

PART 170

EMPIRE STATE FILM PRODUCTION TAX CREDIT PROGRAM

Section 1. Subdivision (a) of section 170.1 is amended to read as follows:

Section 170.1 Purpose and general description.

(a) The purpose of these regulations is to set forth the application process for the Empire State Film Production Tax Credit Program established by Chapter 60 of the Laws of 2004 and amended by Chapter 57 of the Laws of 2009 and 2010, Chapter 268 of the Laws of 2012, [and] Chapter 59 of the Laws of 2013 and 2014 and as amended by Chapter 60 and 420 of the Laws of 2016, Chapter 59 of the Laws of 2017, Chapters 39 and 59 of the Laws of 2019 and Chapter 59 of the Laws of 2021-2023. Pursuant to Chapter 60 of the Laws of 2004, the Department of Economic Development 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, and any other provisions deemed necessary and appropriate. The Department of Economic Development shall administer the program, including the issuance of tax credit certificates.

* * * *

Section 2. Subdivisions (a), (d), (f), (j), (k), (aa), (ad) and (ah) are amended; subdivisions (i), (m), (u) (ai) (al) (am) and (ar) are added to section 170.2 and the relevant subdivisions re-lettered as follows:

170.2 Definitions.

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

(a) Authorized applicant means a qualified film production company that is scheduled to begin principal and ongoing photography on a qualified film after submitting a complete initial application to the department and intends to shoot a

minimum of one day of principal and ongoing photography on a stage at a qualified film production facility on a set or sets. For the purposes of this definition a day of shooting principal photography shall mean a minimum of eight hours from first unit crew call to wrap during which time the director, first unit crew and principal performer(s) are engaged in the production of principal photography on a stage on a set or sets built specifically for the production. A Level Two applicant must shoot 10 percent of all principal photography days at a qualified film production facility on a set or sets built specifically for the production as outlined above. The department shall determine which principal and ongoing shooting schedule shall satisfy the requirements of the Program.

* * * *

(d) Certificate of tax credit means a certificate issued by the department which states the amount of the Empire State film production tax credit that the approved applicant has qualified for, based on the department's analysis under section 24 of the Tax Law and the provisions of this Part. Such certificate may include, but not be limited to, the following information: name and address of the approved applicant, name of the qualified film the credit applies to, the amount of the tax credit to be received by the approved applicant, allocation year of the tax credit earned, for applicants who applied to the Program prior to April 1, 2023, a disclaimer stating that the tax credit shall not be claimed before the later of either the taxable year the production of the qualified film is complete or the taxable year immediately following the allocation year for which the film has been allocated credit, and a disclaimer stating that actual receipt of the tax credit is subject to the statutory maximum amount of credits that are allocated for the program. Note that for applicants who applied to the Program after April 1, 2023 such certificate shall contain, in addition to the parameters listed above, a disclaimer stating that the tax credit shall not be claimed before the later of the taxable year the production of the qualified film is complete or the taxable year that includes the last day of the allocation year for which the film has been allocated credit by the department.

* * * *

(f) Completion of a qualified film means that the process of post production of a qualified film has been finished and a [cut negative, video master] DCP, or other final locked form of the qualified film is ready for [the striking of prints or electronic copies, and/or ready for broadcast or] delivery to [a distributor] the primary venue. All [activities and] expenses related to archiving, marketing and distribution, including, but not limited to, the making of [release prints, video dupes or other forms of] copies[,] and promotional [images] materials [, and poster art] are considered to occur after the production of a qualified film is completed.

* * * *

(i) Digital Cinema Package (DCP) means a collection of digital files used to store and convey digital cinema (DC) audio, image, and data streams.

