

Appendix D

Department's Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

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MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

FROM: JANE OATES *Jane Oates*
Assistant Secretary
for Employment and Training

SUBJECT: Response to Draft Report No. 18-10-003-03-390
"Recovery Act: The U.S. Department of Labor Needs to
Evaluate its Role in the Health Coverage Tax Credit
Program"

Thank you for the opportunity to comment on the findings and recommendations provided by the Office of Inspector General (OIG) in the draft report resulting from your audit of the Health Coverage Tax Credit (HCTC) National Emergency Grant (NEG) program under the American Recovery and Reinvestment Act of 2009 (Recovery Act). HCTC NEGs were created by the Trade Adjustment Assistance Reform Act of 2002, as an amendment to the Workforce Investment Act of 1998 (WIA). The HCTC NEGs, which are the subject of the OIG audit, support the Internal Revenue Service (IRS)-administered HCTC program.

The Employment and Training Administration (ETA) appreciates the opportunity to work collaboratively with the OIG audit team to clarify the intent of and the use of HCTC NEGs. As your team knows, when describing the HCTC benefit, it is critical to make the distinction between the HCTC program operated by the IRS and the HCTC NEGs administered by the U.S. Department of Labor (Department). The Recovery Act, signed into law on February 17, 2009, provided the Department with \$44.9 billion. Specifically, the Trade Adjustment Assistance (TAA) Health Coverage Improvement Act of 2009, which can be found in Section 1899 of the Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA) in Division B of the Recovery Act, appropriated \$150 million to the Department for HCTC NEGs by amending section 174(c)(1)(A) of the WIA. HCTC NEGs allow states to request funds that provide for a portion of the monthly cost of qualifying health insurance coverage for eligible individuals, until such time as they can be enrolled in the IRS' HCTC program which serves eligible TAA participants, Pension Benefit Guaranty Corporation (PBGC) recipients, and their qualified family members. States may pay this benefit with their own funds or with HCTC NEG funds for up to 3 months. However, the primary mechanism for providing HCTC assistance is through a Federal tax credit administered by the IRS. At the Department, ETA is responsible for administering HCTC NEGs.

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Audit Objectives

The audit objectives, as stated in the OIG's report, included: (1) the status of the states applying for, and using Recovery Act funds under the HCTC NEG [program]; and, (2) a review of the outreach ETA conducted to inform states of the availability of funds.

Objective 1 – What is the status of states applying for, and using Recovery Act funds under the HCTC NEG program?**Finding – Overall, states have neither applied nor used HCTC NEG Recovery Act funds.**

While the Department agrees that the purpose of the Recovery Act is to assist those most impacted by the recession, the premise of the audit, and the objective stated above, is that HCTC NEGs are subject to the same obligation timeframes as other Recovery Act resources and that funds appropriated for HCTC NEGs must be obligated by the end of Fiscal Year (FY) 2010. As noted in the report, ETA has stated from the initiation of this audit that HCTC NEGs are not and should not be subject to the same obligation timeframes as other appropriations in the Recovery Act. HCTC NEGs were created by the Trade Adjustment Assistance Reform Act of 2002, which amended WIA to create HCTC NEGs. HCTC NEGs were included in Division B of the Recovery Act as part of the reauthorization of the TAA program. While the Recovery Act appropriated \$150 million for HCTC NEGs, it did so by amending the section of WIA that created the program in 2002. As such, the Recovery Act did not merely add supplemental funds to the existing program, as was done in Division A of the Recovery Act for the other WIA programs. Rather, it appropriated HCTC NEG funds by amending WIA section 174(c)(1)(A). Funds under this section of WIA are available on a 'no-year basis,' remaining available for Federal obligation during the pendency of any outstanding claim under the Trade Act of 1974, as amended by the Trade Act of 2002 and TGAAA, and do not carry the same obligational life as other funds appropriated under Division A of the Recovery Act. Attached is the Office of Solicitor's opinion, sent December 14, 2009, by the Associate Solicitor of the Division of Management and Administrative Legal Services. While ETA has strongly encouraged and taken significant steps to ensure that states and local areas spend Recovery Act funds quickly and well, the Office of the Solicitor's opinion concludes:

“...Both the 2002 and the 2009 versions of Section 174(c)(3) specify that the funds appropriated by Section 174 (c)(1)(A) remain available for obligation during the pendency of any outstanding claim under the Trade Act of 1974, as amended by the Trade Act of 2002. In light of the connection between the Health NEGs and the TAA and ATAA recipients, we believed in 2002 that the most reasonable interpretation of the intent of section 173(c)(4) of WIA was that, as long as any individual had an outstanding claim for TAA benefits under the Trade Act of 1974 and therefore, remained eligible for assistance under the Health NEGs and HCTC, the funds appropriated to carry out the Health NEGs would remain available for Federal obligation. Our conclusion is the same in 2009. Moreover, both versions of Section 174(c)(1)(A) use similar wording in referring to funds appropriated “for fiscal year 2002” and “for the period of fiscal years 2009 through 2010,” SOL's view is that this language must be harmonized with the language of Section 174(c)(3) and that the most reasonable interpretation of

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Section 174 overall is to read Section 174(c)(1)(A) as governing when the funds become available (that is, the first day of the fiscal year identified) and Section 174(c)(3) as governing when the period of availability ends.

