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Governor's Task Force on EDA Tax Incentives

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Second Published Report

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I. EXECUTIVE SUMMARY

The New Jersey Task Force on the Economic Development Authority's Tax Incentives (the "Task Force") is an advisory body and, pursuant to its mandate, submits this second report (the "Second Report") to advise the Governor of its additional findings and recommendations to date. Familiarity with the Task Force's first report (the "First Report"), dated June 17, 2019, is assumed.

In January 2018, Governor Philip D. Murphy directed the Office of the State Comptroller to conduct a comprehensive performance audit of the Grow New Jersey Assistance Act ("Grow NJ") and Economic Redevelopment and Growth ("ERG") tax-incentive programs (collectively, the "Programs"), and predecessor programs, from 2010 forward to "inform the public about the EDA's operations" and "assist lawmakers in their deliberations as to whether these programs should be reauthorized when they expire on July 1, 2019." On January 9, 2019, New Jersey State Comptroller Philip James Degnan (the "Comptroller") issued his audit report¹ of the State's tax-incentive programs. The Comptroller's audit report revealed, among other things, that the New Jersey Economic Development Authority (the "EDA") had failed to comply with the applicable statutes and regulations and to implement key internal controls for monitoring the performance of tax-incentive beneficiaries. In response to the Comptroller's audit report, Governor Murphy issued Executive Order No. 52 ("EO 52"), which established this Task Force with the following objectives:

1. Conduct an in-depth examination of the deficiencies in the design, implementation, and oversight of the Grow NJ and the ERG tax-incentive programs, including those identified in the Comptroller's audit report, to inform consideration regarding the planning, development and execution of any future structure of these or similar tax-incentive programs; and
2. Hold public hearings and request testimony from individuals who can provide insight into the design, implementation, and oversight of these programs.

The Task Force has been authorized to call upon any department, office, division or agency of the State to supply it with data and any other information or assistance available to such agency as the Task Force deemed necessary to execute its duties. Each State agency also has been required to timely cooperate with the Task Force. In addition, Governor Murphy appointed Professor Ronald Chen to "perform all of the functions of a duly authorized representative of the Governor" pursuant to N.J. Stat. § 52:15-7, which includes the ability to "subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material."² The Task Force has generally sought, in the first instance, to obtain information through witnesses' voluntary cooperation, but has relied on Professor Chen's subpoena power where necessary.

¹ A Performance Audit of Selected State Tax Incentive Programs, Jan. 9, 2019.

² See March 22, 2019 Letter from Governor Murphy to Professor Chen.

The Task Force issued its First Report on June 17, 2019. Since then, the Task Force has continued its in-depth examination of the EDA's administration and implementation of the Programs. During its investigation, the Task Force has facilitated several voluntary terminations of awards and has also referred other projects to the State Treasury or either law enforcement agencies, the EDA, or both, whose independent review may result in, among other things, steps to suspend or terminate these awards. The aggregate savings to the State from voluntary terminations of awards exceeds \$11 million, while the potential aggregate savings from projects that the Task Force has referred so far exceeds \$540 million.

In this Second Report, we update the Task Force's findings to date based on the continued examination. The principal findings include the following:

A. In Administering the Tax-Incentive Programs, the EDA Has Fostered a Permissive Culture of "Getting to Yes" With Applicant Companies

The Task Force has observed a systemic issue with the EDA's administration of the Programs, in the form of fostering a culture of "getting to yes" with applicant companies (a phrase that more than one EDA employee used during interviews with the Task Force). Based on interviews with multiple EDA employees, the "getting to yes" culture has permeated the EDA's approach to the Programs. Within the EDA, tax-incentive applicants are often referred to as the Authority's "clients" or "customers," and, when processing their applications for tax incentives, the EDA's staff place a paramount focus on "customer service." To that end, the Task Force has observed a general predisposition at the EDA to approve awards for tax incentives, and at higher amounts when possible. Although the Task Force has not observed any instances in which the EDA willfully awarded incentives in clear violation of legal requirements, there is evidence of numerous instances in which the EDA made efforts to interpret and apply the governing statutes and regulations in a manner that favored the interests of the applicant. Moreover, the Task Force observed instances when underwriters were warned against or even criticized for asking "too many questions" of an applicant. Correspondingly, this general culture provides context for, and raises questions concerning, the extent to which the EDA carried out its vital role as a steward of public funds.

Furthermore, this "getting to yes" culture at the EDA should be considered in light of the Authority's system of funding. That is, the EDA's funding structure is such that the award of tax credits is directly and positively correlated to the Authority's revenues. Put another way, the more tax credits the EDA issues, and the larger they are, the more revenue the Authority accrues for its own operations. While it is unfeasible at this juncture to determine whether there is a direct causal connection between the EDA's budgetary considerations and its internal culture, the possibility of a relationship warrants note. These issues are discussed in Section IV of this Second Report.

B. In Certain Instances, the EDA's Manner of Administering the Programs Has Failed to Maximize the State's Benefits

The Task Force has observed two instances where the EDA's administration of the Programs has resulted in less benefit accruing to the State than otherwise could have. In sum, these instances, which are discussed in Section VI of this Second Report, are as follows:

- To receive tax incentives from the EDA, companies are required to pay certain fees to the Authority, which, depending on the circumstances of the company's application, could exceed \$1 million. Companies are required to pay these fees out of pocket. However, the EDA has allowed one Grow NJ beneficiary, the Philadelphia 76ers, to essentially be reimbursed for its fees paid to the EDA from public funds by way of tax credits. In effect, the public, rather than the company, paid the EDA's fees in this instance.
- The Task Force discussed the "phantom tax" provisions of the Grow NJ statute, as modified by the Economic Opportunity Act of 2013 ("EOA 2013"), in its First Report. As previously discussed, these provisions essentially allow companies to artificially boost the size of their incentive awards by characterizing taxes that the company will never actually pay as "benefits to the State" nonetheless. In this Second Report, we discuss new evidence relating to these phantom tax provisions. In short, the Task Force has learned that these provisions were introduced into the legislation for the specific benefit of Holtec International. After the company demanded that the size of its potential incentives award for locating certain jobs in New Jersey be increased, the EDA's senior leadership worked with political officials to modify the draft EOA 2013 bill to incorporate provisions that would have that effect, eventually culminating in the phantom tax provisions that were enacted into law. Since then, by allowing companies to characterize illusory taxes as state benefits, the provisions have both limited the real benefits to the State and contributed to public confusion concerning the relative costs and benefits of the Grow NJ program.

C. Deficiencies in the EDA's Processes for Evaluating Tax-Incentive Applications Have Resulted in Improper Awards

The Task Force's First Report preliminarily found that the EDA demonstrated clear deficiencies in its evaluation of claims made by companies in their tax-incentive applications, including claims related to the company's site-selection considerations. As previously discussed, a core goal of the Grow NJ program is to incentivize the preservation of jobs in New Jersey that are at risk of being relocated to another state. However, the EDA's "at risk" evaluations have demonstrated serious shortcomings. The Task Force's further examination of the EDA's processes and procedures in this area have further corroborated the deficiencies discussed in the First Report. For example:

- One Grow NJ beneficiary discussed in the First Report, The Cooper Health System ("Cooper Health"), which the EDA approved for almost \$40 million in incentives to retain its jobs in New Jersey, has now conceded that it never actually considered relocating its jobs outside the State. As such, the EDA's award of incentives in this instance—to retain jobs that were never at risk—was an error, because the EDA's Board approved the award based on its belief that the jobs were at risk of leaving the State. We discuss new evidence concerning the EDA's approval of this

application, as well as several other applications previously discussed in the First Report, in Section VII below.

- The vast majority of companies that apply to the EDA for tax incentives retain professional consultants to assist them in the process. There is evidence that these consultants are well aware of the deficiencies in the EDA’s “at risk” evaluations and, at least in some cases, were willing to exploit them. One such consultant who has represented numerous companies that the EDA approved for incentives, Susan Harte, formerly of the CBRE firm, advised a client that the “at risk” issue was a matter of “check[ing] the box” for the EDA, and that the Authority’s staff did not “focus on . . . the actual likelihood a company would or would not make the move.” She added: “It’s all a lot of BS It’s all about optics.”³ This same consultant advised another client—Rainforest Distribution, discussed in Section VII of this Second Report—to include an alternative site outside of New Jersey in its Grow NJ application when, in reality, the company had no actual intention of relocating to that site under any circumstances. Moreover, as discussed in Section V, while consultants can play a pivotal role in the EDA’s processes, many consultants fail to register and disclose their lobbying efforts, as New Jersey law requires.

In addition to its review of the EDA’s “at risk” evaluations, the Task Force also continued its overall review of EDA policies and procedures with respect to the implementation and administration of the tax-incentive programs from application through the annual award of tax-incentive credits, focusing on the EDA’s review of applicant and awardee legal disclosures as well as the EDA’s post-approval and certification processes. The Task Force’s evaluation found additional weaknesses in the EDA’s processes. For example:

- The Task Force has found clear deficiencies in the EDA’s review of applicant companies’ legal history disclosures. Companies that apply to the EDA for tax incentives are required to disclose certain criminal, civil, and other legal proceedings that have involved the company or its affiliates. However, the EDA lacks a robust due diligence and review process for these disclosures. Section VIII of this Second Report discusses this issue in connection with two entities the EDA approved for tax incentives despite the existence of certain prior legal proceedings that the Authority failed to appropriately review: Elwyn and Amerinox Processing, Inc.
- The Task Force also identified deficiencies in the EDA’s post-approval and certification processes that may have resulted in improper or inflated awards. For example, the Task Force found that, until recently, the EDA lacked robust due

³ The Task Force is continuing to examine the EDA’s processing and approval of this company’s application.

diligence with respect to its independent verification of awardees' capital investments and eligible jobs during the overall and annual certification phases and, in general, relies too heavily on the data provided by awardees. Indeed, a recent 2018 internal audit that focused on the EDA's post-approval and certification processes revealed various problems in all five of the projects selected at random suggesting that the tax credits issued to each of those projects may have been issued in error—either because the amount was incorrect or because the applicant should not have qualified for an award in the first instance. Section IX of this Second Report discusses the Task Force's findings with respect to deficiencies in the EDA's post-approval and certification processes and also discusses the EDA's recent efforts to incorporate feedback from the Comptroller's January 9, 2019 audit report and the Task Force's First Report and to improve its processes.

Although the Task Force's investigation is ongoing, we supplement the Task Force's recommendations previously made in the First Report. By way of summary, the new recommendations include:

- Measures for the EDA to improve its recordkeeping concerning its decision-making process with respect to tax-incentive applications.
- Measures to eliminate or mitigate any potential conflict of interest in the EDA's administration of the Programs related to the Authority's funding.
- Measures to improve the EDA's review of company claims made in connection with applications for tax incentives, including claims relating to the company's site-selection deliberations and its legal history.
- The appointment of an inspector general or similar position within the EDA to promote continued oversight and accountability.

II. STATUS OF INVESTIGATION

Since the First Report, the Task Force has continued its in-depth examination of the EDA's administration and implementation of the Programs. During the last year, the Task Force has focused on conducting an "end-to-end" review of the EDA's application and approval process, closely studying each phase through interviews of relevant EDA personnel, review of EDA internal documents, and close analysis of individual award recipient applications.

In addition, and as introduced in the First Report, the Task Force has engaged in a meticulous review of certain projects that are in scope pursuant to EO 52, including any project that applied for a tax-incentive credit under the Programs, was awarded a credit, or in fact received a credit. We believe that doing both has allowed the investigation to achieve dual purposes—study the efficacy and effectiveness of the EDA's current processes and procedures for overseeing the Programs and to determine whether the sampled award recipients properly received tax credits and are in continued compliance with the requirements.

During its ongoing investigation, the Task Force has obtained evidence and information that raised red flags about the implementation and administration of the Programs and the awards granted to particular recipients. As such, in some instances, we closely reviewed companies and

projects related to these concerns and focused on potential conflicts of interest, issues adverse to the public interest, and the potential for fraudulent misrepresentations to influence the EDA's processes and decisions.

In addition, the Task Force has educated itself on nuances and processes involved in the implementation and administration of the Programs that it believes are unknown or misunderstood by the public. The Task Force explored these topics and their interplay with the EDA's ability to effectively and efficiently implement and administer the Programs. In this Second Report, we address some of these topics.

Throughout this process, the Task Force has continued to work collaboratively with the EDA to collect, review, and analyze documents, as well as conduct interviews of EDA personnel to better understand the EDA's protocols. In particular, the Task Force recognizes the importance of working with the EDA to strengthen its administration and review process, which will benefit both award recipients and the State's taxpayers well after the Task Force has completed its investigation.

The Task Force's investigation and findings are based on evidence and information gathered from myriad sources. Its primary source of information is, of course, the EDA. Since the First Report, the Task Force has obtained an additional 320,749 pages of materials from the EDA and conducted 23 additional interviews of current EDA personnel. The Task Force continues to review internal EDA policy and process documents. The Task Force has also requested, and is continuously reviewing, internal and external communications between the EDA and project recipients. For each project and award recipient within its scope, the Task Force is conducting a careful review to identify deficiencies in the process and assist the EDA in determining whether companies properly received incentives under the Programs and are in compliance with the applicable requirements. As part of both the Accelerated Recertification Program ("ARP") and other areas of interest, the Task Force has requested and obtained documents from award recipients and relevant third-party individuals and entities. Many of these entities and individuals have chosen to cooperate with the Task Force's requests, and the Task Force commends these efforts to proactively supply information. The Task Force aims to continue building productive relationships with relevant parties and sources of information for the duration of its work.

III. ACCELERATED RECERTIFICATION PROGRAM

As set forth in the Task Force's First Report, the Task Force established the ARP to facilitate a review process that would allow companies to proactively establish their compliance with the Programs' requirements and avoid a broader investigation of that compliance. As the Task Force works toward the conclusion of the ARP, this Second Report provides an update regarding the ARP participant companies.

As of the date of this Second Report, 66 companies have pursued participation in the ARP. Other companies have expressed interest in the ARP, and the Task Force continues to consider the eligibility of companies on a rolling basis. Through this process and through independent evidence, the Task Force has learned of concerning discrepancies related to companies' cost

benefit analyses and proposed alternative sites that may call into question a company's material factor certification. The Task Force is working to obtain additional information on these issues.

Aside from the companies that present potential eligibility issues, most companies are progressing through the ARP and nearing the conclusion of the process. To date, 58 companies have submitted the requested verifying documents or written responses regarding the same, which allows the Task Force to evaluate whether additional information may be necessary for the company to complete the ARP. Additionally, 37 companies have submitted at least a draft Verification Affidavit for the Task Force's review.

Separate from the ARP, the Task Force is engaging those companies that have elected not to participate in the program. As noted in the First Report, the Task Force recognizes that a wide range of companies sought the benefit of the tax-incentive programs and that these companies operate in many different ways, with varying resources. The Task Force will seek all necessary information for its investigation from these companies through document requests, or subpoena, if necessary. To date, the Task Force has sent document requests to 35 companies in this category. In full transparency, companies that are not in the ARP have been identified to the EDA.

IV. THE EDA'S CRITICAL ROLE IN ALLOCATING SCARCE RESOURCES

In testimony before the Task Force and elsewhere, tax-incentive programs such as Grow NJ have been extolled by elected public officials and by representatives of the private sector as the primary, if not the sole, method by which significant economic growth can be achieved. It is not difficult to understand the reason for their enthusiasm, or the superficial allure of tax incentives as a device for allocating resources to private actors. Unlike virtually every other potential source of public funds, there are no legal limits or procedural barriers (with the exception of legislative caps on certain ERG grants), other than the eligibility requirements of the incentive program itself, that constrain the award of tax incentives. To many outward appearances, tax credits seem to be a virtually inexhaustible supply of liquid funds.

Normally, the New Jersey Constitution places strict limits on expenditures of other public sources of funds. Foremost amongst these is the requirement that "No money shall be drawn from the State treasury but for appropriations made by law."⁴ Appropriations, however, may not exceed revenue as certified by the Governor,⁵ and the process—at times a struggle—to arrive at a balanced budget by July 1 is an annual staple of political life in New Jersey. But since tax credits are essentially forgiveness of *future* tax liability, the funds represented by the credit are never paid into the treasury, and thus are not subject to the appropriations clause or the limitations of the balanced budget requirement.⁶ Other constitutional limitations are intended to prevent favoritism

⁴ N.J. Const. Art. VIII, § II, ¶ 2.

⁵ N.J. Const. Art. VIII, § II, ¶ 2.

⁶ The New Jersey Constitution also places strict limits on accumulating state debt, which must be authorized by voter referendum. N.J. Const. Art. VIII, § II, ¶ 3(b). Since a tax credit is not State "debt" in the traditional sense, but rather a commitment to forgo future tax revenue, this constitutional limitation also does not apply.

in allocating public resources. The Uniformity Clause,⁷ for instance, requires that all property taxes in the same taxing district shall, unless otherwise authorized in the Constitution,⁸ be assessed at the same rate. Tax credits are relief from corporate business taxes, not property taxes, however, and thus are not affected. And the New Jersey Constitution contains a special proscription: “The Legislature shall not pass any private, special or local laws . . . [r]elating to taxation or exemption therefrom.”⁹ But the constitutional proscription against special laws related to taxation has been construed very narrowly by the courts, although, as discussed in the Task Force’s First Report, it may still have relevance for some provisions of the EOA 2013.¹⁰

We recite this constitutional context in order to demonstrate that tax credits, such as those available under the EOA 2013, are unique among those state benefits available to private parties, since they can be bestowed free of the limitations and constraints that our state constitution wisely imposes on allocation of other state resources in order to curb favoritism and fiscal abuse. Of course, anyone of common experience and understanding knows that ultimately there is no such thing as an inexhaustible source of money for which there never will be an accounting. Tax credits represent State funds that will not be collected in the future, and thus directly impact the public fisc. But the temptation to treat tax credits as an inexhaustible fund of money places not only incredible authority with—but also severe institutional pressures on—the EDA. Unlike other state agencies, whose discretion in dispensing state funds for what may be very worthy endeavors is limited by the undeniable reality of a finite appropriation and budget limit, the EDA staff are in the both enviable and unenviable position of being the only bulwark of protection against inappropriate allocation of scarce state resources, when they seek to enforce the substantive eligibility criteria of the tax-incentive program. Simply put, the lack of external limitations on the award of tax credits, coupled with the EDA’s fee structure (which we discuss further below), creates multiple pressures to say “Yes” to an applicant, and very little ability or justification to say “No.” Since the only filtering mechanism that stands between an applicant and an award of tax credits is a determination of compliance with the program criteria, a state agency vested with this unique responsibility should be equipped with robust underwriting and verification capabilities in order to verify that an application meets those criteria. The EDA, however, traditionally operated in a manner akin to an investment bank granting loans, and thus its underwriting capabilities were similar to those at other lending institutions, focused on routinized evaluation of financial information, such as analysis of the business balance sheet, tangible net worth, debt ratio, etc. When the Grow NJ program added factors to satisfy the “net benefit” test such as retention of jobs

⁷ N.J. Const. Art. VIII, § 1(a).

⁸ For example, the Blighted Areas Clause, N.J. Const. Art. VIII, § III, ¶ 1, permits tax exemptions for property located in areas designated as blighted or in need of redevelopment. N.J. Const. Art. VIII, § I, ¶ 3, permits for personal property tax deductions for veterans honorably discharged during times of war or other emergencies, and N.J. Const. Art. VIII, § I, ¶ 4, permits for personal property tax deductions for persons with disabilities or over the age of 65.

⁹ N.J. Const. Art. IV, § VII, ¶ 9(6). *See also*, N.J. Const. Art. VIII, § I, ¶ 2 (providing that exemption from taxation may be granted only by general laws).

¹⁰ *See* First Report at notes 68-69 and accompanying text.

in New Jersey, or the imminent possibility of relocation outside of New Jersey, the EDA was poorly equipped to verify the factual claims made in an application in any systematic way. This lack of an adequately resourced compliance and verification function explains some of the failings described below.

In view of this context related to the EDA's critical role in allocating resources, the Task Force has been cognizant of the "tone from the top" at the EDA in terms of whether senior management established and promoted a culture of compliance within the Authority. In this respect, the Task Force has found, as a systematic issue that has permeated the EDA's operations between 2013 and the present, that the Authority has generally been predisposed to approve applications for tax incentives, and to award incentives at relatively higher amounts, when possible. Although we have not identified any instance in which the EDA willfully awarded incentives in clear violation of legal requirements, we have observed numerous instances of the Authority working to "get to yes," as more than one EDA employee described it during interviews with the Task Force. We discuss this general predisposition below. Further, we discuss certain issues with the EDA's system of funding that are potentially related to this culture at the Authority of "getting to yes." That is, the EDA's system of funding is structured such that the award of tax credits is directly and positively correlated to the Authority's revenues. Put another way, the more tax credits the EDA issues, and the larger they are, the more revenue the Authority accrues for its own operations. As discussed below, while it is impossible to determine whether there is a direct causal connection between the EDA's budgetary considerations and its "getting to yes" culture, the potential nexus warrants note.

A. The EDA Is Generally Predisposed to Approving Applications, And to Awarding Incentives at Relatively Higher Amounts, When Possible

As described above, the Task Force has observed that the EDA's institutional approach, set by senior management, is generally predisposed towards approving projects and granting relatively higher awards, an attitude that trickles down through the organizational structure within the EDA. Although at least two EDA employees described the EDA as a "steward" or "fiduciary" to State resources and taxpayers, the Task Force identified a pervasive view within the EDA that applicants to the Authority's tax-incentive programs are "clients" or "customers" of the Authority. To this end, the Task Force observed a practice of focusing on "customer service" for the award applicant when reviewing and processing applications, which in certain instances resulted in aiding applicants to reconfigure applications to satisfy requirements, prioritizing certain projects for expedient approval, and finding ways to interpret and apply the statutes and regulations that favored approval of projects.

Although the Task Force did not identify any explicit pressure from EDA senior management on the Authority's staff to process applications in a manner inconsistent with the rules

and regulations set forth by the EDA,¹¹ the Task Force has noted that EDA employees expressed a consistent attitude that the EDA was responsible not only for evaluating applications, but also for assisting and shepherding applicants through the pre-approval and post-approval certification processes. Numerous EDA personnel have referred to award recipients as “customers” and “clients” and noted that the EDA’s Incentive Officers were responsible for managing the “client relationship”—exhibiting an attitude of trying to “serve” the customer. Although the EDA has a responsibility to promote economic development in the State by supporting applicants to the tax-incentive programs, this mindset may ultimately have played a role in the level of scrutiny afforded to the applications.

Among other EDA employees who reported on this “customer-friendly” attitude, we interviewed the manager over all underwriters during the period from 2007 to 2017. The Task Force found his perspectives particularly important, given his relative seniority, and credible. In his interview, he told the Task Force of his discomfort with the approval of certain projects that he believed neither met program requirements nor qualified for certain program bonuses because they had been prioritized in some way due to external interest. This manager perceived the EDA as having a “predisposition to get to yes” that resulted in approvals and higher award amounts due to additional bonuses.

This same manager stated that he believed this “getting to yes” approach was consistent across senior management and resulted in repeated pushback from senior management against his efforts to create a more robust due diligence process for incentive applications. For example, the EDA manager stated that, on several occasions, he proposed obtaining additional information and/or documentation evidencing an applicant’s alternative site in its Grow NJ application, but was met with resistance from senior management who believed that what the EDA already sought from applicants was sufficient. The EDA manager understood that the resistance was due, in part, to an unwillingness to overburden the “customer” or applicant and desire to adhere to internally set deadlines. Other current and former EDA employees, including another supervisor, confirmed that this manager “often raised concerns and was often overruled” and suggested that others, including senior management, were frustrated by his repeated questioning of applications, in part due to the delay in processing that the additional questioning caused. Indeed, the Task Force reviewed year-end evaluations for this manager, which suggested that his direct supervisors, at times, disagreed with his approach of seeking more information or evidence from applicants, noting that additional questions could potentially delay the decision making process while adding “minimal input” into the review process. While the Task Force acknowledges that the EDA sets

¹¹ Although the EDA employees that the Task Force interviewed denied the presence of undue influence within the EDA and maintained that they and other members of the EDA staff always acted according to EDA policy and procedures, one former employee, David Sucsuz, accused EDA senior management of improperly directing EDA staff to review and push applications toward Board approval in manners inconsistent with the law and the EDA’s policies. Despite multiple efforts to meet and speak with Mr. Sucsuz regarding his allegations, which included a subpoena issued by Professor Chen, Mr. Sucsuz evaded the Task Force’s efforts and was unwilling to cooperate with the Task Force’s investigation.

internal goals and timelines to process applications efficiently, the consistent feedback that this employee's efforts to conduct further due diligence added "minimal input" and caused delays to the decision process, combined with the EDA's predisposition towards approving projects, creates concerns that the EDA's bias towards approving applications affected its officers' abilities to conduct thorough due diligence.

B. The EDA's System of Funding Presents a Potential Conflict of Interest

As potentially probative context to the internal EDA culture discussed above, the Task Force has found that the EDA's system of financing presents a potential conflict of interest with respect to its administration of the Programs. The EDA is a self-supporting governmental agency that does not receive appropriations from the legislature to cover its operational costs but, rather, is required to fund its own operations. It does so by charging fees in connection with the programs it administers, including the tax-incentive programs. Significantly, the EDA created a fee structure for the programs in which the size of the fees charged are dictated by the size of the tax credits the Authority issues. Put another way, the more tax credits the EDA awards—and the larger the size of those tax credits—the more revenue from fees the EDA collects. The EDA thus has a financial interest in the approval and award of tax credits. This presents the risk that the EDA may have a natural incentive to administer the tax-incentives programs in a manner that results in more, rather than fewer, approved awards—for example, by applying relatively less scrutiny to applications.¹²

During interviews with EDA staff, each person who spoke with the Task Force about the EDA's fee structure stated that the EDA's reliance on fees revenue did not affect its administration of the incentive programs and that the EDA took seriously its responsibility as a fiduciary of public funds. The Task Force has found no evidence to date that the EDA's reliance on fees directly affected the EDA's conduct with respect to any specific application for tax credits. For example, there is no evidence that the EDA approved any company for tax credits that should have been denied just so that the EDA could collect a fee. However, that the EDA operated under a funding system that presented the potential for a conflict of interest is not just limited to individual applications, but also presents questions of the EDA's operations at the systemic level. Furthermore, the Task Force has observed clear inadequacies in the scrutiny applied by the EDA staff to incentives applications to ensure compliance with program requirements, as discussed throughout both of the Task Force's reports. Although we could find no evidence of a direct causal

¹² There are other examples in state government of state agencies being funded by industry assessments. The Department of Banking and Insurance, the Board of Public Utilities and the Division of Rate Counsel, which engage in ongoing functions overseeing heavily regulated industries, are all funded in this way. These examples are distinguishable, however, since the assessments are calculated as an overall percentage of revenue and are not dependent upon any particular decision that the agency may make. For example, the funding of the BPU does not depend (except in the most attenuated way) upon whether it rules for or against a utility in a rate proceeding. There is therefore no financial incentive in the same way that the EDA might be incentivized to grant a Grow NJ application, which has a direct impact on income received from ensuing fees.

connection, the Task Force cannot ignore the common-sense observation that financial conflicts of interest are normally considered problematic particularly because of their tendency to impact behaviors.

1. Following the Economic Opportunity Act’s Enactment in 2013, the EDA’s Approval of Tax Credits Became an Important Revenue Source for the Authority’s Budget

When the EDA was created in 1974 by the Economic Development Authority Act, the legislature appropriated \$200,000 of public funds for the new Authority to establish itself. However, the legislature required that the appropriation “be repaid” by the EDA “as soon as practicable.”¹³ Ever since, the EDA, unlike many other governmental authorities, has generally been a “self-supporting entity” required to pay for its own continued operations, without reliance on public funds.¹⁴ To pay for its operations, the EDA receives revenue from various sources related to the programs it administers. When the EDA lends businesses money, for example, it receives interest on the loans, and when it acts as a landlord with respect to real estate it owns, it receives rental payments from tenants.

For some time, interest payments on the EDA’s investments—the Authority’s principal revenue source at the time—easily provided the agency with more than sufficient funds to cover its operating costs.¹⁵ Between 2005 and 2007, more than half of the EDA’s total revenues each year came from interest payments on the EDA’s investments in the tens of millions of dollars.¹⁶ Even after that revenue was used to cover the EDA’s operating costs, the Authority still gained millions of dollars in excess “net earnings” each year.¹⁷ During this time, the EDA, as one member of its senior staff leadership described it, was “able to rely on the interest on investments to finance administrative expenses.”¹⁸

However, this critical income source started to evaporate in 2008. Starting in 2008, the EDA’s income from its investments declined precipitously.¹⁹ From a high of \$29 million in 2006, the EDA’s investments income dropped to \$4.5 million in 2011, as summarized below in Table 1.²⁰

¹³ See P.L. 1974, c. 80, § 20 (“There is hereby appropriated to the [EDA] from the General State Fund the sum of \$200,000.00, or so much thereof as may be necessary, for the purposes of carrying out its function and duties pursuant to this act. Such appropriation shall be repaid to the General State Fund as soon as practicable out of the proceeds of bonds issued by the [EDA] or other available funds.”).