([i]j) Diversity impact data means information submitted by an authorized applicant that describes the gender and race/ethnicity of all individuals working on a production seeking the tax credit under this Part. In order for the department to aggregate data, this includes the legal gender of all individuals and, to the extent disclosed, the race/ethnicity/gender identity of all individuals. This shall include information on the diverse business ownership of vendors working on a production, to the extent the information is known and verifiable to the production, in addition to job creation numbers for production and post-production staff and crew at entry, middle and management level positions; and talent positions (cast and extras). Productions may utilize self-reporting and identification by the individual members of the production workforce and vendors, employment, payroll, and human resources data, and other sources in order to collect and aggregate this information.

([j]k) Diversity plan means [a written document] that information contained in the initial application's project summary and supporting documentation as necessary [submitted with the initial application] which includes, but is not limited to:

(1) an authorized applicant's specific goals for hiring a diverse workforce on a production that applies for the tax credit under this Part;

(2) whether and how such authorized applicant intends to participate in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York residents who represent the diversity of the State's population; and

(3) an authorized applicant's plan for hiring vendors with diverse ownership. The diversity plan shall detail the manner in which the applicant proposes to achieve its goals to ensure employment of a diverse workforce on the production.

([k]l) Diversity report means [a] written [document] information provided in the final production summary, reports and supporting documentation [submitted with the final application] that includes, but is not limited to:

- (1) diversity impact data;
- (2) illustrates how the authorized applicant has met or made good faith efforts to meet the specific goals for hiring a diverse workforce outlined in their diversity plan;
- (3) whether and how the authorized applicant has participated in or intends to participate in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York residents who represent the diversity of the State's population; and
- (4) how the authorized applicant has executed its plan for hiring vendors of diverse ownership.

(m)(1) Relocated television series eligible for relocation costs pursuant to section 190.2(ai) of this Part shall mean the first two years of a regularly occurring production intended to run in its initial broadcast, regardless of the medium or mode of its distribution, in a series of narrative and/or thematically related episodes.

(2) The series must have filmed a minimum of six episodes of the television series outside New York State, with a total minimum budget of at least one million dollars per episode immediately prior to relocating to the state.

(3) For a television series produced by and/or for network/cable television, each episode must have a running time of at least thirty minutes in length (inclusive of commercial advertisement and interstitial programming).

(4) For a television series produced by and/or media services providers described as streaming services and/or digital platforms (and excluding network/cable) the aggregate length of episodes must be at least seventy-five minutes, although the episodes themselves may vary in duration from the thirty minutes specified for network/cable production.

(5) For the purposes of this definition only, first two years of a regularly occurring production shall include only the first two seasons of such production.

(6) Relocated television series which do not produce a minimum of two seasons in New York State are ineligible to receive qualified relocation costs

pursuant to section 190.2(ai) of this Part but may still receive the film tax credit on qualified costs.

([l]n) End credit requirements means those acknowledgements that a qualified film production company or qualified independent film production company, which has applied for credit under the provisions of this section, agrees to include in each qualified film as a condition for the granting of the credit. Each qualified film shall include in the end credits, the phrase "Filmed with the support of the New York State Governor's Office of Motion Picture and Television Development" and a logo provided by the Governor's Office of Motion Picture and Television Development.

([m]o) Feature-length film means a production intended for commercial distribution to a motion picture theater or directly to the consumer viewing market that has a running time of at least 75 minutes in length.

([n]p) Film production facility means a building and/or complex of buildings and their improvements and associated back-lot facilities in which films are or are intended to be regularly produced and which contain at least one sound stage; provided, however, that an armory owned by the State or City of New York located in the City of New York shall not be considered to be a "film production facility" unless such facility is used by a level one qualified production or it meets the criteria contained in the definition of a "qualified film production facility" in subdivision ([y]af) of this section. Specifically, an armory located in the City of New York used by a level two qualified production must be certified by the [D]department.

