

## **Excelsior Jobs Program Regulations (updated for Green CHIPS 3/28/23)**

### Section 190.1 Purpose and general description

(a) The purpose of these regulations is to set forth the administrative process governing the Excelsior Jobs Program (“Program”) and specifically to establish an application process, standards for application evaluation and procedures for businesses claiming the tax credit under this program. Chapter 59 of the Laws of 2010 establishes the Program and grants the Commissioner of the Department of Economic Development the authority to promulgate regulations to establish procedures for the allocation of the Excelsior Jobs Program Credit, which consists of four components: the Excelsior Jobs Tax Credit Component, the Excelsior Investment Tax Credit Component, the Excelsior Research and Development Tax Credit Component, and the Excelsior Real Property Tax Credit Component.

### 190.2 Definitions

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

(a) “Agriculture” means both agricultural production (establishments performing the complete farm or ranch operation, such as farm owner-operators, tenant farm operators, and sharecroppers) and agricultural support (establishments that perform one or more activities associated with farm operation, such as soil preparation, planting, harvesting, shearing, animal and plant fiber processing, and management, on a contract or fee basis).

(b) “Applicant” means a business enterprise that is operating in New York State or is planning to operate in the State.

(c) “Application” means the form that the department determines must be submitted by an applicant in order to be considered for acceptance into the program.

(d) “Back office operations” means a business function that may include one or more of the following activities: customer service, information technology and data processing, human resources, accounting and related administrative functions.

(e) “Benefit-cost ratio” means the following calculation: the numerator is the sum of:  
(1) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program; and  
(2) the value of capital investments to be made by the business enterprise during the period of anticipated participation in the program, and the denominator is the amount of total tax credits that will be used and refunded pursuant to article 17 of the Economic Development Law.

(f) “Business services” for the purposes of this regulation, shall only refer to the provision of professional services licensed by the State or by the courts of this State.

(g) “Certificate of eligibility” means the document issued by the department to an applicant that has completed an application to be admitted into the Excelsior Jobs Program and has been accepted into the program by the department. Possession of a certificate of eligibility does not by itself guarantee eligibility to claim the tax credit.

(h) “Certificate of tax credit” means the document issued to a participant by the department that entitles a participant to claim the tax credit pursuant to section 355 of the Economic Development Law. The certificate specifies the exact amount of each of the tax credit components and the taxable year in which such credit may be claimed. The certificate of tax credit shall be issued annually only after the department has verified that the participant has met all applicable eligibility criteria. The certificate may also include such information as the commissioner deems necessary.

(i) “Child care services” means those services undertaken or sponsored by a participant in this program which are proximate and convenient to the project location and meet the requirements of child day care as defined in paragraph (a) of subdivision one of section 390 of the Social Services Law or any child care services in the city of New York whereby a permit to operate such child care services is required pursuant to the health code of the city of New York.

(j) “Commissioner” means Commissioner of the Department of Economic Development.

(k) “Department” means the Department of Economic Development.

(l) “Make products or develop technologies that are primarily aimed at reducing greenhouse gas emissions or supporting the use of clean energy in accordance with goals described in chapter 106 of the laws of 2019” means the creation of products or the development of proven technologies that are commercialized or ready to be commercialized and moved into market and are aimed at reducing greenhouse gas emissions or supporting the deployment or adoption of clean energy.

(m) “Distribution center” means a large scale facility involving processing, repackaging and/or movement of finished or semi-finished goods to retail locations or other end users across a multi-state area. “Retail locations” includes delivery of goods directly to consumers.

(n) “Eligible real property taxes” has the same meaning as in section 15(e) of the Tax Law, provided that the definition in subdivision (e) shall be read as if it specifically referenced the Excelsior Jobs Program and participants in that program.

(o) “Entertainment company” means a corporation, partnership, limited partnership, or other entity principally engaged in the production or post production of:

- (i) motion pictures, which shall include feature-length films and television films;
- (ii) instructional videos;
- (iii) televised commercial advertisements;

- (iv) animated films or cartoons;
- (v) music videos;
- (vi) television programs, which shall include but not be limited to, television series, television pilots, and single television episodes; or
- (vii) programs primarily intended for radio broadcast.

Entertainment company shall not include an entity: (i) principally engaged in the live performance of events, including but not limited to, theatrical productions, concerts, circuses, and sporting events; (ii) principally engaged in the production of content intended primarily for industrial, corporate or institutional end-users; (iii) principally engaged in the production of fundraising films or programs; or (iv) engaged in the production of content 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.

(p) “Financial services data centers” or “financial services customer back office operations” means operations that manage the data or accounts of existing customers, or provide product or service information and support to customers of financial services companies, including banks, other lenders, securities and commodities brokers and dealers, investment banks, portfolio managers, trust offices, and insurance companies.

(q) “Green CHIPS benefit-cost ratio” means the following calculation with respect to Green CHIPS projects: the ratio for which the numerator is the sum of: (1) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program; (2) the value of capital investments projected to be made by the business enterprise during the period of participation in the program; and (3) the projected increase in research and development expenditures by the participant in New York State during the period of participation in the program; and the denominator is the amount of total tax benefits under this article that will be used and refunded as well as any state grants provided directly to the participant.

(r) “Green CHIPS community plan” shall mean a plan submitted by the participant in a manner and form prescribed by the Department and approved at the sole discretion of the Department. The Department may consult with one or more host municipalities regarding such plan to ensure that the areas of investment included in the plan are aligned with local needs. Such plan shall include milestones and specific, actionable commitments for worker and community investments. Such specific, actionable commitments may include, but need not be limited to, those training and education benefits paid by the participant to support local workforce development and employment opportunities for local residents, including economically disadvantaged individuals.

(s) “Green CHIPS sustainability plan” shall mean a plan submitted by the participant in a manner and form prescribed by the Department and approved at the sole discretion of the Department. The Department may consult with other state agencies and authorities regarding such plan. Such plan shall include annual participant milestones and specific and actionable commitments to mitigate the project’s greenhouse gas emissions over its lifetime as a program participant.

(t) “Green CHIPS report” shall mean a report submitted to the Department not less than annually by the participant in a manner and form prescribed by the Department detailing the performance of the Green CHIPS project against the milestones and commitments of its Green CHIPS community plan and its Green CHIPS sustainability plan.