¹⁴ Hr’g Tr. (Oct. 17, 2019) at 165:12-166:24.

¹⁵ Hr’g Tr. (Oct. 17, 2019) at 168:17-169:20.

¹⁶ Hr’g Tr. (Oct. 17, 2019) at 169:23-170:15.

¹⁷ Hr’g Tr. (Oct. 17, 2019) at 172:24-175:14.

¹⁸ Exhibit 1.

¹⁹ Hr’g Tr. (Oct. 17, 2019) at 172:24-175:14.

²⁰ Hr’g Tr. (Oct. 17, 2019) at 170:5-9, 172:2-17.

Table 1: EDA Earnings, 2005 to 2011.²¹

Year	Total Revenues	Interest on Investments	Tax Incentive Fees	Net Earnings
2005	\$36.9m	\$19.3m (52%)	-	\$16.4m
2006	\$45.9m	\$29.0m (63%)	-	\$23.4m
2007	\$48.2m	\$28.4m (59%)	-	\$23.0m
2008	\$35.4m	\$15.9m (45%)	-	\$7.7m
2009	\$29.4m	\$8.8m (30%)	-	\$1.5m
2010	\$28.4m	\$6.5m (23%)	\$1.5m (5%)	\$1.7m
2011	\$27.4m	\$4.5m (16%)	\$3.5m (13%)	\$1.7m

In 2012, the EDA attempted to forecast its future earnings.²² As shown in Table 2 below, the forecast anticipated that the EDA's annual revenues would continue to drop and, in 2013, would be insufficient to cover the Authority's operating costs for that year.²³

Table 2: EDA Projected Earnings, 2012 to 2015 (projections as of December 2012).²⁴

Year	Total Revenues	Interest on Investments	Tax Incentive Fees	Net Earnings
2012	\$25.6m	\$3.2m (13%)	\$4.5m (18%)	\$1.6m
2013	\$24.5m	\$2.3m (9%)	\$3.5m (14%)	(\$0.7m)
2014	\$25.9m	\$2.8m (11%)	\$4.8m (19%)	\$0.7m
2015	\$24.8m	\$2.5m (10%)	\$4.0m (16%)	\$0.2m

Internal EDA documents show that the EDA struggled with its loss of revenue during this period. A December 8, 2009 letter from the EDA's Chief Executive Officer at the time, Caren Franzini, to the EDA Board reported that the EDA was making a "concerted effort to reduce costs."²⁵ The letter reported that the EDA was keeping vacant positions unfilled "to remain fiscally prudent," but the Authority's "management believes this proposed staffing level will present challenges in administering to the [EDA's] many . . . initiatives . . ."²⁶ A December 14, 2010 letter from Ms. Franzini to the EDA Board reported that, with the EDA continuing to experience "bleak" financial performance, it had "redoubled its efforts to cut costs and improve revenues."²⁷ The letter continued: "For example, we have reduced our budgeted headcount by 12% in three

²¹ Data from the internal EDA document attached as Exhibit 2. This document was attached to the email labeled as Exhibit 1. *See also* Hr'g Tr. (Oct. 17, 2019) at 167:2-168:14.

²² Hr'g Tr. (Oct. 17, 2019) at 182:23-183:5.

²³ Hr'g Tr. (Oct. 17, 2019) at 183:7-185:16.

²⁴ Data from the internal EDA document attached as Exhibit 2. This document was attached to the email labeled as Exhibit 1. *See also* Hr'g Tr. (Oct. 17, 2019) at 167:2-168:14.

²⁵ Exhibit 3; Hr'g Tr. (Oct. 17, 2019) at 177:3-179:17.

²⁶ Exhibit 3; Hr'g Tr. (Oct. 17, 2019) at 177:3-179:17.

²⁷ Exhibit 4; Hr'g Tr. (Oct. 17, 2019) at 179:23-181:8.

years. We continue to challenge our vacancies and backfills while we maintain our commitment to service levels.”²⁸

Every year, the EDA’s Board approves a “Strategic Business Plan” for the agency’s operations, which set out the Authority’s objectives for the year.²⁹ With the Great Recession having taken a toll on the EDA’s finances, starting in 2011, the EDA’s annual business plan every year called for the Authority to find ways to improve its financial performance. In 2011, the EDA set an explicit goal of “[g]enerat[ing] increased operating revenues while outpacing increases in expenses.” As a specific measure, the plan called for the agency to “[i]ncrease operating profit by 10% over 2010 budgeted.” In 2012, the annual plan called for the EDA to “[e]xplore new methods and areas of outreach in order to increase production and fee income.” In 2013, the business plan called for efforts to “maximize return and long term growth.” Similar calls for increased revenue appeared in the EDA’s business plans in 2014 (“Grow top line revenue by 10%”), 2015 (same), 2016 (“Generate new and increased resources”), 2017 (“Generate new and increased funding sources and revenues”), and 2018 (same).

When the Economic Opportunity Act was enacted in 2013 and dramatically expanded the scope of New Jersey’s tax-incentive programs, including by eliminating upper limits on the amount of incentives the Authority could award, senior leadership at the EDA saw a historic opportunity to increase the Authority’s own revenues, which remained significantly below their pre-recession levels. In a memorandum evaluating the year 2013, Tim Lizura’s first full year as the EDA’s President and Chief Operating Officer, he wrote with respect to the recently enacted law: “This landmark piece of legislation retools the [EDA]’s incentives programs as well as changes our business paradigm. **No longer [will³⁰] the Authority be dependent on interest earnings, but for the first time fee [revenue³¹] will be the predominate source of annual income.** The EOA of 2013 with its unparalleled set of economic development tools will be the platform for the next half decade at the Authority shaping all facets of our business.” (Emphasis added).³² The EDA’s Board approved a strategic business plan for 2014—the first full year of the EOA 2013—that called for the agency to “[a]pprove 80 projects under the New Jersey Economic Opportunities [*sic*] Act” that year. Meanwhile, the EDA set a goal that year of “[g]row[ing] top line revenue by 10%.”

²⁸ Exhibit 4; Hr’g Tr. (Oct. 17, 2019) at 179:23-181:8.

²⁹ Hr’g Tr. (Oct. 17, 2019) at 176:3-15. The EDA’s business plans are public documents included in the agendas for the Board meetings at which they are approved. See https://www.njeda.com/eda_board_information/agenda.

³⁰ The original text was “with.” Based on the context, it appears that “will” was likely intended.

³¹ The original text was “review.” Based on the context, it appears that “revenue” was likely intended.

³² Exhibit 5; Hr’g Tr. (Oct. 17, 2019) at 187:10-188:25.

Following the EOA 2013's enactment, the EDA scaled up the fees it charged to Grow NJ beneficiaries in connection with the program, as summarized in Table 3 below.³³ Under this new fees schedule, which the EDA created, the Authority charges meaningful fees to applicant companies only if it has approved the company for tax incentives. When the EDA approves an application, it then calculates the company's fee as a percentage of the tax credit awarded, subject to certain caps. Conversely, if the EDA denies the company's application, the only fee is a relatively minor initial application fee.³⁴

³³ Both the EDA's enabling statute and the Grow NJ statute authorize the EDA to collect fees. *See* N.J. Stat. § 34:1B-5(k) (EDA Act) (authorizing the EDA to "require and collect such fees and charges as the [EDA] shall determine to be reasonable, including but not limited to fees and charges for the authority's administrative, organizational, insurance, operating, legal, and other expenses"); N.J. Stat. § 34:1B-249(a) (Grow NJ Act) (authorizing the EDA to promulgate regulations "for tax credit applicants to be charged an initial application fee, and ongoing service fees, to cover the administrative costs related to the tax credit").

³⁴ Depending on the size of the award requested by the applicant, the application fee is either \$1,000, \$2,500, or \$5,000. *See* N.J. Admin. Code § 19:31-18.6(a).

Table 3: Grow NJ Fees, Before and After EOA 2013

Fee	Pre-EOA 2013 Rate	Post-EOA 2013 Rate
Approval Fee ³⁵	0.5% of approved award, up to \$200,000. ³⁶	0.5% of approved award, up to \$500,000. ³⁷
Issuance Fee ³⁸	0.5% of total tax credit, up to \$200,000. ³⁹	0.5% of total tax credit, up to \$500,000. ⁴⁰
Annual Servicing Fee ⁴¹	\$2,500 each year. ⁴²	2% of annual tax credit, up to \$75,000, each year. ⁴³

Because the EDA's fees are calculated as a percentage of the company's approved award, the EDA stood to substantially profit from the EOA 2013, paving the way for dramatically increased award sizes. Between 2013 and 2018, as the EDA approved incentives awards under the post-EOA 2013 expanded Grow NJ program, the Authority climbed out of its post-economic recession slump.⁴⁴ As summarized in Table 4 below, the EDA's revenues grew almost every year during this period, and the EDA's fees from approving Grow NJ awards materially contributed to these increased earnings, accounting for as much as 30% of the EDA's total revenues in 2017. On the other hand, if the EDA's earnings from Grow NJ fees were eliminated, the EDA's annual revenues in three of the years between 2013 and 2018 would have been insufficient to cover that year's operating expenses.

³⁵ The approval fee is charged in connection with the EDA's approval of the company's application.

³⁶ See 44 N.J.R. 1784(c), 1791 (June 18, 2012) (codified at N.J. Admin. Code § 19:31-18.6(c)).

³⁷ Under current regulations, the maximum approval fee depends on the total award size. For projects with awards of \$1 million or less annually, the maximum fee is \$50,000. For projects with awards between \$1 million and \$4 million annually, the maximum fee is \$200,000. For projects with awards in excess of \$4 million annually, the maximum fee is \$500,000. See N.J. Admin. Code § 19:31-18.6(c).

³⁸ The issuance fee is charged in connection with the EDA's issuance of tax credits to the company, after the company has been approved for an award and has satisfied all requirements to be issued credits.

³⁹ See 44 N.J.R. 1784(c), 1791 (June 18, 2012) (codified at N.J. Admin. Code § 19:31-18.6(d)).

⁴⁰ Under current regulations, the maximum tax credit receipt fee depends on the size of the tax credit. For projects with tax credits of \$1 million or less annually, the maximum fee is \$50,000. For projects with tax credits in excess of \$1 million annually, the maximum fee is \$500,000. See N.J. Admin. Code § 19:31-18.6(d).

⁴¹ The annual servicing fee is charged every year the company has an active incentives agreement with the EDA under which the EDA issues the company annual tax credits.

⁴² See 44 N.J.R. 1784(c), 1791 (June 18, 2012) (codified at N.J. Admin. Code § 19:31-18.6(e)).

⁴³ Under current regulations, the maximum annual servicing fee depends on the size of the annual tax credit. For projects with tax credits of \$1 million or less annually, the maximum fee is \$20,000. For projects with tax credits in excess of \$1 million annually, the maximum fee is \$75,000. See N.J. Admin. Code § 19:31-18.6(e).

⁴⁴ Hr'g Tr. (Oct. 17, 2019) at 198:20-204:24, 208:6-211:7.

Table 4: EDA Earnings, 2013 to 2018.⁴⁵

Year	Total Revenues	Interest on Investments	Grow NJ Fees	Net Earnings	Net Earnings Without Grow NJ Fees
2013	\$24.9m	\$2.4m (10%)	\$1.7m (7%)	\$1.1m	(\$0.6m)
2014	\$26.3m	\$1.9m (7%)	\$3.1m (12%)	\$1.8m	(\$1.3m)
2015	\$35m	\$1.7m (5%)	\$5.4m (15%)	\$8.4m	\$3.0m
2016	\$49.2m	\$2.3m (5%)	\$7.4m (15%)	\$22.3m	\$14.9m
2017	\$43.9m	\$3.1m (7%)	\$13.2m (30%)	\$15.8m	\$2.6m
2018	\$31.7m	\$4.5m (14%)	\$7.2m (23%)	\$1.1m	(\$6.1m)

EDA’s senior leadership took note of the EDA’s earnings. Mr. Lizura wrote a March 15, 2016 memorandum addressed to Melissa Orsen, then the EDA’s Chief Executive Officer, reporting that the Authority had accrued “record[-]breaking operating revenues” in 2015.⁴⁶ In 2016, Mr. Lizura wrote, he “expect[ed] that we will have the largest [net operating earnings] in our history.”⁴⁷ It was, Mr. Lizura wrote, “a very active and successful time.”⁴⁸ By the end of 2017, Mr. Lizura boasted that the EDA was “stronger financially . . . than it has been in some time.”⁴⁹

2. The EDA’s Reliance on Fees from Approving Awards Presents a Potential Conflict with the EDA’s Duty to Appropriately Scrutinize Applications

The EDA’s status as a self-supporting agency, combined with its reliance on fees from the incentives programs—which are awarded in substantial part only when the Authority has approved an application for incentives—creates a potential conflict of interest that risks affecting the EDA’s administration. To state it simply, the EDA faces the dilemma that, the more scrutiny it applies to incentives applications, the more likely it is to determine that an application should be denied in whole or in part, which, in turn, would result in the loss of fees revenue to the EDA. The “strong” financial performance that Mr. Lizura touted in the years following the EOA 2013’s enactment directly resulted from the EDA’s accelerated issuance of tax credits, made possible by the law’s dramatically expanded benefits. Had the EDA been more conservative in its evaluations of incentives applications and applied more exacting scrutiny over them, fewer applications (based

⁴⁵ The data in this table is from the “Projected Actual” column of EDA’s annual fiscal plans. The figures are tallied by the EDA close to the end of the year, and the remainder of the year is estimated. As such, the data is a close, but not precise, reflection of the EDA’s actual performance for the year. *See* Hr’g Tr. (Oct. 17, 2019) at 196:3-198:19.

⁴⁶ Exhibit 6; Hr’g Tr. (Oct. 17, 2019) at 205:4-23.

⁴⁷ Exhibit 7; Hr’g Tr. (Oct. 17, 2019) at 206:2-19.

⁴⁸ Exhibit 7; Hr’g Tr. (Oct. 17, 2019) at 206:2-207:14.

⁴⁹ Exhibit 8; Hr’g Tr. (Oct. 17, 2019) at 207:17-208:3.

on our findings to date) would have been granted and, correspondingly, the EDA's revenues would not have increased at the level they did.

To demonstrate how lack of serious scrutiny of an application could, perversely, benefit the EDA's financial performance, take the example of Cooper Health. As discussed previously in the Task Force's First Report, as well as below, in Section VII of this Second Report, the EDA failed to subject Cooper Health's application to an appropriate level of scrutiny, and the result was that Cooper Health was awarded millions in incentives for which the health system did not qualify. Specifically, the EDA's improper conclusion that Cooper Health's jobs were "at risk" of leaving the State increased Cooper Health's potential award from at most \$7.15 million to \$39.99 million. Meanwhile, the improper "at risk" designation boosted the EDA's approval fee from \$35,750 (0.5% of \$7.15 million) to \$199,950 (0.5% of \$39.99 million)—a \$164,200 increase. Thereafter, when Cooper Health certified for its tax credit several years later, if it certified for the full award (\$39.99 million), the EDA's issuance fee would have again increased by \$164,200 (0.5% of \$39.99 million versus 0.5% of \$7.15 million). And for each year thereafter for the ten-year lifespan of the award, if Cooper Health would certify for the full annual award, the EDA's annual servicing fee would increase from \$14,300 (2% of \$715,000) to \$75,000 (2% of \$3.99 million up to the \$75,000 cap)—a \$60,700 increase each year. Overall, the improper "at risk" designation led to an increase in the EDA's fee revenue over the lifespan of the Cooper Health incentive award by up to \$935,400.⁵⁰

We do not intend to suggest by this illustration that the EDA deliberately approved Cooper Health's improper "at risk" designation in order to accrue the increased fees. As we stated at the outset of this section, the Task Force's investigation has uncovered no evidence that a desire for fees directly affected the EDA's conduct with respect to any application for tax incentives. The point is rather that, at the time of Cooper Health's application, the EDA had such inadequate processes and procedures for evaluating applications that it overlooked open and obvious red flags at the same time it was criticizing the underwriter manager for asking "too many questions." As noted previously, the EDA employees the Task Force interviewed about this issue insisted that the EDA's reliance on fees revenue did not affect its administration of the incentive programs. However, it is clear from internal EDA documentation that the Authority's senior leadership were cognizant of the fact that approving incentives applications had benefits with respect to the EDA's financial performance, which had substantially eroded before the "lifeline" afforded by the EOA 2013. In addition, the EDA's underwriters—who had the primary responsibility for evaluating applications—were told that part of their job was to contribute to the EDA's revenues: their yearly performance goals included a requirement that they "[c]ontribute to revenue goals with approvals . . . that will lead to achieving [annual] production plan metrics."⁵¹ Although no underwriter said

⁵⁰ \$164,200 [approval fee increase] + \$164,200 [issuance fee increase] + (\$60,700 x 10 years) [annual servicing fee increase] = \$935,400 [total increase].

⁵¹ Exhibit 9. An EDA employee interviewed by the Task Force denied that the EDA's revenue goals in any way affected the work of the Authority's underwriters and offered that this instruction may have been "poorly written."

that this directive had any actual impact on their evaluations or on the EDA's due diligence failures, the potential effect is concerning.⁵²

V. THE PUBLIC RECORD OF THE EDA'S DECISION-MAKING CONCERNING TAX-INCENTIVE APPLICATIONS IS INCOMPLETE

With tax-incentive awards under the EOA 2013 reaching hundreds of millions of dollars and having the potential to materially impact the State's budget, it is important that the EDA's decision-making processes be transparent so that the Authority may be subject to appropriate review. However, the Task Force has found that in some instances, the publicly available record of the EDA's decision-making is incomplete. In this section, we discuss two related issues. First, we have found that the EDA often fails to maintain records of communications with third parties. Second, we have also found that in many cases, persons who attempt to influence the EDA's decision-making, such as consultants who represent companies in their incentives applications, fail to register and disclose lobbying activities as required by New Jersey law.

A. The EDA Lacks Sufficient Procedures to Maintain a Complete Record of Its Decision-Making

As discussed in the First Report, the Task Force has found that special interests—in the form of a law and lobbying firm and the clients on whose behalf it apparently operated—appeared to have had a significant impact on the design of the legislation, regulation, and amendments of the Grow NJ statute as amended by the EOA 2013. Furthermore, the Task Force observed, as discussed above, that the EDA has a predisposition to approve projects and grant larger tax-incentive awards when possible. The Task Force, therefore, had concerns about potential influence from other involved parties, including external third parties and special interest groups, that could compromise the efficacy of the EDA's approval process and allow companies to improperly receive tax credits. Thus, the Task Force examined the influence of third parties and whether such contact with individuals within the EDA to advocate on behalf of certain projects had any direct impact on the approval or size of an award.

The Task Force found instances where third parties, including consultants and government officials, such as members of the New Jersey Legislature and representatives of the Lieutenant

⁵² When the Task Force interviewed Maureen Hassett, a senior EDA official between 2012 and 2018, she acknowledged that the EDA's reliance on fees could present a conflict. However, she distinguished the EDA's mission to serve the public from that of a private for-profit enterprise, where profits serve the aim of personal enrichment. By contrast, the EDA did not use its net earnings to pay additional bonuses to the Authority's senior officials, for example, but rather reinvested them in advancement of the EDA's economic development mission. For that reason, Ms. Hassett was not troubled by any potential conflict between EDA's reliance on fees and its duty to serve as a steward of public funds.

Governor’s Office,⁵³ directly contacted EDA personnel to refer potential applicants for the Programs, set up meetings between potential applicants and members of the EDA, and inquired about the status of projects. EDA employees told the Task Force that outreach from government officials for either a project status inquiry or to request that the EDA expedite the process for a particular project often resulted in a re-prioritization for that project. This sort of outreach also prompted the EDA personnel to pay immediate attention to the project and to review it expeditiously. EDA employees also indicated that outreach—in particular, direct outreach to EDA’s senior leadership—was common practice and often occurred outside the purview of less senior staff members. One EDA employee indicated that it was “routine” for companies to request meetings with senior management at the EDA, either through political figures or directly, to advocate for their position that they qualified for an award or additional incentive bonuses.⁵⁴

However, the Task Force found that, as a result of limited recordkeeping concerning certain communications between the EDA and third parties, it was impossible to determine the content of certain communications. Specifically, while some of these third-party communications occurred over email (and thus left an electronic record), many of the communications between both EDA staff and senior leadership and third parties occurred over the telephone (both during telephone calls and via text message) or during in-person meetings, and no record was made of the communications’ content. In some cases, email communications indicated that the discussion was continued between the parties over the telephone after either the third party or EDA employee suggested a telephone call. In a small number of cases, text was suggested as an alternative to email, which could have been for the purpose of obfuscating the subsequent communication. Thus, in many instances, the Task Force was unable to discern the full extent of what occurred during such conversations or meetings between third parties and EDA employees to assess how decisions were reached or how communications may have impacted the EDA’s review of the application or project. For example, in the case of one Grow NJ beneficiary, as discussed below in Section VII(A)(1), a dispute has arisen between the beneficiary and the EDA as to what was said on a telephone call between representatives of the two while EDA staff were processing the entity’s

⁵³ The New Jersey Business Action Center (“BAC”) was led by Lieutenant Governor Kim Guadagno until her departure in 2018. The BAC was created to foster economic growth in the State of New Jersey by attracting businesses and supporting incentive programs in the State. Thus, the Task Force evaluated communications from the BAC to assess whether the EDA was subject to undue pressure or influence in its administration of the Programs. To date, the Task Force has not identified any such inappropriate communications.

⁵⁴ The Task Force reviewed information obtained from the EDA and various other sources and conducted interviews of EDA employees to assess whether there was any evidence of third-party influence that unduly affected the EDA’s application, approval, or post-approval certification processes. While EDA employees denied ever processing applications in a manner inconsistent with law or EDA policy as a result of undue pressure from third parties, the Task Force has observed how certain well-situated individuals can influence the drafting of a project application, its likelihood of success in the EDA review process, and EDA personnel during the internal review process. We discussed one such role, the consultant, at our October 2019 public hearing and in Section VII.

application. Contemporaneous email correspondence suggests that the telephone call was relevant to the entity's claim that it might relocate out of state—specifically, that information about the call could shed further light on why the entity claimed that it was considering moving the relevant jobs out of New Jersey—but there is no documentary record of the discussion that took place.

Although EDA personnel, from senior leadership down to line officers in the Business Development and Underwriting Groups, have received calls from or attended meetings with government officials, consultants, and company representatives advocating on behalf of applicants and award recipients, the EDA does not have policies with respect to third-party communications to ensure that such calls or meetings are recorded to maintain a complete record of the Authority's decision-making process. We found instances in which underwriters referred to notes or notebooks, in which they recalled taking notes of discussions, but then were unable to locate those for production.

Moreover, the Task Force has also observed that EDA-related business between EDA Board members and staff or third parties sometimes took place using Board members' personal email addresses. At the time the Task Force initially made these observations, the EDA did not consistently provide an EDA-issued email address to EDA Board members for Authority business.⁵⁵ However, the Task Force understands that, after the Task Force raised this issue with the EDA and requested documents and communications from EDA Board members, the EDA issued email addresses to at least some Board members. Currently, there is no formal policy requiring EDA Board members or staff to use EDA-issued email addresses when conducting Authority-related business. However, it is the Task Force's understanding that the EDA is developing such a policy. The Task Force has also observed instances in which email communications related to EDA business were sent to the personal email addresses of EDA staff, and, in at least one instance, an EDA employee removed a conversation with a consultant from the EDA email system to continue it over personal text message.

Thus, the EDA's Board, senior leadership and officers sometimes engaged in third-party communications that may constitute public records subject to disclosure pursuant to the New Jersey Open Public Records Act ("OPRA"), but which are not memorialized or otherwise recorded in a form that may readily be collected and provided to the public. The result is that, in some cases, the public record of the EDA's decision-making processes—which may have resulted in the issuance of millions of dollars in tax credits—is incomplete.

The Task Force believes that the EDA would benefit from implementing an official communications and record-keeping policy to ensure transparency and maintain a more complete record of the EDA's processing of applications and awards. Indeed, the EDA's ability to access a complete record is integral to its ability to conduct a complete review and audit its awards. Moreover, the public's ability to review the EDA's work is necessary to ensure transparency into the major processes and incentive programs impacting the public fisc. The Task Force therefore

⁵⁵ In one instance, a Board Member requested, and was provided with, an EDA-specific email address.

recommends that the EDA implement an official communication policy requiring that (1) all EDA business be conducted with official government email addresses (rather than personal email addresses) and (2) that the substance of all telephone calls related to tax-incentive applications be contemporaneously documented or otherwise memorialized.

B. Lobbyists Who Attempt to Influence the EDA Often Fail to Register and Disclose Their Lobbying Activities

As explained above, the public record concerning the EDA's decision-making processes is incomplete in some cases because of the EDA's limited recordkeeping practices. Relatedly, New Jersey law already dictates that certain persons who communicate with the EDA and seek to influence EDA decisions must file public disclosures relating to their efforts. This law, the New Jersey Legislative and Governmental Process Activities Disclosure Act (the "Lobbying Law"), classifies certain persons who communicate with the EDA on behalf of companies as "governmental affairs agents" (or, to use the common parlance, "lobbyists") and requires them to publicly register and file disclosures.⁵⁶ Moreover, Stephanie Olivo, the Director of Compliance at the New Jersey Election Law Enforcement Commission ("ELEC"), testified at the October 17, 2019 Task Force public hearing that many of these communications with the EDA constitute lobbying.⁵⁷ Despite the Lobbying Law's requirements, the Task Force has observed that numerous consultants who regularly communicate with the EDA on behalf of companies have not registered and disclosed their roles.

1. Lobbying Defined

In explaining the purpose of the Lobbying Law, the Legislature stated that "[i]t is in the public interest to closely monitor the activities of governmental affairs agents and lobbyists with respect to their involvement in influencing legislative, regulatory and governmental processes to ensure the integrity of government."⁵⁸ The Lobbying Law and the regulations define what it means to influence each of three areas: legislation, regulation, and governmental processes.⁵⁹ As discussed further below, the category of "influenc[ing] governmental process" refers to any attempt to communicate with certain individuals within the Executive Branch, including those "empowered by law to administer a governmental process or perform other functions that relate to such processes."⁶⁰

There are also certain exemptions or carve-outs for activities that would not fall under the Lobbying Law.⁶¹ As a threshold matter, the Lobbying Law excludes instances where the communications at issue are "an isolated, exceptional or infrequent activity in relation to the usual

⁵⁶ The Lobbying Law is located at N.J. Stat. § 52:13C-18 *et seq.*

⁵⁷ ELEC is responsible for the oversight and enforcement of the Lobbying Law. For Ms. Olivo's testimony, see Hr'g Tr. (Oct. 17, 2019) at 313:4-352:8.

⁵⁸ N.J. Stat. § 52:13C-18.

⁵⁹ 141 N.J. Stat. §§ 52:13C-20(h), (p), (t); N.J. Admin. Code § 19:25-20.2.

⁶⁰ N.J. Stat. § 52:13C-20(t); N.J. Admin. Code § 19:25-20.2.

⁶¹ N.J. Stat. § 52:13C-20; N.J. Admin. Code §§ 19:25-20.2, 20.3.

duties of [the person's] employment.”⁶² The regulations specify that communications are “‘isolated, exceptional or infrequent’ if they constitute less than 20 hours of the time an employee spends working at his or her employment during a calendar year.”⁶³ As Ms. Olivo explained at the Task Force’s October 17, 2019 public hearing, the 20-hour threshold includes related work in support of the communications, such as research or drafting proposed changes to laws or regulations.⁶⁴ The 20 hours is also cumulative of all lobbying activities, regardless of how many projects connect to these activities.⁶⁵ Moreover, the regulations exempt communications for a “routine ministerial matter” where the communications are made to influence employees associated with the executive branch of State government.⁶⁶ The regulations also exempt from the Lobbying Law certain attempts to influence governmental processes.⁶⁷

Whether activities constitute lobbying also depends on the person that the lobbyist seeks to influence. Specifically, the definition of “governmental affairs agent” states that the activities must be directed to “a member of the Legislature, legislative staff, the Governor, the Lieutenant Governor, the Governor’s staff, or any officer or staff member of the Executive Branch, or who holds himself out as engaging in the business of influencing legislation, regulation or governmental processes”⁶⁸ The term “officer or staff member of the Executive Branch” includes, in relevant part, “the members and chief executive officer of any authority, board, commission or other agency . . . who is empowered by law to issue, promulgate or adopt administrative rules and regulations or to administer governmental processes, and any person employed in the office of such an officer who is involved with the development, issuance, promulgation or adoption of such rules and regulations or administration of governmental processes in the regular course of employment.”⁶⁹

The type of individual on the receiving end of the lobbyist’s activities affects whether a rebuttable presumption of lobbying activity applies. Generally, there is a rebuttable presumption

⁶² N.J. Stat. § 52:13C-20(g); N.J. Admin. Code § 19:25-20.2.