In summary, this is the most reasonable interpretation of Section 174, is consistent with principles of statutory construction, and is consistent with DOL's and OMB's practice of treating Section 174(c)(1)(A) funds as "no year" funds since 2002...."

In other words, the Office of the Solicitor (SOL) has interpreted the period of availability for obligation of the Recovery Act funds for HCTC to be as long as there are valid claims against those funds.

To further underscore the assertion by the OIG that funds must be Federally obligated by the end of FY 2010, it was cited that "As of December 3, 2009, ...6 states were awarded grants in August and November 2009, and have not reported any expenditures." However, expenditures for those new awards were not available, as the first report for those awards was not due until February 12, 2010. As additional eligible workers participate in the HCTC program and states choose to call on HCTC NEGs to assist with program payments, the Department would expect to see reported expenditures increase.

The draft report questioned the expediency by which ETA planned to obligate \$150 million for HCTC NEGs. It is correct that ETA estimated that it would obligate \$28 million by September 30, 2010. This estimate was based on the assumption that a significant increase in HCTC-eligible TAA-certified workers would have been enrolled in TAA by September 2010. The fact that those workers have just recently become eligible has caused ETA to revise its estimates. Additionally, it should be noted that both the HCTC program and the associated HCTC NEGs remain available for eligible workers and are funded through an x-year account and will remain available for Federal obligation after September 30, 2010, unlike many other Recovery Act appropriations with a definitive sunset date.

PBGC

Throughout the report, the OIG recommends that ETA provide states with information identifying eligible PBGC recipients. However, the HCTC program through which eligible PBGC and TAA recipients receive health insurance coverage benefits is an IRS-operated program. As the OIG audit team recognizes, there are privacy considerations about identifying "eligible PBGC recipients" at the state level, and ETA does not have access to such information.

Objective 2 – What outreach did ETA conduct to inform states of the availability of funds?

Finding – ETA conducted various outreach activities; however, these outreach efforts were not completely effective.

Outreach

We appreciate OIG's acknowledgement of ETA's outreach on HCTC NEGs. However, in the audit report, the OIG stated "ETA conducted outreach through webinars, conference calls,

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emails, roundtable discussion, and forums; however, these outreach efforts were not completely effective as 11 of 36, or 31 percent, of non-participating states were not aware of the Recovery Act HCTC NEG program.”

Training on the reauthorized TAA program was provided to all states through six training sessions this past summer and fall. ETA partnered with the IRS to provide training on the HCTC program and associated HCTC NEG, and to promote this benefit. The IRS’ HCTC experts participated in each of the six sessions and the availability of HCTC NEG was explained and discussed. Additional outreach was provided to the states through multiple presentations at the Recovery and Reemployment Summits, the TAA Forums, and through numerous webinars, all of which outlined the availability of HCTC NEG funds. The draft report further stated that the OIG could not “determine the sufficiency of these outreach activities as ETA has not provided a listing of attendees, minutes of meetings, or invitees to the meetings.” While ETA did not provide attendee lists or meeting minutes for every summit, forum, and webinar, this information was presented to the OIG when available, including: the agenda for all of the TAA forums, attendance lists for the TAA forums in the Philadelphia and Dallas regions, the PowerPoint presentations and the electronic invites for the webinar presentations, as well as summaries and invitee information for meetings with the IRS in May, July and December 2009.

Guidance

The OIG cited that ETA had not released guidance “detailing changes made to the HCTC NEG program and the availability and use of the funds under the Recovery Act.”