(u) “Green CHIPS project” means a project meeting all of the following criteria: (1) is within the semiconductor manufacturing and related equipment and material supplier sector; (2) includes sustainability measures to mitigate the project's greenhouse gas emissions over its lifetime under a Green CHIPS sustainability plan; (3) provides for the payment of not less than federal prevailing wage rates for its project construction; (4) makes specific and actionable commitments to worker and community investment under a Green CHIPS community plan; (5) will create at least five hundred net new jobs and make at least three billion dollars in qualified investment prior to the conclusion of its preliminary schedule of benefits; and (6) will maintain a Green CHIPS benefit-cost ratio of at least fifteen to one as calculated for the overall project term. Such projects are eligible to enter into a phase one of a Green CHIPS project ten-year benefit term. Such projects, provided they are in good standing with all requirements of this Part, are also eligible to enter into a phase two of a Green CHIPS project, and therefore to initiate a new and separate ten-year schedule related to phase two, provided that phase two will create at least five hundred net new jobs beyond those created in phase one, and that phase two will make at least three billion dollars in qualified investment beyond the investment total associated with phase one. For Green CHIPS projects, phase one and phase two terms may overlap, depending on the time of initiation for both projects. Green CHIPS projects may be allowed to claim credits for taxable years up to January first, two thousand fifty.

(v) “Green project” means a project deemed by the commissioner to make products or develop technologies that are primarily aimed at reducing greenhouse gas emissions or supporting the use of clean energy in accordance with goals described in chapter 106 of the laws of 2019. “Green project” shall include, but not be limited to, the manufacture or development of products or technologies or supply chain components primarily for renewable energy systems as defined in section 66-p of the Public Service Law, vehicles that use non-hydrocarbon fuels and produce zero or near zero emissions, heat pumps, energy efficiency, clean energy storage and other products that significantly reduce greenhouse gas emissions by minimizing the utilization of depletable resources or by improving industrial or agricultural efficiency. Green project shall not include a project primarily composed of: (1) necessarily local activities such as retail, building construction, or the installation, deployment or adoption of a clean energy product or technology at an end user's site; or (2) the production of products or development of technologies that would produce only marginal and incremental energy savings or environmental benefits ancillary to the core function of the product or technology.

(w) “High value-added products” means durable goods requiring assembly by skilled technicians, automation, or other advanced technology.

(x) “Improving industrial efficiency” means achieving significant reductions in the greenhouse gas emissions associated with an industrial process, through a variety of potential measures aimed at reducing onsite energy consumption and/or converting fuel sources to zero

and low-emission fuels where the resulting product does not have a significant negative impact on State's clean energy goals as set forth in chapter 106 of the laws of 2019 and as determined by the department.

(y) "Industry with significant potential for private sector growth and economic development in the State" means any industry where it can be demonstrated that employment in the industry could grow to any of the following:

(1) 4,000 or more in a metropolitan statistical area or to one-half of one percent of the employed population in the metropolitan statistical area; or

(2) 500 or more in a labor market area, or to one percent of the employed population in the labor market area; or

(3) to a level that exceeds the percentage level that the industry employs on a national basis. Such demonstrated potential shall be on the basis of one or more key attributes of the metropolitan statistical area or labor market area that a business enterprise in the industry would consider essential in any decision to locate or expand within such metropolitan statistical area or labor market area. For a business in an industry that meets the criteria indicated above to be eligible as an applicant to the program, the business enterprise must create at least three hundred net new jobs and make significant capital investments of at least \$30 million. Nothing in this section shall allow any business entity excluded under section 191.2(g) of this Title to become a participant in this program.

(z) "Investment zone" shall mean an area within the State that had been designated under section 958(a)(i) and (d) of the General Municipal Law that was wholly contained within up to four distinct and separate contiguous areas as of the date immediately preceding the date the designation of such area expired pursuant to section 969 of the General Municipal Law. Investment zones are the designated distinct and separate contiguous areas of the municipality that qualified for investment zone status as those areas existed on June 29, 2010.

(aa) "Life sciences" means agricultural biotechnology, biogenetics, bioinformatics, biomedical engineering, biopharmaceuticals, academic medical centers, biotechnology, chemical synthesis, chemistry technology, medical diagnostics, genomics, medical image analysis, marine biology, medical devices, medical nanotechnology, natural product pharmaceuticals, proteomics, regenerative medicine, RNA interference, stem cell research, medical and neurological clinical trials, health robotics and veterinary science.

(ab) "Life sciences company" means a business entity or an organization or institution that devotes the majority of its efforts in the various stages of research, development, technology transfer and commercialization related to any life sciences field.

(ac) "Manufacturing" means the process of working raw materials into products suitable for use or which gives new shapes, new quality or new combinations to matter which has already gone through some artificial process by the use of machinery, tools, appliances, or other similar equipment. Manufacturing does not include an operation that involves only the assembly of components, provided, however, the assembly of motor vehicles or other high value-added products shall be considered manufacturing.

(1) “Animal and plant fiber textile manufacturing” means the processes of harvesting, cleaning, spinning, knitting, weaving, dyeing and finishing textiles containing animal and plant fiber grown or produced predominantly in New York state.

(ad) “Music production” means the process of creating sound recordings of at least eight minutes, recorded in professional sound studios, intended for commercial release. Music production does not include recording of live concerts, or recordings that are primarily spoken word or wildlife or nature sounds, or produced for instructional use or advertising or promotional purposes.

(ae) “Net new jobs” means jobs created in this State that:

(i) are new to the State;

(ii) have not been transferred from employment with another business located in this State including from a related person in this State or through an acquisition, merger, consolidation, or other reorganization of businesses or the acquisition of assets of another business;

(iii) are either full-time wage-paying jobs or equivalent to a full-time wage-paying job requiring at least 35 hours per week;

(iv) are filled for more than six months; and

(v) are in excess of the applicant's employment at the project location as of the date the applicant is admitted into the Excelsior Jobs Program, provided that applicant's employment in New York State during each of their benefit years exceeds its employment base which shall be calculated as the average of the applicant's employment in New York State for each of the four quarters immediately prior to the date set forth in the certificate of eligibility, or, if the applicant was not in business in New York State during all four quarters, the employment base shall be calculated as the average of the applicant's employment in New York State for each of those quarters immediately prior to the date set forth in the certificate of eligibility in which the applicant was in business in New York State.