⁶³ N.J. Admin. Code § 19:25-20.2.

⁶⁴ Hr’g Tr. (Oct. 17, 2019) at 336:11-337:12.

⁶⁵ Hr’g Tr. (Oct. 17, 2019) at 337:13-17.

⁶⁶ Examples of communications for a “routine ministerial matter” include a communication to schedule a meeting; to request information concerning requirements to comply with existing laws or regulations; to request procedures or forms; to respond to a subpoena; or to provide a response to a detailed request for specific information. N.J. Admin. Code § 19:25-20.3(a)(7).

⁶⁷ The exempt communications include attorney communications that implicate the attorney-client privilege and ethical duties; attorney communications on behalf of a client in a routine litigation or administrative proceeding with the State or in the course of a quasi-judicial civil or administrative proceeding with the State; or communications involving collective negotiations or bargaining in connection with employment. N.J. Admin. Code § 19:25-20.3(b).

⁶⁸ N.J. Stat. § 52:13C-20(g); N.J. Admin. Code § 19:25-20.2.

⁶⁹ N.J. Stat. § 52:13C-20(n); N.J. Admin. Code § 19:25-20.2.

that a communication constitutes lobbying activity where the lobbyist directs the communication to the Governor, the Governor's staff, or other specified and high-level positions.⁷⁰

2. Requirements to Register Under the Lobbying Law

Under the Lobbying Law, the primary requirement for those engaging in lobbying activities is that they must register as lobbyists and make certain disclosures.⁷¹ These requirements facilitate the purpose of the Act and promote monitoring of attempts to influence in these areas. The registration notice must include certain details about the lobbying activities, such as the person whose interests are being represented by the lobbyist, and the general nature of the services.⁷² Notably, the Lobbying Law requires a separate notice of representation for each client that provides compensation to the governmental affairs agent for his services; thus, all interested parties are disclosed.⁷³ The Lobbying Law and regulations further require certain quarterly and annual reports from those that register under the Act.⁷⁴

⁷⁰ N.J. Admin. Code § 19:25-20.3A. This rebuttable presumption does not apply in limited instances involving an attempt to influence governmental processes that are exempt from the Lobbying Law, as set forth above and in footnote 67. *See* N.J. Admin. Code § 19:25-20.3A (cross-referencing N.J. Admin. Code § 19:25-20.3(b)).

⁷¹ There exists some debate on the extent to which the registration requirements apply to lawyers while engaged in activities that also amount to the “practice of law.” The New Jersey Constitution gives to the Supreme Court the ultimate authority to regulate the Bar. N.J. Const. Art. VI, §II, ¶ 3. The Court has held that “[n]either the Legislature nor the Executive has any power to overrule attorney ethical standards promulgated by this Court[,]” reasoning that, “[u]ltimately, it is the Court that establishes the ethical standards to which an attorney is held, and neither the Legislature nor the Executive can diminish them.” *In re Advisory Comm. on Prof'l Ethics Opinion No. 621*, 128 N.J. 577, 591 (1992), superseded on other grounds as stated in *In re Supreme Court Advisory Comm. on Prof'l Ethics Opinion No. 697*, 188 N.J. 549 (2006). Nevertheless, where a legislatively authorized rule or regulation serves a legitimate governmental purpose and does not improperly encroach on judicial interests, the Court often voluntarily defers to the Legislature in the spirit of comity. *In re Advisory Comm. on Prof'l Ethics Opinion 705*, 192 N.J. 46 (2007). A person is not exempt from registering as a lobbyist, however, simply because the person is a lawyer admitted to the New Jersey Bar. As Ms. Olivo noted in her testimony, there are many lawyers registered with ELEC as lobbyists. Hr'g Tr. (Oct. 17, 2019) at 348:25-349:7. For attempts to influence governmental processes, ELEC's regulations themselves exempt representation by a lawyer of clients in a routine litigation or administrative proceeding with the State or in the course of a quasi-judicial civil or administrative proceeding with the State. *See* footnote 67. Clearly, however, that exemption would not apply to attempts by lawyers to influence the drafting of statutes or regulations.

⁷² N.J. Stat. § 52:13C-21; N.J. Admin. Code § 19:25-20.4.

⁷³ N.J. Stat. § 52:13C-21(b).

⁷⁴ *See, e.g.*, N.J. Stat. §§ 52:13C-21, 52:13C-22, and 52:13C-22.1.

3. Lobbying Involving the Tax-Incentive Programs

Given the prevalence of third-party consultants involved in the development, implementation, and use of the Programs, it is unsurprising that the Task Force identified numerous instances of lobbying. As set forth in the Task Force's First Report and its public hearings, some lobbying occurred in the form of attempts to influence the legislation and regulations relating to the Programs.⁷⁵ Certain lobbying efforts relating to EOA 2013 appeared to be instances of unregistered lobbying, in violation of the Act.⁷⁶

Moreover, lobbying to influence governmental process includes communications that attempt to influence the EDA regarding individual tax-incentive awards under the Programs. Specifically, the Act defines "governmental process" to include the "award, denial, modification, renewal or termination of financial assistance, grants and loans."⁷⁷ The EDA determines awards or denials of financial assistance or grants in the form of the tax incentives.

Additionally—when considering to whom the lobbying activities must be directed—the EDA employees involved in various stages of the application approval, post-approval, and certification processes fall within the definition of "officer or staff member of the Executive Branch."⁷⁸ In that definition, the phrase "the members and chief executive officer of any authority" would include the EDA's Board members and the chief executive officer of the EDA.⁷⁹ The definition would also encompass high-ranking officers within the EDA, including the Chief Operating Officer, and other positions of the senior leadership team.⁸⁰ Additionally, the remaining portions of the definition extend to the various staff and other positions at the EDA, including business development officers, incentives officers, underwriters, closing officers, post-closing officers, directors, and managers.⁸¹ Ms. Olivo testified that individuals empowered to administer governmental processes include those who are involved in the process "of deciding or checking boxes of the requirements, whether they're met, whether they're not met . . . and how the application will move forward and if it will move forward."⁸²

It is apparent that applicants under the Programs engaged third parties, whose attempts to influence the EDA and its processes fall within the scope of the Lobbying Law. As set forth in this Section, for numerous applications and approvals, the Task Force found that consultants communicated with the EDA, including senior leadership (Mr. Lizura in particular), to lobby for their clients' awards. For example, as discussed further below in Section VII(C), Susan Harte,

⁷⁵ See, e.g., Task Force First Report, at Section IV.

⁷⁶ Task Force First Report, at Section IV(A). As noted in the First Report, the Task Force has referred matters of unregistered lobbying to appropriate law enforcement authorities.

⁷⁷ N.J. Stat. § 52:13C-20(u); N.J. Admin. Code § 19:25-20.2; see also Hr'g Tr. (Oct. 17, 2019) at 324:18-325:9.

⁷⁸ N.J. Stat. § 52:13C-20(n); N.J. Admin. Code § 19:25-20.2.

⁷⁹ See Hr'g Tr. (Oct. 17, 2019) at 327:17-328:20.

⁸⁰ See Hr'g Tr. (Oct. 17, 2019) at 328:13-20.

⁸¹ See Hr'g Tr. (Oct. 17, 2019) at 331:5-335:25.

⁸² See Hr'g Tr. (Oct. 17, 2019) at 330:5-14.

who was the Director of Location Incentives for CBRE, communicated with the EDA on behalf of Rainforest Distribution Corp. Ms. Harte was not and has not registered as a lobbyist.⁸³ She is not alone. However, where consultants such as Ms. Harte receive compensation from companies, such as Rainforest, to communicate with the EDA to persuade it regarding the applicant's tax-incentive award, these communications, according to Ms. Olivo fall within the scope of the Lobbying Law and its requirements.⁸⁴ While certain communications may fall within one of the exemptions, applicants generally retain these consultants because the consultants have the ability to sway and influence the process in favor of the applicant. The Task Force has observed that consultants regularly communicate with the EDA in this manner, and the Task Force is continuing to examine how these communications affect the EDA's administration of the Programs.

4. Importance of Lobbying Disclosures

Based on its examination of numerous EDA witnesses, many individuals have attempted to influence the EDA one way or another with respect to applications or other aspects of the Programs. While it is not per se inappropriate for a retained consultant to diligently represent the interests of a tax-incentive applicant that pays for his or her services, special interests have had a significant—and largely hidden—effect on the administration of the Programs and State taxpayer funds. The EDA and the public may benefit from increased transparency in this process, including appropriate disclosures of lobbying, which can help prevent concealment of corruption and untoward special interests.⁸⁵

VI. THE EDA'S ADMINISTRATION OF THE TAX-INCENTIVE PROGRAMS HAS FAILED TO MAXIMIZE THE STATE'S BENEFITS IN CERTAIN INSTANCES

Tax-incentive programs are designed to benefit the State and its citizens as a whole, not just the companies that receive tax credits. Indeed, it is a statutory requirement of the Grow NJ program that every tax-incentive award be anticipated to "yield a net positive benefit to the State."⁸⁶ However, the Task Force has observed that in certain instances the manner in which the EDA has administered the Programs has resulted in the State accruing less benefits than it otherwise could have. First, the Task Force has identified one instance in which the EDA allowed

⁸³ ELEC's website maintains a database of registered lobbyists, available at https://www3-elec.mwg.state.nj.us/ELEC_AGAA/entitysearch.aspx.

⁸⁴ At the Task Force's October 2019 public hearing, Ms. Olivo responded to questions regarding an email from Ms. Harte to John Rosenfeld, then the Director of Bonds and Incentives at the EDA. On behalf of Rainforest Distribution, Ms. Harte wrote to Mr. Rosenfeld because the EDA planned to vote on the application in January, rather than in December, a month earlier. Ms. Harte questioned whether there is "anyway we can reconsider this?" Ms. Olivo testified this communication was lobbying. Exhibit 10; Hr'g Tr. (Oct. 17, 2019) at 341:8-24. Ms. Olivo also testified about other scenarios in which Ms. Harte apparently lobbied on behalf of other projects. Hr'g Tr. (Oct. 17, 2019) at 338:7-343:7.

⁸⁵ See Hr'g Tr. (Oct. 17, 2019) at 346:10-348:7.

⁸⁶ N.J. Stat. § 34:1B-244(a)(3).

a company to be reimbursed for its fees paid to the Authority from public funds rather than out of pocket. Second, we continue our discussion of the “phantom tax” provisions of the Grow NJ program, which, as previously discussed, allow companies to include illusory taxes that will never be paid as “benefits to the State” nonetheless.

A. The EDA’s Treatment of the Capital Investment Requirement Allowed a Project to Reimburse the Fees It Paid to the EDA from Public Funds by Way of Its Tax Credits

As discussed in Section IV above, companies that apply to the EDA for tax incentives must pay certain fees to the Authority. In fact, with these fees potentially exceeding \$1 million per application, they provide a significant source of revenue for the EDA. The Task Force has found that in one instance, the EDA allowed a company—the Philadelphia 76ers—to be reimbursed for its fees paid to the EDA from public funds, by way of tax credits.

The manner in which the EDA allowed the Philadelphia 76ers to be reimbursed for its EDA fees from public funds relates to the “capital investment” provisions of the Grow NJ program. As discussed in the Task Force’s First Report, companies with projects in Camden, unlike projects in other parts of the State, may receive tax credits equal to the “capital investment” they make in their project (referred to as the “Camden alternative” approach). A project subject to the Camden alternative approach award calculation can receive an award equal to the size of its eligible capital investment. In other words, every dollar counted toward the project’s eligible capital investment would be a dollar toward the company’s tax credit award amount. Thus, if a company characterizes the fees it pays to the EDA as part of its capital investment, the result is that the company may receive tax credits to effectively compensate it for the fees. As discussed further below, this is precisely what happened with the Philadelphia 76ers.

Certain eligible capital expenditures are more easily recognizable than others. For example, the definition of capital investment includes: “site preparation and construction, repair, renovation, improvement, equipping, or furnishing on real property or of a building, structure, facility, or improvement to real property” as well as “obtaining and installing furnishings and machinery, apparatus, or equipment . . . for the operation of a business on real property or in a building, structure, facility, or improvement to real property.”⁸⁷ Accordingly, as the EDA’s Director of Incentives Relationship Management, Susan Greitz, explained during the Task Force’s October 17, 2019 public hearing, eligible costs under the definition include “physical construction sort of costs” or “hard costs,” such as costs incurred for physical work to the site and the physical acquisition of certain items for the site.⁸⁸ The regulations further provide that the definition of capital investment includes expenses incurred “for the operation of a business on real property in

⁸⁷ N.J. Stat. § 34:1B-243; N.J. Admin. Code § 19:31-18.2

⁸⁸ Hr’g Tr. (Oct. 17, 2019) at 223:21-24. Moreover, at the Task Force’s October 17, 2019 public hearing, Bruce Ciallella, the EDA’s Senior Vice President of Portfolio Management and Compliance and HUD, explained that the capital investment requirement would involve “looking at the capital investment cost. So steel. The carpenters. The permits. Things of that nature.” Hr’g Tr. (Oct. 17, 2019) at 290:13-16.

a building, structure, facility, or improvement to real property, including associated soft costs.”⁸⁹ Under the regulations, “‘soft costs’ means all costs associated with financing, design, engineering, legal, or real estate commissions, provided they do not exceed 20 percent of total capital investment.”⁹⁰

However, the definition of “capital investment” also permits inclusion of certain additional costs for projects within a Garden State Growth Zone (a “GSGZ”)—that is, Atlantic City, Camden, Trenton, Passaic, and Paterson. These costs include “any development, redevelopment, and relocation costs, including, but not limited to, site acquisition if made within 24 months of application to the authority, engineering, legal, accounting, and other professional services required; and relocation, environmental remediation, and infrastructure improvements for the project area, including, but not limited to, on- and off-site utility, road, pier, wharf, bulkhead, or sidewalk construction or repair.”⁹¹ Nowhere within the definition does it explicitly state—nor does it implicitly suggest—that companies may include fees paid to the EDA in its eligible capital investment. Moreover, two EDA employees testified during the October 2019 public hearing that a project’s capital investment costs cannot include fees paid to the EDA as an eligible cost.⁹²

1. EDA Fees Should Not Be Included in a Project’s Eligible Capital Investment

Indeed, allowing a company to recoup in tax credits the fees it pays to the EDA is inconsistent with the concept of the “capital investment.” All Grow NJ projects must meet a capital investment requirement and make a threshold amount of eligible capital expenditures toward its New Jersey facility. The capital investment requirement “encourages growth,” “directs funds to those geographically challenged areas,” and ultimately ensures that the incented company invests in the project location, where it must remain for the duration of the award term.⁹³ By including EDA fees in a project’s eligible capital investment, the EDA allows the company to use the fees it

⁸⁹ N.J. Admin. Code § 19:31-18.2.

⁹⁰ N.J. Admin. Code § 19:31-18.2.

⁹¹ N.J. Stat. § 34:1B-243; *see also* N.J. Admin. Code § 19:31-18.2 (substantially similar). This language expands the eligible capital investment for projects within a GSGZ to include additional types of costs and also to include costs incurred earlier in time, within 24 months before the application to the EDA. Typically, the capital investment includes costs incurred only after the project submits its application for the incentive. N.J. Stat. § 34:1B-243 (“‘Capital investment’ in a qualified business facility means expenses by a business or any affiliate of the business **incurred after application** . . .” (emphasis added)).

⁹² *See* Hr’g Tr. (Oct. 17, 2019) at 224:23-225:9 (testimony of Susan Greitz: “Q: [A]re the fees that the company has to pay to the EDA an eligible capital expense for the incentive programs? A: No, they’re not. Q: So in other words, as it currently stands, EDA fees should not be counted as part of a company’s capital investment, not a soft cost? A: Correct.”); Hr’g Tr. (Oct. 17, 2019) at 290:25-291:5 (testimony of Bruce Ciallella: “Q: Could you provide some examples of expenses that would not count toward [the capital investment?] A: Sure. I think we talked about it earlier. The fees that are associated with the EDA application and the approval, would be one.”).

⁹³ Hr’g Tr. (Oct. 17, 2019) at 220:4-221:5.

pays to the EDA—rather than additional expenditures in the “geographically challenged area”—to help the company meet the program eligibility criteria.

Moreover, this practice is arguably inconsistent with the EDA’s design as a self-supporting agency. The legislature intended that the EDA fund its own operations. When fee payments to the EDA are reimbursed from public funds, the EDA’s operations are effectively paid for from the public fisc although the legislature did not appropriate any funds for this purpose.

2. Inclusion of the EDA Fees in the Philadelphia 76ers’ Capital Investment

The Task Force examined the capital investment and the EDA fees issue for the Philadelphia 76ers’ project. The Philadelphia 76ers applied for a Grow NJ award on March 27, 2014, seeking incentives to bring 250 new jobs to Camden, New Jersey, from Philadelphia, Pennsylvania.⁹⁴ As part of its application, the Philadelphia 76ers indicated that it expected to make a capital investment in the estimated amount of \$82,040,507. The EDA calculated the Philadelphia 76ers’ incentives award using the Camden alternative approach. Accordingly, on June 10, 2014, the EDA Board approved the project for an award of \$82,040,507, based on its anticipated capital investment.⁹⁵ Despite the clear rule that the EDA fees should not be included in a project’s “soft costs,” the EDA allowed the Philadelphia 76ers to include the fees it was required to pay to the EDA—approximately \$400,000, at that point in its application—as an eligible capital expenditure. As a result, the company’s tax credit award amount was calculated to include the amount of those fees. In effect, the EDA caused public funds to be used to reimburse the company (via tax credits) for the fees it paid to the EDA to obtain those tax credits. From a practical perspective, it is unclear how or why this was permitted, given that the current policy at the EDA is that the EDA fees should not be included as an eligible capital expense.⁹⁶

The Task Force has not been able to identify a reason why the EDA fees were included in the capital investment for the Philadelphia 76ers. EDA communications from the time of the award approval and certification imply that no one at the EDA questioned the inclusion of the fees. The Task Force came across several emails to this effect, including communications from Tim Lizura, then the President and Chief Operating Officer of the EDA, with a consultant for the Philadelphia 76ers and with EDA staff regarding inclusion of the fees.⁹⁷

In the context of the Philadelphia 76ers’ award, inclusion of the EDA fees was significant because the Philadelphia 76ers’ actual eligible capital investment was lower than the amount

⁹⁴ Exhibit 11.

⁹⁵ Exhibit 12.

⁹⁶ Exhibit 13 (Policy Clarification that listed under “Ineligible Expenses” “NJEDA Fees (e.g. approval fee for GROW NJ, issuance fee for GROW NJ, etc.)”).

⁹⁷ See Exhibits 14 and 15. The Task Force contacted Mr. Lizura to inquire about these communications and the EDA’s policy regarding inclusion of the EDA fees in a project’s eligible capital investment. After an initial call with his counsel, Mr. Lizura stopped responding to requests to discuss these communications.

anticipated at the time of its award approval—meaning that the company would receive a lower award than it had initially anticipated. The EDA Board originally approved the project for an award of \$82,040,507, based on its anticipated capital investment.⁹⁸ This approved amount acted as a cap on the amount of tax incentives that the project would receive. However, the Philadelphia 76ers ultimately certified to a capital investment of only \$79,561,774, inclusive of the EDA fees. The Philadelphia 76ers paid a total of \$397,808.87 (or 0.5% of \$79,561,774) in EDA fees tied to its award issuance.⁹⁹ Because the project ultimately cost less than the anticipated amount, the inclusion of the EDA fees as part of the capital investment increased the dollar amount of the tax credits that the company could receive under the circumstances. Had the Philadelphia 76ers expended the originally anticipated \$82,040,507 on eligible capital investments, the inclusion of the EDA fees would have no effect because, under the circumstances, the award likely could not be increased beyond the approved award amount.¹⁰⁰ However, the Task Force notes that even if the EDA had not included the EDA fees as part of the Philadelphia 76ers' eligible capital investment, the company would not have been disqualified from receiving an award, given that the reduced capital investment amount without the EDA fees still greatly exceeded the required capital investment of \$9,600,000.¹⁰¹

To date, the Task Force has not uncovered another Grow NJ project where the capital investment has included the fees that the company paid to the EDA.¹⁰²

3. Lack of Instructions to Ensure Consistent Evaluation of the Capital Investment Requirement

This unique treatment of the Philadelphia 76ers' capital investment occurred, in part, because the EDA failed to provide clear guidance both to the EDA staff and to the certified public accounting ("CPA") firms responsible for cost certification reports that the project's capital

⁹⁸ Exhibit 12.

⁹⁹ Exhibit 16. The Philadelphia 76ers had initially paid the EDA \$410,202.54 as the overall issuance fee, based on its anticipated award rather than the actual certified award, but the EDA reimbursed the company for overpayment by \$12,393.67. Exhibit 16. It is unclear whether the amount of fees included in the capital investment was \$410,202.54 or a lower amount, after the \$12,393.67 reimbursement. While the project's cost certification report does not provide a detailed breakdown of the expenditures, documents produced to the Task Force by the Philadelphia 76ers indicate that the fees were included in the category of costs for "Financing Costs." *See, e.g.,* Exhibit 17.

¹⁰⁰ *See* Hr'g Tr. (Oct. 17, 2019) at 234:18-235:2. (testimony of Susan Greitz: "[I]f you had a project come in and overspend, which to be frank, most of them do overspend, this wouldn't be the EDA fees. It probably – it would be moot. You know, they would have spent more than [the] maximum anyway, beyond our fees. Here, it came up because these people were spending less than what was anticipated.").

¹⁰¹ Exhibit 18.

¹⁰² Hr'g Tr. (Oct. 17, 2019) at 229:15-230:2. As explained in testimony during the Task Force's October 17, 2019 public hearing, there are only a few awards that were calculated using the Camden alternative that have certified.

investment was accurate and in line with the statutory and regulatory definition of capital investment. Prior to changes that the EDA has implemented within the last year, EDA employees responsible for the overall certification process were not required to provide specific guidance to CPAs regarding the definition of capital investment under the programs. At the Task Force’s October 17, 2019 public hearing, Mr. Bruce Ciallella, Senior Vice President of Portfolio Management, testified that the lack of guidance to CPA firms was “problematic” because “[t]he law and the rules are complicated as it relates to capital investment. And CPA firms might not necessarily have the expertise in understanding the nuances of the program.”¹⁰³

Moreover, prior to recent changes, the EDA generally took the CPA cost certification report at face value, without independently corroborating whether the costs were accurately categorized.¹⁰⁴ Beginning in 2019, the EDA’s certification process now includes uniform agreed-upon procedures between the EDA and the CPAs, which the EDA provides to each CPA at the outset of the CPA’s review process.

However, the EDA must make further improvements in its distribution of instructions and policies to its staff. In September 2019, the EDA issued to staff in its Incentives Portfolio division a “Policy Clarification” regarding the capital investment, which specifically identified “NJEDA Fees (e.g. approval fee for GROW NJ, issuance fee for GROW NJ, etc.)” as ineligible expenses.¹⁰⁵ In other words, the EDA fees could not be included as capital investment “soft costs.” And, during the Task Force’s October 2019 public hearing, both Mr. Ciallella and Ms. Greitz testified that EDA fees were not to be included as soft costs or other capital expenditures. Nevertheless, two EDA credit underwriters that the Task Force interviewed in November and December 2019—after the public hearing testimony and the dissemination of the “Policy Clarification” on this issue—indicated that they believed that EDA fees *could* be included as soft costs to be recouped in the form of tax credits by ERG program award recipients.¹⁰⁶ In addition, the Managing Director of

¹⁰³ Hr’g Tr. (Oct. 17, 2019) at 296:25-297:5.

¹⁰⁴ Hr’g Tr. (Oct. 17, 2019) at 296:16-21 (testimony of Bruce Ciallella).

¹⁰⁵ Exhibit 13.

¹⁰⁶ While these EDA employees are responsible for underwriting ERG projects and not Grow NJ projects, Ms. Greitz—who has oversight duties for both Grow NJ and ERG—indicated during an interview that the eligible costs for ERG projects should *not* include EDA fees. Moreover, the CPA certification reports for Grow NJ and ERG projects appear to be identical. According to Ms. Greitz’s testimony during the October 2019 public hearing, she opined that the Philadelphia 76ers may have been permitted to include the EDA fees in its capital investment because of the expanded definition of capital investment for Grow NJ projects located in a Garden State Growth Zone. *See* Hr’g Tr. (Oct. 17, 2019) at 232:21-233:18 (“The section of the law that talks about capital investment was brought in just for the Garden State Growth Zone. . . and it has some broad language in it that reiterates some that were already including historically for soft costs. . . . And they included kind of a catch-all phrase. . . . [T]hat’s the gist of it. So it was a broader understanding.”). However, Ms. Greitz acknowledged that the EDA’s current policy does not allow the EDA fees to be included as part of a project’s eligible capital investment. Hr’g Tr. (Oct. 17, 2019) 228:23-229:2. The broad statutory language to which Ms. Greitz referred does not exist in the statute or regulations governing ERG.

Underwriting, who oversees the bonds and incentives underwriters of Grow NJ projects and the credit underwriters of ERG projects, was uncertain about whether EDA fees qualified as eligible costs for the ERG program.

The fact that this policy was the subject of a recent “Policy Clarification” and was still inconsistently understood evidences a deficiency in the way that the EDA disseminates its policies. The “Policy Clarification” memorandum was circulated to members of the EDA’s post-approval groups, but it was not circulated to the underwriters, who are responsible for evaluating Grow NJ and ERG applications before they are approved.¹⁰⁷ It is unclear why the policy clarification would not be circulated to the Underwriting Department more generally, since the underwriters are responsible for communicating with project applicants about the Programs’ requirements, including about the anticipated capital expenditures that can be included for the project. To avoid scenarios like this one, where EDA employees at different stages of the process have conflicting or incorrect understandings of the Programs’ requirements, the EDA needs more effective and comprehensive dissemination of its policies. By enhancing the internal communication process, the EDA can better ensure that employees working on different aspects of the Programs are armed with the same knowledge and information about compliance with the Programs’ requirements. The EDA’s current implementation of changes at the post-approval stage, described in Section IX, should strengthen the EDA’s ability to vet a project’s capital investment and ensure that CPAs understand which costs are consistent with the Programs’ requirements. However, the EDA’s overhaul of the post-approval process does not address problems that may arise from an underwriter’s misunderstanding of eligible capital expenditures at the pre-approval stage. The EDA should attempt to remedy misunderstandings and deficiencies at the earliest stage possible, well before a project’s certification.

B. The “Phantom Taxes” Provisions of EOA 2013 Have Limited the State’s Benefits

The “phantom taxes” concept, as it was explained in the Task Force’s First Report, was conceived as a mechanism to artificially inflate the size of certain incentive awards approved by the EDA. The concept is closely related to the Grow NJ program’s “net benefits” requirement. That is, the Grow NJ statute requires that every incentives award be anticipated to “yield a net positive benefit to the State.”¹⁰⁸ In this context, the “benefit to the State” means tax revenues collectible by the State as a result of the fruition of the project for which the tax incentives were awarded—that is, tax revenue that the State would not collect in the absence of the tax incentives. For example, consider construction work in New Jersey that would not occur unless tax incentives are provided. If the incentives are awarded and the construction is commenced, any taxes collected by the State as a result of such incentivized construction—such as property taxes on the developed property and sales taxes on building materials purchased in New Jersey and used in the

¹⁰⁷ The “Policy Clarification” Memorandum was directed to Grow NJ projects only; however, as discussed in footnote 106, Ms. Greitz said that the eligible costs for ERG projects also should not include the EDA fees, and both Grow NJ and ERG use the same CPA certification report.

