

PART 180 OF THE REGULATIONS OF THE COMMISSIONER OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT ARE AMENDED TO READ AS FOLLOWS:

PART 180

EMPIRE STATE COMMERCIAL PRODUCTION CREDIT PROGRAM

180.1 Purpose and general description.

(a) The purpose of these regulations is to set forth the application process for the Empire State Commercial Production Credit Program established by Chapter 62 of the Laws of 2006 as amended. Pursuant to Chapter 62 of the Laws of 2006, the Commissioner has been granted the authority to promulgate regulations to establish procedures for the allocation of such credits, including, but not limited to, the application process, standards for application evaluations, the documentation that will be provided to taxpayers to substantiate to the New York State Department of Taxation and Finance the amount of credits allocated to such taxpayers and any other provisions deemed necessary and appropriate. The Department shall administer the program, including the issuance of tax credit certificates.

(b) An individual who has been issued a certificate of tax credit or is a partner in a partnership, member in a limited liability company, or a shareholder of an S corporation which has been issued a certificate of tax credit shall be allowed to claim an Empire State commercial production tax credit pursuant to section 28, section 210-B(23) and section 606(jj) of the Tax Law.

180.2 Definitions.

As used in this regulation, the following terms shall have the following meanings:

(a) **Advertisement** means an openly and identifiably sponsored public promotion or announcement of goods, services, companies or ideas. For the purposes of this definition, advertisement shall not include music videos or “infomercials.”

(b) **Applicant** means a qualified commercial production company or a sole proprietor of a qualified commercial production company which is subject to tax or the partners or members of which are subject to tax under article 9-A or 22 of the Tax Law.

(c) **Application** means a document created by the Department and submitted by an applicant after it has completed a year of production of qualified commercials. Such application shall include, but not be limited to: actual data with regard to each individual qualified commercial’s total budget, the actual costs incurred within the metropolitan commuter transportation district and the actual costs incurred outside such district and any other information the Department determines is necessary to properly evaluate the application.

(d) **Certificate of tax credit** means a certificate issued by the Department which states the amount of the Empire State commercial production credit that the applicant has qualified for, based on the Department's analysis under section 28 of the Tax Law and the provisions of this part. Such certificate shall include, but not be limited to, the following information: name and address of the applicant, the amount of the tax credit to be received by the applicant and a designation of which component program the money has been allotted from pursuant to section 28(a)(i) or (ii) of the Tax Law.

(e) **Component program** means one of the two tax credit programs (the downstate credit or the upstate credit) established pursuant to section 28(a)(2)(i) and (ii) of the Tax Law and section 180.5 of this Part.

(f) **Commissioner** means the Commissioner of the Department.

(g) **Downstate program** means the tax credit component program established in section 28(a)(2)(i) of the Tax Law which applies to eligible production companies who film or record qualified commercials within the metropolitan commuter transportation district.

(h) **Metropolitan commuter transportation district** means the area of New York State defined in section 1262 of the Public Authorities Law.

(i) **Department** means the New York State Department of Economic Development.

(j) **Post-production costs** means any costs associated with the production of original content for a qualified commercial employing techniques traditionally used in post-production for visual effects, graphic design, animation and musical composition including, but not limited to, editing, sound editing, special effects, graphics, and color timing costs. **Post-production costs** shall not include the editing of previously produced content for a qualified commercial or payments not made directly by a qualified commercial production company.

(k) **Production costs** means any costs for tangible property used and services performed directly and predominantly in the production (including pre-production and post-production) of a qualified commercial. "Production" costs shall not include: (1) costs for a story, script or scenario to be used for a qualified commercial and (2) wages or salaries or other compensation for writers, directors, including music directors, producers and performers (other than background actors with no scripted lines who are employed by a qualified company and musicians). **Production costs** generally include technical and crew production costs, such as expenditures for commercial production facilities and/or locations costs, or any part thereof, film, audiotape, videotape or digital medium, props, makeup, wardrobe, commercial processing, camera, sound recording, set construction, lighting, shooting, editing and meals.

(l) **Qualified commercial** means an advertisement of any length that is recorded on film, audiotape, videotape or digital medium in New York for multi-market distribution by way of radio, television networks, cable, satellite, motion picture theaters or internet. **Qualified commercial** shall not include (1) news or current affairs program, interview or talk program, network promos i.e., commercials promoting television series or movies, "how-to" (i.e., instructional) commercial

or program, commercial or program consisting entirely of stock footage, trailers promoting theatrical films, sporting event or sporting program, game show, award ceremony, daytime drama (i.e., daytime “soap opera” or “reality” program, or (2) a production involving sexually explicit conduct subject to the record-keeping requirements of section 2257 of Title 18 of the United States Code. For the purpose of this definition the term “**qualified commercial**” shall include a package of commercials which includes two or more commercials which are bid and produced under a single agency/client contract in which a specified number of deliverables are produced together within a defined timeframe by a qualified commercial production company.

(m) **Qualified commercial production company** means a corporation, partnership, limited partnership or other entity or individual which or who (1) is responsible for the direct payment of production expenses and is a signatory to the qualified commercial’s contracts with its payroll company and facility operators; and (2) is not the distributor, or the contracting entity for production of such commercial, nor is a variable interest entity of such distributor or contracting entity.