(af) “New media” means the application of information technology to traditional communications outlets, particularly through interactive modes such as the Internet, including video games, web search portals, interactive web-based content, and interactive advertising. New media also includes the post production process for film and television projects which involves the following activities: picture, sound and music editing; rerecording and mixing; visual effects, graphic design, original scoring, animation and musical composition.

(ag) “Net new child care services expenditures” means the calculation of new, annual participant expenditures on child care services whether internal or provided by a third party (including coverage for full or partial discount of employee rates), minus any revenues received by the participant through a third-party operator (i.e. rent paid to the participant by the child care provider) or employees. Such expenditures must be incurred by a participant or third-party operator and must be proximate and convenient to the project location. For the purposes of this definition, expenditures for child care services that a participant has incurred prior to admission to this program shall not be eligible for the credit.

(ah) “Participant” means a business entity that:

- (1) has completed an application prescribed by the department to be admitted into the program;
- (2) has been issued a certificate of eligibility by the department;
- (3) has demonstrated that it meets the eligibility criteria in section 353 and section 354(2) of the Economic Development Law as further defined in sections 191.1 and 191.2 of this Title; and
- (4) has been certified as a participant by the commissioner.

(ai) “Preliminary schedule of benefits” means the maximum aggregate amount of each component of the tax credit that a participant in the program is eligible to receive pursuant to this regulation. The preliminary schedule of benefits shall indicate the annual amount of each component of the credit a participant may claim in each of its 10 years of eligibility. The preliminary schedule of benefits shall be issued by the department when the department approves the application for admission into the program. The commissioner may amend that schedule, provided that the commissioner complies with the credit caps in section 359 of the Economic Development Law.

(aj) “Program” means the Excelsior Jobs Program.

(ak) “Qualified investment” means an investment in tangible property (including, a building or a structural component of a building) owned by a business entity that:

- (1) is depreciable pursuant to section 167 of the Internal Revenue Code;
- (2) has a useful life of four years or more;
- (3) is acquired by purchase as defined in section 179(d) of the Internal Revenue Code;
- (4) has a situs in this State; and
- (5) is placed in service in the State on or after the date the certificate of eligibility is issued to the business entity.

(al) “Regionally significant project” means:

- (1) a manufacturer creating at least 10 net new jobs in the State and making a significant capital investment in the State;
- (2) a business creating at least 10 net new jobs in agriculture in the State and making a significant capital investment in the State;
- (3) a financial services firm or back office operation creating at least 100 net new jobs in the State and making a significant capital investment in the State;
- (4) a distribution center creating at least 100 net new jobs in the State and making a significant capital investment;
- (5) a scientific research and development firm creating at least 10 net new jobs in the State and making a significant capital investment in the State;
- (6) an entertainment company creating or obtaining at least 200 net new jobs in the State and making significant capital investment in the State;
- (7) a life sciences company creating at least 20 net new jobs in the State and making significant capital investment in the State. Other businesses creating 150 or more net new jobs in the State and making a significant capital investment in the State also may be considered eligible as a regionally significant project by the commissioner. In order to be a regionally significant project under this subdivision a business must export a substantial portion of its

products or services outside of the State or outside of a metropolitan statistical area or county within the State.

(am) “Related person” means a related person pursuant to section 465(b)(3)(c) of the Internal Revenue Code.

(an) “Remuneration” means wages and benefits paid to an employee by a participant in the program. Under no circumstances shall remuneration include mandated benefits including, but not limited to, Federal Insurance Contributions Act (FICA), Medicare tax, unemployment insurance or workers' compensation insurance.

(ao) “Research and development expenditures” mean the expenses of the business entity that are qualified research expenses under the Federal research and development credit under section 41 of the Internal Revenue Code and are attributable to activities conducted in the State. If the Federal research and development credit has expired, then the research and development expenditures shall be calculated as if the Federal research and development credit structure and definition in effect in Federal tax year 2009 were still in effect.

(ap) “Scientific research and development” means conducting research and experimental development in the physical, engineering, and life sciences, including but not limited to agriculture, animal fiber, electronics, environmental, biology, botany, biotechnology, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, plant fiber, veterinary, and other allied subjects. For the purposes of this article, scientific research and development does not include medical or veterinary laboratory testing facilities.

(aq) “Semiconductor manufacturing and related equipment and material supplier sector” means:

- (1) The semiconductor and related device manufacturing industry; or
- (2) The semiconductor machinery manufacturing industry; or
- (3) Establishments primarily engaged as chemical, gas or other material suppliers to the semiconductor and related device manufacturing industry and/or the semiconductor machinery manufacturing industry; or
- (4) Research, development and prototyping establishments primarily engaged in the support of the semiconductor and related device manufacturing industry and/or the semiconductor machinery manufacturing industry; or
- (5) Other related semiconductor industries as determined by the Department

(ar) “Semiconductor and related device manufacturing industry” means establishments primarily engaged in manufacturing semiconductors and related solid-state devices. Examples of products made by these establishments are integrated circuits, memory chips, microprocessors, diodes, transistors, solar cells, and other optoelectronic devices.

(as) “Semiconductor machinery manufacturing industry” means establishments primarily engaged in manufacturing wafer processing equipment, semiconductor assembly and packaging equipment, and other semiconductor making machinery.



(at) “Significant capital investment” means a project which will be either a newly constructed facility or a newly constructed addition to, expansion of or improvement of a facility, consisting of tangible personal property and other tangible property, including buildings and structural components of buildings, that are depreciable pursuant to section 167 of the Internal Revenue Code, have a useful life of four years or more, are acquired by purchase as defined in section 179 (d) of the Internal Revenue Code, and that is equal to or exceeds:

- (a) \$1 million for a manufacturer;
- (b) \$250,000 for an agriculture business;
- (c) \$3 million for a financial services firm or back office operation;
- (d) \$15 million for a distribution center;
- (e) \$3 million for a scientific research and development firm; or
- (f) \$3 million for other businesses.

(au) “Software development” means the creation of coded computer instructions or production or post production of video games, as defined in subdivision 1-a of section 611 of the General Business Law, other than those embedded and used exclusively in advertising, promotional websites or microsites, and also includes new media.