While \$150 million was appropriated for HCTC NEG and there were some changes to the IRS-administered HCTC program, such as the increase in the amount of health insurance costs covered by the credit (an increase to 80 percent from 65 percent); there were no changes to the process to apply for HCTC NEG. The fact that \$150 million was appropriated for HCTC NEG was stated in Training and Employment Guidance Letter (TEGL) 19-08, even though this is of little consequence to applicants as the fund source for these NEG is immaterial to a potential grantee. Applicants have had and continue to have the ability to apply for HCTC NEG. Guidance on how to apply for HCTC NEG has been available since 2002 in TEGLs 10-02, 20-02, and 20-02, Change 1. ETA provided this guidance to the OIG on December 3, 2009. ETA remains committed to issuing new guidance; a new HCTC NEG TEGL is currently in Departmental clearance. It will consolidate language already included in the existing three TEGLs. Months of discussions among SOL, the Employee Benefits Security Administration (EBSA) and the IRS’ attorneys did not allow additional flexibility in the use of these funds beyond what was already available.

It is important to note that statutory changes to the HCTC program under the TGAAA are included in the Department’s Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade and Globalization Adjustment Assistance Act of 2009. This document was distributed to all states, used in training on the reauthorized TAA program, and is available on the ETA website.

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OIG Recommendations

ETA appreciates the recommendations provided by the OIG and will pursue efforts to improve HCTC NEG spending. Each of the OIG's recommendations and ETA's responses to the recommendations follow:

- (1) Assess the need for the remaining \$142 million by obtaining an annual estimate of the amount of Recovery Act HCTC NEG funds needed by each state.

ETA Response: ETA agrees that obtaining annual estimates from states on the need and intention to apply for HCTC NEG funds for infrastructure support and "gap filler" payments for eligible workers, in light of the enhanced IRS HCTC program, may assist in determining how the HCTC NEG program could better address state needs and produce more accurate projections of annual usage of HCTC NEG funds. The demand for HCTC NEG funds is dependent on several factors, many of which are out of ETA's control and purview. ETA will explore and initiate such efforts in Fiscal Year 2010. ETA will also continue to explore any flexibility that may be available to reprogram HCTC NEG funds, if necessary.

- (2) Coordinate with PBGC to identify eligible PBGC recipients for targeted outreach and potential enrollment.

ETA Response: The HCTC program under which eligible PBGC and TAA recipients receive health insurance coverage benefits is an IRS-administered program. As the OIG audit team recognizes, there are privacy considerations about identifying "eligible PBGC recipients" at the state level, and ETA does not have access to such information. To further strengthen coordination, ETA will enhance its relationship with both the PBGC and the IRS to determine how best to provide information about the HCTC program to states, encouraging them to inform potentially eligible PBGC recipients and their families of the HCTC benefit.

- (3) Provide effective outreach activities to ensure all 50 states, District of Columbia, and Puerto Rico are aware and knowledgeable of the Recovery Act HCTC NEG program.

ETA Response: ETA appreciates OIG's acknowledgement of its outreach on HCTC NEGs. This outreach was conducted in two broad methods, one focusing on the reauthorized TAA program, the HCTC benefit, and HCTC NEGs specifically, and the second by integrating the information on HCTC NEGs as part of a larger agenda where ETA provided information on the rapid implementation of all Recovery Act funds. An example of the former was the six training sessions ETA conducted, in partnership with the IRS, for state personnel on the reauthorized TAA and HCTC programs and HCTC NEGs. An example of the latter was the inclusion of HCTC NEG information during the ETA-sponsored Recovery and Reemployment Summits and various webinars. While ETA was unable to provide invitations, attendee lists, and meeting minutes for each event, we believe that we provided sufficient examples to the OIG team.

- (4) Issue proposed guidance to states for the availability and use of HCTC NEG funds under Recovery Act as changes have been made to the program.

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ETA Response: ETA acknowledges that it has not yet issued a new TEGL confirming the information provided by ETA through other outreach efforts. While TEGL 19-08 provided general guidance on NEG funds, including HCTC NEGs, under the Recovery Act, and TEGLs 10-02, 20-02, and 20-02, Change 1 provide guidance specifically tailored to HCTC NEGs, ETA plans to issue a new TEGL on HCTC NEGs which is currently in Departmental clearance. In doing so, the new TEGL will consolidate previous guidance language.

- (5) Reconcile the apparent conflict between ETA’s interpretation that funds appropriated under this section are “no-year” funds, and the Recovery Act’s clear message that funds should be expended expeditiously.

ETA Response: ETA does not believe that there is any “apparent conflict” that needs to be reconciled. While ETA has strongly encouraged and taken significant steps to ensure that states and local areas spend most Recovery Act funds quickly and well, it remains cognizant that HCTC NEG funds support the HCTC program serving eligible PBGC and TAA-certified workers. As such, these funds are to remain available as long as there are valid claims against them and are available on a ‘no year’ basis.

Please let me know if you or the audit team have any questions or want to discuss this response in more detail.

Attachment

Office of the Solicitor Analysis of the Availability of WIA HCTC NEG Appropriations