¹⁰⁸ N.J. Stat. § 34:1B-244(a)(3).

construction—are “benefits to the State.” Because of this so-called “net benefit” requirement, the Grow NJ program is sometimes said to effectively “pay for itself.”¹⁰⁹ If the statute operates as intended, the State will collect tax revenue at least in the amount that the State “spends” on tax incentives, meaning that there is no loss of public funds.¹¹⁰

However, this net benefit requirement was undermined by certain EOA 2013 amendments allowing “phantom benefits” to be included in the total benefits calculation. Pursuant to these provisions, which apply to projects in Camden only, the net benefit calculation “may utilize” the value of certain taxes that would otherwise accrue but, instead, were exempted from payment by operation of other provisions of law.¹¹¹ In other words, the “benefits” calculation for projects in Camden may include “phantom taxes” as ostensible “benefits to the State” even if the State would never collect those taxes. As a result of these provisions, the “net positive benefit to the State” that is required by the law may be rendered illusory for some applications, and the tax incentives awarded under the Grow NJ program may, in fact, come at a cost of public funds rather than a gain.¹¹²

In the First Report, the Task Force discussed evidence that Parker McCay P.A., a law and lobbying firm based in Mount Laurel, Hamilton, and Atlantic City, appears to have played a role in the incorporation of the phantom tax concept into the Grow NJ program. The Task Force has since confirmed, as discussed below, that the phantom tax concept was specifically intended to boost the tax-incentive award of Holtec International (“Holtec”), a Parker McCay client that received one of the largest tax credits in New Jersey history. After the company demanded that the size of its potential incentives award for locating certain jobs in New Jersey be increased, the EDA’s senior leadership worked with political officials to modify the draft EOA 2013 bill to incorporate provisions that would have that effect, eventually culminating in the phantom tax provisions that were enacted into law. We also further discuss below the ways in which the

¹⁰⁹ See, e.g., Martin Bricketto, *Camden Rises As NJ Economic Incentives Bear Fruit*, LAW360, Jan. 9, 2015, <https://www.law360.com/articles/609401/camden-rises-as-nj-economic-incentives-bear-fruit> (quoting the then Chief Executive Officer of the EDA, Michele Brown: “In no event is any incentive awarded to a project that doesn’t result in a net benefit to the state.”); Katherine Landergan, *Tax incentives likely the next big battle in Trenton*, POLITICO, Apr. 22, 2019, <https://www.politico.com/states/new-jersey/story/2019/04/22/tax-incentives-likely-the-next-big-battle-in-trenton-981226> (quoting former New Jersey State Senator Ray Lesniak: “From a pure revenue standpoint, [Grow NJ is] a revenue plus for the state.”).

¹¹⁰ More precisely, under Grow NJ as amended by EOA 2013, projects in Camden must satisfy a 100% benefit-cost threshold, meaning that the anticipated benefits to the State must be at least equal to the tax-incentive award. In other parts of the State, the requisite benefit-cost threshold is 110%, meaning that the anticipated benefits to the State must be anticipated to exceed the tax-incentive award by at least 10%.

¹¹¹ N.J. Stat. § 34:1B-244(a)(3)(b).

¹¹² At the Task Force’s May 2, 2019 public hearing, the EDA’s former President and Chief Operating Officer Tim Lizura was asked whether these provisions “allowed projects to get through even though they weren’t paying for themselves.” Mr. Lizura responded, “I would say that’s a pretty accurate statement.” Hr’g Tr. (May 2, 2019) at 257:9-15.

phantom tax provisions of the Grow NJ program—which, once enacted into law, benefited numerous additional companies beyond Holtec—have contributed to public confusion concerning the costs and benefits of the program.¹¹³

1. The Phantom Tax Provisions Were Intended for the Specific Benefit of Holtec International

In 2012, Holtec, a nuclear energy company with facilities in Marlton, New Jersey, and in other states, was allegedly pursuing plans to locate certain operations in South Carolina.¹¹⁴ In early 2013, Holtec started discussing with New Jersey government officials the possibility of relocating its operations in Camden, instead. In February 2013, the BAC, which seeks to attract businesses to the State, provided Holtec with information about the New Jersey incentive programs that Holtec could qualify for if it located in Camden, including the then-existing Grow NJ program (before it was expanded by EOA 2013 later that year).¹¹⁵ Later that month, the BAC followed up with an “incentive proposal” in which it estimated that Holtec could qualify for \$40 million in tax credits under the Grow NJ program, and an additional \$1.6 million in assistance under other incentive programs.¹¹⁶

Meanwhile, as the BAC was working to persuade Holtec to locate its operations in New Jersey based on the State’s then-existing incentive programs, the New Jersey Legislature was considering revamping those programs. The EOA 2013 bill revamping the tax-incentive programs was first introduced in the State Assembly in January of that year. The initial version of the bill proposed to expand the Grow NJ program, but only modestly compared to the changes that would later be made by the State Senate in June of 2013. Under the Senate version of the bill, tax credits for incentivized projects in Camden could be calculated based on the company’s capital investment, rather than based on the standard formula that applied to projects in other parts of the

¹¹³ While it is clear that a number of companies benefited from the phantom tax provisions, the Task Force has been unable to compile a precise list. Mr. Lizura testified at the Task Force’s May 2, 2019 public hearing that he recalled the following companies with approved Grow NJ awards as having benefited from the phantom tax provisions: Holtec International, Philadelphia 76ers, L.P., American Water (American Water Works Company, Inc., American Water Works Service Company, Inc., and American Water Enterprises, Inc.), Subaru of America, Inc., Conner Strong & Buckelew Companies, LLC, The Michaels Organization, LLC, and NFI, L.P. Hr’g Tr. (May 2, 2019) at 257:16-258:19. The EDA, however, did not keep records concerning phantom taxes, and each company’s EDA file may or may not contain sufficient information to determine whether the company benefited from phantom taxes.

¹¹⁴ See, e.g., Holtec International, *For immediate release: Press Conference on Small Modular Reactor, Columbia, South Carolina*, June 19, 2012, <https://holtecinternational.com/2012/06/19/for-immediate-release-press-conference-on-small-modular-reactor-columbia-south-carolina-june-19-2012/>.

¹¹⁵ Exhibit 19.

¹¹⁶ Exhibit 20.

state.¹¹⁷ Thus, if a company spent \$100 million to construct a new business facility in Camden, it could receive \$100 million in tax credits. This “alternative approach” to award calculation would allow companies that located in Camden to receive awards far in excess of what would otherwise be possible for projects in other parts of the State.¹¹⁸ However, these Camden awards could still be limited by the net benefits requirement (*i.e.*, the requirement that the anticipated benefits of the award exceed—or at least be equal to—the size of the tax credit). To continue the prior example, if the EDA’s econometrics modeling anticipated that the company’s \$100 million incentive (which equaled the company’s \$100 million capital investment) would lead to only \$75 million in benefits to the State, then the tax credit had to be reduced to \$75 million. Thus, the net benefits requirement could operate as a “ceiling” that limited the maximum tax-incentive award a company could otherwise receive.

The net benefits requirement became an issue in the Holtec negotiations. In mid-2013, with EOA 2013 still being negotiated in the Legislature, the EDA used its econometrics model to predict the anticipated benefits to the State from Holtec’s project and to try to determine whether the benefits calculation would limit an award. The EDA found that, based on the circumstances of Holtec’s project as understood at that time, the benefits to the State would be relatively small compared to the company’s investment, and its tax-incentive award would therefore be limited. The BAC recorded in its files, in an entry dated May 30, 2013, that there were “Net Benefit issues” with Holtec.¹¹⁹ An EDA test run around this time found that, despite Holtec’s anticipated sizeable capital investment of several hundred million dollars, the company could qualify for only a \$50 million award as a result of the net benefits test.¹²⁰ New Jersey government officials believed that Holtec would locate the operations in Camden, rather than in South Carolina, only if they would provide the company with tax incentives far in excess of that, perhaps requiring as much as \$250 million in incentives. The estimated \$50 million award, therefore, was “[n]aturally . . . too low,” one EDA official observed in an email.¹²¹

Discussions between Holtec and the State continued, with Holtec proposing various modifications to the project (such as to the number of employees that would be based in Camden), and the EDA re-running its econometrics model to provide revised net benefits estimates based on the modifications. On June 20, 2013, the BAC informed Holtec that the EDA had estimated its award could be \$121 million.¹²² Several days later, on June 23, 2013, the BAC reported to the

¹¹⁷ Prior to the enactment of EOA 2013, the capital investment method of award calculation was a feature of the Urban Transit Hub Tax Credit Program (or “HUB”).

¹¹⁸ As explained in the Task Force’s First Report, for projects in parts of New Jersey other than Camden, the usual approach to an award calculation under the Grow NJ program as amended by EOA 2013 is to apply a formula based on the number of jobs. *See* First Report at 19.

¹¹⁹ Exhibit 21.

¹²⁰ Exhibit 22.

¹²¹ Exhibit 22.

¹²² Exhibit 23.

EDA that Holtec's Chief Executive Officer, Dr. Krishna Singh, and the company's lobbyist, Philip Norcross from the Parker McCay firm, were asking for a \$200 million award.¹²³

As New Jersey government officials considered how to increase Holtec's incentives, senior EDA officials assisted by proposing ways the EOA 2013 could modify the net benefits test in order to boost Holtec's potential award. As Mr. Lizura described it in a June 23, 2013 email with the subject line "Holtec" [*sic*], he was "[t]rying to get the NBT [net benefits test] to work for them."¹²⁴ That same day, he circulated a proposal that the EOA 2013 could be drafted to provide that projects meeting certain specifications, which were designed to capture Holtec's project, could be provided a "20% NBT bonus."¹²⁵ The suggestion was apparently to increase the forecasted benefits to the State from Holtec's project by 20% (as a "bonus"), thereby allowing Holtec to receive 20% more in tax credits. That proposal was not adopted but seems to have served as a precursor to the "phantom taxes" concept that would be introduced the next day.

On the evening of June 23, 2013, the BAC and the EDA invited Holtec to have a conference call "to discuss last minute options and the new incentive bill."¹²⁶ The call took place at 8:00 AM the next morning, between Holtec representatives, including Philip Norcross, and officials from the BAC and the EDA. It appears likely that during this 8:00 AM call on June 24, 2013, someone proposed the phantom tax concept for the EOA 2013 (EDA officials would later internally credit Philip Norcross with the idea).¹²⁷ At 9:35 AM, apparently after the call had concluded, Maureen Hassett, the EDA's then-Senior Vice President of Finance and Development, circulated proposed statutory language to implement the phantom tax concept, which allowed the EDA to classify certain taxes that companies were not actually required to pay to nonetheless count as "benefits to the State" for purposes of the net benefits test.¹²⁸ She again circulated slightly revised language at 9:53 AM.¹²⁹ A few minutes later, at 9:57 AM, Colin Newman, then an aide to former New Jersey Governor Chris Christie, responded that Ms. Hassett's proposed language "[l]ook[ed] good" and said that he would "pass [it] along."¹³⁰ That day, a revised draft of the EOA 2013 passed the

¹²³ The BAC representative who reported this information to the EDA further opined that he thought Holtec "may not need that much." He added: "I think they walk at 120. Need north of 150." Exhibit 24.

¹²⁴ Exhibit 24.

¹²⁵ Specifically, Mr. Lizura proposed that "projects completed on sjpc property" could be provided the "20% NBT bonus." Exhibit 25. Holtec planned to lease (and since has leased) property in Camden for its development project from the South Jersey Port Corporation (SJPC).

¹²⁶ Exhibit 23.

¹²⁷ In 2014, when additional amendments to the Grow NJ statute were under consideration, Ms. Hassett sent an internal EDA email that credited "Phil" with including "the 'phantom tax' notion . . . in [the] original bill draft." Exhibit 26. Ms. Hassett has confirmed to the Task Force that the "Phil" referenced in her email was Philip Norcross of Parker McCay. Mr. Lizura, who received Ms. Hassett's email, has also informed the Task Force that he understood "Phil" to refer to Mr. Norcross.

¹²⁸ Exhibit 27.

¹²⁹ Exhibit 27.

¹³⁰ Exhibit 27.

Senate Budget and Appropriations Committee, including, for the first time, the phantom tax provisions.¹³¹ Summarizing the events of the day, the BAC recorded in its files the following note about Holtec: “NJBAC NJEDA 2 conference calls to discuss updated \$250 million dollar offer from Senior Leadership molding new language into the new incentive bills. Call went very well and project seems to be back on track.”¹³²

The final EOA 2013 bill, including the phantom tax provisions, was enacted into law on September 18, 2013. Although the phantom tax provisions were designed for the specific benefit of Holtec, apparently at the suggestion of Holtec’s lobbyist, any company with a project in Camden could use the provisions to its advantage. Thus, once enacted into law, the EOA 2013 allowed any company with a project in Camden to include phantom taxes, which the companies would never pay, in their net benefits calculation.¹³³

Holtec submitted its application for tax incentives to the EDA on January 20, 2014. The application, which sought \$260 million in tax credits, was based on a \$260 million capital investment by Holtec.¹³⁴ The EDA’s econometrics model used to assess benefits to the State calculated that Holtec’s project in Camden was expected to provide \$260,155,520 in gross benefits to New Jersey. In other words, the EDA estimated that Holtec’s project in Camden would result in \$155,520 in net benefits to the State (net of the cost of the tax credits granted to Holtec). Pursuant to the phantom tax provisions of the EOA 2013, however, the EDA’s benefits calculation for Holtec included almost \$5 million in annual property taxes that Holtec was in fact exempt from paying (and the EDA was fully aware that Holtec was exempt from paying). Had the EDA’s econometrics model excluded these phantom tax benefits from the calculation and limited the

¹³¹ As discussed in the Task Force’s First Report, the Task Force is in possession of two non-public draft versions of the bill, both from June 21, 2013, which did not yet include the phantom tax provisions. *See* First Report at 23.

¹³² Exhibit 21.

¹³³ Ironically, the EDA realized in 2014 that, despite the phantom tax provisions being intended to benefit Holtec specifically, there was an ambiguity in the statutory language that created a question as to whether the provisions would actually apply to Holtec. Holtec had no property tax liability for its planned Camden development because it intended to lease the land for the project from the South Jersey Port Corporation, which, as a public entity, was itself exempt from property taxes. As initially enacted, although the EOA 2013 was clear that certain exempt taxes could be included as phantom benefits in the net benefits calculation, the statute was not explicit that exempt taxes in this precise situation qualified. The Grow NJ statute was amended in 2014, by the Economic Opportunity Act of 2014, to explicitly state that the net benefits calculation may include, in addition to other phantom taxes, “the value of those property taxes that would have been assessed on the new construction, improvements, or substantial rehabilitation of structures on real property if the structures were not exempt because they are on real property owned by a public entity.” This language clarified that the net benefits calculation for Holtec would include the company’s phantom property taxes. Internal EDA correspondence indicates that the EDA believed this was the “intent” of the “original” EOA 2013 bill. Exhibit 26.

¹³⁴ The application was initially based on a \$350 million anticipated capital investment, which was later reduced to \$260 million.

analysis to Holtec’s actual tax liabilities, it would have found no net benefit to the State. In reality, Holtec’s incentives would cost the State millions of dollars over the life of the award, because the costs of the tax credits awarded to the company actually exceeded the anticipated real (not phantom) benefits to the State.¹³⁵ The EDA approved Holtec for the \$260 million award—one of the largest incentive awards in New Jersey history—on July 10, 2014. The BAC recorded in its notes: “7/10/14 Approved...success.”¹³⁶

2. Phantom Taxes Have Contributed to Public Confusion Concerning the Costs and Benefits of the Grow NJ Program

The costs and benefits of tax-incentive programs should be disclosed transparently to the public so that voters can be equipped to decide, through the democratic process, whether to vote for legislators who approved or support such programs. However, the Task Force has found that the EDA’s public communications concerning the Grow NJ program have not disclosed the manner in which the law’s phantom tax provisions affect the EDA’s costs and benefits calculations. Meanwhile, it appears to the Task Force that non-disclosure of the phantom tax provisions has contributed to public confusion concerning the costs and benefits of the Grow NJ program.

For example, the EDA’s project summary memorandum for Holtec’s award, which is publicly available on the EDA’s website, states: “It is estimated that [Holtec’s] project would have a net benefit to the State of \$155,520 over the 35 year period required by the Statute.” The EDA did not disclose that this calculation was artificially boosted by phantom benefits, which, if eliminated from the analysis, would have the EDA estimating the award to cost the State millions of dollars. Meanwhile, numerous news publications that reported on Holtec’s move to Camden repeated the EDA’s net benefits estimate, but none explained that the estimate was boosted by phantom benefits.¹³⁷ In none of these stories was it apparent that the State was not actually

¹³⁵ The Task Force has insufficient information to determine the precise benefits calculation that the EDA’s econometrics modeling would have calculated for Holtec absent the phantom taxes.

¹³⁶ Exhibit 21.

¹³⁷ For instance, a July 13, 2014 report in the *Philadelphia Inquirer* newspaper stated: “Projects in Camden are required to ensure the state will break even on its tax credits over 35 years. . . . The state expects Holtec to produce a net benefit of \$155,520 over 35 years.” See Andrew Seidman, *Economic incentives bill brings deals to S. Jersey*, PHILA. INQUIRER, July 13, 2014, https://www.inquirer.com/philly/news/local/20140713_Economic_incentives_bill_brings_deals_to_S_Jersey.html. For other examples of similar stories, see, e.g., Jeff Blumenthal, *Energy company gets \$260M in tax credits to open Camden facility*, PHILA. BUS. J., July 10, 2014, <https://www.bizjournals.com/philadelphia/news/2014/07/10/energy-company-gets-260m-in-tax-credit-to-move.html> (“New Jersey officials estimated that the project would have a net benefit to the state of \$155,520 over a 35 year period.”); Geoff Mulvihill, *Business incentives boom in NJ*, THE DAILY JOURNAL, Nov. 29, 2014, <https://www.thedailyjournal.com/story/news/local/new-jersey/2014/11/29/business-incentives-boom-nj/19687279/> (“Holtec’s application projected its net benefit to taxpayers would be \$156,000 . . .”).

expected to “break even” with Holtec’s tax credit, let alone accrue \$155,520 in additional benefits beyond the cost of the tax credit.

Beyond Holtec’s project, EDA’s non-disclosure of phantom taxes has contributed to broader misunderstandings concerning the agency’s net benefits data. For example, an editorial published earlier this year in the *Real Estate NJ* magazine claimed, presumably based on EDA data, that under the Grow NJ program, New Jersey was projected to see “a return on investment of \$3.30 for every \$1 in tax credits awarded—a net benefit of \$2.30 in excess of every \$1 of incentives to be invested in projects over time.”¹³⁸ In fact, because the EDA’s published net benefits data does not distinguish phantom benefits from real ones, it is impossible to determine the actual “return on investment” that the EDA’s modeling would have forecasted if the phantom returns were discounted. The result is that the public discussion concerning the Grow NJ program has been based on an inflated understanding of the actual forecasted benefits of the program.

The Task Force recommended in its First Report that future tax-incentive legislation be transparent with respect to the benefits or costs of the programs. If tax incentives are forecasted to provide a return on investment at no cost to public funds, they may be considered an unmitigated good as a matter of public policy. On the other hand, if tax incentives are forecasted to cost millions of dollars in public funds, then there may be legitimate questions concerning whether the means justify the ends and whether alternative uses of the funds may be preferable. The phantom tax provisions of Grow NJ have created the false impression of the former when, at least in some cases (including Holtec), the latter has been the reality.

VII. THE EDA FAILS TO EFFECTIVELY TARGET INCENTIVES FOR JOBS AT RISK OF BEING LOCATED OUTSIDE NEW JERSEY

In examining the EDA’s administration of the Grow NJ program, the Task Force has thoroughly explored the EDA’s practices and procedures for determining whether applicants are at risk of locating their jobs outside New Jersey. To implement Grow NJ both successfully and efficiently, it is imperative for the EDA to make accurate “at risk” determinations. If the EDA erroneously awards incentives to companies that would have located their jobs in New Jersey either with or without the incentives, public funds are wasted. In the Task Force’s First Report, we explained that, based on our examination to date of the EDA’s “at risk” evaluations, we found clear deficiencies in the Authority’s practices and procedures in this area. Here, in this section of the Second Report, we continue the discussion.

First, we begin with the incentives applications of four entities previously discussed in the Task Force’s First Report: The Cooper Health System, Conner Strong & Buckelew Companies, LLC, The Michaels Organization, LLC, and NFI, L.P.¹³⁹ The Task Force has obtained new evidence since the issuance of its First Report, which further illuminates the issues relating to the

¹³⁸ Michael G. McGuinness, *Incentives are investments that build over time*, REAL ESTATE NJ, Jan. 21, 2019, <https://re-nj.com/incentives-are-investments-that-build-over-time/>.

¹³⁹ See First Report at 47-64.

EDA's processing and approval of these applications.¹⁴⁰ This new evidence is particularly relevant given the recent testimony of George E. Norcross, III before the New Jersey Senate's Select Committee on Economic Growth Strategies on November 18, 2019. In his testimony, Mr. Norcross contended that the Task Force's First Report contained certain inaccuracies, which he purported to correct. However, based on the information below, Mr. Norcross's testimony seems incorrect in several important respects. We discuss the new evidence that the Task Force possesses and explain potential inaccuracies in Mr. Norcross's testimony, below.

Next, we discuss the case of another Grow NJ award recipient, which was presented at the Task Force's public hearing on October 17, 2019: Rainforest Distribution Corp., a food and beverage distributor that the EDA approved for up to \$2.4 million in tax incentives to locate in Bayonne, New Jersey, rather than Orangeburg, New York. However, as further discussed below, this company identified its purported alternative site in Orangeburg solely for purposes of the company's Grow NJ application, and the company, in fact, had no sincere intention to relocate to that site in any event.¹⁴¹

Finally, based on our further examination of the EDA's "at risk" evaluations since the First Report, we supplement our findings on this issue. Principally, we reiterate and further elaborate upon the First Report's preliminary finding that there are clear deficiencies in the EDA's evaluations of the risk that applicants will choose to locate outside New Jersey if denied incentives by the Authority. As we further explain below, the Task Force has found that, as a result of the EDA's inadequate "at risk" evaluation practices and procedures, companies applying to the EDA for tax incentives may easily misrepresent their relocation intentions without fear of likely consequence. There is powerful evidence that at least some companies have done precisely that, obtaining millions of dollars in tax incentives premised on threats to relocate to out-of-state locations that, in reality, were never genuinely under consideration. By failing to effectively ensure that incentives are awarded only where jobs are truly at risk, the EDA has been deficient in its role as a steward of public funds.

¹⁴⁰ Much of the new evidence discussed in this Second Report was recently provided to the Task Force by Cooper Health, CSB, TMO, and NFI, in response to subpoenas issued by Professor Chen. By way of background, Professor Chen initially issued subpoenas to the four entities in April 2019. The entities did not comply and filed a lawsuit against the Task Force, asking the Court to order the Task Force to cease its operations. After the Court denied the request and dismissed the lawsuit, Professor Chen reissued subpoenas to the four entities. NFI readily complied with the subpoena reissued to it and provided responsive documents to the Task Force, but Cooper Health, CSB, and TMO continued to lodge objections. Following further discussions between Cooper Health, CSB, TMO, and the Task Force, the entities made limited document productions to the Task Force in late 2019. Documents from these productions, as well as from other sources, are discussed herein.

¹⁴¹ Rainforest voluntarily cooperated in the Task Force's investigation and provided documents and information to the Task Force without the necessity of a subpoena or judicial process. The company's Chief Executive Officer, Alexander Ridings, voluntarily testified at the Task Force's public hearing.

A. Additional Evidence Relating to the Tax-Incentive Application of The Cooper Health System

The EDA approved The Cooper Health System (“Cooper Health”)—a health system for which Mr. Norcross serves as the Chairman of the Board—for an approximately \$40 million tax-incentive award in December 2014, as discussed in the Task Force’s First Report.¹⁴² That award was based on the EDA’s erroneous belief that, if Cooper Health were not awarded the incentives, it intended to relocate certain jobs from New Jersey to Philadelphia.¹⁴³ In truth, Cooper Health did not ever sincerely consider relocating to Philadelphia, as shown by the evidence discussed in the First Report (and as Cooper Health now admits).¹⁴⁴ Thus, Cooper Health’s award from the EDA was erroneously intended to incentivize the health system to retain jobs that were never actually at risk of leaving the State.¹⁴⁵ In his recent testimony, Mr. Norcross made several incorrect contentions concerning Cooper Health’s EDA application, as well as the rules and regulations that applied to it. We describe these contentions and respond to them below.

1. The Cooper Health System Represented to the EDA That Its Jobs Were at Risk of Leaving the State

In his recent testimony, Mr. Norcross contended that Cooper Health was not at fault for the EDA’s erroneous belief that New Jersey was at risk of losing Cooper Health’s jobs to Philadelphia because, Mr. Norcross claimed, Cooper Health had been “clear” with the EDA “from the start” that none of its jobs would be relocated outside the State.¹⁴⁶ However, Mr. Norcross is incorrect that Cooper Health was “clear” with the EDA about this fact.

In brief review of our discussion in the First Report, when Cooper Health first applied to the EDA for tax incentives, it did not claim in its initial application any intention to relocate jobs outside the State.¹⁴⁷ The initial application sought incentives solely for Cooper Health to relocate certain administrative jobs from their existing locations in Cherry Hill and Mt. Laurel, New Jersey, to a new location in Camden, New Jersey.¹⁴⁸ However, after its initial submission, Cooper Health proceeded to provide the EDA with a proposal letter for the health system to lease real estate in Philadelphia, as well as a form that compared the costs of the Philadelphia site to the proposed

¹⁴² First Report at 49-55.

¹⁴³ First Report at 53.

¹⁴⁴ First Report at 53-54; Letter from Abbe David Lowell, Counsel for Cooper Health, to Eric Corngold, Counsel for the EDA (Nov. 26, 2019) (“Cooper stipulates that it never actually considered leaving New Jersey.”).

¹⁴⁵ First Report at 55.

¹⁴⁶ Senate Select Cmte. Tr. (Nov. 18, 2019) at 45-46 (“[Cooper’s] application specifically stated that no jobs were at risk of leaving the State of New Jersey. No jobs would ever leave the State of New Jersey; not one. . . . Cooper has been clear from the start. Its jobs were never at risk of leaving the state . . .”)

¹⁴⁷ First Report at 50.

¹⁴⁸ First Report at 50.

Camden location.¹⁴⁹ When transmitting this information to the EDA, Cooper Health’s Vice President of Real Estate and Facilities, Andrew Bush, wrote in his cover email that, because of the cost differential between the Camden and Philadelphia sites, there was “a burden to Cooper to remain in NJ.”¹⁵⁰ Additionally, there appear to have been further communications between the EDA and Cooper Health related to the possibility that the health system would relocate to Philadelphia, including at least one telephone call, but the Task Force has been unable to determine the content of those communications from contemporaneous documents.¹⁵¹ Based on Cooper Health’s submissions to and communications with the EDA, the Authority certainly concluded that New Jersey was at risk of losing some of the health system’s jobs to Philadelphia.¹⁵²

As such, any contention that Cooper Health was “clear” with the EDA that it had no intention of relocating its jobs to Philadelphia is not correct. Indeed, Cooper Health does not deny that it submitted information to the EDA about Philadelphia real estate. However, Cooper Health’s argument, as we understand it, is that its submissions to the EDA were intended merely to demonstrate, purely as a hypothetical matter, the sorts of costs that could be involved if Cooper Health were to relocate outside New Jersey, which, Cooper Health claims, the EDA understood it had no actual intention to do.

Cooper Health claims that an EDA employee asked Cooper Health to provide the hypothetical out-of-state relocation costs during a November 13, 2014 phone call between the EDA employee and Cooper Health’s lawyer, Kevin Sheehan. However, the EDA employee in question has denied this allegation. The EDA employee represented to the Task Force that, although he does not recall the alleged phone call between himself and Mr. Sheehan, the EDA required at all times that alternative locations be actual and bona fide and there are no circumstances in which he would have, as Cooper Health claims, asked a Grow NJ applicant to provide “comparative” location information for a site that the company was not actually considering for relocation.

To explore the veracity of the EDA’s account, we asked for interviews of relevant employees or executives from Cooper Health and their lawyer, Mr. Sheehan. Tellingly, Cooper Health has declined the Task Force’s request to make witnesses available to testify about the phone call in question, and Mr. Sheehan has declined requests to speak with the Task Force. Furthermore, while Cooper Health has produced some documents to the Task Force that could potentially shed light on the phone call, it redacted the apparently relevant portions of the documents, asserting attorney-client privilege, and it has declined to produce unredacted versions of the documents. Thus, the Task Force has been limited in its ability to assess Cooper Health’s contentions concerning the phone call with the EDA employee.

Nevertheless, new evidence in the Task Force’s possession—not previously discussed in the First Report—rebutts any contention that Cooper Health’s submissions to the EDA related to

¹⁴⁹ First Report at 50-52.

¹⁵⁰ First Report at 52-53.

¹⁵¹ The telephone call is discussed further below. *See also* First Report at 50-51.

¹⁵² First Report at 52.

Philadelphia real estate were intended to provide merely comparative or hypothetical information about the Philadelphia site. The evidence discussed below shows that, until recently, Cooper Health maintained that it had, in fact, communicated to the EDA a “threat” to relocate to Philadelphia.