(av) “Smart growth” means the sensible, planned, efficient growth that integrates economic development and job creation with community quality-of-life by preserving and enhancing the built and natural environments. Smart growth encourages growth in developed areas with existing infrastructure to sustain it, particularly municipal centers, downtowns, urban cores, historic districts and older first-tier suburbs.

#### Section 191.1 Application and review process

(a) An applicant must submit a complete application as prescribed by the commissioner.

(b) As part of such application, an applicant must:

(1) agree to allow the Department of Taxation and Finance to share its tax information with the department. Note that the form created by the department to effectuate this information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the State Freedom of Information Law; and

(2) agree to allow the Department of Labor to share its tax and employer information with the department. Note that the form created by the department to effectuate this information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the State Freedom of Information Law; and

(3) allow the department and its agents access to any and all books and records deemed relevant by the department to monitor compliance with the provisions of article 17 of the Economic Development Law; and

(4) agree to be permanently disqualified for empire zone benefits at any location or locations that qualify for Excelsior Jobs Program benefits if admitted into the Excelsior Jobs Program for such location or locations; and

(5) provide, upon request by the department, all of the following information:

(i) a plan outlining the schedule for meeting the job and investment requirements (such plan must include details on job titles and expected salaries);

(ii) the prior three years of Federal and State income or franchise tax returns, unemployment insurance quarterly returns, real property tax bills and audited financial statements;

(iii) the amount and description of projected qualified investments for which it plans to claim the Excelsior Investment Tax Credit;

(iv) an estimate of the portion of any Federal research and development tax credits, attributable to research and development activities conducted in New York State, that it anticipates claiming for the years it expects to claim the Excelsior Research and Development Credit;

(v) the employer identification or social security numbers for all related persons to the applicant, including those of any members of a limited liability company or partners in a partnership; and

(6) provide a clear and detailed presentation of all related persons to the applicant to assure the department that jobs are not being shifted within the State; and

(7) certify, under penalty of perjury, that it is in substantial compliance with all environmental, worker protection, and local, State, and Federal tax laws; and

(8) for Green CHIPS projects, submit a Green CHIPS sustainability plan and a Green CHIPS community plan.

(c) The commissioner, upon receipt of a complete application from an applicant, shall determine whether the applicant meets the eligibility criteria set forth in section 191.2 of this Part. An applicant that does not meet the eligibility criteria set forth in section 191.2 of this Part shall not be accepted into the program.

(d) Having determined that an application is complete and that the applicant meets the eligibility criteria set forth in section 191.2 of this Part and, if a Green CHIPS project, also meets the eligibility provisions of section 190.2(r) of the Title, the Department may admit the applicant and issue a certificate of eligibility as defined in section 190.2(g) of this Title and a preliminary schedule of benefits that indicates the annual amount of each component of the credit an applicant may be entitled to in each of its ten or twenty years of eligibility as applicable. The Commissioner may amend a preliminary schedule of benefits provided that the Commissioner complies with the credit caps in section 359 of the Economic Development Law.

(e) With respect only to participant's engaging in a Green CHIPS project as defined herein, such participants may provide a range of estimated net new jobs to the Department that consists of a lower-bound "estimated number of net new jobs" and an upper-bound "maximum number of net new jobs." For the purposes of calculating whether a participant has met its minimum number of net new jobs to be subject to the pro-ration or loss of all other tax benefits as further articulated in section 192.1(c) of this Title, the lower-bound estimated number of net new jobs shall be used. For purposes of calculating the jobs tax credit that may be available to a Green CHIPS participant in any given year, the upper-bound maximum number of net new jobs shall be used. In order for a participant to receive its maximum jobs tax credit, it must create the maximum number of net new jobs listed in its schedule of benefits. In presenting its net new jobs

schedules to the Department, the estimated and maximum number of net new jobs shall be the same in year 10 of each project phase. In addition, the estimated and maximum number of net new jobs schedules must be reasonably justified by the Green CHIPS participant and approved by Department. The Department may adopt standards to establish a reasonable relationship between the two schedules and shall approve or reject such schedules in their sole discretion.

(f) With respect to investment, each Green CHIPS participant will have a cap on the annual amount of investment tax credits it can be issued, provided that: 1) if a participant initially falls short on its investment goal pursuant to the schedule of benefits, it may amend its schedule commensurate with the shortfall to allow for increased investment in future schedule years and/or phases; and 2) if a participant exceeds its investment goal, the excess investment shall carry forward as counting toward future year investment goals. However, if a participant fails to meet its estimated lower bound net new jobs commitment as outlined above in any given year, then it shall face a pro-rated or complete loss of investment tax credit component and research and development tax credit components.

(g) With respect to participants engaging in Green CHIPS projects, any investment and net new jobs made or created subsequent to the eligibility date established by the certificate of eligibility but prior to year one of phase one shall count towards the tax credit. A participant who is awarded and accepts a phase two schedule and elects to postpone the commencement of phase two after completing phase one, shall be required to submit a "request for temporary extension" to the Department for each year in which it requests the postponement. Such request for temporary extension shall include, to the satisfaction of the Department, the reasons for the requested postponement (e.g., industry demand slowdown, industry oversupply conditions, etc.). Provided that each request for temporary extension is granted by the Department at its sole discretion and the participant is awarded and accepts a phase two schedule, upon commencing its phase two schedule of benefits, the value of investments not counted in phase one and made prior to the start of phase two shall be counted as progress toward its investment goals, as shall any excess investment made during phase one. Provided further that each request for temporary extension is granted by the Department in its sole discretion and if the participant is awarded and accepts a phase two schedule, upon commencing its phase two schedule of benefits, any net new jobs not counted in phase one and created prior to the start of phase two shall be counted as progress toward its net new job goals, as shall any excess net new jobs created during phase one provided such net new jobs are maintained continuously during phase two. Any excess investments made or net new jobs created prior to the award and acceptance of a phase two schedule by a participant shall not be counted as progress towards its phase two investment or net new job goals.

