, and Planning Areas 4 and 5 which are designated growth centers, designated redevelopment or rehabilitation areas or expansion of pre-existing structures. N.J.S.A. 34:1B-243; 34:1B-337.

[4] N.J.S.A. 34:1B-337.

[5] N.J.S.A. 34:1B-343(g).

[6] Third Taskforce Report, Recommendation 19, at pg. 102.

[7] Third Taskforce Report, Recommendation 24, at pg. 103.

[8] N.J.S.A. 34:1B-339(a)(8)(a).

[9] N.J.S.A. 34:1B-337, definition of “building services.”

[10] N.J.S.A. 34:1B-340(d).

[11] https://www.njeda.com/emerge/

[12] N.J.S.A. 34:1B-342(a).