([o]q) Final application means information concerning actual expenditures regarding a qualified film that could make it eligible for the Empire State film production tax credit under section 24 of the Tax Law and the provisions of this Part provided in a form and manner as prescribed by the [D]department and submitted by an applicant after it has completed production of a qualified film. Such application may include, but not be limited to: actual data with regard to the qualified film's total budget, the total production costs at film production facilities in and outside of New York, and the total number of shooting days in and outside of New York and any other information the [D]department determines is necessary.

([p]r) Initial application means information concerning projected expenditures regarding a qualified film that could make it eligible for the Empire State film

production tax credit under section 24 of the Tax Law and the provisions of this Part provided in a form and manner as prescribed by the [D] department and submitted by an authorized applicant. Such application may include, but is not limited to, the following information: the estimated total budget for the qualified film, estimates of expenditures at a qualifying production facility, estimates of shooting days and expenditures in New York State and outside of New York State and any other information the department determines is necessary.

([q]s) Level one qualified production means a qualified production that has a maximum production budget of \$15,000,000 and is being produced by a qualified independent production company in which no more than five percent of the beneficial ownership is owned directly or indirectly by a publicly traded entity.

([r]t) Level two qualified production means a qualified production that has a production budget over \$15,000,000, or which is being produced by a qualified film production company in which more than five percent of the beneficial ownership is owned, directly or indirectly, by a publicly traded entity.

(u) "Other compensation" means payments by the Applicant to qualified production personnel which constitute taxable income to the individual; said payment may be in the form of goods, services or monetary compensation and is directly and predominantly related to the labor provided by the qualified personnel to the production.

([s]v) Pre-production means the process of preparation for actual physical production which begins after a qualified film has received a firm agreement of financial commitment with, for example, the establishment of a dedicated production office, the hiring of key crew members such as a unit production manager and location manager, and includes, but is not limited to, activities such as location scouting, hiring of crew, and execution of contracts with vendors of equipment and stage space.

([t]w) Principally engaged in the production of a qualified film and controls the qualified film during production means that the legal entity is responsible for payment of the direct production expenses (including pre- and post-production) and is a signatory to the qualified film's contracts with its payroll company and facility operators.

([u]x) Post-production means the final stage in a qualified film's production after principal and ongoing photography is completed, including, but not limited

to, editing, Foley recording, automatic dialogue replacement, sound editing, special effects, scoring and music editing, beginning and end credits, soundtrack production, the addition of sound/visual effects, and dubbing. Advertising and marketing activities and expenses are not included in post-production.

([v]y) Premature application means an initial application in which the [D]department reasonably determines that the applicant cannot commence principal and ongoing photography within 180 days of the date the initial application was submitted. Such determination shall be based on, among other things, completeness of the applicant's answers on the initial application and lack of documentation supporting an applicant's initial application.

([w]z) Principal and ongoing photography means the period of time during which the majority of the film is shot with the participation of actors, director and first unit crew. Re-shoot days with actors, director and crew are considered principal photography. Second unit shoots, and pick-up shots without director and actor(s) are not considered principal photography.

([x]aa) 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 film. Production costs shall not include:

- (1) costs for a story, script or scenario to be used for a qualified film;
- (2) licensing or rights associated with the production of a qualified film; or
- (3) wages or salaries or other compensation for writers, directors, [including music directors,] composers, [producers] and [, including, but not limited to, line producers,] performers (other than background actors with no scripted lines) [and qualified certified public accountants] to the extent those wages or salaries or other compensation exceed five hundred thousand dollars per individual. Production costs generally include technical and crew production costs, such as expenditures for film production facilities, or any part thereof, props, makeup, wardrobe, film processing, camera, sound recording, set construction, lighting, shooting, editing and meals and shall include the wages, salaries or other compensation of no more than two producers per qualified film, not to exceed \$500,000 per producer, where only one of whom is the principal individual responsible for overseeing the creative and managerial process of the production of the qualified film and only one of whom is the principal individual responsible for the day to day operational management of the production of the qualified film; provided, also, that such producers are not compensated for any other position on the qualified film by a qualified film production company or a qualified independent film production

company for services performed. Productions with producers eligible for this program who are also compensated for another position on the qualified film must elect to choose one of the position's costs for inclusion in their final application.