(h) Notwithstanding subdivision (ai) of section 190.2 of this Title, the Department is hereby authorized to allow a Green CHIPS participant in good standing with phase one of a Green CHIPS project to enter into phase two of a Green CHIPS project with a new and separate schedule of benefits which may overlap with phase one of a Green CHIPS project schedule of benefits from a timing perspective, for a new ten-year benefit term. Notwithstanding subdivision (d) of section 191.1 of this Part, such phase two of a Green CHIPS project shall be admitted into

the program. Provided however, for such phase two of a Green CHIPS project, the new benefit term shall exclusively be provided for net new investments, new research and development expenditures, and net new job creation above the commitments outlined in the schedule of benefits for a participant's phase one of a Green CHIPS project with the Department. Assuming the requirements of this Part have been met, a participant in both a Green CHIPS project and any phase two of such project shall be eligible for benefits under section 193.1 of this Title.

#### 191.2 Eligibility criteria

(a) To be a participant in the program, an applicant must be operating predominantly in a strategic industry and meet the respective job requirements for strategic industries or be a regionally significant project. When determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

(b) Strategic industries shall consist of the following:

- (1) financial services data center or a financial services back office operation;
- (2) manufacturing, including in animal and plant fiber textile manufacturing;
- (3) software development;
- (4) scientific research and development;
- (5) agriculture;
- (6) the creation or expansion of back office operations in the State;
- (7) distribution center;
- (8) entertainment;
- (9) music production;
- (10) life sciences;
- (11) an industry with significant potential for private-sector economic growth and development in this State;
- (12) a company operating in one of the industries listed in paragraphs (2) through (5) of this subdivision and engaging in a green project as defined in subdivision (p) of section 190.2 of this Title;
- (13) as a participant operating in one of the industries listed in paragraphs (1) through (11) and (14) of this subdivision and operating or sponsoring child care services to its employees as defined in subdivision (i) of section 190.2 of this Title; or
- (14) as a Green CHIPS project.

(c) Job requirements for strategic industries. Notwithstanding subdivision (g) of this section, a business entity operating predominantly in manufacturing must create at least five net new jobs; a business entity operating predominately in agriculture must create at least five net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least 25 net new jobs; a business entity operating predominantly in scientific research and development must create at least five

net new jobs; a business entity operating predominantly in software development must create at least five net new jobs; a business entity creating or expanding back office operations must create at least 25 net new jobs or a business entity operating predominantly as a distribution center in the State must create at least 50 net new jobs; a business entity operating predominantly as an entertainment company must create or obtain at least 100 net new jobs; a business entity operating predominantly in music production must create at least five net new jobs; or a business entity operating predominately as a life sciences company must create at least five net new jobs or a business entity must be a regionally significant project or a Green CHIPS project as defined in Part 190 of this Title.

(d) A business entity operating predominantly in one of the strategic industries referenced in paragraphs 1-7 and 10-11 of subdivision (b) of this section but which does not meet the job requirements of subdivision (c) of this section must have at least 25 full-time job equivalents unless such business is a business entity operating predominantly in manufacturing then it must have at least five full-time job equivalents, and must demonstrate that its benefit-cost ratio is at least 10 to one.

(e) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations.

(f) A business entity may not owe past due State or local taxes; provided, however, in the case of a tax certiorari proceeding a business entity would not be considered in arrears until a final decision is made with respect to such proceeding.

(g) A not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, a business entity engaged predominantly in the retail or entertainment industry, other than a business operating as an entertainment company and other than a business entity engaged in music production, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity is not eligible to participate in the program.

(h) A business entity must demonstrate that it has satisfied the job requirements for strategic industries indicated in section 191.2(c) of this Part. A business entity certified as a regionally significant project must demonstrate that it is a regionally significant project as defined in section 190.2a1 of this Title and satisfies the job and investment requirements therein. A business entity participating in the Excelsior Jobs Program through a Green CHIPS project must demonstrate that the project is a Green CHIPS project as defined in section 190.2(u) of this Title and satisfies the job and investment requirements therein.

(i) Notwithstanding the requirements of this section, an existing participant in the Excelsior Jobs Program may be eligible for an enhanced investment tax credit on net new expenditures for projects for child care services and the excelsior child care services tax credit component, provided:

(1) the participant is in compliance with the requirements of this Part; and

(2) the participant is seeking to provide additional services on condition of receipt of additional tax credits attributable to child care services. Such existing participant may apply to the department for the benefit as defined in section 193.1 of this Title. In no circumstances shall the benefit term for child care services exceed the existing participant's existing benefit term in its preliminary schedule of benefits.

### 191.3 Evaluation standards

(a) The evaluation standards which may be utilized by the commissioner when determining whether to admit an applicant to the program include the following:

(1) whether the applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or

(2) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or

(3) the degree of economic distress in the area where the applicant will locate the project identified in its application; or

(4) the degree of applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or

(5) the degree to which the project identified in the application supports New York State's minority and women business enterprises or service-disabled veteran-owned business enterprises; or

(6) the degree to which the project identified in the application supports the principles of Smart Growth as defined in section 190.2(an) of this Title; or

(7) the estimated return on investment that the project identified in the application will provide to the State; or

(8) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be created; or

(9) the degree to which other State or local incentive programs are available to the applicant; or

(10) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of State or local incentives; or

(11) the recommendation of the relevant regional economic development council or the commissioner's determination that the proposed project aligns with the regional strategic priorities of the respective region.

(b) In addition, the commissioner shall make all reasonable efforts to allocate tax credits in a geographically proportionate manner throughout the state.