The first new evidence is an email, dated December 3, 2014, written by Mr. Bush.¹⁵³ Two days before Cooper Health provided the EDA with its proposal letter to lease space in Philadelphia, Mr. Bush wrote: **“I toured [the Philadelphia building] today and believe that I will have a [proposal letter] in hand by the end of tomorrow that provides our ‘credible threat to move’ to satisfy the EDA.”** (Emphasis added).¹⁵⁴

Second is an email, dated December 8, 2014, the day before the EDA’s Board voted to approve Cooper Health’s incentives application.¹⁵⁵ That day, Cooper Health’s Vice President of Marketing, Jill Sayre Lawlor, sent an email to several senior Cooper Health executives, including George Norcross (Executive Chairman), Adrienne Kirby (then-Chief Executive Officer), Douglas Shirley (then-Chief Financial Officer), and Gary Lesneski (then-General Counsel), as well as Mr. Bush.¹⁵⁶ She wrote: “NJEDA has notified us that they will release our application (attached) to the media at 10 am tomorrow.”¹⁵⁷ Attached to Ms. Lawlor’s email was the EDA’s project summary memorandum for Cooper Health’s application, which the Authority’s staff prepared to explain to its Board the basis for the requested tax incentives.¹⁵⁸ The memorandum stated that Cooper Health “has certified that the 353 New Jersey jobs listed in the application are at risk of being located outside the State.”¹⁵⁹ It further explained that, if Cooper Health would not receive incentives to locate the jobs in a new facility in Camden, its “main alternative option is to relocate to Philadelphia, PA.”¹⁶⁰ The memorandum concluded by requesting that EDA’s Board “approve the proposed Grow New Jersey grant to encourage Cooper Health System to locate in Camden” (rather than Philadelphia).¹⁶¹ The memorandum made clear, therefore, that the EDA believed that if Cooper Health did not receive incentives to locate the jobs in Camden, it would relocate them to Philadelphia. There is no evidence, however, that any of the Cooper Health executives who received the memorandum made any effort to inform the EDA that the health system was not, in fact, considering a potential relocation to Philadelphia.¹⁶² And, quite certainly, any of the Cooper

¹⁵³ Exhibit 28. The Task Force is also in possession of an electronic notice that appears to indicate that the email was not successfully delivered to its intended recipient.

¹⁵⁴ Exhibit 28.

¹⁵⁵ Exhibit 29.

¹⁵⁶ Exhibit 29.

¹⁵⁷ Exhibit 29.

¹⁵⁸ Exhibit 29.

¹⁵⁹ Exhibit 29.

¹⁶⁰ Exhibit 29.

¹⁶¹ Exhibit 29.

¹⁶² In a June 12, 2019 opinion-editorial published by *NJ.com*, Cooper Health’s spokesperson Thomas W. Rubino said this about the EDA’s project summary memorandum for Cooper Health’s

Health executives who undoubtedly read this important communication would have been aware of the EDA's belief that Cooper Health had threatened to pull jobs from the state.

Third is an email chain between several Cooper Health employees from the following day.¹⁶³ After the EDA released the project summary memorandum to the media and publicly approved Cooper Health for incentives to locate the jobs in Camden, rather than Philadelphia, on December 9, 2014, Ms. Lawlor wrote that she had received several "questions from the media."¹⁶⁴ The first question, which Ms. Lawlor attributed to the "Inquirer" (the *Philadelphia Inquirer* newspaper), was: "Were out of state locations actually considered? If so, where?"¹⁶⁵ Writing to her Cooper Health colleagues, Ms. Lawlor proposed the following response to the media inquiry: "We had considered various locations, including Philadelphia, prior to submitting our application."¹⁶⁶ Cooper Health's Chief Financial Officer, Douglas E. Shirley, responded to Ms. Lawlor's proposal: "I would . . . change the locations to: we looked at multi locations to relocate these employees throughout South Jersey and the Philadelphia area."¹⁶⁷ Mr. Bush also responded to Ms. Lawlor's email: "Looks good. Not for distribution, but we did consider out of state alternatives and as part of our application supplied the EDA with a lease proposal for Center Square in Philadelphia. . . ."¹⁶⁸ The *Philadelphia Inquirer* reported: "Cooper spokeswoman Lori Shaffer

application: "So what is the controversy about? Apparently, it is about an internal EDA staff memorandum that incorrectly states that Cooper certified that it planned to move its jobs out of state. Cooper neither wrote nor approved this memorandum, which is plainly wrong. . . . Defaming Cooper due to a careless and incorrect EDA staff memorandum is wrong." Thomas W. Rubino, *Cooper Health official says the company's tax incentive award is appropriate, justified and legitimate*, NJ.COM, June 12, 2019, <https://www.nj.com/opinion/2019/06/cooper-health-official-says-the-companys-tax-incentive-award-is-appropriate-justified-and-legitimate.html>. Mr. Rubino did not disclose that Cooper Health received an advanced copy of the memorandum and did not object to it.

¹⁶³ Exhibit 30.

¹⁶⁴ Exhibit 30.

¹⁶⁵ Exhibit 30.

¹⁶⁶ Exhibit 30.

¹⁶⁷ Exhibit 31.

¹⁶⁸ Exhibit 30. Viewed in isolation, one could read this email to contradict the Task Force's conclusion that Cooper Health did not seriously consider moving out of state. However, Mr. Bush, who wrote the email, was the same Cooper Health employee who, earlier, when soliciting the proposal letter for the Philadelphia property, asked the real estate broker to provide the letter for the Philadelphia property as a "favor" related to Cooper Health's New Jersey incentives application since there was "[n]o probability of [Cooper Health] moving [there]." First Report at 53-54. Furthermore, Cooper Health now admits that it did not sincerely contemplate a potential relocation to Philadelphia. See Letter from Abbe David Lowell, Counsel for Cooper Health, to Eric Corngold, Counsel for the EDA (Nov. 26, 2019) ("Cooper stipulates that it never actually considered leaving New Jersey.").

said the health system considered ‘various’ locations, including Philadelphia, before submitting the application.”¹⁶⁹

Fourth is an email from February 8, 2019—years after the EDA approved Cooper Health’s application, but only days after Governor Murphy announced the creation of this Task Force to examine deficiencies in the State’s tax-incentive programs.¹⁷⁰ Mr. Bush sent the email to two Cooper Health executives, Kevin M. O’Dowd, Jr. (Co-President and Chief Executive Officer) and Thomas W. Rubino (Senior Vice President of Communications and Marketing).¹⁷¹ In the email, Mr. Bush provided Mr. O’Dowd and Mr. Rubino with “a summary of our NJ Grow incentive program.”¹⁷² Mr. Bush’s email stated that he was “attach[ing] a few pertinent documents including . . . [a] term sheet for [the building in] Philadelphia.”¹⁷³ Mr. Bush added: “I toured this building with our program requirement. . . . The term sheet and the tour represent a good faith effort to consider leaving the state as an option”¹⁷⁴

¹⁶⁹ Allison Steele, *Cooper, Subaru get tax deals for moving to Camden*, PHILA. INQUIRER, Dec. 9, 2014, available at https://www.inquirer.com/philly/business/20141210_Cooper__Subaru_get_O_K_on_tax_breaks_for_moving_to_Camden.html.

¹⁷⁰ Exhibit 32. See also Press Release, *Governor Murphy Forms Task Force to Examine Deficiencies of New Jersey’s Tax Incentive Programs*, GOVERNOR OF THE STATE OF NEW JERSEY, Jan. 24, 2019, available at <https://www.nj.gov/governor/news/news/562019/approved/20190124a.shtml>. Prior to the announcement of the Task Force’s creation, New Jersey Attorney General Gurbir Grewal announced on January 14, 2019, that his office would investigate potential violations of civil or criminal law related to the State’s tax-incentive programs. See Kate King, *New Jersey Attorney General to Investigate State’s Corporate Tax Credits*, WALL STREET J., Jan. 14, 2019, available at <https://www.wsj.com/articles/new-jersey-attorney-general-to-investigate-states-corporate-tax-credits-11547493649>.

¹⁷¹ Exhibit 32.

¹⁷² Exhibit 32.

¹⁷³ Exhibit 32.

¹⁷⁴ Exhibit 32. Mr. Bush’s February 11, 2019 email contains additional statements that, while difficult to understand, warrant note. Mr. Bush claimed that, although Cooper Health made a “good faith effort to consider leaving the state as an option,” that fact “was not specifically disclosed to the EDA.” He further wrote that “Cooper [did not] provide evidence of efforts to leave the State” to the EDA. These statements are confusing in light of the evidence discussed above, showing that Mr. Bush, in point of fact, did provide the EDA with Cooper Health’s proposal letter for the Philadelphia site. When sending the proposal letter for the Philadelphia site to the EDA, Mr. Bush wrote that, because of the cost differential between the Philadelphia and the Camden sites under consideration, there was “a burden to Cooper to remain in NJ.” On the day that the EDA approved Cooper Health’s award, Mr. Bush wrote internally that “we did consider out of state alternatives and as part of our application supplied the EDA with a lease proposal for Center Square in Philadelphia.” The Task Force is unable to reconcile this evidence of Mr. Bush’s actual 2014 interactions with the EDA, and his contemporaneous emails related to those interactions, with his 2019 representations to Cooper Health’s senior leadership about those interactions.

These emails are inconsistent with Cooper Health’s current position, which Mr. Norcross echoed in his testimony, that the health system never considered leaving New Jersey, was always “clear” with the EDA about that fact, and had submitted the information about Philadelphia real estate to the EDA purely as a hypothetical matter and not in connection with any actual threat to relocate the jobs at issue outside New Jersey. Instead, these emails show that it was only recently that Cooper Health adopted this position, after the Task Force’s publication of evidence related to the health system’s incentives application. In short, the evidence shows that Cooper Health communicated to the EDA that it was considering relocating its jobs at issue to Philadelphia, and the EDA awarded incentives to the health system to keep the jobs in New Jersey instead. Because New Jersey was never actually at risk of losing the jobs, those incentives were awarded in error. Any contention that Cooper Health was not responsible for the erroneous incentives because it was “clear” with the EDA that its jobs would stay in New Jersey, as Mr. Norcross contended in his testimony, is inconsistent with the available evidence we have been able to review. Other, undisclosed, evidence may further bear on these issues.

2. The EDA Boosted Cooper Health’s Award Based On Its Representations That Jobs Were at Risk of Being Relocated Outside New Jersey

For companies that seek tax incentives to relocate jobs to Camden, the EDA applies a different methodology to calculate the award size depending on whether the company’s jobs are at risk of being relocated outside New Jersey. Because the EDA was led to believe that Cooper Health’s jobs were at risk of being relocated to Philadelphia, the EDA approved Cooper Health for almost \$40 million in incentives to relocate the jobs to Camden instead. As discussed in the First Report, if the EDA had been aware that Cooper Health was not actually considering leaving the State, the health system would have qualified for only, at most, a \$7.15 million incentive award.¹⁷⁵ In his recent testimony before the Senate Select Committee, Mr. Norcross denied that the EDA’s designation of Cooper Health’s jobs as “at risk” boosted the size of the health system’s award. According to Mr. Norcross, the risk of an out-of-state relocation is relevant to the size of an applicant’s award only under an EDA regulation that went into effect in 2017—and which, therefore, was not in effect in 2014, when Cooper Health’s application was under submission to the EDA.¹⁷⁶ According to Mr. Norcross, “the rules of the game changed” in the years after Cooper Health’s application.¹⁷⁷

Mr. Norcross is incorrect. In fact, the relevant “rules of the game” have remained constant since 2014, and those rules consistently provided that Cooper Health—or any other company

¹⁷⁵ First Report at 55.

¹⁷⁶ Senate Select Cmte. Tr. (Nov. 18, 2019) at 41-42, 43, 46, 53 (“There was one set of rules in 2013 that were changed in 2017. That has been missed by virtually everyone who’s written on the subject; the Task Force, which incorrectly, inaccurately misstated this set of facts which are well-documented. Cooper, in the words of the Task Force, was being asked to be compared to regulations in 2017 in their 2013 application. The rules of the game changed.”).

¹⁷⁷ Senate Select Cmte. Tr. (Nov. 18, 2019) at 41-42, 43, 46, 53.

seeking incentives to relocate existing New Jersey jobs to Camden—would qualify for a larger award if its jobs were at risk of being relocated outside the State.

The “rules of the game” that Mr. Norcross invoked in his testimony relate to the so-called “net benefits” requirement under the Grow NJ program, which, as explained in the Task Force’s First Report, mandates that every Grow NJ award be anticipated to result in a “net benefit” to the State in terms of new tax revenue.¹⁷⁸ For instance, when a Grow NJ award incentivizes a company to construct a building that, absent the incentives, would not be constructed, the new property taxes that result from the construction is a “benefit” to the State. When the anticipated new tax revenues of this sort exceed the costs of the tax credits awarded to the company, there is a “net benefit” to the State from the incentives. This net benefit requirement operates as a ceiling on the size of a company’s award. That is, the EDA may not award companies tax credits in excess of the anticipated net benefit to the State.

The net benefits requirement relates to benefits to the State as a whole, rather than to a locality within the State. This is a critical distinction. When companies relocate existing jobs already in New Jersey to Camden, those jobs create no new benefit to the State as a whole, because New Jersey would accrue tax revenue from those jobs whether or not they relocated to Camden. It is irrelevant, under the net benefits test, that the jobs benefit Camden. Thus, when a company relocates jobs to Camden, and those jobs are not at risk of being relocated outside New Jersey, the jobs are excluded from the EDA’s calculation of the State’s anticipated net benefits.

In December 2016, the EDA amended its implementing regulations for the Grow NJ program, which are published in the New Jersey Register. The regulations were amended to provide that, for projects in Camden, “[r]etained employees . . . shall not be included [in the net benefits calculation] unless the business demonstrates that the award of tax credits will be a material factor to retain the employees in the State”¹⁷⁹ Mr. Norcross was apparently referring to these amendments in claiming that “the rules of the game” changed in 2017. **However, when amending the regulations in late 2016, the EDA explained that it was not announcing any change to its practices, but rather was only “clarify[ing] existing policy.”**¹⁸⁰

Indeed, the policy formalized in the 2016 amendments to EDA’s regulations represented EDA’s consistent policy and practice since the Economic Opportunity Act was enacted in 2013. Even before EOA 2013’s enactment, the EDA applied this policy to predecessor programs that, like Grow NJ, also incorporated a “net benefit” requirement into an awards calculation. Thus, the EDA’s written net benefits policy has provided since 2010: “In analyzing the value of jobs in the [net benefits] model, the EDA considers whether the employment is ‘at risk’ of being located

¹⁷⁸ N.J. Stat. § 34:1B-244(a)(3) (requiring Grow NJ awards to “yield a net positive benefit to the State”). See First Report at 22, 28.

¹⁷⁹ 49 N.J.R. 134(a) (Dec. 7, 2016) (amending N.J. Admin. Code § 19:31-18.7(c)).

¹⁸⁰ 48 N.J.R. 2031(a) (Oct. 3, 2016) (explaining that the amendments “clarify existing policy that, for the purposes of the net positive economic benefits test . . . , taxes paid directly, or generated indirectly by retained employees, are for those which the award of tax credits will be a material factor in the business’s decision to retain the employees in the State”).

outside of the state **Jobs that are neither ‘at risk’ . . . nor otherwise deemed new jobs to the state are not considered to provide any incremental benefit to the state under this model and are thus given no credit in the net benefits calculation.**” (Emphasis added).¹⁸¹ The EDA has consistently applied this policy to the Grow NJ program between 2013 and today.¹⁸²

Thus, pursuant to the rules that the EDA consistently applied at all relevant times, Cooper Health’s award was boosted by representing that the health system’s jobs were at risk of being relocated outside New Jersey. Specifically, the EDA’s net benefits calculation for Cooper Health included credit for 353 jobs already in New Jersey, slated for relocation to Camden, that the EDA incorrectly believed were at risk of being relocated to Philadelphia, thereby allowing Cooper Health to qualify for an almost \$40 million award. If those 353 jobs were eliminated from the calculus, as they should have been, the net benefits calculation—and, correspondingly, Cooper Health’s award—would have fallen by nearly \$33 million to at most \$7.15 million.

B. Additional Evidence Relating to the Tax-Incentive Applications of Conner Strong & Buckelew, The Michaels Organization, and NFI

In addition to Cooper Health, Mr. Norcross’s testimony also addressed the incentives application of his insurance brokerage firm, Conner Strong & Buckelew Companies, LLC (“CSB”), and the applications of The Michaels Organization, LLC (“TMO”) and NFI, L.P. (“NFI”). These three companies, which were already located in New Jersey prior to filing for tax credits, were approved by the EDA for incentives to relocate to a new office tower to be

¹⁸¹ The quoted language was first set out in a policy document dated July 8, 2010, attached as Exhibit 33. The same language was set out in a revised policy document dated June 1, 2012, attached as Exhibit 34. EDA reincorporated the June 1, 2012 policy in a memorandum dated December 13, 2016, attached as Exhibit 35. We note that these policy memoranda also contain provisions related to jobs that are relocated from “suburban” to “urban” locations. These provisions are outdated in that they relate solely to pre-EOA 2013 programs that EOA 2013 eliminated.

¹⁸² The Task Force has found significant evidence of the EDA’s consistent application of this policy. As one example only, attached as Exhibit 36 is an August 26, 2014 email from EDA’s then President and Chief Operating Officer, Tim Lizura, explaining: “Since the Net benefit test is to the state, what we have done is included [jobs relocated to Camden from another part of New Jersey] as new jobs if the applicant was deciding on NJ or not **So if they are not at risk of leaving NJ (or otherwise committed to stay in NJ) then they are not included in net benefits**” (Emphasis added). Furthermore, the evidence available to the Task Force indicates that the attorney who represented Cooper Health before the EDA, Kevin Sheehan, has been aware of the EDA’s net benefits policy since at least March 2015. That month, Mr. Sheehan wrote in an email summarizing a meeting with the EDA, related to a different company, that the EDA had said the company’s jobs in Camden “may not count toward the net benefit test unless they are legitimately at risk of leaving the state.” Exhibit 37. Additionally, in April 2017, Mr. Sheehan sent a memorandum to the EDA, attached as Exhibit 38, arguing, on behalf of another company, that the company’s jobs “should be included in the Net Benefit Test” because they were “at risk of leaving the State.” Mr. Sheehan’s memorandum cited and quoted in relevant part the EDA’s July 8, 2010 and June 1, 2012 policy documents discussed above (see footnote 181).

constructed on the Delaware River waterfront of Camden (the “Camden Tower”). Each of the three companies claimed to the EDA that, as an alternative to Camden, the company also was considering relocating to office space in Philadelphia that the company would lease. However, as discussed in its First Report, the Task Force has found evidence that calls into question whether CSB, TMO, and NFI ever sincerely considered relocating to the Philadelphia sites as they claimed and whether the EDA should have conducted further diligence concerning these representations.¹⁸³

Mr. Norcross claimed in his testimony that the Task Force’s findings were erroneous and that each company genuinely “considered moving out of state.”¹⁸⁴ However, the Task Force has obtained new evidence—not previously discussed in the First Report—that further demonstrates that these companies did not sincerely consider their claimed alternative sites.

1. The Task Force’s First Report Cited Substantial Evidence That the Companies Never Sincerely Considered Their Claimed Alternative Sites Outside New Jersey

To place the new evidence in context, we first recap the discussion in the Task Force’s First Report. As previously discussed, the evidence shows that the three companies spent years carefully planning for their respective moves to Camden.¹⁸⁵ More than two years before CSB, TMO, and NFI submitted their incentives applications, Mr. Norcross’s brother, Philip A. Norcross, was already meeting with the EDA to discuss the planned office tower development on the Camden waterfront.¹⁸⁶ By September 24, 2015, the planning had proceeded far enough that the parties were prepared for a public announcement, and Mr. Norcross participated in a press conference, hosted in Camden, to announce the planned waterfront development.¹⁸⁷ Mr. Norcross circulated a press release that described himself, as chief executive of CSB, as well as the chief executives of TMO and NFI, as “committed to investing in the project either personally or through their

¹⁸³ The EDA’s net benefits policy—discussed above in relation to Cooper Health—unquestionably applies to CSB, TMO, and NFI, given that the EDA’s December 2016 regulatory amendments were already in effect when the EDA approved CSB’s, TMO’s, and NFI’s applications in March 2017, as well as for the reasons discussed with respect to Cooper Health. Pursuant to that policy, and as noted in the Task Force’s First Report, if CSB, TMO, and NFI had disclosed to the EDA that their jobs were not at risk of being located outside New Jersey, their awards would have been reduced by over \$70 million, collectively. *See* First Report at 64.

¹⁸⁴ Senate Select Cmte. Tr. (Nov. 18, 2019) at 53-54 (“The most critical error the Task Force has made is that my firm and my partners’ had committed to move to Camden years before we filed our application, much less when they were approved. This is not true. . . . More to the point, there’s ample evidence that each firm seriously considered moving out of state, and took affirmative steps to find additional space. We didn’t do this because we were required to, but because we seriously considered locating our national headquarters in Pennsylvania, where half my staff already was located. . . .”).

¹⁸⁵ First Report at 55-58.

¹⁸⁶ First Report at 55-56.

¹⁸⁷ First Report at 56.

firms.”¹⁸⁸ The *Philadelphia Inquirer* reported, based on an anonymous source, that CSB was “considering moving its headquarters into the development” and that TMO and NFI were also “expected to join the project.”¹⁸⁹ The companies’ EDA submissions were still more than a year away.

In stark contrast to the years of planning that went into the Camden Tower, the three companies only cursorily looked at potential real estate in Philadelphia shortly before applying to the EDA for tax incentives in connection with the Camden project.¹⁹⁰ It was not until a few months before the companies submitted their Grow NJ applications, and almost a year after their chief executives had publicly announced their “commitments” to the Camden development, that the companies jointly reached out to a real estate broker to solicit offers for space in Philadelphia.¹⁹¹ Then, for several weeks in August 2016, they engaged in a search for space in Philadelphia that was so rushed that it raised red flags for at least one landlord—who wrote in an email that CSB’s request that the landlord produce a lease proposal over the weekend “does not make any sense.”¹⁹² This search resulted in proposals for NFI and TMO to lease space on different floors of the same office building, at 1500 Spring Garden Street, and for CSB to lease space in a different building, at 1601 Market Street.¹⁹³ Although the companies questioned in internal discussions whether it would be “suspicious” for both NFI and TMO to claim the same alternative site in Philadelphia, they nonetheless did.¹⁹⁴

By the time the CSB, TMO, and NFI submitted their applications to the EDA on October 24, 2016, with each company claiming that it intended to relocate to Philadelphia if denied incentives to relocate to Camden, their proposal letters for the Philadelphia sites had already expired.¹⁹⁵ After an EDA employee asked the companies whether they still had valid offers for the Philadelphia sites, the companies discovered that the spaces initially offered to them were no longer available precisely as before, and the companies were forced to provide the EDA with new proposal letters for modified space in the same buildings.¹⁹⁶ Despite several red flags as to the plausibility of the proposals, the EDA concluded that New Jersey was at risk of losing the three companies’ respective jobs to Philadelphia and approved the companies for almost \$245 million in total incentives to locate the jobs in Camden instead.¹⁹⁷

¹⁸⁸ First Report at 56.

¹⁸⁹ First Report at 56 n.147 (citing Allison Steele, *Plans for Vast New Development on Camden Waterfront*, PHILA. INQUIRER, Sept. 24, 2015, https://www.inquirer.com/philly/business/20150924_Top_developer_to_announce_Camden_waterfront_project.html).

¹⁹⁰ First Report at 61-64.

¹⁹¹ First Report at 61.

¹⁹² First Report at 61 n.183.

¹⁹³ First Report at 60, 62-63.

¹⁹⁴ First Report at 62.

¹⁹⁵ First Report at 59.

¹⁹⁶ First Report at 59-60.

¹⁹⁷ First Report at 59-61.

2. New Evidence Further Shows That the Companies Never Sincerely Considered Their Claimed Alternative Sites Outside New Jersey

Since publishing the First Report, the Task Force has obtained additional relevant evidence. The first category of new evidence relates to the events of September 2015, more than a year prior to the tax-incentive applications, when Mr. Norcross participated in a press conference announcing the plans for Camden’s waterfront development. On the same day as that 2015 press conference, the *Philadelphia Inquirer* reported, based on an anonymous source, that CSB was “considering moving its headquarters into the development” and that TMO and NFI were also “expected to join the project.”¹⁹⁸ In July 2019, after the Task Force quoted the *Philadelphia Inquirer* article in its First Report, each of CSB, TMO, and NFI sent letters to the EDA contending that, notwithstanding the September 2015 newspaper story, the companies had not yet committed to relocate to Camden at that time.¹⁹⁹ The companies further argued that a newspaper story based on an anonymous source was “flimsy evidence” that should not be credited, and, they contended, it was “outrageous” and “offensive to [the] right to due process” that the Task Force had cited an anonymously sourced story.²⁰⁰

The Task Force has since learned that the anonymous source for the *Philadelphia Inquirer* story was Mr. Norcross’s own public relations consultant, Daniel Fee, who was working with the three companies. On September 20, 2015, four days before the press conference in Camden, Mr. Fee sent an email to Mr. Norcross attaching several “documents for [his] review and input regarding Thursday’s [press] announcement.”²⁰¹ Attached to Mr. Fee’s email was a memorandum, addressed to Mr. Norcross, that provided an “overall plan” for “three distinct stages to the

¹⁹⁸ First Report at 56 n.147 (citing Allison Steele, *Plans for Vast New Development on Camden Waterfront*, PHILA. INQUIRER, Sept. 24, 2015, https://www.inquirer.com/philly/business/20150924_Top_developer_to_announce_Camden_waterfront_project.html).

¹⁹⁹ The companies also submitted their respective letters to the Senate Select Committee.

²⁰⁰ See Exhibit 39 at 9-10 (letter from CSB to EDA, dated July 16, 2019, stating, “The *Philadelphia Inquirer* article that is cited [in the Task Force’s First Report] does not include a quote from a representative or an official statement of any of the three companies indicating they have committed to moving their companies to the [Camden] project site. That article cites ‘an anonymous source’ A citation in a newspaper article to a comment from an anonymous source cannot, by any reasonable measure, be said to be a commitment by any of the companies to locate in Camden.”); Exhibit 40 at 5 (letter from TMO to EDA, dated July 29, 2019, stating, “The [Task Force’s First Report] also cites to an article by Allison Steele in the *Philadelphia Inquirer* It is outrageous the Task Force is making the bold claim that TMO misrepresented the facts in its application based upon a statement attributed to an anonymous source”); Exhibit 41 at 9-10 (letter from NFI to EDA, dated Aug. 21, 2019, stating, “[The *Philadelphia Inquirer*] article does not contain a single statement from NFI or any authorized representative. . . . The vague statement of an anonymous source in a newspaper article can hardly be said to be solid evidence of a commitment by NFI to move [to Camden] Such flimsy evidence is offensive to NFI’s right to due process.”).

²⁰¹ Exhibit 42.

announcement of this project.”²⁰² The first stage was as follows: “The announcement should be previewed to, but embargoed from print or web until Thursday morning, the *Philadelphia Inquirer* (Allison Steele).”²⁰³ The memorandum further noted that Mr. Fee had already spoken to Ms. Steele, the newspaper reporter, and confirmed that she was available to cover the announcement, and that Mr. Fee planned to meet with her on the day prior to the press conference.²⁰⁴ The memorandum contained a summary of the “preview” that Mr. Fee would provide to the reporter, including the following: “‘Sources’ will confirm that local partners, including YOU, will consider moving their companies to Camden under the Grow NJ program.”²⁰⁵

Mr. Fee’s email to Mr. Norcross also attached a second memorandum, which provided “sample text for local partners to send to their staffs on the day of the announcement.”²⁰⁶ The memorandum was prepared for CSB, but, Mr. Fee wrote, its message could be “modif[ie]d for other businesses.”²⁰⁷ The memorandum, addressed to CSB’s President and Chief Executive Officer, Michael Tiagwad, explained: **“It will be difficult to walk the line that needs to be walked – highlighting the development and the involvement of you and George without crossing any line to confirm that Conner Strong is likely to move its headquarters. I have attempted to detail what an important and exciting development this will be, while raising the prospect of a CSB move to it, without confirming one.”** (Emphasis added).²⁰⁸ The memorandum’s suggested message to CSB’s employees touted the “exciting new development” on Camden’s waterfront, described as “the largest private sector investment in Camden’s history.”²⁰⁹ The suggested message did not explicitly state that CSB planned to relocate to the development, but did say that the company was “likely to apply to be part of the Grow New Jersey program that has helped Camden attract so many major employers in the last few years” and promised that the company would hear from employees on “what can and should be done.”²¹⁰

Thus, the evidence shows that by September 2015, more than a year before the companies applied to the EDA for tax incentives, they were already formulating plans to relocate to Camden. However, the companies were careful to “walk the line that needs to be walked” when announcing the Camden waterfront development while avoiding “crossing any line” by confirming that their respective companies already had plans to move there. It was in this context that Mr. Fee arranged for the *Philadelphia Inquirer* to attribute the companies’ plans to relocate to Camden to an anonymous source rather than to the companies themselves. Meanwhile, the companies have argued in their respective letters to the EDA that the anonymously sourced article was “flimsy

²⁰² Exhibit 43.