([y]ab) Program means the Empire State film production tax credit program.

([z]ac) Qualified certified public accountant means a New York State certified public accountant approved by the [D]department to conduct a third party verification.

([aa]ad) Qualified film means a feature-length film, television film, relocated television production, television pilot or television series, regardless of the medium by means of which the film, pilot or series is created or conveyed. For the purposes of the credit provided by these regulations only, a qualified film whose majority of principal photography shooting days in the production of the qualified film are shot in Westchester, Rockland, Nassau, or Suffolk county or any of the five New York City boroughs shall have a minimum budget of one million dollars. A qualified film whose majority of principal photography shooting days in the production of the qualified film are shot in any other county of the state than those listed in the preceding sentence shall have a minimum budget of \$250,000. Qualified film shall not include: (1) a documentary film, news or current affairs program, interview or talk program (unless such talk program meets the requirements of subdivision (a[e]j) of this section), how-to (i.e., instructional) film or program, film or program consisting primarily of stock footage, sporting event or sporting program, game show, award ceremony, film or program intended primarily for industrial, corporate or institutional end-users, fundraising film or program, daytime drama (i.e., daytime soap opera), commercials, music videos or reality program; or (2) a production for which records are required under section 2257 of Title 18, United States Code, to be maintained with respect to any performer in such production (reporting of books, films, etc. with respect to sexually explicit conduct); or (3) a compilation of short films or webisodes aggregated to meet either the definition of television film or television series under these regulations; or (4) other than a relocated television production, a television series commonly known as variety entertainment, variety sketch and variety talk, i.e., a program with components of improvisational or scripted content (monologues, sketches, interviews), either exclusively or in combination with other entertainment elements such as musical performances, dancing, cooking, crafts, pranks, stunts, and games. However, a qualified film shall include a television series as described in subparagraph (4) of this paragraph only if an application for such series has been deemed conditionally eligible for the tax credit

under this section prior to April first, two thousand twenty, such series remains in continuous production for each season, and an annual application for each season of such series is continually submitted for such series after April first, two thousand twenty. Title 18, United States Code, is available for public inspection and copying at the following address: New York State Department of Economic Development, 625 Broadway, 8th floor, Albany, NY 12245. A series that changes either or both the title of the series or the principal cast prior to March thirty-first, two thousand twenty-three, shall be considered to remain in continuous production for each season, provided the series films at the same location as prior seasons, is produced by the same entity, and retains at least eighty percent of the staff from the prior season.

([ab]ae) Qualified film production company means a corporation, partnership, limited partnership, or other entity or individual which or who is principally engaged in the production of a qualified film and controls the qualified film during production.

([ac]af) Qualified film production facility means a film production facility in New York State, which contains at least one sound stage having a minimum of 7,000 square feet of contiguous open unimpeded production space; provided, however, that except with respect to a qualified film production facility being used by a qualified independent film production company:

(1) a film production facility in the City of New York must contain at least one sound stage having a minimum of 7,000 square feet of contiguous open unimpeded production space that is sound proof with a Noise Criteria of 30 or better, has sufficient heating and air conditioning for shooting without the need for supplemental units, incorporates a permanent grid and sufficient built-in electric service for shooting without the need for generators, and is column-free with a clear height of at least 16 feet under the permanent grid for facilities constructed on or after January first, two thousand nineteen, and at least 12 feet under the permanent grid for facilities constructed before and which have otherwise met the requirements of this section by January 1, 2019; and (2) an armory owned by the State or City of New York located in the City of New York that does not satisfy the criteria of paragraph (1) of this subdivision shall be treated as a qualified film production facility upon certification by the department of a petition submitted to the department by a qualified film production company establishing that no qualified film production facility is available in the City of New York that has stage space available for shooting such company's film. Such petition shall be submitted no later than 90 days prior to the start of principal photography for the qualified film and the department shall have 10 days to certify or reject the

petition. A stage will be deemed unavailable if consideration has been paid for its use or such stage is currently under an agreement with an option for use and, in either circumstance, such period of use includes the petitioner's estimated start date of principal photography.