### Section 191.4 Additional Eligibility Requirements for Green CHIPS Projects

(a) In addition to meeting the requirements of section 191.2 of this Part, a participant that implements a Green CHIPS project must adhere to the following additional requirements:

- (1) Prevailing wage. Participants must not pay less than the applicable Federal prevailing wage and any required fringe benefits for construction performed as if the project were subject to the requirements of Section 602 to the Public Works and Economic Development Act of 1965 (42 U.S.C. 3212) and any implementing regulations. In addition to any other requirements prescribed by the Department, participants shall be required to:
  - (i) Annually certify to the Department that all covered workers have been paid at least the Federal prevailing wage and required fringe benefits in the previous year;
  - (ii) Maintain payroll records during the course of the work and preserved for a period of three years thereafter for all covered workers on the project;
  - (iii) Upon request of the Department, submit all records required to be maintained in subparagraph (ii) of this paragraph to the Department or make available for inspection, copying, or transcription by authorized representatives of the Department or the New York State Department of Labor, and shall permit such representatives to interview employees during working hours on the job site.
- (2) Sustainability. Participants must enter into a Green CHIPS sustainability plan approved by the Department. Each Green CHIPS sustainability plan must describe the Green CHIPS project's annual milestones and specific and actionable commitments with respect to the methods being employed to mitigate the project's greenhouse gas emissions over its lifetime as a program participant. The Department shall publish a common template and requirements for such plans. Such plans may include, but need not be limited to, requirements relating to the use of renewable energy for project electricity, energy efficient design and operation, the use of electrification for space heating and cooling, investments to encourage or promote sustainable housing, achievement of minimum Leadership in Energy and Environmental Design (LEED) standards for project facilities, and other measures intended to mitigate GHG emissions over the project's lifetime and support the goals of the Climate Leadership and Community Protection Act (CLCPA).
- (3) Community and workforce benefits. Participants must enter into a Green CHIPS community plan approved by the Department. The Department shall publish a common template and requirements for such plans. Such plans may include, but need not be limited to, the utilization of a local community engagement committee, specific and actionable goals for the utilization of socially and economically disadvantaged individuals (SEDI), SEDI-owned businesses and New York State Certified Minority-Owned Business Enterprises, New York State Certified Woman-Owned Business Enterprises and Service-Disabled Veteran-Owned Businesses, investments in child care facilities and services, and commitments to philanthropic investment in the host community.
- (4) Noncompliance. In addition to complying with all eligibility criteria under this Title, Green CHIPS participants must remain in compliance with the Green CHIPS eligibility criteria articulated in paragraphs 1-3 of this subdivision, including payment of prevailing wage as applicable, articulation and implementation of a Green CHIPS sustainability

plan, and articulation and implementation of a Green CHIPS community plan. If a participant fails to meet a program requirement or fails to cure a material deficiency in a given year, the Department shall not issue the participant tax credits for that year in an amount associated with the Green CHIPS program. Instead, such participant may be eligible for benefits associated with participants not undertaking green projects or Green CHIPS projects depending on the nature of the failure or shortfall. To enable participants of Green CHIPS projects to remain in compliance and cure material deficiencies, the following provisions shall apply:

**Federal Prevailing wage compliance.** If a participant in the program fails to satisfy the requirements with respect to payment of not less than Federal prevailing wages to any worker, the participant shall cure such deficiency by making payment to such worker in an amount equal to the difference between:

The amount of wages paid to such worker during such period and the amount of wages required to be paid to such worker pursuant to the prevailing wage schedule in place at the time the contract was entered into, plus a commercially reasonable rate of interest or penalty on the calculated amount as prescribed by the Department. In addition, willful failure of the participant to comply with the Federal prevailing wage requirements may subject the participant to removal from the program pursuant to section 195.1 of this Title.

(b) **Sustainability and community and workforce benefits compliance.** If a Green CHIPS participant achieves a material deficiency as it relates to an annual milestone or commitment in its Green CHIPS sustainability plan or Green CHIPS community plan, as identified by the participant in its Green CHIPS report or as identified by the Department and communicated in writing to the participant as formal notice, the following provisions shall apply:

1. In anticipation of or following the occurrence of a material deficiency, a participant may request to modify the schedule or allocation of the milestones and commitments to cure and compensate for the material deficiency, which may be approved at the discretion of the Department provided that a Green CHIPS sustainability plan and Green CHIPS community plan remain as required project elements; and

2. If a material deficiency remains uncured for ninety days after the identification of the material deficiency, a participant may be granted an additional ninety days during which it shall be permitted to make a payment to a local non-profit organization of related mission approved in writing by the Department in order to compensate for the underlying issue that was the subject of the unmet milestone or commitment, with such payment required to be of a value proportional to the nature of the shortfall, as determined by the Department, after which the material deficiency shall be deemed to have been cured for the year.



## Section 192.1 Claiming credits

(a) A participant must submit evidence of achieving the applicable job and investment requirements to the department in order to receive benefits under the program.

(b) For purposes of satisfying requirements other than the additional requirements for Green CHIPS projects listed under 191.4 of this Title, such evidence may include, but not be limited to, submission of the NYS-45 form and, where applicable, submission of receipts specifically documenting research and development expenditures and/or qualified investments as such terms are defined in section 352 of the Economic Development Law. This evidence will serve to demonstrate that the participant has satisfied all applicable eligibility requirements other than additional requirements for Green CHIPS projects and form the basis for the tax credit components. For purposes of satisfying the additional eligibility requirements for Green CHIPS projects, the participant must also satisfy the reporting requirements outlined in Section 194.2 of this Title.

(c) If a participant fails to demonstrate that it has satisfied the eligibility requirements set forth in section 191.2(h) of this Title, the department shall not issue such participant a certificate of tax credit. If a participant certified as a regionally significant project fails to demonstrate that it has satisfied the eligibility requirements set forth in section 191.2(h) of this Title, the department shall not issue such participant a certificate of tax credit. Provided, however, if the participant fails to fully satisfy the applicable job creation projections in the preliminary schedule of benefits, the commissioner shall reduce the tax credit to an amount in proportion to the percentage of the job creation achieved. If the participant fails to create at least 75 percent of the job creation projections, the commissioner shall not issue such participant a certificate of tax credit.

(d) If a participant certified pursuant to section 191.2(d) of this Title fails to demonstrate that it has 25 full-time job equivalents or, if such business is a business entity operating predominantly in manufacturing, five full-time job equivalents or fails to demonstrate that it has a benefit-cost ratio of at least 10 to one, the department shall not issue such participant a tax credit.

(e) After reviewing such evidence and finding it sufficient, the department shall calculate the appropriate amount of tax credit and issue a certificate of tax credit for one taxable year. The certificate shall specify the exact amount of each of the tax credit components that a participant may claim pursuant to Part 193 of this Title, and shall specify the taxable year in which such credit may be claimed. The tax credit components may only be claimed on tax returns for the tax year indicated on the certificate. If the participant is a business entity that passes through the tax credit components to its owners (such as partners in a partnership or members in a limited liability company), such owners can only claim their share of the credit components on the tax return that corresponds to the tax year indicated on the certificate issued to the participant. In order to receive a certificate of tax credit for subsequent taxable years, the participant must submit to the department a performance report demonstrating that the participant continues to satisfy the eligibility criteria specified in sections 353 and 354(2) of the Economic Development Law. If such eligibility criteria are met, a participant can receive tax credits based on the interim

job, investment or research and development milestones indicated in the preliminary schedule of benefits in accordance with subdivision (c) of this section.