(n) **Qualified production costs** means production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within New York State directly and predominantly in the production (including pre-production and post-production) of a qualified commercial. For the purpose of this definition, “attributable to the use of tangible property or the performance of services within New York State” shall include only pro rata portions of costs which are incurred directly in New York State.

(o) **Upstate program** means the tax credit component program established in section 28(a)(2)(ii) of the Tax Law which applies to eligible production companies who film or record qualified commercials outside the metropolitan commuter transportation district but within the State of New York.

180.3 Application Process.

(1) Applications must be received by the Department between the first day of business in January of the year succeeding the year in which the commercial work was performed and April 1st of such year.

(2) An applicant shall submit an application to the Department which shall contain qualified commercial work produced in a calendar year.

(3) An applicant may request and shall receive a preliminary interview with the Department to discuss the details of the application before the application is submitted. Such interview should occur within 90 days after the completion of the first commercial for which the applicant seeks a tax credit.

(4) The Department shall approve or disapprove the application based upon criteria set forth in section 180.4 of this part.

(5) The Department may request additional documentation, including copies of receipts of payment for qualified production costs, to help determine if the production is a qualified commercial and qualifies for the Empire State commercial production credit. If the application is approved, the Department shall issue a certificate of tax credit to the applicant. The Department shall provide a copy of such certificate of tax credit to the Department of Taxation and Finance. If the application is disapproved, the Department shall provide the applicant with a notice of disapproval which shall state the reasons therefor. Such disapproval shall be a rejection of the applicant's application. A disapproved applicant may appeal such disapproval pursuant to the provisions of this Part.

180.4 Criteria for evaluation of applications.

(a) In the event that any of the following criteria are not met, the Department shall disapprove the application. The Department shall determine whether:

(1) application is substantially complete; for the purpose of this section an application must reflect all the applicant's qualified commercial work done within the calendar year for which the applicant is applying, and an applicant may not add additional commercial work to his or her application after it has been submitted to the Department;

(2) the applicant is a qualified commercial production company or a sole proprietor of a qualified commercial production company which is subject to tax or the partners or members of which are subject to tax under article 9-A or 22 of the Tax Law;

(3) at least 75 percent of the production costs (excluding post-production) paid or incurred directly or predominantly in the actual filming or recording of each qualified commercial must be qualified production costs;

(4) the qualified production costs listed on the application correspond to one or more of the Department's two component programs as established by section 28(a)(2)(i) and (ii) of the Tax Law and meet their individual criteria established in section 180.5 of this Part; and

(5) the applicant did not knowingly submit false or misleading information to the Department.

180.5 Criteria for eligibility and calculation of credit component programs

(a) Downstate Credit Program. In order to be eligible for this credit, a qualified commercial production company must film or record qualified commercials within the metropolitan commuter transportation district. The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of twenty percent of the qualified production costs paid or incurred in the production of a qualified commercial, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or in the performance of services within the state in the production of such qualified commercial.

To be eligible for the credit, the total qualified production costs of a qualified production company in the aggregate incurred in the metropolitan commuter transportation district during the calendar year must be greater than \$500,000 and such credit shall be applied only to qualified production costs exceeding such amount in the calendar year.

(b) Upstate Credit Program. In order to be eligible for this credit, a qualified commercial must film or record qualified commercials outside the metropolitan commuter transportation district. The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of thirty percent of the qualified production costs paid or incurred in the production of a qualified commercial, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial.

To be eligible for the credit, the total qualified production costs of a qualified production company in the aggregate incurred outside the metropolitan commuter transportation district but within the State of New York during the calendar year must be greater than one hundred thousand dollars. Such credit shall be applied to all qualified production costs in the calendar year.

Section 180.6. Treatment of commercials with dual expenses

A qualified commercial may incur expenses in both the upstate and downstate component programs. In the event that this occurs, the Department shall apply expenses incurred geographically in upstate to the upstate program and expenses incurred geographically downstate to the downstate program.

Section 180.7. Record retention

All applicants must maintain records, in paper or electronic form, of any qualified productions costs used to calculate their potential or actual benefit(s) under this program for a minimum of three years from the date the applicant claims the tax credit on its New York State tax return. The Department shall have the right to request such records upon reasonable notice.

Section 180.8. Appeal process

If the applicant's application is disapproved by the Department, or if the applicant disagrees with the amount of the tax credit granted by the Department, the applicant shall have a right to appeal. In the case of an appeal from a disapproval of an application, such appeal shall be made by sending a letter to the New York State Department of Economic Development, Attn: Counsel's Office, 625 Broadway, Albany NY 12245, within 30 days from the date of the denial letter issued by the Department. In the case of an appeal from a disagreement of the amount of the tax credit issued, such appeal shall be made by sending a letter to the same address as listed above within 30 days from the date of issuance of the certificate of tax credit. Failure to request an appeal within 30 days will finalize the denial decision and/or the amount of the tax credit.

Upon receipt of a timely letter of appeal, an independent hearing officer will be appointed by the Commissioner to handle the appeal. The independent hearing officer shall make a report on the appeal to the Commissioner. The Commissioner or his designee shall issue a final order within 60 days of the report. A copy of the final order will be issued to the appellant within 10 days after the date the Commissioner or his designee renders the final order.