([ad]ag) Qualified independent film production company means a corporation, partnership, limited partnership, or other entity or individual, that or who: (1) is principally engaged in the production of a qualified film with a maximum budget of \$15,000,000; and (2) controls the qualified film during production; and (3) either is not a publicly traded entity, or no more than five percent of the beneficial ownership of which is owned, directly or indirectly, by a publicly traded entity.

([ae]ah) 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 film. For the purpose of this definition, "attributable to the use of tangible property or the performance of services within New York State" shall only include costs and their pro rata portions which are incurred directly in New York State. In the case of an eligible relocated television series, the term "qualified production costs" shall include, in the first season that the eligible relocated television series is produced in New York after relocation, qualified relocation costs. Provided, however, that the aggregate total eligible qualified production costs for producers, writers, performers (other than background actors with no scripted lines) and composers shall not exceed forty percent of the aggregate sum total of all other qualified production costs.

(ai) Qualified relocation costs means the costs incurred, excluding wages, salaries and other compensation, in the first season that an eligible relocated television series relocates to New York including such costs incurred to transport sets, props and wardrobe to New York and other costs as determined by the department of economic development to the extent such costs do not exceed six million dollars.

([af]aj) Relocated television production shall mean, notwithstanding the limitations in subparagraph (i) of paragraph three of subdivision (a) of section 31 of the Tax Law, a television production that is a talk or variety program that filmed at least [five] two seasons outside the State prior to its first relocated season in New York, the episodes are filmed before a studio audience of 200 or more, and the relocated television production incurs at least \$30,000,000 in annual production

costs in the State, or at least \$10,000,000 in capital expenditures at a qualified film production facility in the State.

([ag]ak) Sound stage means a large interior room or space which provides a controlled environment in which filming takes place on sets built or assembled specifically for the production.

(al) Stage holding costs are those costs incurred by a production for reserving a stage prior to the start of production and set construction and/or complete sets for a period during which no shooting on the stage occurs.

(am) Storage costs are those costs incurred by a production for space rental to store props, wardrobe, and other materials which are planned to be used by the production on a continuous, recurring or intermittent basis.

([ah]an) Television film means a production that has a running time of at least 90 minutes in length (inclusive of commercial advertisement and interstitial programming, if any), regardless of the medium or mode of its distribution.

([ai] ao) Television pilot means the initial episode produced for a proposed television series of at least 30 minutes in length (inclusive of provision for commercial advertisement and interstitial programming.)

([aj]ap) Television series means a regularly occurring production intended to run in its initial broadcast, regardless of the medium or mode of its distribution, in a series of narrative and/or thematically related episodes, each of which has a running time of at least 30 minutes in length (inclusive of commercial advertisement and interstitial programming, if any). For the purposes of this definition only, a television series produced by and for media services providers described as streaming services and/or digital platforms (and excluding network/cable) shall mean a regularly occurring production intended to run in its initial release in a series of narrative and/or thematically related episodes, the aggregate length of which is at least 75 minutes, although the episodes themselves may vary in duration from the 30 minutes specified for network/cable production.

([ak]aq) Third party verification means a review conducted by a qualified certified public accountant of an applicant's final application using agreed upon procedures as prescribed by the department to verify that all criteria pursuant to section 170.6(b) of this Part have been met.

(ar) Wrap costs are those costs incurred by a production after the completion of production, involving dismantling sets, disposing of, or storing wardrobe, props and other items, returning rentals of equipment and shutting down production office and all other production related operations.