(f) A participant's increase in employment, qualified investment, or Federal research and development tax credit attributable to research and development activities in New York State above its projections listed in its application shall not result in an increase in tax benefits under this regulation. However, if the participant's expenditures are less than the estimated amounts, the credit component shall be less than the estimate.

(g) No costs used by an entertainment company as the basis for the allowance of a tax credit described in this Part shall be used by such entertainment company to claim any other credit allowed pursuant to the Tax Law.

#### Section 193.1 Calculation of tax credits

(a) The department shall calculate the amount of each tax credit component for which the participant is eligible pursuant to section 355 of the Economic Development Law. The amount of each component shall be separately stated on the certificate of tax credit.

(b) Excelsior Jobs Program Credit Component. A participant in the program shall be eligible to claim a credit for each net new job it creates in New York State. In a project that is not a green project, the amount of such credit per job shall be equal to the product of gross wages and up to 6.85 percent. In a green project, or a Green CHIPS project, the amount of such credit per job shall be equal to the product of the gross wages paid and up to 7.5 percent. Provided, however, given the transformational nature of Green CHIPS projects, for the year 2022, only the first two hundred thousand dollars of gross wages per job shall be eligible for this credit. Starting in 2023 and each year thereafter, the maximum amount of gross wages per job for a Green CHIPS project shall be adjusted for inflation at an annual amount determined by the commissioner in a manner substantially similar to the cost of living adjustments calculated by the United States Social Security Administration based on changes in consumer price indices or a rate of four percent per year, whichever is higher.

(c) Excelsior Investment Tax Credit Component. A participant in the program shall be eligible to claim a credit on qualified investments. In a project that is not a green project, the credit shall be equal to two percent of the cost or other basis for Federal income tax purposes of the qualified investment. In a green project, the credit shall be equal to five percent of the cost or other basis for federal income tax purposes of the qualified investment. In a project for child care services or a Green CHIPS project, the credit shall be up to five percent of the cost or other basis for federal income tax purposes of the qualified investment in child care services or in the Green CHIPS project as applicable. A participant may not claim both the Excelsior Investment Tax Credit Component and the investment tax credit set forth in section 210-B(1), section 606(a), the former section 1456(i), or section 1511(q) of the Tax Law for the same property in any taxable year, except that a participant may claim both the excelsior investment tax credit component and the investment tax credit for research and development property. In addition, a taxpayer who or which is qualified to claim the Excelsior Investment Tax Credit Component and is also qualified

to claim the Brownfield Tangible Property Credit component under section 21 of the Tax Law may claim either the Excelsior Investment Tax Credit Component or such tangible property credit component, but not both with regard to a particular piece of property. The Excelsior Investment Tax Credit Component may not be claimed until a participant has received a certificate of tax credit, provided that qualified investments made on or after the issuance of the certificate of eligibility but before the issuance of the certificate of tax credit to the participant, may be claimed in the first taxable year for which the participant is allowed to claim the credit. Expenses incurred prior to the date the certificate of eligibility is issued are not eligible to be included in the calculation of the credit.

(d) Excelsior child care services tax credit component. A participant in the Excelsior Jobs Program shall be eligible to claim a credit on its net new child care services expenditures for its operation, sponsorship or direct financial support of a child care services program. The credit shall be up to six percent of the net new child care services expenditures as defined in this Part.

(e) Excelsior Research and Development Tax Credit Component. A participant in the program shall be eligible to claim a credit equal to 50 percent of the portion of the participant's Federal research and development tax credit that relates to the participant's research and development expenditures in New York State during the taxable year, provided, however, if not a green project, the excelsior research and development tax credit shall not exceed six percent of the qualified research and development expenditures attributable to activities conducted in New York State, or, if a green project or a Green CHIPS project, the excelsior research and development tax credit shall not exceed eight percent of the research and development expenditures attributable to activities conducted in New York state. If the Federal research and development credit has expired, then the research and development expenditures relating to the Federal research and development credit shall be calculated as if the Federal research and development credit structure and definition in effect in 2009 were still in effect. Notwithstanding any other provision of this chapter to the contrary, research and development expenditures in this State, including salary or wage expenses for jobs related to research and development activities in this State, may be used as a basis for the excelsior research and development tax credit component and the qualified emerging technology company facilities, operations and training credit under the tax law.

(f) Excelsior Real Property Tax Credit Component. (1) A participant in the program who either qualified as a regionally significant project, a Green CHIPS project that meets the requirements of a regionally significant project under this Title or is located in an investment zone shall be eligible to claim an excelsior real property tax credit for a period of 10 years. In the first year, the credit shall be equal to 50 percent of the eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone. (2) In the remaining years the credit shall be computed according to the following schedule:

- (i) Year two: 45 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (ii) Year three: 40 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (iii) Year four: 35 percent of eligible real property taxes on real property comprising the regionally significant project or located in the investment zone;

- (iv) Year five: 30 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (v) Year six: 25 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (vi) Year seven: 20 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (vii) Year eight: 15 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone;
- (viii) Year nine: 10 percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone; and
- (ix) Year ten: five percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone.

(3) For purposes of this credit component, the term eligible real property taxes shall have the same meaning as in section 15(e) of the Tax Law, provided that such subdivision (e) shall be read as if it specifically referenced the Excelsior Jobs Program and participants in that program.

(4) In calculating the excelsior real property tax credit and determining the maximum aggregate amount of such credit component in the preliminary schedule of benefits, the commissioner shall include any improvements projected to be made by the taxpayer to the property comprising the regionally significant project or located in the investment zone as listed in its application for participation in the Excelsior Jobs Program. Provided, however, the actual amount of the excelsior real property tax credit issued by the department for a taxable year cannot exceed the real property taxes assessed and paid by a participant during that taxable year when issued a certificate of tax credit pursuant to section 192.1(e) of this Title.