²⁰³ Exhibit 43.

²⁰⁴ Exhibit 43.

²⁰⁵ Exhibit 43.

²⁰⁶ Exhibit 42.

²⁰⁷ Exhibit 43.

²⁰⁸ Exhibit 44.

²⁰⁹ Exhibit 44.

²¹⁰ Exhibit 44.

evidence” that should be discounted, failing to disclose that the source was, in fact, their own agent whose statements were based on the companies’ actual intentions.²¹¹

The second category of evidence relevant to these companies’ site-selection considerations relates to the companies’ search for real estate in Philadelphia in mid-to-late 2016. As discussed above, the First Report explained that CSB, TMO, and NFI did not start pursuing real estate in Philadelphia until August 2016, only two months before the companies applied to the EDA for tax incentives. The new evidence obtained by the Task Force relates to these efforts, which started slightly earlier than previously reported, in late July 2016.

On July 25, 2016, Kevin Sheehan, the attorney representing CSB, TMO, and NFI before the EDA, wrote, in an email to NFI’s Chief Executive Officer, Sidney Brown: “We should start getting the EDA Grow NJ application together. . . . It is my understanding that the application is to be filed in August.”²¹² Mr. Sheehan described some of the work that needed to be done to complete the applications before the planned filing date in August 2016.²¹³ **Among other tasks, Mr. Sheehan noted: “We will also have to work on the Cost Benefit Analysis comparing a location out of state to the proposed site.”**²¹⁴

Two days later, TMO’s Chief Financial Officer, Joseph Purcell, wrote to a real estate broker at the CBRE firm, Matthew Stefanski, under the subject line “Move to Camden”:

Matt,

Hope all is well.

As part of our move to Camden I need to show the NJ Agency some comps in Philly, Montgomery County, Delaware County or Bucks County.

Would you be aware of any 100,000 sq ft office space that is available and what the rent would be?

Sorry, needs to have amenities for exercise, cafeteria, etc. included or near by.

Please do not put any time in this, just thought maybe something would come to mind.

²¹¹ Although this evidence of Mr. Fee’s communications work includes memoranda prepared for and sent to CSB and its executives, including Mr. Norcross, CSB did not produce these documents in response to the Task Force’s subpoena. The Task Force obtained these documents from another source.

²¹² Exhibit 45.

²¹³ Exhibit 45.

²¹⁴ Exhibit 45.

The bottom line is when the agency compares the two (as apples to apples) that the Camden deal comes in at a higher price (but need to be comparable in quality, etc.)

Thanks

Joseph F. Purcell

(Emphasis added).²¹⁵

On August 8, 2016, NFI's Vice President, Edward A. Leo, Jr., wrote an email to the company's Chief Financial Officer, Steven Grabell.²¹⁶ The only text in Mr. Leo's email, cryptically, was "6708."²¹⁷ More notable is what Mr. Grabell wrote in response to Mr. Leo's email: **"Directionally looks good. With wording, we should be cognizant of the fact that we cannot make any commitments to Camden until tax credits are approved. In theory we are still pursuing Pa."** (Emphasis added).²¹⁸ Mr. Leo replied: **"Ok. Thanks for letting me know. I didn't realize that."** (Emphasis added).²¹⁹

On August 19, 2016, Ken Zirk, the CBRE real estate broker who was then working with the three companies, sent a "market survey" for "Greater Philly" to NFI's Chief Financial Officer, Mr. Grabell.²²⁰ The report listed information about real estate in Philadelphia, its surrounding suburbs, and in nearby Allentown, Pennsylvania—including, among other listed properties, 1500 Spring Garden Street, the building that NFI and TMO ultimately used in their EDA applications.²²¹ Three days later, on August 22, 2016, Mr. Grabell forwarded the CBRE report to his Chief Financial Officer counterparts at TMO and CSB, Joe Purcell and John Muscella, respectively, as well as to Mr. Sheehan.²²² The next day, on August 23, 2016, Mr. Grabell sent an email to the group, writing that he "did review with CBRE their findings" and that NFI had "someone on [its] real estate team looking at 1500 Spring Garden tomorrow."²²³ **Mr. Grabell further explained that, based on the building's anticipated costs, "the Spring Garden location would appear to be far less expensive than Camden."**²²⁴ Mr. Purcell replied, **"Sounds great to me."**²²⁵ Mr.

²¹⁵ Exhibit 46. As discussed in the Task Force's First Report, it was ultimately a different broker at CBRE, Ken Zirk, who facilitated CSB, TMO, and NFI's coordinated search for Philadelphia real estate in August 2016. *See* First Report at 61-63. It is unclear why the companies went from working with Mr. Stefanski to working with Mr. Zirk.

²¹⁶ Exhibit 47.

²¹⁷ Exhibit 47.

²¹⁸ Exhibit 47.

²¹⁹ Exhibit 47.

²²⁰ Exhibit 48.

²²¹ Exhibit 49.

²²² Exhibit 50.

²²³ Exhibit 51.

²²⁴ Exhibit 51.

²²⁵ Exhibit 52.

Muscella replied, “Sounds like a real good comp to use.”²²⁶ Several days later, Mr. Grabell reported to Mr. Purcell and Mr. Muscella that he had authorized CBRE to “proceed full speed ahead with getting” proposals for both NFI and TMO to lease space at 1500 Spring Garden Street, **although he did have concerns that “it would be a little suspicious” for both companies to use the same building for their alternative site.**²²⁷ Nonetheless, both NFI and TMO obtained lease proposals for 1500 Spring Garden Street by the end of August 2016.

CSB still needed to find an alternative site. After CBRE identified 1601 Market Street as a possibility, CBRE’s Zirk wrote to CSB’s Muscella on August 26, 2016: “I arranged for an inspection of 1601 Market Street at 11am today. You will meet Mike Kane the leasing agent from CBRE in the lobby and he will provide an overview of the building and amenities. . . . Unfortunately, I have a doctors [sic] appointment that I cannot change, but will be available this afternoon to discuss next steps.”²²⁸ Mr. Muscella forwarded Mr. Zirk’s email to NFI’s Grabell, who had been leading the search process on behalf of all three companies, and asked: “Just so I am clear and don’t say anything I shouldn’t, I assume Ken [Zirk] is fully aware of the Camden project but please confirm.”²²⁹ Three days later, Mr. Grabell responded: “Woops. Just saw this in the flood of emails. Yes, as you are probably aware by now, Ken [Zirk] knows the program.”²³⁰ Mr. Muscella wrote back: “No problem. Ken [Zirk] was not at the site visit so I did not say anything to leasing agent and just proceeded in looking at the space as to how it would fit our needs.”²³¹ Three days after the site visit, on August 29, 2016, the broker for 1601 Market Street provided a proposal letter for CSB to lease space in the building.²³²

CSB, TMO, and NFI had initially planned to submit their incentives applications to the EDA by the end of August 2016, which provides context for their expeditious efforts that month to obtain proposal letters for the Philadelphia locations.²³³ However, on August 31, 2016, NFI’s Grabell wrote to the group: “I understand that the [sic] we have decided to delay the application for up to 30 days.”²³⁴ Mr. Grabell proposed a “a call next week to review open items.”²³⁵ He added: “We could include Ken ZIrk [sic] for a part of the call to review the Philadelphia comps and any revisions or further actions he should take with the landlords.”²³⁶ We have found no evidence, however, that the companies did take any significant “further actions” with respect to

²²⁶ Exhibit 53.

²²⁷ First Report at 61-62.

²²⁸ Exhibit 54.

²²⁹ Exhibit 55.

²³⁰ Exhibit 55.

²³¹ Exhibit 55.

²³² As noted previously, CSB’s site visit was on a Friday, and it requested that the building’s landlord produce a lease proposal letter by Monday. The landlord complained in an internal email that the expedited request “does not make any sense.” See First Report at 61 n.183.

²³³ Exhibit 45.

²³⁴ Exhibit 56.

²³⁵ Exhibit 56.

²³⁶ Exhibit 56.

the Philadelphia locations before they ultimately submitted their EDA applications on October 24, 2016. As previously noted, TMO's and NFI's proposal letters for 1500 Spring Garden Street expired in mid-September, and the companies did not restart discussions with the building's representatives until November, after an EDA employee asked whether they still had valid offers for real estate in Philadelphia.²³⁷ Only then did the companies attempt to reopen negotiations with the buildings' representatives.

C. Rainforest Distribution Corp.

Next, we discuss the incentives application of a company not previously addressed in the Task Force's First Report, but which was presented at the Task Force's public hearing on October 17, 2019: Rainforest Distribution Corp. ("Rainforest"). When Rainforest applied to the EDA for tax incentives, it represented that the lease at its current facility in New York City was reaching expiration and the company was deciding between potential relocation sites in Bayonne, New Jersey, and Orangeburg, New York. In reality, however, the company had no sincere intent to relocate to Orangeburg in any circumstances. Guided by a team of professionals at the CBRE firm, the company first identified the Bayonne site that it was actually interested in, and then, for the sole purpose of supporting its application for incentives to relocate to the Bayonne site, searched for a cheaper alternative location to cite on the EDA application. We summarize these facts below.

In 2015, Rainforest's business was growing, and the company was considering relocating from its existing facility in New York City.²³⁸ Rainforest believed that it could extend its lease at its existing facility if it wanted, but it would be in the company's long-term interests to find a larger location that could facilitate growth.²³⁹ The company's Chief Financial Officer at the time (now its Chief Executive Officer), Alexander Ridings, reached out to CBRE for assistance with searching for potential relocation sites, and he was connected with Nicholas Nitti, a CBRE real estate broker.²⁴⁰ Prior to meeting with Mr. Nitti, Mr. Ridings wrote to him that Rainforest was

²³⁷ First Report at 59. At least one document related to these efforts, resulting from the EDA's inquiry, to keep the Philadelphia offers open deserves mention. On January 20, 2017, NFI's Vice President of Real Estate, Michael Landsburg, sent an email to Philip Norcross, George Norcross's brother, stating: "[I]n order to keep options open for Conner Strong's office relocation and the Philly option, I toured the 1601 Market office space again (same as previously submitted). I wanted to give a head's up in case anyone calls about it so that the principals aren't surprised." Exhibit 57. It is notable that NFI, the company that was leading efforts on behalf of the three firms to search for Philadelphia real estate, rather than CSB itself, conducted this site visit to 1601 Market Street in an effort to keep CSB's offer open, when it was CSB that was ostensibly considering relocating there.

²³⁸ Hr'g Tr. (Oct. 17, 2019) at 80:13-81:3.

²³⁹ Hr'g Tr. (Oct. 17, 2019) at 81:4-82:9.

²⁴⁰ Hr'g Tr. (Oct. 17, 2019) at 82:10-83:11.

interested in seeing sites in New Jersey and New York City (specifically, in Brooklyn, the Bronx, and Queens).²⁴¹

At their first meeting in June 2015, Mr. Nitti explained to Mr. Ridings that, if his company would relocate to New Jersey, it could qualify for tax incentives.²⁴² Before then, Mr. Ridings had no experience with tax-incentive programs, either in New Jersey or elsewhere.²⁴³ Mr. Nitti further told Mr. Ridings that, if Rainforest was interested in such a subsidized relocation to New Jersey (and it was) then, in addition to working with Rainforest to find real estate in New Jersey, CBRE would also help the company secure the tax incentives.²⁴⁴ CBRE employed an incentives consultant, Susan Harte, then the Director of Location Incentives, who would handle the company's incentives application, Mr. Nitti explained.²⁴⁵ After an introductory telephone call with Ms. Harte, Rainforest retained her to help the company apply for tax incentives.²⁴⁶ The contract provided that CBRE would charge a "success fee" for Ms. Harte's services, calculated as a percentage of any incentives award that the EDA approved for Rainforest.²⁴⁷

In the summer of 2015, CBRE's Mr. Nitti worked with Rainforest to search for potential relocation sites.²⁴⁸ In July 2015, Mr. Ridings and Mr. Nitti took a tour of a number of sites across New Jersey, after which Rainforest settled on a warehouse for lease located at 20 Pulaski Street in Bayonne, New Jersey.²⁴⁹

In August and September of 2015, CBRE, on behalf of Rainforest, and the landlord for the Bayonne site exchanged competing proposals for a potential lease of the warehouse, eventually culminating in the landlord providing a draft lease contract to Rainforest on September 25, 2015.²⁵⁰

Mr. Ridings told the Task Force that, throughout this search for New Jersey real estate in mid-to-late 2015, he had no understanding or belief that Rainforest would have to consider any alternative potential relocation sites outside New Jersey in order to qualify for tax incentives in New Jersey.²⁵¹ Once Rainforest settled on the Bayonne warehouse, Mr. Ridings intended to solely pursue that site—not to continue searching for any other potential relocation sites.²⁵²

According to Mr. Ridings, at some point, he had a conversation with Ms. Harte, the CBRE incentives consultant, in which she advised him that Rainforest's EDA application should indicate an alternative site outside New Jersey that the company could potentially relocate to instead of

²⁴¹ Hr'g Tr. (Oct. 17, 2019) at 83:8-22; Exhibit 58.

²⁴² Hr'g Tr. (Oct. 17, 2019) at 84:4-15.

²⁴³ Hr'g Tr. (Oct. 17, 2019) at 86:10-15.

²⁴⁴ Hr'g Tr. (Oct. 17, 2019) at 84:9-85:8.

²⁴⁵ Hr'g Tr. (Oct. 17, 2019) at 84:16-85:4.

²⁴⁶ Hr'g Tr. (Oct. 17, 2019) at 85:9-86:6.

²⁴⁷ Hr'g Tr. (Oct. 17, 2019) at 88:6-90:21.

²⁴⁸ Hr'g Tr. (Oct. 17, 2019) at 91:14-92:15.

²⁴⁹ Hr'g Tr. (Oct. 17, 2019) at 92:16-93:13, 94:8-96:5.

²⁵⁰ Hr'g Tr. (Oct. 17, 2019) at 96:11-98:8, 102:11-104:16; Exhibit 59.

²⁵¹ Hr'g Tr. (Oct. 17, 2019) at 87:5-22, 93:15-94:7, 98:9-99:2, 106:9-17.

²⁵² Hr'g Tr. (Oct. 17, 2019) at 105:21-106:7.

Bayonne.²⁵³ Following that conversation, to support Rainforest’s EDA application, Rainforest and CBRE proceeded to search for an alternative site, outside New Jersey, that was less expensive than the Bayonne site for which Rainforest was already negotiating a draft lease.²⁵⁴

In early October 2015, Ms. Harte wrote to her CBRE colleague, Mr. Nitti, regarding Rainforest’s need for an “alternative scenario.”²⁵⁵ Ms. Harte and Mr. Nitti exchanged multiple emails during which Mr. Nitti promised to provide information for an alternative site and Ms. Harte reminded him to ensure that it would be “less expensive than NJ.”²⁵⁶

On October 6, 2015, Mr. Nitti sent Ms. Harte a report that provided information on real estate listings in several municipalities in New York State.²⁵⁷ Responding to Mr. Nitti, and also copying Rainforest’s Mr. Ridings, Ms. Harte explained that the listings were not enough—for Rainforest’s EDA application, she needed an actual “response to an RFP or proposal from one of these locations.”²⁵⁸ The parties exchanged emails considering possible locations, which eventually included 125 South Greenbush Road in Orangeburg, New York.²⁵⁹ Having been identified as a comparable but less expensive location than the Bayonne site, this was the first time that Orangeburg, New York had become a part of Rainforest’s site-selection process in any respect.²⁶⁰

Ms. Harte asked Mr. Ridings to provide her with a rationale for a potential Rainforest relocation to the Orangeburg site that she could use when preparing Rainforest’s EDA application.²⁶¹ Only a few hours after Mr. Ridings had first identified the Orangeburg site and without any additional information regarding the feasibility for satisfying Rainforest’s technical

²⁵³ Hr’g Tr. (Oct. 17, 2019) at 110:13-112:17.

²⁵⁴ Ms. Harte has declined to speak with the Task Force and has not indicated whether she disputes any aspect of Mr. Ridings’s testimony, including this telephone call he described. The Task Force found Mr. Ridings’s testimony to be generally credible.

²⁵⁵ Exhibit 60.

²⁵⁶ Exhibit 60.

²⁵⁷ Exhibit 61.

²⁵⁸ Exhibit 60.

²⁵⁹ Hr’g Tr. (Oct. 17, 2019) at 114:3-116:13; Exhibit 60; Exhibit 62.

²⁶⁰ About 30 minutes after identifying the Orangeburg site, Mr. Ridings wrote an email to the contractor who had provided a quote to install a refrigeration system at the Bayonne site, writing that Rainforest was “still working on the lease agreement with the landlord and don’t yet have clarity on the timeline.” Mr. Ridings proceeded to ask the contractor: “If that NJ building falls through, we are also looking at one in CT. Would there be any change to the estimate should we decide to move forward in a different state?” Mr. Ridings did not mention Orangeburg, New York, which, just moments before, he had identified as a potential “alternative site” to use on Rainforest’s EDA application, because he was not considering the possibility that Rainforest would actually relocate there. Hr’g Tr. (Oct. 17, 2019) at 117:17-119:23; Exhibit 63.

²⁶¹ Hr’g Tr. (Oct. 17, 2019) at 122:13-20, 138:15-139:5.

needs, Mr. Ridings sent Ms. Harte the requested rationale for Rainforest to relocate there.²⁶² Mr. Ridings told the Task Force he did so at Ms. Harte's request, without ever having seen the location or having anyone conduct a suitability analysis for Rainforest's business needs. In fact, Mr. Ridings visited the Orangeburg site for the first time two days later.²⁶³ He did not plan to visit it, but Mr. Nitti asked him to, reminding him of the building's address.²⁶⁴

Despite having identified an alternate site, Rainforest still needed to obtain a lease proposal to submit to the EDA with Rainforest's incentives application. While Mr. Nitti reached out to the building's representatives to obtain a proposal, Ms. Harte started preparing Rainforest's incentives application. On October 16, 2015, Mr. Nitti forwarded to Ms. Harte a proposal letter dated October 15, 2015, that he had received from the Orangeburg building's representatives, writing that it was the "first proposal" and he would "try to get the rental number lowered."²⁶⁵ On October 19, 2015, Mr. Nitti forwarded to Ms. Harte a revised proposal letter for Rainforest to lease the Orangeburg site.²⁶⁶ The letter bore the same date: October 19, 2015.²⁶⁷ Ms. Harte wrote to Mr. Ridings: "I got the updated Orangeburg RFP so we are good to go."²⁶⁸

Ms. Harte submitted Rainforest's incentives application to the EDA on October 27, 2015.²⁶⁹ In response to the application's request that the company "[l]ist other states New Jersey is in competition with," Ms. Harte wrote: "New York."²⁷⁰ She attached an addendum to the application, stating that, as compared to the Bayonne, New Jersey site that Rainforest was seeking tax incentives to relocate to, the Orangeburg, New York site was both less expensive and "a slightly more convenient location for Rainforest."²⁷¹ The statement concluded: "Without the GROW NJ

²⁶² When negotiating a lease for the Bayonne site, Rainforest's representatives visited the site on multiple occasions and, on at least one such visit, brought a refrigeration contractor to evaluate the costs of installing commercial refrigeration units in the warehouse. However, Rainforest did not conduct a comparable assessment of the Orangeburg site. *See* Hr'g Tr. (Oct. 17, 2019) at 99:11-101:25, 102:6-9, 119:25-122:20, 125:17-21; Exhibit 64.

²⁶³ Hr'g Tr. (Oct. 17, 2019) at 123:22-125:16; Exhibit 65.

²⁶⁴ Hr'g Tr. (Oct. 17, 2019) at 123:22-125:16; Exhibit 65.

²⁶⁵ Exhibit 66.

²⁶⁶ Exhibit 67.

²⁶⁷ Exhibit 67.

²⁶⁸ Exhibit 68.

²⁶⁹ Two days after submitting the application, Ms. Harte wrote to Mr. Ridings: "[H]ave you been to the Orangeburg site yet to make a visit? I need you to do that in case we are asked." Exhibit 69.

²⁷⁰ Exhibit 70. The EDA's electronic systems allow applicants to prepare draft applications before they are finally submitted to the EDA for review. This version of Rainforest's application, attached as Exhibit 70, is dated October 23, 2015, but it was not finally submitted to the EDA for review until October 27, 2015.

²⁷¹ Exhibit 70.

grant the company would not pursue the Bayonne location and the approval of incentives will be a material factor in the location decision.”²⁷²

Ms. Harte also attached Rainforest’s proposal letters for the Bayonne and Orangeburg sites to the EDA application.²⁷³ Although negotiations concerning the Bayonne site had surpassed the initial proposal phase and reached the point that a draft lease contract had already been circulated, Ms. Harte attached only the earlier proposal letter—and not the later draft lease—to the application. That was because, she explained to Mr. Ridings, she wanted to create the appearance that Rainforest was “not so far along” with the Bayonne negotiations.²⁷⁴ (She added: “...and since we likely won’t have a lease draft from the alternative scenario.”²⁷⁵).²⁷⁶

Based on the evidence currently available to the Task Force, it appears that Ms. Harte attempted to alter the proposal letter for the Orangeburg site to backdate it before submitting it to the EDA. As described above, Ms. Harte received the Orangeburg proposal letter from Mr. Nitti on October 19, 2015, and the letter bore that same date. However, the proposal letter attached to Rainforest’s EDA application was dated, on its first page, October 1, 2015.²⁷⁷ On subsequent pages, the date appearing in the letter’s header remained October 19, 2015.²⁷⁸ It seems likely, therefore, that Ms. Harte altered the date on the first page while inadvertently overlooking the date in the header on the subsequent pages.²⁷⁹ Presumably, the backdating was intended to suggest that the Orangeburg site was under consideration by Rainforest for a lengthier, and relatively more meaningful, period of time than it actually was (to the extent that it was under actual consideration at all). By deceptively portraying the Orangeburg site as under consideration for longer than it was while simultaneously concealing from the EDA that the Bayonne negotiations had progressed to an advanced stage, Ms. Harte likely intended to portray Rainforest as sincerely considering

²⁷² Exhibit 70.

²⁷³ Exhibit 70.

²⁷⁴ Hr’g Tr. (Oct. 17, 2019) at 131:16-133:11; Exhibit 71.

²⁷⁵ Hr’g Tr. (Oct. 17, 2019) at 131:16-133:11; Exhibit 71.

²⁷⁶ While processing Rainforest’s application, an EDA employee asked Ms. Harte to provide the draft lease for the Bayonne site. Ms. Harte responded, inaccurately: “There currently is not a draft lease for Bayonne as the company wants to see if it is approved for the benefits before starting the lease draft.” Exhibit 72. She would later repeat this same inaccurate statement to a second EDA employee. Exhibit 10.

²⁷⁷ Exhibit 70.

²⁷⁸ Exhibit 70.

²⁷⁹ The proposal letter that Ms. Harte received from Mr. Nitti was a Microsoft Word document, which could have been easily edited. Furthermore, on the last page of the letter, to the left of the signature block, there is a vertical line that appears to be a marking created by Microsoft Word to indicate where a revision had been made in “track changes” mode. The marking likely indicates a minor edit that was inadvertently left in the document, such as a slight line spacing change, for example. No such marking appears in the version of the proposal letter that Ms. Harte received from Mr. Nitti.

relocating to either Bayonne or Orangeburg, with the company's consideration of the respective sites occurring concurrently.²⁸⁰

The EDA does not appear to have noticed that the proposal letter for the Orangeburg site had inconsistent dates—which, had it been noticed, should have been a red flag. Believing that Rainforest was genuinely deciding between relocating to either of the Bayonne or Orangeburg sites, the EDA, on January 12, 2016, approved Rainforest for up to \$2.4 million in incentives if it chose the Bayonne site.²⁸¹ Rainforest has since relocated from its prior New York City location to Bayonne, subsidized by tax credits from the EDA. Rainforest's Mr. Ridings has represented to the Task Force that, although the company never had any intention to actually relocate to the Orangeburg site, he did consider it a "viable" option where the company could hypothetically relocate.²⁸² He further stated that, concerning Rainforest's efforts at meeting the requirements of the Grow NJ program, he relied on Ms. Harte's expertise.²⁸³ During the Task Force's October 17, 2019 public hearing, at which much of this evidence related to Rainforest's application was presented, CBRE announced in a press release that it had terminated Ms. Harte's employment.²⁸⁴

D. Updated Findings Concerning the EDA's "At Risk" Evaluations

The Task Force has assessed the EDA's "at risk" evaluations through case studies, examining the EDA's processing and approval of specific applications. In its First Report, the Task Force explained that it had found, based on its examination to date at that time, that there were clear deficiencies in the EDA's evaluations concerning the risk that jobs may be located outside New Jersey. Based on the continued investigation, including the case studies discussed

²⁸⁰ Because Ms. Harte has declined to speak with the Task Force, we are left to infer her likely intentions from the available evidence.

²⁸¹ The memorandum prepared by EDA staff and presented to the EDA Board before its vote on Rainforest's application stated that the company was "considering relocating its operations from its current facility in Long Island City, NY to either a 50,740 SF space at 20 Pulaski Street, Bayonne City, NJ or a 45,000 SF space at 125 S Greenbush Road, Orangeburg, NY. . . . The location analysis submitted to the Authority shows New Jersey to be the more expensive option and, as a result, the management of Rainforest Distribution Corp. has indicated that the grant of tax credits is a material factor in the company's location decision." The memorandum recommended that the Board "approve the proposed Grow New Jersey grant to encourage Rainforest Distribution Corp. to increase employment in New Jersey." Exhibit 73.

²⁸² Hr'g Tr. (Oct. 17, 2019) at 111:18-112:17.

²⁸³ Hr'g Tr. (Oct. 17, 2019) at 79:6-12.

²⁸⁴ See, e.g., Ted Sherman, *Company got \$2.4M in tax breaks to come to N.J., with bogus claim of planned N.Y. move*, NJ.COM, Oct. 17, 2019, <https://www.nj.com/politics/2019/10/company-got-24m-in-tax-breaks-to-stay-in-nj-even-though-it-says-it-never-planned-to-leave-the-state.html> ("Before the hearing in Trenton was over, CBRE announced it had fired the executive involved in the lucrative deal. . . . 'Susan Harte, who previously served in our Location Incentives Group, is no longer employed by CBRE,' said the real estate firm. 'CBRE takes great pride in its reputation for upholding the highest ethical standards, which we demand from each of our 90,000 professionals around the globe.'").

above, we now update our findings concerning the EDA's practices and procedures for "at risk" evaluations. The Task Force is continuing its ongoing efforts to examine the EDA's "at risk" evaluations, including whether certain addresses were used to misrepresent applicants' relocation intentions. As such, these findings may be amended based on further factual development.

1. The EDA's Quantitative "Cost Comparison" Analytical Model Inadequately Assesses the Risk That a Company Will Locate Outside New Jersey

The Grow NJ statute, as amended by the EOA 2013, provides little direction to the EDA as to how to assess the risk that a company may locate its jobs outside New Jersey if denied tax incentives to locate in this State. The statute merely states that when a company is considering a proposed intra-state relocation (that is, a relocation from one site within New Jersey to another, while also considering relocating outside the State as an alternative), the EDA "shall require the business to submit" certain documentation.²⁸⁵ Those documents are: "a full economic analysis of all locations under consideration by the business; all lease agreements, ownership documents, or substantially similar documentation for the business's current in-State locations; and all lease agreements, ownership documents, or substantially similar documentation for the potential out-of-State location alternatives, to the extent they exist."²⁸⁶ The statute directs the EDA to "base" its analysis as to whether the company's jobs are "actually at risk of leaving the State" on these documents submitted by the company, as well as "any other information deemed relevant by the authority."²⁸⁷ However, beyond the general mandate to "base" its decision on the company's submissions, the statute says nothing about *how* the EDA should consider the information.²⁸⁸ Nor does the statute provide any direction as to what additional information, beyond the documents listed in the statute, the EDA should "deem relevant" to its analysis. Furthermore, with respect to inter-state relocations (that is, relocations from outside to inside New Jersey), the statute is entirely silent as to how the EDA should conduct its "at risk" analysis. For inter-state relocations, the statute does not direct the EDA to consider any particular documents at all.