* * * *

Section 3. Paragraphs (4), (9) and (11) of subdivision (a) and paragraphs (2) and (9) of subdivision (b) of section 170.6 are amended to read as follows:

170.6 Criteria for evaluation of applications.

(a) Initial application. An initial application shall be reviewed by the department to determine, in its discretion, that all of the following criteria are met:

- (1) the application is complete;
- (2) the application is not premature;
- (3) the authorized applicant is a qualified film production company or a sole proprietor of a qualified film production company;
- (4) the authorized applicant intends to shoot [a] the required portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets;
- (5) the authorized applicant is planning to produce a qualified film;
- (6) the authorized applicant's projected qualified production costs (excluding post-production credits) paid or incurred which are attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of a qualified film is likely to equal or exceed 75 percent of the projected production costs (excluding post-production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at any film production facility within and without the State in the production of the qualified film;

(7) if the qualified film being produced is a level two qualified production (other than a pilot), then the applicant intends to shoot at least 10 percent of its principal photography days at a qualified film production facility;

(8) if the qualified film being produced is a television pilot and is a level two qualified production, the applicant intends to shoot at least one full day of principal photography at a qualified film production facility;

(9) the authorized applicant did not knowingly submit false or misleading information to the [D]department;

(10) the authorized applicant certifies that it will purchase taxable tangible property and services, defined as qualified production costs, only from companies registered to collect and remit New York State and local sales and use taxes;

(11) the authorized applicant intends to comply with the end credit requirements set forth in section 170.2([i]n) of this Part;

(12) if the applicant is seeking credit on any costs incurred in New York outside a qualified film production facility, and the projected qualified production costs (excluding post-production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of a qualified film are less than \$3,000,000, then the shooting days spent in New York outside of a film production facility in the production of the qualified film are projected to equal or exceed 75 percent of the total shooting days spent within and without New York outside of a film production facility in the production of such qualified film; and

(13) the authorized applicant has submitted a diversity plan.

(b) Final application. A final application shall not be approved by the commissioner unless the commissioner determines, in his or her discretion, that the following criteria are met:

(1) the application is complete;

(2) the applicant shot [a] the required portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets;

(3) if the qualified film produced was a level two qualified production (other than a pilot), then the applicant shot at least 10 percent of its principal photography days at a qualified film production facility;

(4) if the qualified film that was produced was a television pilot and was a level two production, then the applicant shot at least one full day of principal photography at a qualified film production facility;

(5) a qualified film was produced and completed;

(6) the applicant's actual qualified production costs paid or incurred (excluding post-production costs) which are attributable to the use of tangible property or the performance of services at a qualified film production facility in

the production of the qualified film equaled or exceeded 75 percent of the production costs (excluding post-production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at any film production facility within and without the State in the production of the qualified film;

(7) the authorized applicant did not knowingly submit false or misleading information to the department;

(8) in the event that the actual qualified production costs (excluding post-production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of a qualified film are less than \$3,000,000, then the shooting days spent in New York outside of a film production facility in the production of a qualified film equaled or exceeded 75 percent of the total shooting days spent within and without New York outside of a film production facility in the production of such qualified film. If the shooting days spent in New York equaled or exceeded the 75 percent threshold, the department shall include in its calculation of the Empire State film production tax credit the portion of qualified production costs attributable to the use of tangible property or the performance of services in the production of a qualified film outside of a qualified film production facility; and

(9) the applicant has supplied documentation (e.g. still shot, frame grab, finished DVD or other documentation such as the department may require) that the end credit requirements set forth in section 170.2([i]n) of this Part have been met;

(10) the applicant has completed a diversity report and the extent to which the applicant has met or made good faith efforts to meet the specific goals outlined in their diversity plan; including how the applicant has participated in training, education and recruitment programs that are designed to promote and encourage the training and hiring of New York State residents who represent the diversity of the State's population. With respect to this subdivision, the department may issue guidelines to delineate its process for analyzing good faith efforts to meet goals on a diversity plan.