### 193.2 Refundability of credits

(a) The tax credit components established in this section shall be refundable as provided in the Tax Law. If a participant fails to satisfy the eligibility criteria, specifically the applicable job creation and/or investment requirements indicated in the preliminary schedule of benefits in any one year, it will lose the ability to claim credit for that year.

(b) The event of such failure shall not extend the original 10-year eligibility period.

### 193.3 Excelsior jobs program rates for gas or electric service

(a) Special Excelsior Jobs Program rates for gas or electric service, as further described in subdivision 12-d of section 66 of the Public Service Law, may remain available to participants as defined in this article for a period of up to 10 years commencing in the first taxable year that the participant receives a certificate of tax credit, or the first taxable year listed on its preliminary schedule of benefits, whichever is later. Provided however, if a participant is removed from the Excelsior Jobs Program pursuant to this article, the Excelsior Jobs Program rates may be denied. Notwithstanding any other provision of this section, in the event a Green CHIPS project enters into a phase two, such special excelsior job program rates shall be available to such project for its second ten-year schedule of benefits.

## Section 194.1 Record retention

(a) Each participant shall keep all relevant records for their duration of program participation plus three years.

(b) The department shall have the right to inspect all relevant records upon reasonable notice to the participant.

## Section 194.2 Reporting

(a) Each participant must submit a performance report annually, in such form as the commissioner may require within 30 days of the end of its taxable year.

(b) In addition, Green CHIPS participants must annually submit a Green CHIPS report to the Department. Participants must also separately submit evidence annually to the Department documenting compliance with its Green CHIPS project obligations in a form and manner prescribed by the Department, which may include, but not be limited to, attestations under penalty of perjury, forms, receipts and other supporting documentation.

(c) The commissioner shall prepare on a quarterly basis a program report for posting on the department's website. The first report will be due June 30, 2011, and every three months thereafter. Such report shall include, but not be limited to, the following information: number of applicants; number of participants approved; names of participants; total amount of benefits certified; benefits received per participant; total number of net new jobs created; number of net new jobs created per participant; aggregate new investment in the State; new investment per participant; and such other information as the commissioner determines necessary.

(d) In addition, the commissioner shall prepare on a quarterly basis information related to the utilization of the excelsior child care services tax credit component for inclusion in the quarterly Excelsior Jobs Program tax credit reports required pursuant to subdivision (b) of this section. Such information shall include, but need not be limited to the following: number of applicants; number of participants approved; total net new child care services expenditures certified; total amount of benefits certified; and benefits received per participant. On an annual basis, businesses participating in the excelsior child care services credit shall report to the department on the number of employees participating in child care services supported by the credit.

## Section 195.1 Removal from program

(a) The Commissioner may remove any participant from the program for failing to meet any of the requirements set forth in section 191.1(b) of this Title, or for failing to meet the minimum job or investment requirements set forth in section 191.2(c) and (d) of this Title or for failing to meet the requirements of section 191.4(a)(1) of this Title. (b) If the Commissioner has removed the participant from the program pursuant to subdivision (a) of this section, the Commissioner

shall notify the participant of such removal in writing. Such notice of removal shall explain the reason or reasons for the removal from the program. The notice of removal shall state the effective date of removal, and advise the participant that it may appeal the removal in accordance with Part 196 of this Title. Such notice may be served by the Department on the participant by certified, registered or overnight mail sent to the participant at the address last provided to the Department by the participant.

(b) If the commissioner has removed the participant from the program pursuant to subdivision (a) of this section, the commissioner shall notify the participant of such removal in writing. Such notice of removal shall explain the reason or reasons for the removal from the program. The notice of removal shall state the effective date of removal and advise the participant that it may appeal the removal in accordance with Part 196 of this Title. Such notice may be served by the department on the participant by certified, registered or overnight mail sent to the participant at the address last provided to the department by the participant.

### Section 196.1 Applicability

(a) This Part shall apply to all appeals taken as a result of a participant being removed from the program pursuant to section 195.1(a) of this Title.

### 196.2 Designation of appeal officers

(a) The commissioner may designate any impartial person or persons to act as an appeal officer.

### 196.3 Notice of appeal

(a) A participant that received a notice of removal pursuant to section 195.1(b) of this Title may send a written notice (notice of appeal) to the commissioner appealing the removal by no later than 30 days from the date of the mailing of the notice. Failure by a participant to appeal the commissioner's denial or removal of certification within the aforementioned 30-day period will be deemed a waiver of the participant's right to an appeal.

(b) The notice of appeal must contain specific factual information and documentation supporting the basis for the appeal and all legal arguments that are the basis for the participant's challenge to the removal.

(c) All notice of appeals must be sent to the name and address indicated on the notice of removal.

(d) Counsel to the department may file a response to the notice of appeal with the appeal officer. Any response should address the factual and legal allegations contained in the notice of appeal. A copy of the response shall be sent to the participant, or to the attorney representing the participant.

#### 196.4 Authority of appeal officer

(a) The appeal officer shall evaluate the merits of the appeal and any response from counsel to the department. Where the appeal officer deems it appropriate, the appeal officer may require the participant or counsel to the department to address additional issues and/or submit additional information regarding the appeal. If the appeal officer requires submission of additional documents by either participant or counsel to the department, both parties shall receive copies of all submissions.

(b) Nothing herein shall preclude the appeal officer from obtaining information from any outside source, as he or she deems appropriate.

(c) The appeal officer shall determine whether he or she deems it necessary to conduct a fact-finding hearing, and the level of formality of any hearing conducted.

#### 196.5 Appeal officer's report

(a) The appeal officer shall prepare a report and make recommendations to the commissioner. The recommendations may be in the form of a proposed decision which will contain findings of fact and conclusions of law. This report, along with the entire record, shall be transmitted to the commissioner, the counsel to the department, and the business entity that filed the appeal.

#### Section 197.1 Caps on the tax credit

The Department shall be subject to annual caps as articulated in subdivision one of section 359 of the Economic Development Law, both for traditional Excelsior projects and the annual cap articulated in subdivision four of section 359 of the economic development law for Green CHIPS projects. In the case of Green CHIPS projects, a given year's cap shall be the sum of \$500 million and the balance of any available carry forward credits not yet issued and allowed pursuant to such section.