With little statutory guidance, the EDA was left to develop its own policies and practices for "at risk" evaluations. For both intra-state and inter-state relocations alike, the EDA came to apply the same mode of analysis, which may be referred to as a "cost comparison" analytical model, to determine whether a Grow NJ applicant's jobs are at risk of being located outside New Jersey. The EDA requires applicants to use the Authority's "Cost Benefit Analysis" (or "CBA")

²⁸⁵ N.J. Stat. § 34:1B-244(d).

²⁸⁶ N.J. Stat. § 34:1B-244(d).

²⁸⁷ N.J. Stat. § 34:1B-244(d) ("Based on this information, and any other information deemed relevant by the authority, the authority shall independently verify and confirm, by way of making a factual finding by separate vote of the authority's board, the business's assertion that the jobs are actually at risk of leaving the State, and as to the date or dates at which the authority expects that those jobs would actually leave the State . . .").

²⁸⁸ For example, the statute directs the EDA to consider lease agreements, ownership documents, and similar documents for potential out-of-state sites "to the extent [such documents] exist." How should it affect the EDA's analysis if no such documents exist? The statute provides no guidance.

form to demonstrate that, at the time of the company's Grow NJ application, the company is deciding between two potential locations, one in New Jersey and another outside the State, and the New Jersey option is the more expensive one, justifying the need for tax credits to incent the company's relocation. All costs related to the alternative sites purportedly under consideration by the company must be catalogued on the CBA form and substantiated by additional documents. Additionally, an executive officer at the applicant company must attest that the company will choose to locate at the more expensive New Jersey option only if it is subsidized by tax incentives from the EDA. Typically, these two components are all the EDA considers, resulting in an analysis that amounts to a mechanical cost comparison. If the company has submitted adequate documentation of higher costs at its proposed New Jersey site than its claimed out-of-state alternative and the company's executive has made the requisite attestation, the EDA concludes, virtually automatically, that New Jersey is at risk of losing the jobs to the competitor state.

The Task Force has observed two flaws with the manner in which the EDA administers this "cost comparison" model of "at risk" evaluations. First, with the EDA focused on a quantitative analysis, the EDA eschews qualitative considerations. Often, we have seen, EDA staff tasked with reviewing applications directed their efforts towards ensuring that all costs, including relatively small ones (such as, for example, electrical rates at the respective sites), were correctly catalogued, substantiated, and, when tallied, showed that the New Jersey site was more expensive than the claimed alternative. But, as demonstrated by the cases the Task Force has discussed, the EDA, while myopically focused on this cost comparison, has given short shrift to circumstantial factors that call into question the plausibility of the company's purported intention to actually relocate outside New Jersey if denied incentives. The case studies discussed in the Task Force's reports have shown numerous red flags that the EDA's staff apparently overlooked in reviewing applications. Consistent with the Grow NJ statute's invitation that the EDA consider all information it "deems relevant" to the "at risk" analysis, the Task Force recommends that the EDA consider ways to conduct meaningful qualitative assessments—beyond pure cost comparisons—of whether a company is reasonably likely to relocate its jobs outside New Jersey if denied incentives. For example, the EDA may consider whether to require executives of applicant companies to meet with the EDA to explain their site-selection deliberations, as some authorities in other jurisdictions already require in connection with their respective incentive programs.

Further, it should be noted that companies have a resource available to learn about the EDA's evaluation processes, including their deficiencies, in advance of submitting applications to the Authority: the small network of professional consultants, spread across only a handful of firms, who are retained by the majority of companies that apply to the EDA for tax incentives. There is evidence that these consultants are well aware of the shortcomings in the EDA's "cost comparison" model of analysis for "at risk" evaluations—and, in at least some cases, are willing to exploit them. For instance, the Task Force is in possession of an email that Susan Harte—the consultant, formerly of CBRE, who represented Rainforest (as discussed above)—sent to another of her clients

on January 19, 2019.²⁸⁹ Ms. Harte advised the client about ensuring that the New Jersey site was more expensive than the out-of-state alternative so that EDA could “check[] the box.”²⁹⁰ She explained: “[EDA staff] seem much more focused on just having an audit worthy application than the actual likelihood a company would or would not make the move.”²⁹¹ In a subsequent email, she elaborated: “I know companies (not my clients) who didn’t get the incentives and went to NJ anyway. It’s all a lot of BS to be honest with all these hypotheticals It’s all about optics.”²⁹² As discussed above, Ms. Harte advised Rainforest to include an alternative site in its application that the company had no actual intention to relocate to in any circumstances.

Second, the “cost comparison” model is a rigid one-dimensional analysis that fails to adequately capture the reality of the site-selection process for many companies. This may be particularly true for companies outside New Jersey that seek incentives to relocate into the State. Consider, for example, the circumstances of Rainforest’s relocation to New Jersey, as described above. When Rainforest first started its site-selection process, it wanted to explore sites in both New Jersey and New York City. However, after Rainforest learned that it could receive lucrative incentives to relocate to New Jersey, it made the rational decision to focus its search efforts on potential New Jersey sites only. At that point in time, it could have been said that, if not for the availability of incentives in New Jersey, there was a meaningful risk that Rainforest would choose not to relocate to New Jersey, but rather stay at its current facility in New York City or, if not there, somewhere else outside the State. However, even though Rainforest was proposing to relocate into New Jersey from outside the State, under the EDA’s “cost comparison” model of analysis, unless and until Rainforest identified a specific, and less expensive, location outside New Jersey and attested that it intended to move there—to that specific site—if not awarded incentives by the EDA, then the company would not qualify for incentives. As such, it is easy to see how the “cost comparison” model could have the unintended consequence of effectively inviting companies to fabricate relocation deliberations that are not reflective of their actual intent—which happened in Rainforest’s case. The company’s consultant led the company to identify a site in Orangeburg, New York as a proposed “alternate site,” despite the fact that the company had no intent to move there.

For these reasons, the Task Force recommends that the EDA consider whether its analysis should differ for intra-state and inter-state moves. Notwithstanding this recommendation, we note that the shortcomings we perceive in the EDA’s analysis does not exculpate any company that may have misrepresented its relocation intent to the EDA in order to qualify for tax incentives. It is not a defense to public program fraud that the program imposes unwise qualifying criteria.

²⁸⁹ Exhibit 74.

²⁹⁰ Exhibit 74.

²⁹¹ Exhibit 74.

²⁹² Exhibit 75. The Task Force is continuing its examination of the EDA’s processing and approval of this company’s application.

2. As a Result of the EDA’s Inadequate “At Risk” Analysis, Public Funds Have Been Misspent Incentivizing Jobs That Were Never Truly at Risk

A recent academic article estimated that somewhere between 75 to 98 percent of projects awarded incentives by state and local authorities across the country would have taken place with or without the incentives.²⁹³ With respect to business attraction and retention programs, like Grow NJ, that estimate translates to an inference that somewhere between 75 and 98 percent of the incentivized jobs were never truly “at risk.” In New Jersey, the Task Force’s investigation has shown that the EDA has awarded tax credits to incentivize the retention of jobs that would not have left the State in any event. The full scope of such unnecessary awards, however, is impossible to determine. The Task Force has identified red flags in additional applications, other than those already discussed as case studies, and is continuing to investigate.

VIII. THE EDA DOES NOT FOLLOW A RELIABLE OR ROBUST STANDARD OF REVIEW FOR LEGAL DISCLOSURES

The Grow NJ application provides, in part, that “Businesses applying for eligibility for NJEDA programs are subject to the Authority’s Disqualification/Debarment Regulations.”²⁹⁴ The referenced regulations set forth potential grounds for disqualification for the Authority to consider before awarding financial assistance through business employment incentive program grants.²⁹⁵ The EDA incorporated the regulations into its Grow NJ application through a series of 11 questions (the “Legal Questionnaire”), which mirror the causes for disqualification delineated in the regulations. The questions require truthful disclosure of whether the company, its directors or officers, or affiliates have been the subject of various forms of Legal Proceedings,²⁹⁶ including criminal and civil enforcement processes, debarment, and certain categories of action. The last question requires companies to disclose any other relevant lawsuits that were pending at the time of its application. The companies and project applicants have a continued disclosure obligation during the pendency of the application process.

Yet the Task Force has found that, in practice, the Legal Questionnaire, relevant failures to disclose, and efforts by underwriters and Incentive Officers to gather additional information pertaining to the Legal Questionnaire have had no meaningful purpose or impact on an award’s approval because the EDA lacks a consistent and reliable standard of review. The Task Force has

²⁹³ Timothy J. Bartik, “*But For*” *Percentages for Economic Development Incentives: What percentage estimates are plausible based on the research literature?* (W.E. Upjohn Institute for Employment Research, Working Paper 289, 2018), available at https://research.upjohn.org/up_workingpapers/289/.

²⁹⁴ See, e.g., Exhibit 76. The regulations referenced in the Grow NJ application are set forth in N.J. Admin. Code § 19:30-2.1 *et seq.*

²⁹⁵ N.J. Admin. Code § 19:31-10.8.

²⁹⁶ The Grow NJ application defines “Legal Proceedings” as “any State, Federal or foreign civil, criminal or administrative proceeding in a court or administrative tribunal in the United States, any territories thereof or foreign jurisdiction.”

reviewed internal policies and memoranda that offer guidance to EDA personnel, interviewed relevant personnel, and reviewed project files and communications for companies within our scope to determine whether the processes in place are followed and whether they are sufficient. That review and independent legal investigation of applicants has raised concerns. For several companies, we found material or pending legal action that the EDA did not find during its legal review and that the companies did not disclose on their applications. In addition, regardless of the egregiousness of a company's failures, we have not found a single applicant that EDA disqualified based on inadequate legal disclosures, even in instances when the nondisclosed information was suggestive of criminal conduct by the applicant, its affiliates, or employees, even if the employees were high-level executives or directors. Instead, we have found that, although the EDA has a process for review, it is weak and does not adequately assess whether a legal issue should render an applicant ineligible. In this Section, we discuss the EDA's current procedure and present a case study to illustrate its gaps and our initial findings.

A. The EDA's Process and Standard of Review

The Task Force has reviewed several "delegation memoranda" offering guidance on the evaluation of legal disclosures in connection with Program applicants. These memoranda discuss the breadth of the EDA's authority to determine how certain categories of disclosures impact eligibility and which others require review in conjunction with the New Jersey Attorney General's Office. In a December 10, 2013 memorandum, Mr. Lizura sought Board approval to increase the level of delegation to EDA staff related to Grow NJ and ERG.²⁹⁷ In other words, he sought for the EDA's staff to have more control and decision-making authority over whether certain information or disclosures required action or disqualification. After acknowledging that the tax-incentive applicants were often large companies that were subject to more legal issues during the course of ordinary business, he stated that he "wanted to provide efficiency for our customers while ensuring that appropriate oversight and signing authority under these delegations protects our management of these accounts."²⁹⁸ In a subsequent memorandum, dated May 16, 2014, Mr. Lizura requested EDA Board approval for additional delegation authority, which the Board approved at a Board meeting on the same day.²⁹⁹

Understanding that the EDA had increased its unilateral authority and oversight to determine grounds for disqualification, the Task Force sought to assess the effectiveness of its review process. The Task Force learned that EDA BDOs and underwriters review Legal Questionnaire responses and engage companies to request additional information where needed. EDA personnel also conduct their own searches for potential legal issues. A company's original disclosures and any additional information or responses gathered by EDA personnel while conducting due diligence are sent to Mr. Marcus Saldutti, EDA's Senior Legislative Offer and the individual responsible for legal review.

²⁹⁷ See Exhibit 77.

²⁹⁸ See Exhibit 77.

²⁹⁹ See Exhibit 78.

At the Task Force’s public hearing in October 2019, Mr. Saldutti testified that the purpose of reviewing the legal disclosures was to uncover any potential disqualifiable offenses.³⁰⁰ The 11 questions, answerable by checking either “YES” or “NO”, require the applicant to answer “YES” if they have any legal history relevant to the specific question or commission of certain listed legal actions that can lead to debarment or disqualification from eligibility. For example, Question 6 inquires whether the applicant committed “to the best of [applicant’s] knowledge after reasonable inquiry, violation of any laws governing hours of labor, minimum wage standards, prevailing wage standards, discrimination in wages, or child labor.” If an applicant checks “NO” to any of the 11 questions, they are certifying that they have no relevant legal history and have not committed certain conduct that the EDA might find disqualifying. When asked about the process, Mr. Saldutti testified that the EDA initially reviews the applicant’s responses to the 11 “YES” or “NO” questions, but that EDA personnel conducts further review of certain companies even if they checked off “NO” to each of the questions.³⁰¹ He further explained that EDA personnel conduct independent reviews that sometimes uncover legal matters that were not disclosed by the company, but “that should have been a ‘YES’ answer.”³⁰² Mr. Saldutti told the Task Force that after identifying companies needing further review, next step steps were to gather additional facts.³⁰³ During interviews with the Task Force, Mr. Saldutti explained that there are instances where he conducts additional research or reaches out to applicants directly for supplemental information if an EDA BDO or underwriter has not yet requested the information. After review, if Mr. Saldutti believes there are issues of concern, he drafts a memorandum to the EDA’s Board that includes relevant matters and any mitigating factors.³⁰⁴ He includes a recommendation regarding whether the Board should approve the application in the memorandum.³⁰⁵ During his tenure, Mr. Saldutti has reviewed approximately 250 applications³⁰⁶ but drafted a memorandum with recommendation (*i.e.*, a memorandum identifying issues and potential concerns) for approximately only 10%, which then went to the EDA Board. In other words, for approximately 25 applications, Mr. Saldutti believed the applicant’s legal history or responses on the Legal Questionnaire raised potential issues that the EDA Board should be aware of and included such information in his memorandum. The other 90% continue through the process without any legal issues flagged for Board review and are voted on for award approval.³⁰⁷ Mr. Saldutti has never recommended disqualification for an applicant.³⁰⁸ When asked if there was anything “short of death” that would constitute an outlier

³⁰⁰ Hr’g Tr. (Oct. 17, 2019) at 141:6-9.

³⁰¹ Hr’g Tr. (Oct. 17, 2019) at 142:10-15.

³⁰² Hr’g Tr. (Oct. 17, 2019) at 142:16-22.

³⁰³ Hr’g Tr. (Oct. 17, 2019) at 143:2-17.

³⁰⁴ Hr’g Tr. (Oct. 17, 2019) at 143:2-17.

³⁰⁵ Hr’g Tr. (Oct. 17, 2019) at 144:2-10.

³⁰⁶ Hr’g Tr. (Oct. 17, 2019) at 144:11-18. The 250 applications include applications for Grow NJ and ERG tax incentives, but also include applications for other EDA tax credit programs.

³⁰⁷ Hr’g Tr. (Oct. 17, 2019) at 144:20-24.

³⁰⁸ Hr’g Tr. (Oct. 17, 2019) at 145:5-146:5.

for the purposes of EDA disqualification, Mr. Saldutti responded that “[o]ut of the 25 memos I’ve drafted and recommendations I’ve made to the board, no.”³⁰⁹

Separately, the Task Force found numerous instances where an award applicant failed to disclose or misrepresented relevant legal actions and proceedings on its application. In some instances, the EDA found the relevant legal actions during its due diligence process but did not question or request further information as to why the applicant failed to truthfully complete the Legal Questionnaire in a timely manner before the application went to the EDA’s Board for approval. Thus, although the Grow NJ application makes clear that there are consequences if any information provided is willfully false, neither Mr. Saldutti nor the Incentive Officers took steps to determine whether misrepresentations related to the Legal Questionnaire were intentional. Further, the Task Force found that, when EDA personnel discovered that a company had failed to disclose relevant matters on the Legal Questionnaire, they did not pursue such nondisclosure as a red flag bearing on the company’s credibility or warranting additional scrutiny of other aspects of the application.

B. The EDA Does Not Effectively Conduct Due Diligence Nor Does It Efficiently Review Legal Disclosures

The Task Force examined both the EDA’s diligence and consistency with respect to the legal disclosure review, as well as how companies interpret legal disclosure requirements and how forthcoming they are in the Legal Questionnaire. We found that the lack of a robust diligence and review process, which is exacerbated by companies that fail to disclose relevant actions in the first instance, plays out in various ways that are counterintuitive to the goal of providing the EDA’s Board with complete and timely information related to legal disclosures. First, the EDA does not effectively conduct due diligence to reliably find relevant legal actions germane to the Grow NJ application if the applicant failed to disclose them on the Legal Questionnaire. Second, the EDA does not efficiently conduct legal review to ensure that all legal actions are reviewed and adequately assessed in a timely fashion for the EDA Board’s consideration. We discuss one entity, Elwyn, to illustrate the first issue, and another, Amerinox Processing, to illustrate the second.

1. Elwyn

We presented one application in detail at the Task Force’s last public hearing—that of Elwyn, a nonprofit healthcare and human services provider that applied for Grow NJ tax-incentive credits in 2018.³¹⁰ Here we offer a summary to illustrate our initial findings. On August 1, 2019,

³⁰⁹ Hr’g Tr. (Oct. 17, 2019) at 147:15-21. During his interview with the Task Force, Mr. Saldutti stated that there was one company that he recommended be suspended pursuant to Executive Order No. 34, which is different from a recommendation to disqualify or disbar. While debarment is up to a 5-year bar for a company to apply for and receive a tax credit, a suspension is generally much shorter. A suspension is an exclusion from state contracting for a temporary period of time, pending the completion of an investigation or legal proceedings. Executive Order No. 34 (Governor Brendan Byrne).

³¹⁰ Hr’g Tr. (Oct. 17, 2019) at 150:15-163:12.

Elwyn submitted its Grow NJ application and responded “NO” to each of the Legal Questionnaire questions. However, as part of her due diligence process, Christina Fuentes, the EDA BDO assigned to the application, found potentially relevant legal issues, at least one of which was pending at the time of the application. Ms. Fuentes forwarded the potential legal issues to both Elwyn’s consultant, Kevin Sheehan of Parker McCay, and Jeremy Sunkett, Elwyn’s Vice President of Real Estate, and requested additional responses.³¹¹ After a series of communications, during which Mr. Sheehan indicated that his client did not need to disclose the identified matters, Ms. Fuentes clearly stated that in her interpretation of the Legal Questionnaire, the applicant was required to disclose any pending legal issues, such as those she identified.³¹² Shortly after, Mark Chierici, the EDA underwriter assigned to the application, sent an email to Mr. Sunkett and Mr. Sheehan and requested any updates on the legal issues and specifically asked “[a]re there any issues of note within the last couple years that might arise as we proceed with this Project?”³¹³ Mr. Sheehan responded that there were none.³¹⁴ However, in fact, the Task Force found and reviewed several additional legal actions that Elwyn should have disclosed, but did not as part of its application, especially after Ms. Fuentes made clear that she believed that Elwyn needed to disclose pending actions. Further, the Task Force reviewed two civil actions relevant to the Legal Questionnaire where Elwyn was named as defendant, which were filed after its application was submitted. As Elwyn was under a continuing disclosure obligation, it should have disclosed these actions.

An additional concern, however, is that despite Elwyn’s failure to fully disclose certain legal actions, Mr. Saldutti did not conduct a robust review of Elwyn’s legal issues. Based on our review of the correspondence, Mr. Saldutti approved Elwyn’s legal disclosures within minutes of Ms. Fuentes requesting an update on the legal approval.³¹⁵ We have not received or found evidence that Mr. Saldutti applied any additional scrutiny or conducted further investigation of Elwyn’s legal history despite Ms. Fuentes’ discovery that it initially failed to disclose certain actions. The Task Force notes that further diligence could have uncovered the additional publicly available relevant legal actions that the Task Force found and reviewed during its investigation and that the EDA should have considered.

The Elwyn application, as described above and presented more fully in the October 2019 public hearing, presents an example of how the EDA’s current processes fail to ensure that the EDA effectively conducts due diligence concerning an applicant’s legal history, which in this case, would have uncovered several publicly available and relevant legal actions. Based on how quickly Mr. Saldutti approved the application and it moved forward for Board approval, it is unclear whether the current process implements a sufficient level of scrutiny before approval. While the Task Force cannot opine on whether the actions referenced here or presented at the October 2019 public hearing should or should not have influenced Elwyn’s eligibility for a Grow NJ award, we

³¹¹ Exhibit 79.

³¹² Exhibit 79.

³¹³ Exhibit 80.

³¹⁴ Exhibit 80.

³¹⁵ See Exhibit 81.

believe the EDA's Board must receive a complete assessment of an applicant's legal history for its consideration and that the EDA should apply a consistent standard of review and interpretation regarding materiality. Further, based on Mr. Saldutti's testimony at the October 2019 hearing and responses provided to the Task Force during interviews, the Task Force does not believe diligent review would have changed the outcome or how the application was reviewed in this instance. Mr. Saldutti was clear that companies are not penalized in any way nor is their credibility on other responses questioned for failure to disclose relevant information that is later discovered by the EDA.

2. Amerinox Processing, Inc.

A second incentive recipient, Amerinox Processing, Inc. ("Amerinox"), illustrates a separate weakness in the EDA's legal diligence process. Amerinox is a company that processes stainless, aluminum, and galvanized steel for third-party customers. On April 12, 2016, the EDA approved Amerinox for a \$7,950,000 incentive award under Grow NJ.³¹⁶ On February 29, 2016, Amerinox submitted its Grow NJ application to the EDA and responded "NO" to each of the 11 legal questions—thereby representing to the EDA that there were no material legal proceedings to disclose and no grounds for disqualification.³¹⁷ In fact, during its due diligence process, the EDA discovered the fact of a Chapter 11 bankruptcy action that raised red flags and was sent to Mr. Saldutti for further review. Specifically, the Chapter 11 bankruptcy action involved claims that an Amerinox affiliate, Jermax, Inc., had engaged in fraudulent conveyances to Amerinox for the purposes of evading creditors and personally benefitting Jermax's owners. However, the Task Force reviewed the communications related to the EDA's review process and found that while the EDA BDO assigned to the matter escalated the action to Mr. Saldutti, Mr. Saldutti conducted additional diligence and reviewed the action only *after* the EDA's Board had already voted to approve Amerinox's award.

On or about March 1, 2016, Christina Fuentes, an EDA Business Development Officer, conducted a Google search regarding Amerinox as part of preparing a Grow Transmittal Form, an internal form completed by the EDA BDO after review of application materials to ensure that the application meets all program requirements or to identify any issues before submitting the application package for approval.³¹⁸ Ms. Fuentes apparently discovered an adversarial bankruptcy proceeding filed against Amerinox and its individual owners, which had been commenced on June 22, 2012.³¹⁹ Ms. Fuentes referred the matter to Mr. Saldutti and requested additional information from Amerinox.³²⁰ On the morning of March 2, 2016, Ms. Fuentes sent an email to Mr. Sheehan of Parker McCay, who was engaged as a consultant for Amerinox related to its Grow NJ application, with the subject "urgent" and requested to speak with him about Amerinox.³²¹

³¹⁶ See Exhibit 82.

³¹⁷ See Exhibit 76.

³¹⁸ See Exhibit 83.

³¹⁹ *Jurista v. Amerinox Processing, Inc.*, No. 1:12-CV-3825-NLH-JS (D.N.J. filed June 22, 2012).

³²⁰ See Exhibit 83.

³²¹ See Exhibit 84.

Presumably, the two spoke by phone, because later the same day, Mr. Sheehan sent an email to Ms. Fuentes under the subject “Amerinox Legal Matter” and explained that the matter had been settled in 2013.³²² While technically accurate in that the matter had settled, Mr. Sheehan omitted the important fact that the action was based on a separate Chapter 11 Examiner’s Report (the “Report”), which found that Jermax and Amerinox had engaged in fraudulent transfers. Further, Mr. Saldutti did not discover this Report even though it was referred to in a publicly available March 28, 2013 opinion and Ms. Fuentes listed the matter in the Grow Transmittal Form for Mr. Saldutti’s review.³²³ The Report, dated April 30, 2012, was prepared by an Examiner whose appointment was approved by a court order.³²⁴

Regardless, even if Amerinox had disclosed the above, it likely would not have impacted its application and eventual approval for millions of dollars in tax incentives because Mr. Saldutti did not review the legal matters until *after* the EDA’s Board approved the application. The Board approved Amerinox’s application on April 12, 2016. The following day, on April 13, 2016, at 10:11 AM, Ms. Hassett sent Mr. Saldutti an email with the subject “FW: Amerinox,” and without any text.³²⁵ At 11:13 AM, Mr. Saldutti received the order of dismissal for the bankruptcy action from the U.S. District Court.³²⁶ At 12:00 PM, Mr. Saldutti responded to Ms. Hassett, copying Mr. Lizura, stating his conclusion that he did not find the action problematic and therefore Amerinox did not have to disclose because “the opinion addressed preliminary matters (sufficiency of the pleadings, temporary restraints, etc.) and was not dispositive on the merits.”³²⁷

It remains unclear whether Amerinox should have or was required to disclose the Report in response to the Legal Questionnaire. It is clear, however, that once the EDA discovered the information regarding the bankruptcy action and underlying allegations, it believed the related legal history was important and relevant as indicated by the follow-up question and correspondence. Yet, during his review, Mr. Saldutti failed to adequately investigate the underlying reports and findings and did not conduct a timely review before the EDA approved Amerinox. The Task Force found that the review process was insufficient and inefficient. Even if Mr. Saldutti had properly investigated the Report and its findings and believed a disqualification memorandum was appropriate, he would have sent his recommendation too late for the Board to consider. It is also concerning that the Board considered an award application without having yet cleared the legal review process.

³²² See Exhibit 85. As described above in Section V, this correspondence further highlights the Task Force’s concern regarding third-party communications and the need for reliable recordkeeping. The communications between Ms. Fuentes and Mr. Sheehan, especially any telephone calls, exemplifies how records of important communications relevant to the EDA decisions would provide a more complete understanding of the EDA’s decision-making process.

³²³ See Exhibit 86.

³²⁴ See Exhibit 87.

³²⁵ See Exhibit 88.

³²⁶ See Exhibit 89.

³²⁷ See Exhibit 88.

The Task Force recommends that the EDA establish a process to ensure that it has thoroughly completed its legal review process before the Board can vote to approve an application.

C. The Task Force Finds that the EDA Must Establish a Reliable and Consistent Legal Review Process

The Task Force has found that the EDA, as the gatekeeping entity charged with overseeing the administration of the Programs, does not adequately review or make recommendations on issues related to legal disclosures and material Legal Proceedings. As indicated by the delegation memoranda, the EDA's staff retain significant authority to determine whether any award application involves grounds for potential disqualification. As such, the Task Force believes that it must establish a robust review process that involves diligent investigation of legal issues both by requesting information from companies and from independent research.

As discussed above, the Task Force has found numerous instances where companies have failed to disclose potentially material legal proceedings. At times, companies have justified their decision to withhold information by stating that they were operating under counsel from outside consultants or that the matters were pending and therefore not yet relevant. The Task Force has found that the EDA is inconsistent in how it responds to companies' legal disclosures or failures to disclose relevant legal history. When the EDA does review adverse responses and legal proceeding information, the EDA generally accepts all explanations from companies regarding why it should not impact the company's eligibility for an award. The EDA's legal review is effectively a "box checking" exercise: it effectively rubber stamps each application, moving it towards approval even when there are relevant legal proceedings involving indicia of fraud, misrepresentations, discriminations, and other plausible grounds for a disqualification recommendation.

The Task Force understands that the EDA has recently instituted efforts to implement a more effective legal disclosure review process—including retaining an outside vendor to assist in the legal disclosure review and requiring companies to recertify responses on its Legal Questionnaire at multiple points in the approval and certification process. Although these new processes may address some of the deficiencies the Task Force found, it is not clear that they would address all of the deficiencies, including the EDA's fundamental failure to take action based on an applicant's serious legal history. Further, the Task Force believes that the EDA should place greater weight on a company's failure to disclose legal actions and engage in additional scrutiny on other representations made when such failures are identified. The Task Force recommends that the EDA strengthen its legal review process to identify and respond to legitimate grounds for disqualification to properly administer the governing regulations.

IX. THE EDA'S POST-APPROVAL CERTIFICATION PROCESS

A. Overview of the Post-Approval Phases of Grow NJ Awards

In addition to the specific aspects of the EDA's administration of the Grow NJ program discussed in prior sections of this report, the Task Force has continued its broader, in-depth "end-to-end" examination of the EDA's processes. In the Task Force's First Report, we focused on the

EDA's processes from the time a company submits its application for incentives through the EDA's Board's approval of the application. However, the Board's approval of the application is not the end of the process. After such approval, to receive useable tax credits, the company must still invest in its proposed facility in New Jersey and employ the requisite number of employees for the location. In this section of the Second Report, we discuss the Task Force's review of the EDA's processes for these "post-approval" phases of the Grow NJ program, including certain issues we have identified.

