Economic Development Incentives Update

The purpose of this Alert is to address three recent developments regarding economic development incentives matters.

The purpose of this Alert is to address the following recent developments regarding economic development incentives matters: (1) the Ohio Supreme Court's decision in Nestle R&D Center, Inc. v. Levin, Case No. 2009-Ohio-1929; (2) the Economic Development Incentives Study recently released by the Ohio Department of Development ("ODOD"); and (3) the new Ohio and Huntington Growth Partnership and the loans available through that Partnership.

Nestle Case:

On April 30, 2009, the Ohio Supreme Court issued a decision in Nestle R&D Center, Inc., v. Levin. In Nestle, the Ohio Tax Commissioner, through application of a purported statute of limitations that expired before ODOD issued the taxpayer a certificate specifying the value of the taxpayer's refundable jobs creation tax credit ("JCTC"), sought to deny a taxpayer the value of its JCTC. In a 7-0 decision, the Court reversed the Ohio Board of Tax Appeals, which had agreed with the Tax Commissioner. See Nestle R&D Center, Inc., v. Wilkins, Ohio B.T.A. Case No. 2006-M-1365 (June 3, 2008).

Relying on statutory authority, Nestle argued that the three year statute of limitations period to file an application for refund to claim its refundable JCTC began to run on the day the ODOD issued Nestle its certificate. Conversely, the Tax Commissioner argued the three year statute of limitations period began to run on the extended due date of Nestle's corporation franchise tax report. The Court concluded that the issuance of the certificate started the running of the statute of limitations, and thus Nestle's refund claim accrued, for purposes of the statute of limitations period, on the day ODOD issued Nestle its certificate.

The ruling in this case could benefit taxpayers similarly situated to Nestle. In addition, this case demonstrates that the process of claiming the JCTC does not end with the execution of a JCTC agreement; rather, it is an ongoing process with challenges that sometimes involve principles of Ohio tax law.

ODOD Economic Development Incentives Study:

On May 5, 2009, the ODOD released a tax incentives study, which was the result of months of meetings with various stakeholders throughout the State and suggestions from private consultants. The most significant findings contained in this study are as follows:

- Although Ohio's current stable of incentives and reformed tax structure are competitive with other states, Ohio's ability to restrict its incentives offerings and still remain competitive are limited.
- Ohio can improve its competitiveness with other states by modifying several of its current incentives programs and by improving the efficiency and transparency of the existing incentives.

In particular, the study recommends that the following specific changes be made to Ohio's incentives programs (some of these changes are already being proposed in H.B. 1):

- JCTC and Job Retention Tax Credit ("JRTC") Programs:
  - Broaden the eligibility thresholds for the JRTC program, but provide a cap on the number of credits issued by ODOD in any given year.
  - Change the unit of employment measure for the JCTC and JRTC programs from 35 hours per week to payroll growth and full-time equivalent employees.
  - Simplify the JCTC and JRTC annual reporting process.
  - Limit the term of the JCTC and JRTC job maintenance requirement to seven years or the term of the credit plus three years, whichever is greater.
  - Increase the wage threshold for JCTC and JRTC eligibility to 175% of the federal minimum wage (with certain exceptions).
  - Standardize the JCTC relocation restrictions across all Ohio incentives, including the JCTC, by utilizing an "early-warning" relocation notice system.
  - Eliminate the local match requirement for the JCTC and JRTC.
- Local Property Tax Incentives:
  - Extend the sunset date for the enterprise zone ("EZ") program for an additional 12 months past the current sunset of October 15, 2009.

If you have any questions about the developments discussed in this Alert, please contact:

Scott J. Ziance
sjziance@vorys.com
614.464.8287

Chris L. Connelly
clconnelly@vorys.com
614.464.8244

- Initiate a bipartisan working group to develop a detailed proposal for reforming the State's various property tax exemption programs. Although this working group will develop a detailed proposal, ODOD did present its vision for the future of these programs, which includes the following:
  - Eventual sunset of the EZ program.
  - Using a revamped version of the community reinvestment area ("CRA") program as the sole remaining true real property tax exemption program.
  - Redesigning the CRA and tax increment financing ("TIF") programs to limit these incentives to certain distressed areas and other targeted areas.
  - Limiting the extent to which political subdivisions can impose TIF on school district real property taxes to 25% of the tax revenues the school district would have otherwise received, with an exception for communities with collaborative revenue sharing agreements.
  - Allowing TIF revenues to be used for job training and educational purposes.

- Increase the State's capability to extend loans at more favorable terms to minority-owned businesses.
- Clarify the role of Ohio's various workforce development agencies to improve speed and efficiency and transparency of these programs.
- Process Improvements:
  - Standardize incentives wherever possible.
  - Aggregate performance data across all programs and projects.
  - Empower regional representatives to identify and address the needs of current Ohio businesses.
  - Modify existing incentives programs wherever possible to avoid the need to create new incentives programs.
  - Empower the State Controlling Board to undertake streamlining efforts to improve its efficiency.

Although some of the above-described measures have already been proposed in H.B. 1, it remains to be seen how the other proposed changes to the State's incentives programs will be addressed. In particular, any potential modifications to the EZ, CRA and TIF programs could bring about a significant change in the way that property tax incentives are used by local governments.

The Ohio and Huntington Growth Partnership:

On May 6, 2009, Huntington National Bank and the State of Ohio announced the establishment of the Ohio and Huntington Growth Partnership, a unique public-private partnership designed to retain, grow and attract businesses to the State. Huntington has committed to make $1 billion in loans over three years, $250 million of which will be distributed through a highly competitive preferred loan program called the Huntington Job Growth Fund. This program will contain terms analogous to the State's 166 Direct Loan program, with a minimum loan amount of $250,000 and no maximum loan amount. Huntington Job Growth Fund loans will be offered for up to a five year term, at a fixed rate of 2% above Huntington's cost of funds. Eligible businesses include manufacturing, industrial, distribution and other businesses. Eligible project costs are the same as for the 166 Direct Loan program (purchase of land and/or buildings, machinery and equipment; construction and/or renovation of buildings; long-term leasehold improvements; purchase of fixed assets of an on-going business).

The Huntington Job Growth Fund loan program will provide additional opportunities for Ohio businesses to secure loans at favorable terms through a secure, credible Ohio-based lender. This program also represents ODOD's first major public-private partnership arrangement, which arrangements are likely to become more prevalent.

Vorys will continue to follow the progress of the above-described developments.