1. Post-Approval Conditions

The "post-approval" phase begins once the EDA's Board has voted to approve a company's Grow NJ application. After such approval, the company must then satisfy certain preliminary conditions that are set out in an "approval letter" from the EDA. Such conditions, which differ depending on the nature of the project, may include, for example, the submission of proof that the company has control of the site where it intends to develop its new facility in New Jersey, or has secured financing for the project. A "Post-Approval Officer" at the EDA is responsible for ensuring that the award recipient submits the required documentation within the allotted time, as well as for monitoring the recipient's project status. In addition to satisfying these post-approval conditions, the award recipient must also take certain preliminary steps related to green building, affirmative action, and prevailing wage requirements.

2. Closing and Post-Closing Process

After the preliminary post-approval conditions are met, the EDA prepares an "Incentive Agreement" for the company, which sets forth the terms and conditions governing the company's obligations it must satisfy to receive tax credits. Generally speaking, under the Incentive Agreement, the company must make the requisite capital investment and employ the requisite number of new or retained full-time employees in accordance with the EDA's Board approval. The Incentive Agreement also requires the company to make certain representations and warranties with respect to its compliance with legal requirements, the truthfulness of its statements to the EDA, and related matters. Additionally, the Incentive Agreement sets forth events triggering default and contains provisions concerning the EDA's ability to recapture or require forfeiture of tax credits in certain circumstances. The EDA and the company execute the Incentive Agreement at "closing." Once executed, the EDA sends the final contract to the New Jersey Treasury's Division of Taxation. The EDA then assigns an "Incentive Officer" to the project, who is responsible for reviewing and monitoring the company's project status as the company carries out its obligations under the Incentive Agreement.

3. Overall Certification Process

Once a company has satisfied the requirements set forth in the Incentive Agreement, it may apply to the EDA for "overall certification." Generally, overall certification requires the company to show that it has, in fact, established its qualified business facility ("QBF") in New Jersey and has employed the requisite number of new or retained full-time employees at the facility. To obtain overall certification, the company must submit certain documentation to the EDA, including:

- An executed lease or deed, as applicable.
- A certification by an independent CPA that, in developing the company's business facility in New Jersey, the company made the requisite capital investment.
- A certification by the company that it has employed the requisite number of new or retained full-time employees at the company's business facility.
- Evidence that the development of the project complied with affirmative action, prevailing wage, green building, and other requirements.

If the EDA determines that the company has satisfied the conditions required by the Incentive Agreement, it transmits a recommendation of approval to the Treasury's Division of Taxation, which, in turn, issues an "overall" tax credit certificate to the company. The tax credit certificate entitles the company to use a fraction of the tax credit to offset its tax liability each year, beginning with the year the certificate is issued, until the full credit amount has been exhausted.

4. Annual Certification Process

Once an award recipient has received its overall certification, it may certify with the EDA on an annual basis going forward in order to obtain its incremental tax-incentive credit for each successive year. To obtain annual certification, award recipients must submit certain documentation to the EDA each year, including, for example, a new certification by the company that it has continued to employ the requisite number of employees at the company's business facility during the relevant year.

During the annual certification review process, the EDA determines the number of employees employed each month and averages this number across twelve months to calculate the job figures for the entire year, with the aim of ensuring that an award recipient maintains the requisite number of eligible employees throughout the year.

Notably, the EDA has recently changed its annual certification review process. Prior to 2019, the EDA's Incentive Officers did not systematically review and verify each eligible employee against New Jersey Department of Labor records. Instead, to verify the employees, they at most took only samples of employee names provided on the company's logs and compared the samples against certain employment data submitted by the company to the Labor Department on "WR-30" forms. However, as of 2019, the EDA's Incentive Officers are required to review and verify each eligible full-time employee provided on the company's log against the Labor Department records to verify the consistency of information.

As with the overall certification, if the EDA determines that the company has satisfied all necessary requirements, it transmits a recommendation to the Division of Taxation, which, in turn, issues the company's annual tax credit.

B. Deficiencies in the EDA's Post-Approval Processes

The Task Force's examination of the EDA's post-approval processes identified certain issues, which we discuss below.

1. Post-Closing Policies Exist, But EDA Staff Review Is Inconsistent

The Task Force carefully reviewed the EDA's written policies and procedures relating to the post-approval phase of the Grow NJ program. Unlike the pre-approval phase, where the EDA maintained minimal policy documents (as previously discussed in the Task Force's First Report), the EDA maintains a robust post-closing manual for use by Authority employees. However, in interviews with EDA employees, the Task Force found that staff's actual review of the manual was inconsistent and not enforced by senior management. When asked about the manual, several EDA employees indicated that they had not read it or used it only for reference in limited circumstances.

2. Failure to Comprehensively Train EDA Staff

The Task Force has found that the EDA did not comprehensively train its personnel regarding Grow NJ post-closing requirements. This is consistent with the Task Force's finding, described in its First Report, that the EDA did not train its staff concerning pre-approval processes, but rather expected employees to learn on the job. Similarly, EDA employees by the Task Force reported that they did not receive formal training concerning post-approval processes, but rather learned the necessary information while processing applications. Given the detailed nature of the EDA's processes and the value of the tax credits at issue, the Task Force believes it integral to sufficiently train personnel to ensure competency of administration.

However, the Task Force has observed that, despite the lack of formal training in post-approval processes, the responsible EDA employees generally demonstrated comprehensive understandings of program requirements. This may at least in part be because post-approval processes, as compared to the pre-approval phase, are relatively more objective in certain respects, leaving less room for inconsistent interpretation or application.

3. Lack of Proactive Monitoring of Award Recipients

Companies with approved awards are required to submit certain periodic status updates to the EDA. However, the EDA does not proactively monitor the status of its award recipients. Rather, any monitoring is merely reactive when developments that may impact a company's award—such as layoffs, closures, or other issues—are brought to the attention of the responsible EDA personnel. Other than the information companies are required to submit to the EDA, the Authority lacks internal measures to track or monitor the status of a project or the award recipient between mandatory updates. As a result, the EDA may be unaware of potentially important information on a timely basis.

4. The Timing of Overall Certification Lends Itself to Potential Manipulation

The Task Force observed that the current overall certification process lends itself to potential manipulation by award recipients. A company may receive overall certification at any time during the year, and the certification, although it allows the company to claim a tax credit for a full year, is treated as only a "snapshot in time" at the precise moment of the certification. That is, the EDA may certify a company provided the project meets all necessary requirements on the

date of certification, irrespective of whether the company met the requirements at any time earlier in the year. As such, a company could hire the required number of employees only late in the year and yet receive overall certification and claim a tax credit for a full year.

The potential for manipulation was set forth in an example discussed in the Task Force’s First Report. In the case of World Business Lenders, LLC (“WBL”), the company completed its overall certification in October 2016. At that time, the company certified that it had hired at least 80% of the minimum required full-time employees at its New Jersey, most of whom allegedly were hired shortly before overall certification.³²⁸ When the company returned to the EDA in 2017 to complete its annual certification to receive its tax credit for the prior year, the EDA only required the company to submit documentation supporting its employee figures for the period of time from overall certification (October 2016) to year-end—a period of approximately three months. The EDA learned in January 2017 that this same company had laid off more than one-third of its employees. Notably, the EDA was notified of these layoffs by a reporter and did not identify this information itself. Despite indications of mass layoffs in early 2017, the EDA ultimately determined that the company was eligible for its tax credit for the entire tax year of 2016 because this annual credit was based only on three months-worth of employee data. Since this certification, WBL has been unable to obtain subsequent annual certifications for the tax years 2017 and 2018, based on its inability to meet its required job numbers. The Task Force is continuing to investigate whether other award recipients have similar issues.

5. The Overall Certification Process Lacks Independent Verification of Capital Investment Costs

To receive overall certification, award recipients must demonstrate to the EDA that they have made the requisite capital investment in their New Jersey project. The Task Force has found that the EDA’s due diligence practices in connection with its review of company capital cost certifications have generally been insufficient in several respects. Award recipients are required to submit a certification by an independent CPA in support of the company’s eligible capital expenditures. The EDA is not involved in selecting or vetting the independent CPA. Only in the last two years has the EDA begun requesting peer review letters from the CPAs, rather than simply accepting a statement from the CPA attesting to its independence from the award recipient. However, Mr. Ciallella indicated that the EDA has not identified any issues with a CPA’s lack of independence.

The EDA also lacks any input into or oversight of the CPA’s evaluation of eligible project costs and instead relies upon the “Agreed Upon Procedures” (“AUP”) report and cost certification report submitted by the CPA. The AUP report generally sets forth the CPA’s procedures and findings with respect to the award recipient’s eligible capital costs. However, until 2019, the EDA lacked a standard template for AUP reports and generally accepted whatever was provided by the

³²⁸ A whistleblower complaint against this company was filed in 2018, alleging that the company hired underqualified employees during the latter part of 2016 in order to meet program requirements. The whistleblower further alleged that these employees were subsequently terminated. The Task Force takes no position on the accuracy or truthfulness of these allegations.

CPA. We note that the EDA has now created a uniform standard template that all CPAs must follow in their submission of the cost certification. Prior to the standard template, however, CPAs submitted AUP reports that varied in both detail and depth. This variance, coupled with lack of accounting expertise among the EDA personnel responsible for reviewing the reports, created challenges to the EDA's ability to determine whether the reports were sufficient, and EDA staff conducted only extremely limited review. Incentive Officers at the EDA have acknowledged that they are somewhat limited in their ability to navigate and challenge information submitted by third-party CPAs on behalf of a project and have indicated that an in-house CPA at the EDA would be beneficial to their certification review. Furthermore, Mr. Ciallella testified at the Task Force's October 2019 public hearing that, prior to the EDA's implementation of enhanced post-closing procedures, the EDA's process of confirming the accuracy of a project's capital investment was, in part, deficient.³²⁹

Indeed, the EDA's Incentive Officers, who are responsible for the review, do not take steps and are not expected to independently verify capital costs. Rather, the Incentive Officer relies on the company's certification attesting to the accuracy and truthfulness of the cost figures. The Task Force reviewed and analyzed cost certification reports and found that they frequently do not provide a detailed capital expenditure breakdown. Instead, the certification provides only high-level categories of the eligible costs claimed, sometimes encompassing tens of millions of dollars in unelaborated costs. For example, the cost certification report may provide a line item for "equipment and machinery" or "other costs" without any additional detail or information. Without additional detail, it is impossible to determine whether these costs appear reasonable or justified. The Task Force raised this concern with EDA personnel, who indicated that they could ask for invoices or receipts to verify capital costs if they questioned the CPA report. However, it is evident that the lack of cost detail makes it difficult to prompt a question regarding accuracy and truthfulness. This inability to verify costs is particularly troubling for projects located in Camden, where the award calculation is tied to the size of the company's capital investment in its project. In other words, companies with projects in Camden may be approved for millions of dollars in tax credits based on vague and essentially unverifiable cost claims. This is also concerning because project applicants could overstate costs to inflate an award by claiming higher capital investment and construction costs, and the EDA's ability to detect the inflation is, at best, limited.

6. Deficiencies in the Annual Certification Process

The Task Force has found that the EDA's due diligence practices in connection with annual certifications, in which the EDA must verify the company's jobs, are deficient in significant respects. However, the Task Force notes that the EDA has recently taken steps to improve certain of these processes, most notably by enhancing the eligible job review.

Prior to the EDA's recent efforts, the Authority relied too heavily on the award recipient to submit accurate job-related information in support of its annual certification. The Task Force was told in interviews that Incentive Officers were expected to review information submitted for

³²⁹ Hr'g Tr. (Oct. 17, 2019) at 297:6-10.

annual certification but were not expected to conduct independent verification regarding the accuracy or truthfulness of the information or certifications provided. This included employee logs, NJ WR-30 forms (quarterly wage reports to the Department of Labor), and other information regarding the eligibility of jobs, such as whether those employees were full-time, spent 80% or more of their time at the company's facility, or were offered health care benefits, as required. As noted previously, the Incentive Officers conducted sampling or "spot check" reviews of jobs, meaning that they cross-checked a sample of employees listed in the employee log submitted by the company to the EDA against the WR-30 form provided by the company to the Labor Department to confirm consistency of information. At the Task Force's October 2019 public hearing, Mr. Ciallella testified that, prior to the changes to the jobs-verification process in 2019, it was possible for companies to receive a higher award because of deficiencies in the EDA's review of jobs during annual certification.³³⁰

In 2019, the EDA implemented a new process for verifying eligible employees. Now, the EDA cross-checks every employee listed in the company's employee log against a WR-30 form that is provided by the Department of Labor pursuant to a memorandum of understanding. Although this more robust verification process is a significant improvement, the process still contains some shortcomings. For example, the EDA continues to rely on the company to self-report job titles and salaries, that eligible employees worked at least 35 hours per week, whether health benefits were offered to the employee, and that the employee worked at the company's facility at least 80% of the time. Although the Task Force recognizes that limitations on the EDA's financial and staff resources, as well as time constraints, may limit the feasibility of more comprehensive verification, these shortcomings also create the potential for abuse by award recipients.

For example, the EDA relies on companies to report the total number of eligible employees, even if that number exceeds the required minimum. When more than the required number of eligible employees is provided, the EDA counts the required minimum eligible employees based on the date of hire, excluding those employees hired last. The Task Force is aware of at least one scenario where a consultant for a company attempted to manipulate the company's eligible jobs figures by selectively reporting only those employees with the highest salaries in order to qualify for an additional tax credit bonus based on the company's median salary being over the median salary for the county. An EDA Incentives Officer told her supervisor that the company had been approved for 90 new employees, had hired approximately 105 employees, and that the company's consultant indicated that he intended to only report 90 of those 105 new employees. According to the Incentives Officer, the company met the requirements for the bonus when reporting only 90 employees with relatively higher salaries, but, if the additional 15 eligible employees were included, the median salary would fall below the minimum required.³³¹ The EDA supervisor questioned the propriety of this approach, advising the responsible Incentive Officer that the company "must report all their people so they don't pick and choose the salaries to get the bonus.

³³⁰ Hr'g Tr. (Oct. 17, 2019) at 304:22-305:11.

³³¹ Exhibit 90.

You will need to do more research and let me know how you can agree with his request.”³³² The EDA’s policy is to require reporting of all eligible employees and count only the required number of eligible employees by hire date—that is, using the above example, the first 90 eligible employees hired, irrespective of salary. However, the EDA has no method of determining whether a company has selectively reported employees when the company does not self-disclose.

The EDA also employs a potentially imperfect approach to determine “eligible employees.” The EDA uses a “body count” calculation and the average employee per month to determine whether a company has met its required minimum. Specifically, the Incentive Officer will count an employee as eligible only if that employee is present at the end of the month. For example, an employee that starts on February 11 and works until August 29 counts as one employee for the months of February through July, but not for August. By contrast, an employee that starts work on August 30 counts for the month of August, even though she has worked only one day that month.

C. Continued Failures with the EDA’s Policies and Procedures

While the Task Force acknowledges that the EDA has taken steps to improve its post-approval processes, the Task Force has also observed that, in some respects, the EDA has taken a siloed or limited approach to addressing deficiencies in its processes. For example, a 2018 internal audit conducted by the EDA confirmed that the Authority lacked the appropriate processes to address certain failures in its processing of incentive applications and awards and that the EDA’s efforts to remedy such failures—while noteworthy—fall short of comprehensive.³³³ The 2018 internal audit, which was conducted by the EDA’s Audit and Compliance Services team, reviewed five Grow NJ projects that had already received at least one issuance of an annual tax credit. Although the projects were selected at random in order to represent a cross-section of projects, the Audit team found that each of the five projects had various problems suggesting that the tax credit issued to each of those projects may have been issued in error—either because the amount was incorrect or because the applicant should not have qualified for an award in the first instance. Despite the fact that the audit identified issues in all five of the projects reviewed, the EDA to date has not taken additional steps to similarly audit the numerous other companies approved for tax credits. Further, it is the Task Force’s understanding that, although the EDA has followed up with the audited awardees to address the issues identified where it was appropriate to do so, it has not otherwise taken any action with respect to those projects—even though the audit results were issued in December 2018, more than one year ago. Given the results of the 2018 internal audit, the Task Force recommends that a fuller audit be conducted across a wider sample of, if not all, approved awards.

Further, while the 2018 internal audit focused on the EDA’s post-approval and certification processes, the audit revealed issues with respect to one project’s material factor certification—a requirement that the applicant must satisfy *prior to* approval—and determined that without further

³³² Exhibit 90.

³³³ 2018 Audit, EDA Audit and Compliance Services.

documentation, the entire award issued to this project was potentially subject to claw-back by the EDA. To date, the EDA has not obtained the required documentation to demonstrate that a material factor existed at the time of that applicant's approval.

Moreover, while the 2018 internal audit resulted in ten recommendations for corrective actions, many of which have been implemented in this year's overall and annual certification processes, each of these recommendations focused only on the post-approval process, despite a finding that at least one project suffered from pre-approval deficiencies. The Task Force is not aware of any efforts by the EDA to address pre-approval deficiencies based on the results of the 2018 internal audit, nor is it aware of any steps taken by the EDA to audit or review pre-approval processes in a manner similar to the 2018 internal audit.

Relatedly, the Task Force has observed that the sharing and dissemination of information across the EDA's staff is lacking and has resulted in inconsistent understandings of program requirements. Indeed, the Task Force has observed that updates or clarification of policies that apply to both pre- and post-approval processing were not properly distributed to all impacted employees within the EDA, nor do they appear to be memorialized in readily accessible policy documents. For example, as discussed in Section VI of this Second Report, a 2019 policy memorandum advising that EDA fees are not eligible for capital expenditures within the Grow NJ program was not circulated to staff on the pre-approval side of the EDA. Moreover, the policy memorandum was not circulated to EDA staff responsible for processing ERG applications, despite the issue being relevant to that program, as well. This disconnect has resulted in internal inconsistencies in the EDA's processing of applications and awards.

D. Recent Improvements to the EDA's Processes

As noted previously, despite the deficiencies identified by the Task Force, we also acknowledge that the EDA has undertaken efforts to incorporate feedback from the Comptroller's January 9, 2019 audit report and the Task Force's First Report. In addition, the EDA has taken into consideration its own findings from an internal audit conducted in 2018. The Task Force's evaluation of these changes is ongoing, but, subject to the issues discussed above, the review thus far is encouraging. We provide a brief summary of the EDA's improvements to date below.

1. Portfolio Management and Compliance Group

The EDA introduced the Portfolio Management and Compliance Group during a 2018 reorganization. Tasked with the annual certification process, this group has worked to ensure that the 2019 review for compliance, particularly with the jobs' requirement, is thorough and accurate. The EDA has explained to the Task Force that the 2019 review has provided the groundwork for continued improvements in future years, including better technology and establishing a process to minimize the manual review required. Increased information sharing between the EDA and the New Jersey Department of Labor has also provided a benefit to the review process.

2. Increased Attention to Legal and Regulatory Disclosures

In response to recommendations from the Task Force, the EDA has contracted with a professional services firm to enhance and supplement the Authority's application review of Grow

NJ applications, specifically with respect to legal disclosures.³³⁴ This engagement is focused on reviewing project applications for legal disclosure issues prior to approval, at overall certification, and at annual certification. The professional services firm is also training EDA personnel on better practices to review legal disclosure issues.

Furthermore, the EDA has instituted a policy of requiring awardees to submit updated debarment questionnaires at various stages of the process. In addition to requiring the debarment questionnaire at the time of application, the EDA will now require updated questionnaires at annual certification.

3. Independent Verification of Costs

As discussed previously, the EDA relies on CPAs hired by awardees to provide information for project cost certification. Prior to 2019, the EDA lacked a standard template for AUP reports and generally accepted whatever was provided by the awardee's CPA. This process led to the submission of reports that both were inconsistent across projects and varied in detail and depth. Accordingly, with the assistance of the EDA's independent auditor, Mercadien, the Authority instituted a standard template that all CPAs must follow, providing uniform detailed procedures for the CPA to follow. Furthermore, these uniform rules provide further guidance as to what costs are eligible for "capital investment" under the Grow NJ statute.

In addition to the creation of a uniform AUP template, the EDA requires a more detailed report on capital investment and has instituted a directive to more closely assess whether reported costs are eligible under internal guidelines. To the extent costs are included that do not fall within the guidelines, the EDA employs a standard of "commercial reasonableness" to assess whether such costs should be included in a project's capital investment. The EDA is also working to develop policies going forward regarding eligible costs to maintain consistency throughout the application review process.

4. Annual Jobs Verification and "Look-Back"

As noted previously, prior to 2019, the EDA conducted a "spot check" review of jobs at annual certification. The EDA has since implemented a process to review every job submitted by the awardee during annual certification to ensure that the monthly average number of employees meets the relevant requirements. As a result, in 2019, the EDA reviewed a total of 422,000 jobs across 130 different companies, cross-verifying the company's submissions to the EDA against Department of Labor data. In order to verify each job, the EDA uses tools in Excel to filter and compare data. For example, the Excel program identifies discrepancies in employee names, whether an employee worked 13 weeks in a quarter (to qualify as "full-time"), and any discrepancies in wages paid. The program isolates the employee profiles that contain discrepancies so that the EDA's Incentive Officers may conduct a manual check and follow-up with the company as needed. The EDA anticipates that the newly implemented jobs-verification

³³⁴ At this time, the EDA has not contracted with the professional services firm to review ERG awards, though the firm's scope of work may expand in the future.

process will improve and become more efficient as it evolves, and it intends to engage in a “lookback” review of jobs that the EDA has certified in previous years. Because these processes are relatively new, the Task Force is not yet in a position to evaluate their efficacy.

X. RECOMMENDATIONS

Executive Order No. 52 called for the Task Force to offer advice concerning the future of New Jersey’s tax-incentive programs. In its First Report, the Task Force offered nine recommendations related to the design, implementation, and oversight of the Programs. As the Task Force’s work remains ongoing, we offer additional recommendations below based on the findings discussed in this Second Report. With the addition of these recommendations, the Task Force considers its recommendation related to the design of any future tax-incentive legislation complete. To the extent that the Task Force offers additional recommendations based on its investigation and future findings, it anticipates that such recommendations will relate directly to the EDA’s implementation and administration of the Programs.

These recommendations supplement the first nine recommendations previously offered in the Task Force’s First Report:

Recommendation 10: Because tax credits such as those awarded under the Grow NJ program fall outside the safeguards and controls established under our state Constitution against fiscal abuse, the structural and institutional pressures imposed on the EDA to accede to the profligate award of those credits are extraordinary, and indeed almost beyond the structural capability of the EDA to resist. The Task Force recommends that the concepts of limits and bounds that are inherent in any rational resource allocation process be restored to the tax incentive program. For instance, aggregate upper limits on the EDA’s authority to issue tax incentives, which existed in the Grow NJ program prior to the EOA 2013, could be reintroduced. These and other measures should be considered. If the re-imposition of the concept of limits means that the EDA and its staff must engage in a searching, critical and comparative analysis identifying which of many proposals *best* match the program’s stated goals—rather than merely determine whether any or all proposals can plausibly satisfy a minimal baseline requirement—then it would be no different, no less difficult, and no less necessary than with any other coherent process by which scarce resources are distributed.

Recommendation 11: The Task Force has found that when administering the tax-incentive programs, the EDA operated under at least the appearance of a conflict of interest related to its system of funding. Because the EDA’s revenues were tied to the approval and issuance of tax credits, the EDA had a financial interest in approving awards, which could have affected the level of scrutiny applied by the Authority to applications. The Task Force recommends considering measures to eliminate or mitigate this potential conflict of interest and better align the EDA’s interests with the public’s interest. At a minimum, the yearly performance goals of the EDA’s underwriters should not include a requirement that they contribute to revenue goals, and the underwriters should not be privy to any continued impact of tax incentive approvals on the EDA’s budget. The fee structure could be revised so that, for example, it is tied more closely to initial applications and/or based on flat fees, rather than depending so significantly on application

approval and award size. Or alternate funding systems could be considered to decouple the operational budget of the EDA from the fees generated by successful applicants. One possible way to do this would be to fund the EDA's operations by legislative appropriation. These and other structures that would eliminate or mitigate the potential conflict of interest should be considered.

Recommendation 12: The Task Force's investigation has found that Authority-related business between EDA Board members and the Authority's staff or third parties took place on Board members' personal email addresses. EDA Board members were not provided with Authority email addresses on which to conduct official EDA business, and relatedly, there is no formal EDA policy requiring Board members or staff to use EDA-issued email addresses when conducting official business. The lack of such a policy could potentially result in the omission of important information from the public record. As such, the Task Force recommends that all EDA Board members and staff be required to use Authority email accounts, rather than personal accounts, for official Authority business.

Recommendation 13: The Task Force has observed that third-party communications with the EDA often occur over the telephone or during in-person meetings, and these communications are neither regularly recorded nor memorialized by the EDA. Thus, while such communications may be important and inevitable in order to understanding the EDA's decision-making process, there is no available record from which the content of the communications may be discerned. Communications that relay important information about a pending application should be committed to tangible form. To improve the publicly available record concerning the EDA's decision-making, the Task Force recommends that the EDA implement policies and procedures to record or otherwise contemporaneously memorialize the Authority's communications with third parties related to applications for tax incentives.

Recommendation 14: The Task Force has observed clear deficiencies in the EDA's analysis of the risk that a company may locate its jobs outside New Jersey if denied tax incentives to locate in this State. As explained in Section VII of this Second Report, the EDA has typically applied a mechanical "cost comparison" approach, which tallied the costs of the applicant company's proposed site in New Jersey, on the one hand, and the costs of a site outside the State the company was purportedly considering as an alternative, on the other hand. If the proposed New Jersey site was the more expensive option, the EDA virtually automatically concluded that the company's jobs were at risk. However, while focused on this quantitative assessment, the EDA has often eschewed consideration of qualitative factors related to the plausible likelihood that the company would actually choose to locate outside New Jersey if denied tax incentives. The Task Force recommends that the EDA consider ways to incorporate meaningful qualitative analysis into the Authority's "at risk" evaluations in order to make them more than mechanical cost comparisons. For example, the EDA may consider whether to require executives of applicant companies to meet with the Authority to explain their site-selection deliberations, as some authorities in other jurisdictions require.

Recommendation 15: The Task Force's investigation has found that the EDA's current legal disclosure review process is insufficient and ineffective to review the EDA's current Legal

Questionnaire and conduct an independent investigation, which results in a process without meaningful purpose or impact on an award's approval. As discussed in Section VIII of this Second Report, the Task Force's investigation found that, although the EDA has a process for reviewing legal matters, it is weak and does not adequately assess whether a legal issue is material or whether it should render an applicant ineligible. In fact, the EDA has never recommended to disqualify an applicant based on relevant legal issues despite significant and concerning legal histories of certain applicants. While the Task Force appreciates and acknowledges that the EDA has made recent efforts to implement a more robust legal disclosure review—including the retention of an outside vendor to assist in such review and additional points at which the applicant must “refresh” its Legal Questionnaire—the Task Force recommends that the EDA establish additional comprehensive protocols and procedures for legal disclosure review that ensure that the review is completed, thoroughly analyzed, and timely disseminated so that any issues can be fully considered by the EDA Board. This should include, first, the implementation of a process to effectively conduct due diligence to uncover undisclosed legal matters and conduct robust follow-up due diligence as needed; and, second, a requirement that the EDA conduct a second-level review of other application sections and applicant credibility for failures to disclose relevant legal actions before award approval.

Recommendation 16: The Task Force has found numerous instances in which EDA employees have demonstrated limited or inconsistent understandings of applicable requirements of the Authority's Programs. While the Task Force acknowledges and appreciates the EDA's recent efforts to improve their processes, it has also observed, as discussed in Sections VI and IX of this Second Report, that the Authority has failed to adequately disseminate information across the Authority's staff, resulting in further inconsistencies. The Task Force therefore recommends that, in addition to issuing and maintaining comprehensive written policies and procedures to guide EDA staff in the administration of the Programs, the Authority should further implement appropriate procedures and practices for the dissemination of such information, to ensure administrative consistency across the Authority's personnel.

Recommendation 17: After the EOA 2013 lifted upper caps in the EDA's ability to approve tax credits, the EDA became empowered to approve an essentially unlimited amount of tax credits, potentially materially impacting the State's budget. With such heightened authority, the need for appropriate oversight and accountability is similarly increased. The Task Force recommends that the EDA consider creating an internal inspector general or similar role, with a mandate to investigate misconduct, negligence, or similar issues within the Authority, and with appropriate independence.³³⁵ In this regard, we note that the EDA has already undertaken certain efforts to improve its processes and procedures in recent years, including by creating an audit function within the Authority.

³³⁵ The Task Force acknowledges the existence of independent state accountability entities such as the State Auditor and the State Comptroller. The limited resources and missions of those offices, however, and the peculiar needs of an ongoing oversight function over the complex processes of the EDA, suggest the creation of a dedicated inspector general or similar role.